

Appeal of Donald W. Murdock
Department of Transportation
Docket #2006-T-005
(NH Supreme Court Case No. 2007-297)
July 9, 2008

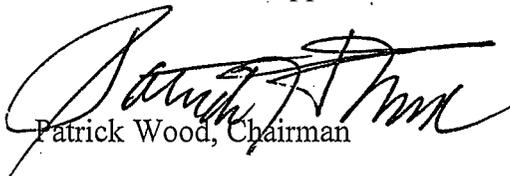
On May 31, 2006, the New Hampshire Personnel Appeals Board issued its decision in the above-titled appeal, upholding Donald Murdock's July 15, 2005 termination from employment. The appellant timely filed a Motion for Reconsideration/Rehearing, which the Board denied by order dated March 28, 2007. The Board's decision was appealed to the NH Supreme Court, and the Court issued an Opinion on February 15, 2008, affirming in part, reversing in part, and remanding the matter to the Board "...for further proceedings, if any, consistent with [the Court's] opinion."

In accordance with the provisions of RSA 21-I:58 and Chapters Per-A 100-200 of the NH Code of Administrative Rules, the Board scheduled the matter for hearing on Wednesday, April 2, 2008, but later postponed the hearing after receiving notice that one of the parties would be unable to attend because of a medical emergency. The matter was rescheduled for hearing on July 9, 2008.

At the scheduled meeting, Attorney John Vanacore appeared on Mr. Murdock's behalf. Assistant Attorney General Lynmarie Cusack appeared on behalf of the Department of Transportation. After discussion between the parties, the parties advised the Board that they had agreed to settle the appeal, subject to approval by the Board and the Attorney General.

Having carefully considered the terms of that agreement, the Board voted unanimously to adopt the agreement as an order of the Board.

For the Personnel Appeals Board


Patrick Wood, Chairman

cc: Karen Hutchins, Director of Personnel
John Vanacore, Attorney, Counsel for Mr. Murdock
Lynmarie Cusack, Assistant Attorney General, Transportation Bureau

THE STATE OF NEW HAMPSHIRE

PERSONNEL APPEALS BOARD

Appeal of Donald W. Murdock

Docket No. 2006-T-005

CONFIDENTIAL SETTLEMENT AGREEMENT

NOW COME the Department of Transportation, by and through the Office of the Attorney General and Donald Murdock (hereinafter "parties") in the above-entitled action and agree that the case will be settled and marked as follows:

1. Mr. Murdock will be reinstated with full back pay and benefits from July 16, 2005 through July 9, 2008.

2. Mr. Murdock resigns effective July 9, 2008.

3. Mr. Murdock accepts and the State will tender \$125,000.00 lump sum in lieu of full back pay and benefits. It is understood that Mr. Murdock will be responsible for all taxes.

4. It is also understood that for the dates from July 16, 2005 through July 9, 2008, the State will contribute to the retirement system as it would for any full time, permanent employee.

5. This Agreement is contingent upon Personnel Appeals Board approval and order, as well as approval from the Attorney General.

6. In consideration of the foregoing settlement and other good and valuable consideration, Mr. Murdock does hereby knowingly and voluntarily release, remise and forever discharge NHDOT, the State of New Hampshire, and their employees,

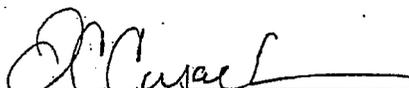
PERSONNEL APPEALS BOARD

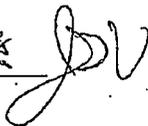
representatives, officers, director, administrators, attorneys, predecessors, successors and/or assigns, from any and all actions or causes of action, suits, debts, claims, complaints, contracts, controversies, agreements, promises, payments, damages, claims for attorneys' fees, costs, interest, punitive damages, judgments and demands whatsoever, in law or equity, that it now has, may have, ever had, or ever will have, whether known or unknown, suspected or unsuspected, asserted or unasserted, arising from or relating to the Personnel Action that was the Subject of Docket PAB 2006-T-205.

7 DOT agrees to take all actions necessary to effectuate the term? of this Agreement in a timely fashion.

8. It is further agreed that this Agreement fully and completely expresses the Parties' agreements and that there are no collateral or outside agreements or understandings of any kind which affect its meaning. Both parties have had the opportunity to have counsel review this Agreement prior to its execution;

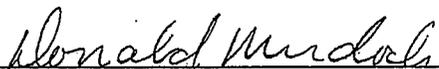
Date: 7-9-08


The State of New Hampshire
Department of Transportation
Lynmarie C. Cusack
Assistant Attorney General

Date: 7-9-8
~~8-7-8~~ 


John Vanacore, Esquire
Counsel for Donald Murdock

Date: 7-9-08


Donald Murdock

State of New Hampshire



PERSONNEL APPEALS BOARD

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

July 14, 2008

Assistant Attorney General Lynnrarie Cusack
Department of Justice
33 Capitol St.
Concord, New Hampshire 03301

Attorney John Vanacore
Vanacore Law Office
19 Washington St
Concord, NH 03301

Re: Settlement Agreement – Appeal of Donald W. Murdock

Enclosed please find the signed order of the Board in the above-titled appeal.

Please feel free to call if you have any questions.

Sincerely,

A handwritten signature in cursive script that reads "Mary Ann Steele".

Mary Ann Steele, SPHR
Executive Secretary to the NH Personnel Appeals Board

enclosure

State of New Hampshire



PERSONNEL APPEALS BOARD

25 Capitol Street
Concord, New Hampshire 03301
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Appeal of Donald Murdock

Notice of Scheduling'

February 26,2008

On February 15,2008, the New Hampshire Supreme Court issued its Opinion in the Appeal of Donald Murdock (PAB Docket #2006-T-005, NH Supreme Court Case No. 2007-297), concerning the Personnel Appeals Board's decision affirming Mr. Murdock's termination from employment following his receipt of three letters of warning for the same offense. In its Opinion, the Court affirmed that portion of the Board's decision refusing to hear Mr. Murdock's second mitten warning, as it was not timely filed. The Court also affirmed the Board's decision with respect to the third written warning, agreeing that the Board made sufficient factual findings to uphold the warning. The Court reversed the Board's decision with respect to the State's interpretation of the Personnel Rules regarding those three warnings being issued for "the same offense," thereby reversing the Board's decision to uphold Mr. Murdock's termination under the provisions of Chapter Per 1000. Finally, the Court remanded the matter to the Board "...for further proceedings, if any, consistent with [the Court's] opinion."

In accordance with the provisions of RSA 21-I:58 and Chapters Per-A 100-200 of the NH Code of Administrative Rules, the Board has scheduled this matter for hearing on Wednesday, April 2,2008, at 9:00 a.m. in Room 411 of the State House Annex, 25 Capitol Street, Concord, NH 03301. The Board has scheduled one hour for this hearing.

The only issue before the Board will be a determination of the appropriate terms of appellant's reinstatement under the provisions of Chapter Per 1000 and RSA 21-I:58, I.

Both parties have a right to be represented by an attorney at their own expense.

FOR THE PERSONNEL APPEALS BOARD



Mary Ann Steele, SPHR

Executive Secretary to the NH Personnel Appeals Board

cc: Karen Hutchins, Director of Personnel, 25 Capitol St., Concord, NH 03301
Lynmarie Cusack, Assistant Attorney General, Department of
Justice/Transportation Bureau, 33 Capitol St., Concord, NH 03301
Attorney John Vanacore, Vanacore Law Office, 19 Washington St, Concord, NH
03301-4352

NOTICE: This opinion is subject to motions for rehearing under Rule 22 as well as formal revision before publication in the New Hampshire Reports. Readers are requested to notify the Reporter, Supreme Court of New Hampshire, One Charles Doe Drive, Concord, New Hampshire 03301, of any editorial errors in order that corrections may be made before the opinion goes to press. Errors may be reported by E-mail at the following address: reporter@courts.state.nh.us. Opinions are available on the Internet by 9:00 a.m. on the morning of their release. The direct address of the court's home page is: <http://www.courts.state.nh.us/supreme>.

THE SUPREME COURT OF NEW HAMPSHIRE

Personnel Appeals Board
No. 2007-297

APPEAL OF DONALD W. MURDOCK
(New Hampshire Personnel Appeals Board)

Argued: January 16, 2008
Opinion Issued: February 15, 2008

Vanacore Law Office, of Concord (John G. Vanacore and Natalie J. Friedenthal on the brief, and Mr. Vanacore orally), for the petitioner.

Kelly A. Ayotte, attorney general (Lynmarie C. Cusack, assistant attorney general, on the brief and orally), for the respondent.

GALWAY, J. The petitioner, Donald W. Murdock, appeals the decision of the New Hampshire Personnel Appeals Board (PAB) affirming his dismissal from employment by the respondent, the New Hampshire Department of Transportation (DOT), following his receipt of three written warnings for the same offense within a five-year period. N.H. Admin. Rules, Per 1001.08(b)(1) (current version at 1002.08(c)(1)). We affirm in part, reverse in part, and remand.

We recite the facts as found by the PAB or as presented in the record. The petitioner was hired by the DOT in February 1994. He worked in various positions until the fall of 2002, when he became the Highway Patrol Foreman for one of the fourteen patrol sections in District IV. District IV is one of the six maintenance districts within the State. In this capacity, the petitioner was

responsible for planning, scheduling and inspecting the work of his five-man patrol crew in coordination with his immediate supervisor, Maintenance Supervisor George Leel, as well as the District Engineer, Douglas Graham. The petitioner was also responsible for enforcing, among other things, DOT policies and procedures within his section, and producing timely and accurate reports of the work activities of his crew.

On May 12, 2003, District Engineer Graham issued the petitioner his first letter of warning for transporting alcohol in his state vehicle contrary to DOT policy. Specifically, it was alleged that the petitioner, after work hours, purchased beer at a local convenience store and transported the alcohol to his home in his state vehicle. The warning cited the petitioner's "failure to meet any work standard" under New Hampshire Administrative Rule, Per 1001.03 (a)(1) (current version at 1002.04(b)(1)) as grounds for the warning. The corrective action provided,

As a Highway Patrol Foreman, you are expected to set the standard for your Patrol Section You must ensure that you follow those rules and standards in your own conduct and enforce those rules and standards among the members of your crew. Your failure to do so will result in further disciplinary action up to, and including, your discharge from employment.

The petitioner did not appeal the issuance of this warning.

On September 20, 2004, District Engineer Graham issued a second letter of warning to the petitioner, again citing Per 1001.03(a)(1) (failure to meet any work standard). This warning resulted from the petitioner having allowed Sports Illustrated swimsuit model calendar pictures to be displayed in the workplace after he had been told to remove them. Although the petitioner removed the pictures from display on the wall after being instructed to do so, several were later found "scattered about" on a desk within the office. The warning stated that the petitioner's "failure to ensure a workplace free from the potential for harassment . . . constitutes a failure to meet any work standard." In addition, the warning alleged the petitioner failed to maintain a safe workplace, noting several tripping hazards in the office, as well as the presence of a wash basin without the proper caution warnings, all constituting a failure to meet any work standard. The corrective action for these various infractions, as with the first warning, generally instructed the petitioner that he must follow, and ensure his crew followed, the applicable rules and standards.

The petitioner challenged this warning, seeking review through the informal four-step review process outlined in the personnel rules, rather than a

direct appeal to the PAB. N.H. Admin. Rules, Per 202.01 (current version at 205.01). At each of the first three review steps, the warning was upheld after the petitioner filed a timely appeal statement. However, at the fourth and final step, the petitioner did not file his appeal statement within the prescribed period of time, and was denied consideration. The petitioner appealed to the PAB, which in November 2005 denied his request as untimely.

On July 15, 2005, the petitioner was issued a third warning for failure to meet any work standard. The warning detailed numerous alleged deficiencies in the petitioner's conduct including exercising poor judgment in parking his state vehicle outside of a restaurant later than the normal lunch hour and for a period longer than thirty minutes. Specifically, District Engineer Graham alleged he had observed the petitioner's state vehicle parked outside of a restaurant at 1:15 p.m. and observed the petitioner leaving at 1:50 p.m. The warning indicated that the petitioner showed poor judgment in taking a late lunch, and also taking a lunch that was at least thirty-five minutes, five minutes more than the permitted time. The warning also alleged the petitioner had left work early without receiving prior approval from his supervisor and had failed, on at least one occasion, to accurately document the work time of his crew.

The warning also served as a letter of dismissal pursuant to Per 1001.08(b)(1), which permits dismissal of an employee after three written warnings for the same offense within a five-year period. See N.H. Admin. Rules, Per 1001.08(b)(1). The letter articulated the two previous written warnings for failure to meet any work standard, in addition to the current warning, as grounds for the petitioner's dismissal.

The petitioner appealed both the warning and his dismissal directly to the PAB. Following a hearing, the PAB upheld the dismissal, concluding,

All three warnings issued to the [petitioner] were issued in accordance with Per 1001.03(a). . . and each was for the "same offense" as contemplated by that rule, as each of the warnings arose from the [petitioner's] lack of familiarity with, or disregard for, the policies and procedures governing the [petitioner's] responsibilities as a Highway Patrol Foreman.

The petitioner filed a motion for reconsideration and rehearing, arguing that the PAB's interpretation of Per 1001.08(b)(1) was unreasonable and violated due process. In addition, the petitioner asserted that the PAB should have waived his failure to meet the filing deadline and considered his appeal of the September 20, 2004 warning. The petitioner also argued that, with respect to

the July 15, 2005 warning, the evidence presented and the PAB's findings of fact were insufficient to sustain his dismissal, and further, that the PAB should have reassigned him, rather than affirming his dismissal. The PAB denied the motion.

This is an appeal from a final decision of the PAB pursuant to RSA 21-I:58, II (2000), RSA 541:6 (2007) and Supreme Court Rule 10. The petitioner has the burden of demonstrating that the PAB's decision was clearly unreasonable or unlawful. RSA 541:13 (2007). The PAB's findings of fact are deemed prima facie lawful and reasonable. Id. We will affirm the decision unless we are satisfied, by a clear preponderance of the evidence, that it is unjust or unreasonable. See Appeal of Waterman, 154 N.H. 437, 439 (2006).

We review the interpretation of administrative rules de novo. State v. Elementis Chem., 152 N.H. 794, 803 (2005). "In construing rules, as in construing statutes, where possible, we ascribe the plain and ordinary meanings to words used." Appeal of Flynn, 145 N.H. 422, 423 (2000) (quotations omitted). We look at the rule under consideration as a whole, and not in segments. See Appeal of Alley, 137 N.H. 40, 42 (1993). "While deference is accorded to an agency's interpretation of its regulations, that deference is not total. We still must examine the agency's interpretation to determine if it is consistent with the language of the regulation and with the purpose which the regulation is intended to serve." Id. (quotation omitted).

The petitioner first argues that the PAB misinterpreted Per 1001.08(b)(1) when it concluded that his three written warnings were for the same offense. Per 1001.08(b)(1) provides, "An appointing authority shall be authorized to dismiss an employee pursuant to Per 1001.03 by issuance of a third written warning for the same offense within a period of 5 years." The petitioner asserts that, although each warning is categorized as a failure to meet any work standard under Per 1001.03(a)(1), the actual conduct underlying each warning is of such a different character that they cannot reasonably be considered the same offense.

The State counters that the petitioner's three warnings all constitute the same offense because, as found by the PAB, the warnings "arose from his lack of familiarity with, or disregard for, the policies and procedures governing [his] responsibility as a highway patrol foreman." The State thus contends that it is not the actual behavior underlying the warning, but the more generalized type of violation, here, the violation of policies and procedures, which must be considered for purposes of dismissal under Per 1001.08(b)(1). The State also suggests that the critical part of a letter of warning is its advised corrective action, and, therefore, that should be the primary consideration for purposes of Per 1001.08(b)(1). The State's interpretation is flawed in several respects.

First, to read Per 1001.08(b)(1) as the State suggests requires us to ignore several other provisions within the rules, and "[w]e will not interpret the rule in such a way as to render a significant portion of it meaningless." Appeal of City of Manchester, 149 N.H. 283, 287 (2003). Per 1001.03(a) provides,

An appointing authority shall be authorized to use the written warning as the least severe form of discipline to correct an employee's unsatisfactory work performance or misconduct for offenses including, but not limited to:

- (1) Failure to meet any work standard;
- (2) Unauthorized absences from work;
- (3) Excessive unscheduled absences even if payment or approval for the leave is authorized;
- (4) Sexual harassment;
- (5) Exhibiting physically or verbally abusive behavior in the workplace . . . ;
- (6) Working unauthorized overtime;
- (7) Failure to report immediately to the appointing authority the expiration of a license or certificate required by the class specification or supplemental job description for performance of the duties of a position; and
- (8) Unauthorized use or misuse of information or communications systems.

N.H. Admin. Rules, Per 1001.03(a)(1)-(8). Under the State's interpretation, every violation of any DOT policy, regulation, procedure, or class specification responsibility amounts to a failure to meet any work standard under Per 1001.03(a)(1). It necessarily follows that the remaining listed categories are merely superfluous, as, under the State's interpretation, any behavior these categories embody would also fall under the failure to meet any work standard provision. This problem is exemplified by the alleged conduct at issue in this case - the petitioner's various warnings address behavior that arguably could have fit other categories of the rule, but were simply framed as a failure to meet any work standard. See N.H. Admin. Rules, Per 1001.03(a)(2) (warning for unauthorized absences), (a)(4) (warning for sexual harassment).

The State's interpretation also nullifies Per 1001.08(b)(2), which permits dismissal of an employee after five written warnings for different offenses within a five-year period. See N.H. Admin. Rules, Per 1001.08(b)(2) (current version 1002.08(c)(2)). If the "same offense" language of Per 1001.08(b)(1) was intended to encompass the same types of violations, as the State suggests,

without any consideration of the actual behavior eliciting the warning, the distinction articulated between sections (b)(1) and (b)(2) of this rule would be meaningless. Essentially, all violations would fall within the purview of the failure to meet any work standard provision, and, without any consideration of the underlying behavior, each warning would always constitute the "same offense," negating the need for a rule allowing dismissal for "different offenses."

Additionally, the State's interpretation contravenes the express purpose of the written warning. Per 1001.03(b) requires that a written warning contain a narrative describing in detail the reason for the warning, and list specifically the corrective action which the employee shall take to avoid additional disciplinary action. N.H. Admin. Rules, Per 1001.03(b)(1)-(2). We have said, "The purpose of the warning requirement is to notify employees that they have committed an offense, and to instruct them on the proper future course of conduct." Appeal of Gielen, 139 N.H. 283, 289 (1994). If the State's interpretation were to prevail, however, the written warning would provide the employee no meaningful guidance on how to avoid additional disciplinary action, as any infraction may be deemed the same offense for purposes of dismissal. Indeed, as was the case here, employees would routinely receive warnings for specific instances of misconduct and be instructed to "follow the rules" in order to avoid additional disciplinary action, only to be subject to dismissal following any violation of those rules. Essentially, an employee, having recognized that a particular behavior is an offense, and avoided this behavior in the future, would not be assured that his dismissal for the "same offense" is prevented.

Read in the context of the rule as a whole, and in light of the purpose behind a written warning, it is clear the term "same offense" was intended to permit dismissal following three written warnings for a particular behavior, and not merely for any behavior that might be characterized as a similar violation under Per 1001.03(a). Furthermore, we are not persuaded by the State's contention that the principal consideration for purposes of Per 1001.08(b)(1) is the corrective action. We have recognized the importance of providing corrective action within a written warning in other contexts. See, e.g., Appeal of Gielen, 139 N.H. at 289; Appeal of Fugere, 134 N.H. 322, 331 (1991). However, although corrective action is a required element under the rules and an integral part of the warning's purpose, similarity of corrective action is not the appropriate measure for purposes of determining whether warnings constitute the "same offense" under Per 1001.08(b)(1). The plain language of Per 1001.08(b)(1) focuses on the nature of the offense itself, requiring that each offense be the "same." The corrective action is the remedy to the offense, not a part of the offense itself. The rule makes no mention of corrective action, nor is it clear to us how the remedy for a particular offense would be relevant to the "same offense" determination, even if identical for several different behaviors. Because the PAB's interpretation of Per 1001.08(b)(1) was in error, we reverse

its determination and remand for further proceedings, if any, consistent with this opinion.

Because the validity of both his second (September 20, 2004) and third (July 15, 2005) warnings may arise again in the future, we will address the petitioner's challenges to them. With respect to the September 20, 2004 warning, which was on appeal at the time of the hearing, the petitioner submits that the PAB should have used its discretion to waive the fifteen-day filing deadline, and considered the merits of that appeal. Per 202.02 and Per 202.03 outline a four-step procedure through which an employee may dispute the application of any personnel rule. See N.H. Admin. Rules, Per 202.01-202.03 (current version at 205.02-205.03). The rule provides that, at each step, "[t]he employee shall present a detailed written description of the basis for the dispute" to the appropriate party within fifteen calendar days following the preceding step's final decision. Id. 202.02(a)(3); see also id. 202.02(b)(1), (c)(2), 202.03(a). Here, the petitioner does not dispute that he did not file this statement within the fifteen-day deadline when initiating the fourth step. However, he argues that, because he had met all filing deadlines before this, and because the DOT had failed to meet several of its time limitations further delaying his appeal, it was unfair for the PAB not to consider his appeal. We are not persuaded.

The petitioner argues that it is unfair for the PAB not to consider his appeal, despite the fact it was untimely, because the DOT had also failed to meet several of its time requirements under Per 202. N.H. Admin Rules, Per 202.02, 202.03. Like the time constraints placed upon the petitioner, Per 202 sets a fifteen-day deadline for the reviewing party to render its decision on the petitioner's appeal. Id. 202.02(a)(4), (b)(3), (c)(6), 202.03(c). Although not specified by the petitioner, it appears from the record that, on at least one occasion, the decision of a reviewing party was rendered after this fifteen-day deadline. However, what the petitioner fails to note is that Per 202 provides a remedy in the event of such a delay. Specifically, the rule provides that, should a decision at any of the four steps fail to be rendered within the prescribed fifteen days, the employee "shall have the option" of proceeding to a further step in the appeal. See N.H. Admin Rules, Per 202.02 (a)(6), (b)(4), (c)(7), 202.03(e).

Here, the petitioner has not argued, nor does the record reflect, that he ever availed himself of this remedy in order to minimize the delay in his appeal. Nor is there any evidence that he raised any objection to an untimely decision by the reviewing party. Thus, the DOT was not without consequences for its failure to satisfy this time deadline, had the petitioner chosen to enforce it. Further, the Administrative Procedure Act requires administrative agencies to follow their own rules and regulations. See Appeal of Gielen, 139 N.H. at 288. Per 202.04, titled "Invalid Appeals," provides, in pertinent part: "The following

matters shall not be subject to . . . appeal under Part Per 202: . . . (h)untimely appeals." N.H. Admin. Rules, Per 202.4(h) (emphasis added). The petitioner does not dispute that this appeal statement was untimely under the applicable rules. Given these facts, we cannot conclude that it was error for the PAB to decline to hear the petitioner's appeal.

Finally, the petitioner challenges the sufficiency of the PAB's ruling with respect to his July 15, 2005 warning, arguing that the PAB merely summarized the evidence without making any findings of fact, and that its ruling is therefore invalid. We disagree. RSA 541-A:35 (2007) requires that the PAB's final decision include findings of fact and conclusions of law, separately stated. It further provides that "[f]indings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings." Id. "The purpose of this requirement is to provide this court with an adequate basis upon which to review the decision of the administrative agency." Petition of Support Enforcement Officers, 147 N.H. 1, 9 (2001).

Upon review of the PAB's decision, we conclude that the PAB's findings of fact, coupled with the narrative decision following its findings, provides adequate basis for our review. Although the specific finding of fact with regard to the third warning appears only to set forth the DOT's grounds for issuing the warning, the PAB used the third warning to support its dismissal determination, affirming the issuance of the warning. Thus, although the PAB could have made more specific findings, the totality of its decision allows for effective judicial review and provides a sufficient statement of the underlying facts to support its determination. We therefore will not vacate it on that basis. Cf. Petition of Support Enforcement Officers, 147 N.H. at 9 (when an agency structures its decision solely by summarizing evidence and opposing views, decision will be vacated and remanded).

Based upon our determinations above, we do not reach the petitioner's remaining arguments.

Affirmed in part; reversed in part;
and remanded.

BRODERICK, C.J., and DALIANIS, DUGGAN and HICKS, JJ., concurred.

State of New Hampshire



PERSONNEL APPEALS BOARD

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

Appeal of Donald W. Murdock

Docket #2006-T-005

NH Department of Transportation

Board's Response to Appellant's Motion for Reconsideration and Rehearing And State's Objection Thereto

March 28, 2007

On June 12, 2006, Attorney Vanacore filed a Motion for Reconsideration of the Board May 31, 2006 decision denying the Appeal of Donald W. Murdock regarding his termination from employment with the New Hampshire Department of Transportation for having received three written warnings for the same offense within a period of five years. Attorney Cusack filed the State's Objection to that Motion by letter dated June 19, 2006.

Per-A 208.03 (b) of the Board's rules provides that a motion for reconsideration and rehearing "...shall set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable" and that "A motion for rehearing in a case subject to appeal under RSA 541 shall be granted if it demonstrates that the board's decision is unlawful, unjust or unreasonable." [Per-A 208.03 (e)]

Attorney Vanacore argued that:

1. The three written warnings issued to the Appellant were not actually for "the same offense," even though they were characterized by the Department as warnings for the offense of "failure to meet any work standard."

3. Because the Department of Transportation repeatedly failed to meet the deadlines for timely response to the Appellant's requests for informal settlement of his second written warning, the Board should waive the timely filing requirement imposed upon Mr. Murdock and hear the appeal of his second written warning.
4. The evidence against Mr. Murdock with regard to the third warning was insufficient and the findings of fact and rulings of law made by the Board with respect to that warning were insufficient to sustain Mr. Murdock's dismissal.

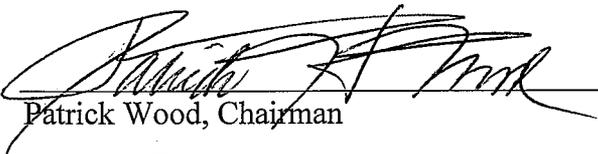
Having carefully considered both the Appellant's Motion and the State's Objection, the Board voted to DENY the Appellant's Motion for the reasons set forth below:

1. "Failure to meet any work standard" is not merely a "catch-all" as the Appellant suggests. The work standard at issue in each of the written warnings involved the Appellant's lack of familiarity with, and disregard for, the policies and procedures governing his responsibilities as a Highway Patrol Foreman. As noted in the Board's May 31, 2006 decision, "All three warnings issued to the Appellant were issued in accordance with Per 1001.03 (a) of the NH Code of Administrative Rules, and each was for the 'same offense' as contemplated by that rule, as each of the warnings arose from the Appellant's lack of familiarity with, or disregard for, the policies and procedures governing the Appellant's responsibilities as a Highway Patrol Foreman." [PAB Decision, May 31, 2006, Appeal of Donald Murdock]
2. RSA 21-I:58, I provides that in all cases, the Board may reinstate an employee or otherwise change or modify any order of the appointing authority, or make such other order as it may deem just. As noted in the Board's decision, the Board contemplated alternatives to termination, and asked at the hearing on the merits of the appeal if it would be possible or feasible to return the Appellant to work at the DOT in a non-supervisory role. The Board gave careful consideration to all the evidence and responses provided by the State's and the Appellant's witnesses in deciding to deny the appeal and uphold the decision to dismiss the Appellant. As indicated in the Board's original decision, taking all those factors into consideration, the Board found no compelling reason to change or modify the decision of the appointing authority.

3. At the final step of the informal settlement process defined by the Rules of the Division of Personnel, the Director of Personnel dismissed the Appellant's second written warning appeal as untimely. The Appellant failed to provide evidence or argument to persuade the Board to reverse that decision. Further, during the course of the Appellant's termination appeal hearing, the Board heard the Appellant's testimony regarding that warning, and took the Appellant's exception to that warning fully into consideration in reaching its decision to uphold the Appellant's termination from employment.
4. Although the Appellant disagrees with the Board's conclusions regarding the sufficiency of the evidence offered in support of the Appellant's third and final warning, that disagreement does not provide good cause to determine that the conclusions reached by the Board, or its decision denying the appeal, was unlawful, unjust or unreasonable.

For all the reasons set forth above, as well as those argument articulated in the State's objection to the Appellant's Motion for Reconsideration and Rehearing, the Board voted to DENY the Appellant's Motion and affirm its decision DENYING the Appeal of Donald Murdock.

The Personnel Appeals Board


Patrick Wood, Chairman


Robert Johnson, Commissioner

John Reagan, Commissioner

cc: Karen A. Levchuk, Director of Personnel, 25 Capitol St., Concord, NH 03301
Attorney John Vanacore, Vanacore Law Office, 19 Washington St., Concord, NH 03301
Assistant Attorney General Lynmarie Cusack, Department of Justice, 33 Capitol St.,
Concord, NH 03301

State of New Hampshire



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

Appeal of Donald W. Murdock

Docket #2006-T-005

NH Department of Transportation

May 31, 2006

The New Hampshire Personnel Appeals Board (Wood, Johnson and Reagan) met on Wednesday, January 4, 2006, and Wednesday, January 11, 2006, under the authority of RSA 21-I: 58 and Chapters Per-A 100-200 of the NH Code of Administrative Rules, to hear the appeal of Donald W. Murdock, a former employee of the New Hampshire Department of Transportation. Mr. Murdock, who was represented at the hearing by Attorney John Vanacore, was appealing his July 15, 2005, termination from employment as a Highway Patrol Foreman after receiving a third written warning for failure to meet any work standard. Assistant Attorney General Lynnmarie Cusack appeared on behalf of the State.

The record of the hearing in this matter consists of pleadings submitted by the parties, notices and orders issued by the Board, the audio tape recording of the hearing on the merits of the appeal, and documents admitted into evidence as follows:

State's Exhibits

1. July 15, 2005 Letter of Warning and Letter of Dismissal issued to Donald W. Murdock by Douglas Graham, District Engineer (49 pages including attachments)
2. February 1, 2005 Letter from Lyle W. Knowlton, Director of Operations, to Donald W. Murdock Re: Step II Appeal for Letter of Warning Dated September 20, 2004
3. Performance Evaluations for Donald W. Murdock dated 11/17/04, 11/10/03 and 12/5/02

Appellant's Exhibits

A. DOT/Murdock Letter of Warning Appeal Actions Sequence

The following persons gave sworn testimony:

Douglas Graham, District IV Highway Maintenance Engineer

George Leel, District IV Highway Maintenance Supervisor

Carol Jeffery, Winter Dispatcher and Information Center Attendant

Christopher Flagg, District IV Highway Maintenance Supervisor

Michael Pillsbwy, Administrator

Brian Cole, Bridge Maintainer

Donald Mwdock, Appellant (former Highway Patrol Foreman)

At the Appellant's request, the witnesses were sequestered.

For the convenience of the parties, and in consideration of the fact that the Board had limited the amount of time the State was permitted for cross-examination, the Board held open the record of the hearing until Friday, January 21, 2006, in order to allow the parties to submit additional evidence. Neither party submitted further evidence by the date that the record of the hearing was closed.

Narrative Summary of Events Leading Up to Dismissal

For purposes of highway maintenance activities, the Department of Transportation divides the State into six maintenance districts, each of which is managed by a Highway Maintenance Engineer. District IV, headquartered in Swanzey, also employs two Construction Foremen, an Assistant Construction Foreman, and office staff. In District IV, which covers forty-two towns, the Highway Maintenance Engineer's responsibilities include assigning crews and providing overall supervision to approximately ninety full-time employees as well as some seasonal and temporary employees. The District Engineer is authorized to hire, fire and discipline staff within the district. The majority of the staff work in field crews assigned to one of fourteen patrol sections within the district, with six to eight people working on each patrol crew. A Highway

Patrol Foreman, who reports to one of the two Maintenance Supervisors, provides direct supervision to crew members in the assigned patrol section.

The Appellant was hired on February 27, 1994, as a Highway Maintainer I. He was later promoted to Assistant Construction Foreman, where he worked independently and performed a variety of construction and maintenance tasks statewide, reporting directly to Michael Pillsbury, who was then the State Maintenance Engineer. Although Mr. Pillsbury described the Appellant as something of a "maverick" and said that he had to "rein him in" from time to time, he also indicated that the Appellant earned a reputation for doing quality work and finding a way to complete whatever task he was assigned.

In the fall of 2002, the Highway Patrol Foreman assigned to the 404 Patrol Section crew was demoted. At the time, the section was in disarray and morale was extremely low. District IV managers persuaded the Appellant to leave his position as Assistant Construction Foreman and take over temporarily as the Highway Patrol Foreman for the 404 Patrol Section. At the hearing, the State stipulated that there were significant performance deficiencies and low morale in that section when the Appellant was assigned there, and that he successfully "turned the crew around."

When the position of Highway Patrol Foreman for the 404 Section subsequently was posted for purposes of recruitment and selection, the Appellant applied for a permanent promotion. He was selected and assigned to that position on February 21, 2003.

According to several of the witnesses, developing the skills to supervise a patrol section involves a significant "learning curve." Christopher Flagg, a District IV Maintenance Supervisor and personal friend of the Appellant's, suggested that it takes as many as five to seven years for a Patrol Foreman to become fully effective in that position, and that some need more direct supervision and counseling during that period. He noted that some individuals undergo a change when they assume that role, and the change is not always for the better, stating, "What happens within the beast at DOT, the workplace... they have so much leeway in those positions, as soon as they become the king, the attitude changes." Although Mr. Flagg seemed to believe that some

course short of termination might have been appropriate in this case, he testified that each of the three warnings issued to the Appellant was justified.

Mr. Graham, Mr. Pillsbwy and Mr. Leel all attested to the Appellant's skills. None of them, however, believed that a lesser form of discipline would have been effective. They agreed that demoting the Appellant or transferring him to another patrol section would simply result in moving the problem rather than eliminating it, and suggested that returning the Appellant to the department in some other role could be extremely disruptive.

The Appellant described himself as someone who could "think outside the box" and who would do whatever it took to get a job done. He described steps he had taken during his tenure as Highway Patrol Foreman to help the crew function as a team. The Appellant testified that if his supervisors had brought issues to his attention and had counseled him, rather than issuing written warnings, he would have made the necessary corrections.

The Appellant testified that he understood he had made a mistake when he transported beer in his State vehicle. Even though he was unfamiliar with the policy, he understood that his actions constituted a violation. He took exception to the other warnings, however, and said he believed that he was dismissed for reasons other than those articulated in the letter of termination. He said he suspected his dismissal had something to do with what he described as a "heated conversation" between himself and Mr. Graham, but provided no further details of the alleged exchange.

Having carefully considered all the evidence and arguments offered by the parties, the Board made the following findings of fact and rulings of law.

Findings of Fact:

1. As the Patrol Foreman for the 404 Patrol Section, the Appellant was responsible for planning, scheduling and inspecting the work of his patrol crew in coordination with his Maintenance Supervisor and District Engineer. He also was responsible for enforcing

DOT policies and procedures, and producing timely and accurate reports of work activities within the patrol section, as well as purchases, expenditures, and payrolls.

2. On May 12, 2003, the Department of Transportation issued a first letter of warning to the Appellant for failure to meet any work standard. (State's Exhibit 1, p. 15.) The warning indicated that the appellant had conducted personal business with a State vehicle, and had transported beer in that vehicle in violation of DOT Policy 205.01. Part of the corrective action outlined in the warning advised the Appellant that, "As a Highway Patrol Foreman, you are expected to set the standard for your Patrol Section and the employees under your supervision. You must ensure that you follow those rules and standards in your own conduct and enforce those rules and standards among the members of your crew. Your failure to do so will result in further disciplinary action up to, and including, your discharge from employment." The first letter of warning was not appealed and remains a part of the Appellant's file.
3. In April 2004, when his supervisors had difficulty reaching the Appellant, and the Appellant's crew did not know or would not disclose his whereabouts, the Appellant's supervisors counseled him, advising him that he needed to improve his ability to be reached. They also advised him to improve communications with supervisors and staff in the District Office, and demonstrate better awareness of public perception for those occasions when he parked his State vehicle at local businesses, or drove his vehicle on roadways the State was not responsible for maintaining. They also discussed appropriate use of MATS, the Department's Maintenance Activity Tracking System, and timely inputting of information into that system.
4. On September 20, 2004, the Department issued a second letter of warning to the Appellant for failure to meet any work standard. (State's Exhibit 1, p. 23.) The letter cited the Appellant for allowing sexually suggestive calendar photos to be displayed in the workplace after he had been told to remove them, and for failing to maintain a safe workplace. According to the warning, the Appellant failed to maintain good housekeeping in the patrol shed, permitting tripping hazards to exist. The warning also indicated that without his supervisor's approval, the Appellant had purchased and installed a parts washer, had failed to post appropriate Material Safety Data Sheets for the solvent being used in the basin, and had allowed a member of the crew to work with the

solvent without the appropriate safety gear in violation of DOT Policy 301.01 and 301.02. The Appellant was advised, "As a Highway Patrol Foreman, you are responsible for your Patrol Section and the actions and well being of employees under your supervision. You must ensure that you follow those rules and standards in your own conduct and enforce those rules and standard among the members of your crew. Your failure to do so will result in further disciplinary action up to, and including, your discharge from employment."

5. The Appellant took exception to the warning and initiated the process of informal settlement defined by PART Per 202 of the Rules of the Division of Personnel. At each of the first three steps of that process, the warning was upheld. The Appellant's final request for review by the Director of Personnel was dismissed as untimely, as the request was filed outside the fifteen-calendar day deadline that the rule requires. As a result, the second warning remains a part of the Appellant's file.
6. On July 15,2005, the Department of Transportation issued a third and final warning to the Appellant for failure to meet any work standard. (State's Exhibit 1, p. 1) The specific conduct for which the warning was issued included the Appellant leaving work early on June 8,2005, without receiving approval from his supervisor or notifying the office that he would be out of service before the end of his normally scheduled work day. He was warned for having his crew work flex time between June 6 and June 7,2005, without providing notice to his supervisor, without accurately documenting the time worked on their weekly timesheets, and without accurately entering the data into MATS, the Maintenance Activity Tracking System. The warning charged the Appellant with failing to respond to the District Engineer on June 28,2005 after receiving a message from him about a "call-out" the previous afternoon. The warning also referred to poor judgment exercised by the Appellant when he and his Assistant Foreman left the State vehicle parked at the Keene Buffet on June 16,2005, where Mr. Graham observed it parked between 1:15 p.m. and 1:50 p.m., later than the usual noon break and for a period of time in excess of one-half hour.
7. While he was working as the Assistant Construction Foreman, the Appellant did not need anyone else's approval to alter his own work schedule as long as he got the job done. He believed that the same standard should apply to him as a Highway Patrol Foreman.

8. The Appellant considered his shed to be a safe workplace, and believed that physical conditions within his shed were as good or better than the condition at any of the other sheds in District IV.
9. Apart from the safety committee report, the Appellant's supervisors never complained about housekeeping at the shed, nor did they raise safety concerns relative to the parts-washing basin that he had purchased and installed or about the solvent being used to clean the chainsaws.
10. The Appellant was unconcerned about the cost of disposing of the solvent because it could be burned in a waste oil furnace.
11. Although the solvent being used in the parts washing basin that Mr. Murdock bought was purchased with Mr. Leel's approval, there were no Material Safety Data Sheets posted, constituting a violation of DOT policies and procedures and failure to meet a work standard.
12. Douglas Graham met with the Appellant on Thursday, July 14, 2005, providing the Appellant with copies of all the evidence that Mr. Graham believed supported a decision to dismiss the Appellant. The Appellant had an opportunity at the meeting to refute the evidence, but was unable to persuade Mr. Graham that he should not be dismissed.

Rulings of Law

- A. Per 1001.03 (a) (1) of the NH Code of Administrative Rules authorizes an appointing authority to use the written warning as the least severe form of discipline to correct employees' failure to meet work standards.
- B. Per 1001.08 (b)(1) of the NH Administrative Rules, authorizes an appointing authority to dismiss an employee who receives three written warnings for the same offense within a period of five years, provided that the appointing authority first complies with the provisions of Per 1001.08 (c) by offering to meet with the employee to discuss whatever evidence the appointing authority believes supports the decision to dismiss, offering to provide the employee with an opportunity to refute the evidence, and documenting in writing the nature of the offense.

- C. Douglas Graham's meeting with the Appellant on Thursday, July 14, 2005, complied with the requirements of Per 1001.08(c) of the NH Code of Administrative Rules.
- D. RSA 21-I:58, I, provides a right of appeal to any permanent employee who is affected by the application of the Personnel Rules. It also provides for reinstatement of an employee if the Board finds that, "...the action complained of was taken by the appointing authority for any reason related to politics, religion, age, sex, race, color, ethnic background, marital status, or disabling condition, or on account of the person's sexual orientation, or was taken in violation of a statute or of rules adopted by the director..."
- E. Per-A 207.12(b) of the NH Code of Administrative Rules (Rules of the Personnel Appeals Board), provides that, "In disciplinary appeals, including termination, disciplinary demotion, suspension without pay, withholding of an employee's annual increment or issuance of a written warning, the board shall determine if the appellant proves by a preponderance of the evidence that: (1) The disciplinary action was unlawful; (2) The appointing authority violated the rules of the division of personnel by imposing the disciplinary action under appeal; (3) The disciplinary action was unwarranted by the alleged conduct or failure to meet the work standard in light of the facts in evidence; or (4) The disciplinary action was unjust in light of the facts in evidence."
- F. RSA 21-I:58, I, authorizes the Personnel Appeals Board to reinstate an employee or otherwise change or modify any order of the appointing authority, or make such other order as it may deem just.

Decision and Order

Having carefully considered the evidence and argument offered by the parties, the Board voted unanimously to DENY Mr. Murdock's appeal, and uphold the Department's decision to dismiss him from his position as a Highway Patrol Foreman. In doing so, the Board concluded that the Appellant's termination was not related to politics, religion, age, sex, race, color, ethnic background, marital status, disabling condition, or sexual orientation. The Board also concluded that the termination was not effected in violation of a statute or of rules adopted by the director. All three warnings issued to the Appellant were issued in accordance with Per 1001.03 (a) of the NH Code of Administrative Rules, and each was for the "same offense" as contemplated by that

rule, as each of the warnings arose from the Appellant's lack of familiarity with, or disregard for, the policies and procedures governing the Appellant's responsibilities as a Highway Patrol Foreman.

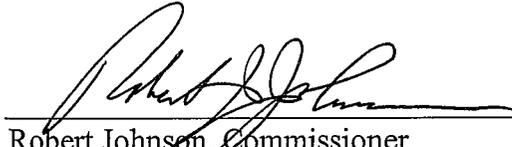
The Appellant testified that if his supervisors had counseled him whenever problems were identified, he would have taken whatever corrective action was necessary. True as that may be, the fact remains that it was the Appellant's responsibility as a supervisor to identify and correct problems as they occurred within his own patrol section. In order to meet the work standard, the Appellant needed to know and enforce the very policies and procedures that he was found to have violated. A supervisor cannot set an example and ensure that his crew complies with the Department's procedures if that supervisor neither recognizes nor understands the significance of his own failure to conform to those requirements.

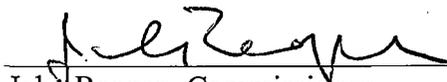
Throughout the hearing, the parties offered ample evidence of the Appellant's talents and abilities, and the Board asked repeatedly if there might be some sort of compromise that would enable the Appellant to return to work at the DOT in a non-supervisory role. Mr. Flagg believed it might work if the Department provided close supervision and frequent evaluations. Neither Mr. Pillsbury nor Mr. Graham believed it would be in either party's best interest. Mr. Pillsbury said that the Appellant's reaction to the letters of warning was more about "taking it on the chin" than learning from his mistakes. He said that he sensed an antagonistic attitude developing in the Appellant. He said he feared that the Appellant could prove to be a very divisive influence if he were reinstated, regardless of where he might be assigned within the Department. Mr. Graham indicated that the Appellant had already received a fair chance, and that in spite of the counseling he received, he simply failed to meet the work standard or exercise the level of judgment necessary to succeed. He believed that if the Board were to reinstate the Appellant to some other position on some other crew, it would simply result in moving the problem rather than correcting it. Taking all those factors into consideration, the Board found no compelling reason to change or modify the decision of the appointing authority.

Therefore, for all the reasons set forth above, the Board voted unanimously to AFFIRM the Appellant's third letter of warning, and to DENY the appeal.

The Personnel Appeals Board


Patrick Wood, Chairman


Robert Johnson, Commissioner


John Reagan, Commissioner

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