

State of New Hampshire

WPPID695



PERSONNEL APPEALS BOARD

State House Annex
Concord, New Hampshire 03301
Telephone (603) 271-3261

APPEAL OF EDWARD MERROW Docket #91-T-4 New Hampshire Department of Transportation

August 28, 1991

The New Hampshire Personnel Appeals Board (McNicholas, Bennett and Rule) met Wednesday, June 5, 1991, to hear the appeal of Edward Merrow, a former employee of the Department of Transportation. Mr. Merrow was represented by Attorney Shawn Sullivan. Attorney Karen A. Levchuk appeared on behalf of the Department of Transportation (hereinafter "DOT").

Before addressing the merits of Mr. Merrow's appeal, the Board heard brief oral argument by the parties' representatives concerning the appellant's employee status at the time of his discharge. The appellant alleged that he had, in prior seasons, worked more than 6 months in a 12 month period, and therefore should be considered a permanent seasonal employee with all the rights and benefits of any permanent employee. Ms. Levchuk argued that merely having qualified for "permanent seasonal" status in one season did not mean that the employee would thereafter enjoy the benefits of permanent status in subsequent seasons unless the employee continued to satisfy the six month in a twelve month period standard established by RSA 98-A:3. The Board advised the parties it would take the State's Motion under advisement, and instructed the parties to proceed.

Ms. Levchuk requested that the Board allow DOT to offer the testimony of a witness not timely disclosed. In support of that request, Ms. Levchuk argued that the witness had been out of work due to an injury, and the agency was unaware of the fact that he had critical testimony to offer at the time witness lists were exchanged. Mr. Sullivan argued that the testimony which this witness would offer would be extremely prejudicial to the appellant's case, that the appellant had had no opportunity develop rebuttal testimony, and that he should not be further prejudiced by the inclusion of such testimony in the record. The Board voted to exclude that testimony.

The appellant requested that the witnesses be sequestered. That motion was granted.

APPEAL OF EDWARD MERROW

Docket #91-T-4

New Hampshire Department of Transportation

page 2

The appellant had been employed by the Bureau of Traffic for the 1990 pavement marking season as the acting carriage Operator on a five-man crew headed by William Peterson, Pavement Marking Foreman. On August 14, 1990, Peterson reported to DOT that while supervising the appellant, he had observed him in possession of, and using, a controlled substance. That allegation was made by Peterson during a meeting on August 14, 1990, between Peterson, the appellant and Clarence Nelson, who was then the Traffic Maintenance Supervisor. The appellant was notified by letter dated August 15, 1990, signed by J. Douglas Graham, Assistant Traffic Engineer, that he was being suspended for one week under the provisions of Per 308.01 of the Rules of the Division of Personnel pending an investigation into charges that he had possessed and used a controlled substance during the performance of his duties. Subsequently, by letter dated August 21, 1990, also signed by Mr. Graham, the appellant was notified of his discharge from employment effective August 22, 1990, based on the outcome of the Department's investigation of those charges.

The appellant, Edward (Ted) Merrow, was originally employed on a full-time temporary basis with the Department of Transportation from August 22, 1988 through November 18, 1988. He was rehired by the Traffic Bureau as a laborer from April 3, 1989 through November 3, 1989. His third period of employment with the Department began on March 28, 1990. At the time of his rehire, he was expected to work through approximately November 15, 1990.

Peterson testified that he had been a friend of the Merrow family for years, and had known the appellant since he was a boy of ten. He testified that he and the appellant did not have any "off-duty" social relationship, but that they were friendly on the job and talked freely with one another. Peterson testified that he'd suspected Merrow of using drugs on the job, particularly when Merrow began "disappearing" from the crew during breaks and walking alone into the woods. He said that on at least two occasions, he'd smelled marijuana on the appellant, observed that the appellant was glassy-eyed, and warned the appellant that he'd have to stop using marijuana on the job. He said he was aware of the appellant's earlier drug problem and knew that at one point he'd entered a drug rehabilitation program. Peterson testified that Merrow had admitted on several occasions to having smoked marijuana on the job, but had agreed not to use controlled substances on work time.

Peterson testified that he and the appellant's father had been friends, and he hoped he could take care of the problem himself by talking with the appellant rather than reporting him to DOT. He also testified that he was afraid that reporting Ted's use of marijuana on the job to either Jim Merrow or Clarence Nelson could have had a significant impact on his own job security since

APPEAL OF EDWARD MERROW

Docket #91-T-4

New Hampshire Department of Transportation

page 3

Merrow's father, Jim, was his immediate supervisor. He said that when in August he reported his June 18, 1990 observation of Ted Merrow smoking marijuana outside the Eggshell Restaurant in Loudon, Jim Merrow was no longer his supervisor.

Peterson said he believed that Merrow had developed a habit of daily marijuana use on the job, although he had only personally observed him using marijuana once. He said Merrow would routinely leave the coffee break area ahead of the rest of the crew and would walk behind a dumpster or into the woods and smoke pot. He testified that on the morning of June 18, 1990, the crew had stopped at the Eggshell Restaurant in Loudon for a coffee break. He testified that when he left the restaurant by the back door, at approximately 9:30 - 10:00 a.m., he smelled marijuana smoke and observed the appellant and another individual sitting in a DOT truck with the door open.

When Peterson came out and approached the truck, the second person lay down in the seat and Merrow immediately put out the joint, then exited the truck, walking around to the other side. Peterson said he noticed three construction workers in the doorway of the restaurant who had also seen Merrow with the joint. He testified that he got into the passenger side of the striper and told Ted, "Let's get out of here before somebody takes down our license plate number." He testified that he should have either called a police officer or headed back to the shed to report the incident, but that he still hoped he could handle the problem without involving the department. He said that since Jim Merrow was his supervisor, he was also afraid that reporting the incident might result in reprisals.

Peterson testified that throughout the summer, after the incident at the Eggshell, he had observed Merrow walking alone into the woods at the end of coffee breaks, and coming back out smelling of marijuana and appearing glassy-eyed. Peterson said he told Merrow he knew exactly what was happening and that Merrow wasn't fooling anyone, and that Merrow had admitted to smoking marijuana on the job. He testified that he told the appellant he'd better keep his drug problem off the job, and had warned him on several occasions that he would not tolerate pot around heavy equipment.

In early August, 1990, the appellant had broken his left hand and was wearing a cast. When he reported to work, Peterson said he believed the appellant would be unable to properly perform his duties. He asked Clarence Nelson to move Merrow out of the Carriage Operator position and assign him to another crew at least until the cast was removed. Nelson agreed to make the change in assignment.

APPEAL OF EDWARD MERROW

Docket #91-T-4

New Hampshire Department of Transportation

page 4

Merrow went to see Nelson the following day and convinced him that he'd be able to perform most Carriage Operator duties in spite of the cast, and asked Nelson to return him to his original position. He testified that he wanted that job back because Carriage Operators make \$1.50 more per hour than "cone drones" assigned to the other crews. Nelson ordered Merrow back on to Peterson's crew.

Peterson admitted that he was not pleased to have Merrow back in his crew, and he again went to Clarence Nelson on August 14, 1990, to ask him to reconsider the assignment. Merrow walked in on the middle of the meeting between Peterson and Nelson, and alleged that Peterson had been harassing him about the cast, and said to Peterson, "I know the reason you don't like me is because I'm Jimmy Merrow's boy." The discussion became heated, and Peterson said the real reason he didn't want Merrow on the crew was because there was a lot more to his incapacitation than the cast on his arm, and suggested that Merrow go into a rehabilitation program. It was then that Peterson reported an incident which had occurred approximately two months earlier at the Eggshell Restaurant in Loudon where he said he had observed the appellant in possession of, and using, a controlled substance.

The appellant argued that Peterson made the allegations of drug use in retaliation for his having given information to his father, Jim Merrow, about problems with Peterson's performance. He said that Peterson never liked having him on the crew "knowing that [he was] the boss' son." He testified that on more than one occasion, he had reported inadequacies in Peterson's performance to his father and that Peterson was angry that Jim Merrow had reprimanded him for those inadequacies.

Peterson agreed that Jim Merrow had spoken with him about several assignments, but disagreed that those discussions had been formal reprimands. The parties agreed that no formal reference to disciplinary action appears in Mr. Peterson's file, and neither Clarence Nelson nor Douglas Graham recalled any complaints from Merrow about Peterson's performance.

The instant appeal turns on the credibility of the witnesses. The Board found Mr. Peterson's testimony to be quite credible. The Board certainly can not condone Peterson's failure to apprise DOT immediately that he had observed Mr. Merrow smoking marijuana. However, in consideration of Peterson's friendly relationship with the family prior to the incident, the fact that the appellant's father was Peterson's immediate supervisor at the time, and that

Peterson had concerns about his own job security were he to make such a report, the Board can appreciate the dilemma he faced.

Peterson did not appear personally concerned about the appellant's use of marijuana, provided that Merrow could safely and adequately perform his duties and did not possess or use marijuana on the job. Peterson's failure to make a timely report of the incident at the Eggshell Restaurant does not make the report any less credible. Peterson's assumption that Merrow was using marijuana on the job, based on his personal observations of the appellant, was credible in light of the uncontroverted testimony concerning Merrow's history of drug use and treatment for drug abuse.

Peterson's concerns about possible reprisals and the threat to his own job security had he reported Ted Merrow's use of marijuana on the job appeared well founded. Jim Merrow, testifying on his son's behalf, admitted that he'd made some threatening remarks to Peterson about, watching every move he made after Ted Merrow was discharged. Douglas Graham, the Assistant Traffic Engineer, testified that he'd spoken to bureau employees about threatening remarks made by Jim Merrow to Bill Peterson, suggesting that Peterson "back off". Given Peterson's long acquaintance with the appellant and his father, he reasonably could have concluded that reporting the incident at the Eggshell, as long as Jim Merrow was his supervisor, posed a threat to his own employment.

The Board did not find the testimony of either Edward Merrow or Jim Merrow to be as credible as that offered by Bill Peterson. Jim Merrow had testified that the allegations made against his son were in retaliation for disciplinary action that he, Jim Merrow, had taken against Bill Peterson. No record of any disciplinary action was offered, however, and no corroborating testimony was offered concerning problems which Merrow claimed to have had with Bill Peterson's performance.

Jim Merrow testified that Douglas Graham had spoken to him about the allegation of drug use by his son, indicating that the incident had taken place at the start of the "Gorham trip", which Merrow believed to have occurred in July. The crew had also done work in the Gorham area in late June. Jim Merrow, after researching the records of the most recent trip to Gorham went back to the members of the Peterson crew to ask them if they had seen Ted smoking marijuana outside the Eggshell Restaurant on that trip, and whether or not they would be willing to sign statements. Jim Merrow then wrote statements up on DOT letterhead at home on his computer indicating that they had not witnessed the smoking incident, and had the crew members sign the statements. The statements were not sworn statements, and were not

corroborated by testimony from any of the persons who signed those statements. Those statements were excluded from the record.

Edward Merrow testified that during the meeting with Nelson, he denied that the Eggshell incident occurred. He said the only discussion that he'd ever had with Peterson concerned whether or not the "guys in the cone truck were smoking pot". He later contradicted that testimony, however, admitting that he told the members of the crew, including William Peterson, that in the spring of 1990 he had been charged with possession of a controlled substance.

In closing arguments, the Department of Transportation argued that the Board should grant its Motion to Dismiss, reasserting its position that Ted Merrow was a temporary employee and should not be deemed a permanent employee for the purposes of having his appeal heard by the Board. The Department also argued that no motive had been suggested by the appellant for William Peterson to allege that Merrow had possessed or used a controlled substance.

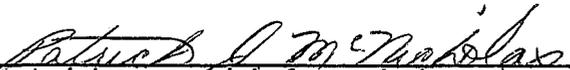
The appellant argued that the Department of Transportation had the burden of proving that the appellant had possessed and used a controlled substance on the job. He argued that Bill Peterson's allegations were made in the heat of an argument with Merrow, and that Peterson was angry that the boss' son was always "looking over his shoulder".

The Board voted to deny the State's Motion to Dismiss. When Ted Merrow was re-hired by the Department of Transportation for the 1990 pavement marking season, he was hired with the expectation that his employment would continue through mid-November. His separation from service was for cause, and not because of a lack of funding or lack of work, as would normally be the cause for separation at the conclusion of the season. Since his separation from service was a formal dismissal under the Rules of the Division of Personnel, the Board found that it did have jurisdiction to hear the matter.

The Board voted to deny Mr. Merrow's appeal, finding the testimony offered by the Department of Transportation to be more credible than that offered by the appellant. The appellant contradicted his own testimony about never having discussed drug use with William Peterson. The appellant's theory that Peterson had "an axe to grind" and made the allegations solely for the purposes of getting even with Jim and Ted Merrow was not persuasive. The only instance any of the witnesses could point to concerning a confrontation between Jim Merrow and Bill Peterson occurred after Ted Merrow was suspended, when Jim Merrow advised Peterson to "back off" and warned him that he'd be watching his every move. In spite of the appellant's assertion that neither

his co-workers nor his former supervisors had ever seen him, or suspected him, of using marijuana, none of those employees offered sworn statements or were called to testify on his behalf. Having found Mr. Peterson's testimony and explanation of events to be more credible than that of Mr. Merrow, the Board voted unanimously to uphold his discharge from the Department of Transportation.

THE PERSONNEL APPEALS BOARD


Patrick J. McNicholas, Chairman


Mark J. Bennett


Lisa A. Rule

cc: Karen A. Levchuk, Transportation Bureau, Attorney General's Office
Shawn J. Sullivan, Cook and Molan, P.A.
John Kirby, Highway Personnel and Administrative Officer, DOT
Virginia A. Vogel, Director of Personnel