

State of New Hampshire



PERSONNEL APPEALS BOARD

25 Capitol Street
Concord, New Hampshire 03301
Telephone (603) 271-3261

Appeal of Alan McDonald

Docket #98-T-3

In Re: Appellarzt's Clarification of his Request for Rehearing

May 6, 1998

On March 20, 1998, the Board received Mr. McDonald's Request for Rehearing in the above-titled appeal. In that request, the appellant argued that he had been denied a fair hearing because of a purported familiarity between one of the Board members and one of the State's witnesses. The State's Objection to that Motion was received on March 27, 1998. On April 3, 1998, the Personnel Appeals Board issued a decision allowing the appellant ten days in which to submit a statement clarifying the request. Specifically, the appellant was directed to: 1) provide a detailed description of the alleged conflict, 2) identify those persons allegedly involved in the conflict, and 3) explain how the appellant believed his rights to a fair hearing were compromised by the alleged conflict. The Board received the appellant's response on April 13, 1998.

A properly filed motion for rehearing must set forth fully every ground upon which it is alleged that the decision or order complained of was unlawful or unreasonable, or it must offer additional evidence that was not available at the time of the original hearing. With that standard in mind, the Board responds to the appellant's allegations as follows.

1. Mr. McDonald argued that the Board overlooked evidence that Mr. Asbury had ordered him to alter certain documents which were later entered as evidence of the appellant's role in the Billy B. incident. He also argued that the Board gave little attention to the fact that Mr. Asbury had served as the SEA representative at the

appellant's pre-termination meeting, although Mr. McDonald specifically had requested different Association representation. Mr. McDonald said that after Brad Asbury had concluded his testimony, Mr. Johnson, a member of the Board, asked the witness how he was doing and how "things as a House Leader" were going. Mr. McDonald argued that the exchange, "...clearly show[ed] that [the Board member] knew Brad prior to him being a house leader or clearly knew him." Mr. McDonald argued that, "...because of them talking in such a friendly way," he knew he would not get a fair hearing.

As a procedural matter, the appellant failed to raise the issue in a timely fashion. If the exchange of pleasantries between Mr. Asbury and Mr. Johnson caused the appellant to believe that he would not receive a fair hearing, he should have raised the issue at the hearing, providing the parties an opportunity to consider whether or not a conflict of interest existed. In fact, no conflict exists. None of the Board members knew Mr. Asbury personally. The exchange of pleasantries between Mr. Johnson and Mr. Asbury was simply that.

2. Mr. McDonald argued that in reaching its decision, the Board overlooked evidence, including that: 1) Mr. Asbury had ordered the appellant to "change documents," 2) the investigator's review was incomplete because he did not interview all of the residents of East Cottage and did not interview the appellant at all, and 3) the agency "violated his rights" by having Mr. Asbury serve as the Association representative at the pre-termination meeting.

Inasmuch as the Board found that the types of documents described by Per 1001.08(b)(6) did not include the logs, reports or statements that the appellant allegedly falsified, discussion of the evidence related to that charge was limited. The appellant has failed to demonstrate that absence of such discussion makes the Board's decision unlawful or unreasonable.

In its decision, the Board found that the investigator had interviewed those students and staff "who had been identified as possible witnesses to the incident," and that the investigator had not interviewed Mr. McDonald in case the appellant was later charged criminally for his conduct. (See Finding #18.) The Board also made a specific finding that Mr. McDonald wanted someone other than Mr. Asbury present as the SEA representative at his pre-termination meeting, but that the agency was unwilling to delay the meeting. (See Findings #24 and #25.) The appellant failed to specify what "rights" the agency violated, or how these specific factors contributed to the alleged violation.

3. Mr. McDonald argued that the State's witness, Kelly Healey, was uncertain whether or not the appellant actually struck Billy B.

The appellant has misstated the evidence. Ms. Healey testified that she saw Mr. McDonald strike Billy B. However, because of her vantage point, she was unable to say specifically where on the upper body the blow landed, or whether the appellant had used an open hand or a closed fist when he struck the student.

4. The appellant argued that the State did not "prove [its allegations] beyond a reasonable doubt."

First, the standard of "proof beyond a reasonable doubt" that applies in criminal cases is not the same standard applied in civil matters and administrative appeals of this nature. On the weight of the evidence, the Board was convinced that Mr. McDonald violated Per 1001.08(a)(4) by being the demonstrated aggressor in a fight or attempt to injure another person in the workplace, and therefore was subject to immediate termination.

The appellant failed to demonstrate that the Board's decision in this matter was unlawful or unreasonable in light of the evidence received. For the reasons set forth above, the Board voted unanimously to deny Mr. McDonald's request for rehearing, and to affirm its earlier decision.

THE PERSONNEL APPEALS BOARD



Mark J. Bennett, Chairman

*(Mr. Johnson took no part in consideration
of this motion for rehearing)*

Robert J. Johnson



Patrick H. Wood

cc: Virginia A. Lamberton, Director of Personnel, 25 Capitol St., Concord, NH 03301
Alan McDonald, 40 Seton Dr., Bedford, NH 03110
Frances DeCunto, HR Coordinator, youth Development Services, 1056 N. River
Rd., Manchester NH 03104-1998

State of New Hampshire



PERSONNEL APPEALS BOARD
25 Capitol Street
Concord, New Hampshire 03301
Telephone (603) 271-3261

Appeal of Alan McDonald

Docket #98-T-3

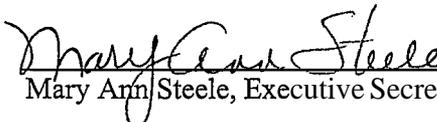
Response to Appellant's Request for Rehearing and State's Objection

April 3, 1998

The New Hampshire Personnel Appeals Board (Bennett, Johnson and Wood) met on Wednesday, April 1, 1998, under the authority of RSA 21-I:58, to consider Mr. McDonald's Request for Rehearing and the State's Objection to that Request.

At the hearing on the merits of Mr. McDonald's appeal, neither of the parties raised an objection to any member of the panel convened to hear the matter. In his Request, however, Mr. McDonald has alleged that a Board member and a witness for the State knew one another, thereby creating a conflict. In her Objection, Ms. DeCunto argued that the appellant provided no information as to the identity of the Board member or the nature of the alleged conflict. Having considered the Request and Objection in light of the Board's decision in this matter, the Board voted unanimously to allow Mr. McDonald ten days from the date of this order in which to submit to the Board and to the Department of Youth Development Services a statement clarifying his Request. In his statement, the appellant shall: 1) provide a detailed description of the alleged conflict, 2) identify those persons allegedly involved in the conflict, and 3) explain how the appellant believes his rights to a fair hearing were compromised by the alleged conflict.

FOR THE PERSONNEL APPEALS BOARD


Mary Ann Steele, Executive Secretary

cc: Virginia A. Lamberton, Director of Personnel
Alan McDonald, 40 Seton Dr., Bedford, NH 03110
Frances DeCunto, HR Coordinator, Youth Development Services, 1056 N. River Rd.,
Manchester NH 03104-1998

State of New Hampshire



PERSONNEL APPEALS BOARD
25 Capitol Street
Concord, New Hampshire 03301
Telephone (603) 271-3261

Appeal of Alan McDonald

Docket #98-T-3

Department of Youth Development Services

February 18, 1998

The New Hampshire Personnel Appeals Board (Bennett, Johnson and Wood) met on October 8, 1997, and on October 29, 1997, under the authority of RSA 21-I:58, to hear the appeal of Alan McDonald, a former employee of the Department of Youth Development Services. Mr. McDonald, who was represented at the hearing by SEA Chief Negotiator Ward Freeman, was appealing his termination from employment, effective July 12, 1997, on charges that he was the aggressor in a fight or an attempt to injure another person in the workplace, and that he willfully falsified an agency record. Frances DeCunto, Human Resources Coordinator, appeared on behalf of the agency.

The record in this matter consists of the pleadings submitted by the parties, orders and notices issued by the Board, the audio tape recording of the hearing on the merits of Mr. McDonald's appeal, and exhibits entered into evidence as follows:

State's Exhibits

- A. June 20, 1997, Assault Investigation Report (with attachment) submitted by DYDS Training Officer Wayne Eigabroadt
- B. Training Records - dated 7/29/96 - Aggression [sic] Management
- C. Policy and Procedure Manual - Incident Reporting and Review
- D. Policy and Procedure Manual - Incident Reporting and Review
- E. December 28, 1996, letter from Ken Goonan to Brad Asbury re: Alan McDonald

F. Performance Summary for Alan McDonald dated 3/10/97

G. Department of Youth Development Services Employee Rules and Regulations

Appellant's Exhibits

1. Aggression Management Training Class Objectives
2. Training Records for Alan McDonald - 3/1/96 to 3/1/97
3. Performance Summary for Alan McDonald dated 3/10/97
4. June 24, 1996, letter of commendation from Robert Decker to Alan McDonald

The following persons gave sworn testimony:

Virgil Bossom, Training Development Manager

Wayne Eigabroadt, House Leader assigned to training

Kelley Ann Healey, summer Youth Counselor I trainee

Jane Merrill, R.N.

Stephanie Kalipolites, Youth Counselor III

Steve Murphy, Youth Counselor II

Brad Asbury, House Leader

Philip Nadeau, Director of Residential Services

John Biron, Youth Counselor II

Robert Kukla, Assistant House Leader

Alan McDonald, Appellant

Before receiving evidence or hearing the parties' opening statements, the Board granted a Motion to Sequester, and a Motion to Protect the Record. The Chairman instructed the witnesses not to discuss their testimony with any other person who might be a witness, and further instructed them that when they were called to testify, to use only first names and last initials when identifying any of the juveniles at the facility. The Board further agreed to redact from the record any references to juveniles' full names in the event that a record was subsequently produced.

The State alleged that on June' 11, 1997, Mr. McDonald provoked and assaulted a juvenile in his care, hitting the student, yelling and swearing at him, and placing him in an unauthorized restraint, thereby violating the agency's policies and procedures and Per 1001.08 of the Rules of the Division of Personnel. The State also alleged that the appellant willfully misrepresented information in written reports about the incident, thereby willfully falsifying an agency record in violation of Per 1001.08.

The appellant argued that the student had instigated the incident which had resulted in his restraint. The appellant argued that the student was verbally and physically threatening, and that the appellant's response to those threats was a reasonable exercise of his judgment in handling a potentially dangerous situation. He also argued that his reporting of the incident was accurate and timely, and that he had made no attempt to falsify agency records.

Having considered the documentary and testimonial evidence received, and in light of the parties arguments, the Board made the following Findings of Fact:

1. At all relevant times, Alan McDonald, the appellant, was working as a Youth Counselor II assigned to East Cottage at the Youth Development Center.
2. As part of their training, Youth Counselors are required to successfully complete a course in Aggression Management, and to sign an Aggression Management Agreement which includes the following provision: "The need or use of physical interventions will only be considered in .situationsposing serious risk of physical harm to the client or others. Any actual use of physical alternatives will be determined by the best judgment, intent, reasonable use of force and least restrictive option under the circumstances and only those techniques that are demonstrated in this class."
3. In Aggression Management, employees are taught to avoid physical confrontations if possible. They also are taught that if they have personal issues with a resident, whenever possible another available staff person should be asked to intervene to keep the situation from escalating.
4. Mr. McDonald completed the Aggression Management Training program and signed the Aggression Management Agreement on August 12, 1996.

5. "Billy B." was a resident of East Cottage on the morning of June 11, 1997. Until the June 11, 1997, incident, no staff person, including Mr. McDonald had ever had to engage in a physical intervention or restraint with Billy B.
6. Billy B. was regarded by staff as mouthy, manipulative and resentful of authority, but none of the staff who testified considered him physically threatening.
7. On the morning of June 11, 1997, Mr. McDonald was working the 6:00 a.m. to 2:00 p.m. shift, and was involved in a conversation with one of the residents, "Dan K.," about the student's missing soap dish. The student was upset.
8. Billy B., who was seated at a nearby table in the O.O.C. (out of community) area, made a remark about who was responsible for the missing property, saying something to the effect of, "Whose fault is it, Al?"
9. While Billy was still seated, Mr. McDonald approached the student, yelling at him to mind his own f---ing business, and struck Billy B. in the upper body area.
10. Billy B. jumped to his feet and yelled at the appellant, pointing at him, telling him to leave him alone and not hit him again.
11. Mr. McDonald grabbed him and shoved him back toward the wall, pinning him there with his hand near the student's throat.
12. Youth Counselor John Biron, who was nearby but with his back to the incident, heard the commotion and went to see if Mr. McDonald needed help.
13. Mr. Biron later reported that when he arrived, he saw that Mr. McDonald had one hand on the student's arm and the other on the student's chest near his collar bone. He reported that Billy was not struggling.
14. Mr. McDonald then took Billy upstairs to his room and locked him in. He notified Operations that the student had been given a room confinement. He did not inform Operations that he had restrained the student.
15. Mr. McDonald, who admitted that he had a difficult relationship with the student, did not seek assistance from any of the other Youth Counselors on duty on the floor.
16. The restraint was not reported until sick call, when Jane Merrill, R.N. was informed. In her later report, she indicated that the student had a lump on the back of his head the size of a quarter,

that his neck was quite red, and that her observations were consistent with the student's report that Mr. McDonald had pushed his head into a wall.

17. Mr. McDonald made two log entries about the Billy B. Incident. The first read, "When talking to Dan K. in the OOC area, Billy got mouthy and was escorted to his room by myself (Alan McDonald). Operations notified of room confinement." The second entry, listed as "Continuation B." read, "When Billy opened his mouth when in the ooc area, I instructed him to tell him to keep his mouth and nose out of other peoples business. He responded with a hostile look and screamed don't touch me or leave me alone. I then took Billy by his left shoulder and mid upper body and held him against the wall to instruct him to keep quiet and to be respectful. This [h]as been an ongoing thing with Billy & his mouth problems. Incident Report Done. Nurse notified at sick call."
18. Mr. Eigabroadt, the House Leader assigned to conduct an investigation of the incident, interviewed a number of the students and staff who had been identified as possible witnesses to the incident. He did not interview Mr. McDonald in the event that subsequent criminal charges were filed.
19. Among the staff on duty at East Cottage on the morning of June 11, 1996, the individual with the best vantage point to witness the entire incident was Kelley Healy, a summer staff person.
20. Ms. Healy did not intervene when the incident occurred, expecting that either John Biron or Stephanie Kalipolites, who were both on duty in the area at that time, would step in.
21. Ms. Healy did not report the incident. Two days later when she asked another staff person for advice on what to do she was told, "Don't bring it upon yourself. Wait until someone asks you."
22. Mr. Biron and Ms. Kalipolites, who were both asked to complete witness statements, reported that they were unaware of the incident until they saw Mr. McDonald restraining the student against the wall.
23. Wayne Eigabroadt submitted his completed investigation report to Phil Nadeau, Director of Residential Services, informing him that in his opinion, Alan McDonald had, without provocation, assaulted Billy B. by first hitting him once in the upper body area, then grabbing him by the neck and shoving him against the wall.

24. Mr. Nadeau told McDonald to report to his office on June 23rd, and told him he could have his SEA representative present.
25. Mr. McDonald asked for an SEA representative other than Brad Asbury. When it was discovered that no one else was immediately available, Mr. Asbury was asked to sit in on the meeting with Mr. McDonald, Mr. Nadeau, and Operations Officer Robert Boisvert and Training Officer Virgil Bossom.
26. During the meeting, Mr. McDonald admitted that he might have used profane language during the incident, but he denied provoking the incident, hitting the student, using an unnecessary restraint, or falsifying records by making an incomplete or inaccurate accounting of the incident.
27. Commissioner Favreau, in consultation with Mr. Nadeau, dismissed Mr. McDonald.

Rulings of Law

- A. Per 1001.08 (a) of the Rules of the Division of Personnel states, "Dismissal shall be considered the most severe form of discipline. An appointing authority shall be authorized to take the most severe form of discipline by immediately dismissing an employee without warning for offenses such as, but not necessarily limited to, the following."
- B. The listed offenses include Per 1001.08 (a)(4), "Being the aggressor in a fight or an attempt to injure another person in the workplace."
- C. Per 1001.08(b) of the Rules of the Division of Personnel states, "In cases such as, but not necessarily limited to, the following, the seriousness of the offense may vary. Therefore, in some instances immediate discharge without warning may be warranted while in other cases one written warning prior to discharge may be warranted."
- D. The listed offenses include Per 1001.08 (b)(4), "Willful falsification of agency records including, but not limited to: a. Requests for annual leave, sick leave, civil leave or military leave; b. Payment vouchers or audit documents; c. Requests for payment of overtime or compensatory time; d. Personnel action forms and eligibility for employment forms; e. Applications for employment."
- E. Paragraph 1 of the Department of Youth Development Services Employee Rules and Regulations states, "Failure to comply with any of the following provisions shall be cause for disciplinary action in accordance with the Rules and Regulations of the Division of Personnel."

- F. The Department of Youth Development Services Employee Rules and Regulations states, "DISCHARGE FROM EMPLOYMENT MAY RESULT IF YOU VIOLATE ANY OF THE FOLLOWING PROVISIONS. IT IS NO DEFENSE THAT A YOUTH MIGHT HAVE CONSENTED TO YOUR DOING ANY OF THE ACTS DESCRIBED BELOW OR THAT YOU DID ANY ONE OF THEM WITH GOOD INTENTIONS. THE FOLLOWING PROVISIONS MUST BE STRICTLY OBEYED."
- G. Paragraph 25 of the Department of Youth Development Services Employee Rules and Regulations, which follows the above caution, states, "You shall not strike or restrain a youth unless necessary to defend yourself or another person as prescribed by the Techniques to Manage Aggressive Behavior Policy. In all cases physical contact should be a last resort and only after other measures have failed, the amount of force necessary to safety restrain a youth may be used."

Decision and Order

The Board does not find that Mr. McDonald willfully falsified agency records. Accordingly, the Board found that he did not violate Per 1001.08 (b) of the Rules of the Division of Personnel. There is ample evidence that Mr. McDonald made incomplete and inaccurate reports of the incident, and the Board understands the agency's reasoning and that employees who engage in such conduct should be subject to disciplinary action. However, the types of agency records described by Per 1001.08 (b)(6) appear to relate to only employment and fiscal information, and are not sufficiently similar in nature to the logs, witness statements and incident reports at issue here to warrant a finding that Mr. McDonald engaged in willful falsification of agency records as contemplated by the rule. If the agency intends to take disciplinary action based upon an employee's inaccurate or incomplete reporting of an incident, the Board would recommend that language describing such conduct as a violation subject to discipline be incorporated into its Rules and Regulations.

On the remaining charge, there is virtually no credible evidence to support Mr. McDonald's claim that Billy B posed a threat of physical violence to himself or to any other person in East Cottage at the time of the June 11th incident sufficient to warrant the use of a restraint or physical force of any

kind. On the contrary, the most credible evidence was given by Kelley Healy, who had the best view of the incident from start to finish. Despite attempts to discredit Ms. Healy's testimony, the appellant failed to persuade the Board that Ms. Healy's report exaggerated the events she witnessed, or that her report was somehow tainted by her inexperience. In fact, by giving a full and accurate report, Ms. Healy ran the risk of alienating her co-workers, as evidenced by the advice she received to not "bring it upon [her]self" and to "wait until someone ask[ed her]." Even if the Board were to have found that because of her inexperience, Ms. Healy's testimony should have been given less weight, her report of the incident is consistent with Jane Merrill's nursing report, and is also consistent with the student's own report as relayed by Investigator Eigabroadt.'

Viewing the testimony of John Biron and Stephanie Kalipolites in the light most favorable to the appellant, the simple fact is that they didn't see anything or know anything that would support the appellant's claim that his actions were excusable, or should be viewed as a controlled and acceptable response to a perceived threat. Neither of them was willing to testify that Mr. McDonald's restraint, even if justified, was an approved form of restraint. Furthermore, all the other witnesses, including Mr. Kultla, testified that in their experience, Billy had never posed a physical threat and had never required a restraint.

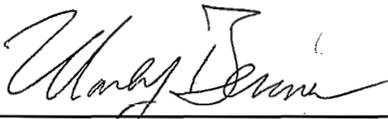
The evidence reflects that Mr. McDonald responded to a verbal affront with physical force. He escalated that verbal exchange to a physical confrontation by approaching the student, striking the student, grabbing the student by the neck, and shoving the student into a wall while yelling profanities at him. He then restrained the student, using an unauthorized and unnecessary restraint, after which he confined the student to his room. Mr. McDonald's actions following the incident give further credence to the State's allegations that Mr. McDonald knew that physical intervention was unwarranted and constituted a violation of the Department's rules. Although required to immediately report a restraint, Mr. McDonald only informed Operations that the student had been

¹ In the absence of eye-witness testimony to corroborate Mr. Eigabroadt's findings, his report would have been given no weight. While the Board is not bound by the rules of evidence and can accept hearsay evidence, the Board finds "trial by investigator" completely unacceptable. Parties are admonished to limit testimonial evidence to that provided by witnesses who can offer the best and most proximate evidence. In most circumstances, the testimony of those witnesses who are unable to present such evidence will be excluded.

escorted and confined to his room. A report of the restraint was not made until sick call, and then only after the student had requested an Ombudsman's report.

On all the evidence, the Board found that Mr. McDonald's actions were in violation of Rule 25 of the Department of Youth Development Services' Employee Rules and Regulations, and in violation of Per 1001.08 (a)(4) in that he was the demonstrated aggressor in a fight or attempt to injure another person in the workplace. Having made such a finding, the Board voted unanimously to deny Mr. McDonald's appeal.

THE PERSONNEL APPEALS BOARD



Mark J. Bennett, Chairman



Robert J. Johnson, Commissioner



Patrick H. Wood, Commissioner

cc: Virginia A. Lamberton, Director of Personnel, 25 Capitol Street, Concord, NH 03301
Ward Freeman, Chief Negotiator, State Employees' Association, PO Box 3303, Concord,
NH 03302-3303
Frances DeCunto, HR Coordinator, Department of Youth Development Services, 1056
North River Road, Manchester, NH 03104-1998