

State of New Hampshire



PERSONNEL APPEALS BOARD

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

Appeal of Leon Noel

Docket #2007-T-016

Department of Transportation

PAB Decision on Pending Motions for Reconsideration and Objections Thereto

May 24, 2010

On April 25, 2008, the New Hampshire Personnel Appeals Board (Bonafide, Johnson and Casey) issued its decision in the termination appeal of Leon Noel, a former employee of the NH Department of Transportation. In that decision, the Board voted unanimously to exercise its authority under the provisions of RSA 21-I:58, I, 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." The Board voted to convert the Appellant's termination to a suspension without pay for a period of 45 days, and to order the Department to compensate him for lost wages subject to the limitations set forth in RSA 21-I:58.

The parties filed Motions for Reconsideration/Rehearing and Responses or Objections as follows:

May 5, 2008: State's Motion for Rehearing/Reconsideration

May 20, 2008: Appellant's Response to State's Motion for Reconsideration

May 27, 2008: Appellant's Motion for Reconsideration/Rehearing

June 5, 2008: State's Objection to Appellant's Motion for Rehearing/Reconsideration

On June 9, 2008, the Board also received a letter from SEA General Counsel Michael Reynolds indicating that both parties asked the Board to delay making a decision regarding the outstanding motions while the parties were discussing the appeal. Mr. Reynolds indicated that if the Board would assent to that request and hold any decision in abeyance, the parties would notify the Board within a month whether or not the case had been resolved. On August 12, 2009, the Board received email correspondence from the State Employees Association indicating that the parties were continuing their attempts to resolve the matter. On April 1, 2010, Attorney Reynolds notified the Board by mail that the parties had been unable to reach

agreement and asked the Board to act on the outstanding motions filed by the parties. A description of those motions and the Board's decision follows.

On May 5, 2008, Assistant Attorney General Lynmarie Cusack submitted the Department of Transportation's Motion for Rehearing/Reconsideration of the Board's April 25, 2008, decision, asking the Board to reconsider its decision, or, in the alternative, limit the award of back pay. In support of that Motion, AAG Cusack argued that the Board's decision was unreasonable and unjust. Specifically, she argued that while the Board has the authority under the provisions of RSA 21-I:58 to "make an order as it may deem just," there was no reasonable basis to conclude that the termination was characterized by an injustice. Ms. Cusack argued that the facts in evidence indicated that the Appellant's continued employment with the Department was a liability, and that the termination was proper, and that the Appellant fully understood that he could lose his job and be subject to immediate dismissal for violating the department's "zero-tolerance policy" with respect to the use of drugs or alcohol. Ms. Cusack argued that the Appellant had the burden of proving that his termination was unjust in light of the facts in evidence, and that nothing in the Board's order suggested that Mr. Noel met his burden of proof.

Ms. Cusack further argued that if the Board decided to uphold its order, Mr. Noel should only be entitled to back pay up to 45 days from the date of the Board's decision, as the law requires the Board to issue decisions within 45 days of the close of the hearing. In this case, she argued the decision was delayed, and the Board failed to notify the parties of the reason for the delay, creating a substantial financial liability for the agency.

SEA General Counsel Michael Reynolds submitted the Appellant's Response to State's Motion for Reconsideration on May 20, 2008. In it, Attorney Reynolds advised the Board that his objection was not comprehensive, as he also would be filing a Motion for Reconsideration of the Board's April 25, 2008 decision. As such, he recommended that the Board to simply address the State's Motion for Reconsideration and Mrs. Noel's¹ Motion for Reconsideration in one decision.

In his response to the State's Motion for Rehearing/Reconsideration, Attorney Reynolds argued that the Board's decision to reinstate the Appellant was both lawful and reasonable in light of the facts in evidence, and that the State failed to prove material aspects of its decision to dismiss the Appellant, specifically that

¹ The Appellant was deceased at the time that the Motion and Response were filed. The Board had received notice from Mrs. Noel that she had been appointed administrator for the Appellant's estate. Attorney Reynolds' pleadings were submitted on behalf of Mrs. Noel and the Estate of Leon Noel.

the Appellant was unable to perform his duty assignments due to being under the influence of drugs or alcohol, that he was aware that he was subject to dismissal, or that he was in violation of a properly adopted policy or procedure. Mr. Reynolds argued that the Board has broad equitable authority mandated by RSA 21-I:58, and acted fully within its authority in fashioning what it believed to be an equitable remedy. He noted that in his Motion for Reconsideration, he would argue that the Appellant's termination was actually effected in violation of a statute or rules adopted by the Director, and that the Appellant was therefore entitled to reinstatement with full retroactive pay and benefits.

With respect to the State's request for a limitation on the award of back pay, Mr. Reynolds argued that although the Board technically violated its own rules by failing to provide notice of the reason that its decision was delayed, the rule specifies no penalty for a technical violation. Mr. Reynolds argued that if the State wanted a faster decision, it could have brought a writ of mandamus.

On May 27, 2008, Attorney Reynolds filed on behalf of Priscilla Noel and the Estate of Leon Noel the Appellant's Motion for Reconsideration/Rehearing. In his motion, Attorney Reynolds argued that it was unreasonable and a violation of the personnel rules for the appointing authority to utilize alleged past conduct to support the termination, since none of that prior conduct had been included in a letter of warning. Attorney Reynolds argued that the Board's Rulings of Law C and D were not supported by the record, and directly and materially contradicted the record. He argued that the appellant was denied substantive and procedural rights, that he was never apprised of all the evidence that the agency factored into the decision to dismiss the appellant, and was never given a real opportunity to refute the evidence. Mr. Reynolds argued that the Board's findings are not sufficient pursuant to RSA 541-A:35, taking specific exception to findings #6, #7, and #10. Attorney Reynolds argued that there was no competent evidence upon which the Board could have reached the conclusion that the appellant was under the influence of alcohol when he reported to work on the morning of December 20, 2006, and that the tests upon which the department relied, and the results that the Board considered, were not reliable. He also argued that the agency applied an impermissible standard in determining that the Appellant engaged in any violation that warrant his termination from employment. Attorney Reynolds argued that for all the reasons set forth in his motion, the Board must conclude that the termination was unreasonable, unjust and illegal.

Assistant Attorney General Lynmarie Cusack filed the Department's Objection to Appellant's Motion for Rehearing/Reconsideration on June 5, 2009. She argued that there was no showing that the Board's decision was unlawful, unjust or unreasonable as to the issues raised and articulated in the Appellant's Motion. She argued that the Motion attempted to re-characterize what transpired at the hearing without the

benefit of an official transcript, and that the Appellant was attempting to shift the burden of proof to the State, as well as attempting to raise issues that were not properly preserved prior to the issuance of a decision. Ms. Cusack argued that the Appellant never filed a prehearing motion to challenge the validity of the testing, and although that issue was raised on cross-examination during the hearing on the merits of the appeal, the Appellant failed to support that argument with any motion prior to a decision on the merits of the appeal that would properly raise that issue for the Board's consideration in making its findings of fact and rulings of law. Ms. Cusack argued that the evidence showed that the appellant neither requested a blood test nor challenged the results of the breathalyzer prior to his dismissal, and that it was not the State's burden to prove that the testing upon which it relied was accurate or reliable, as there was a rebuttable presumption that it was.

Having carefully considered the Motions, Responses and Objections, the Board concluded that neither party offered evidence or argument to demonstrate that the Board's decision reducing the Appellant's dismissal without prior warning to a suspension without pay was either unlawful or unreasonable based on the evidence presented at the hearing on the merits of the appeal, or that there were grounds offered by either party that would warrant a rehearing. Therefore, the Board voted unanimously to DENY the State's and the Appellant's Motions for Rehearing/Reconsideration, and to affirm its original decision.

THE PERSONNEL APPEALS BOARD


Philip Bonafide, Acting Chair


Robert Johnson, Commissioner


Joseph Casey, Commissioner

cc: Karen Hutchins, Director of Personnel
Michael Reynolds, SEA General Counsel
Lynmarie Cusack, Assistant Attorney General

State of New Hampshire



PERSONNEL APPEALS BOARD

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Appeal of Leon Noel

Docket #2007-T-016

Department of Transportation

April 25, 2008

The New Hampshire Personnel Appeals Board (Bonafide, Johnson and Casey) met in public session on Wednesday, May 23, 2007 and June 13, 2007, under the authority of RSA 21-I:58 and Chapters Per-A 100-200 of the Rules of the Division of Personnel, to hear the appeal of Leon Noel, a former employee of the Department of Transportation. Mr. Noel, who was dismissed on January 10, 2007 from his position of Supervisor III, Chief of Property Management, was represented at the hearing by SEA General Counsel Michael Reynolds. Assistant Attorney General Lynmarie Cusack appeared on behalf of the Department of Transportation.

The record of the hearing in this matter consists of pleadings submitted by the parties, notices and orders issued by the Board, the audiotape recording of the hearing on the merits of the appeal, and documents admitted into evidence without objection as follows:

Joint Exhibit 1	Stipulations of Fact
State's Exhibit 1 –	Bates stamped documents (212 pages) representing Mr. Noel's personnel file
State's Exhibit 2	Training documents (Drug and Alcohol Training for Supervisors)
State's Exhibit 3 -	Affidavit of Victoria Chase

By agreement of the parties, the witnesses were sequestered. The following persons gave sworn testimony:

William P. Janelle, Administrator of the Bureau of Right of Way

Mark Brown, Contractor, Cityside Management Company

Leon Noel, Appellant

Brian Pike, SEA Steward

At the conclusion of the hearing, the State presented proposed Findings of Fact and Rulings of Law.

Narrative Summary

According to DOT Policy 205.01, which applies to all employees, "No employee shall report for duty, remain on duty or operate a State vehicle regardless of gross vehicle weight while under the influence, while in possession of, or while using alcohol or a controlled substance." (State's 1, page 15) The policy further states, "Any employee found to have violated this policy and/or procedure may be subject to automatic discharge as provided within Per 1000-DISCIPLINE." (State's 1, page 13)

The record reflects that Mr. Noel had a favorable work record for most of his eighteen and a half years with the Department of Transportation. That record appears to be reflected in a series of promotions up to and including the appellant's promotion to the position of Chief of Property Management in the Right-of-Way Bureau. The evidence also reflects that concerns had arisen in the six or seven months prior to Mr. Noel's termination from employment regarding his attendance, his interactions with at least one of his subordinates, and his tendency to continue performing tasks related to property management while failing to assume higher level duties of his position associated with real estate sales and relations with realtors. Those concerns were discussed with Mr. Noel in late 2006. Issues addressing leave and attendance, excessive unscheduled absences, and the requirement to properly manage his section's workload were

memorialized in a Letter of Counsel issued to Mr. Noel on November 20, 2006 (State's 1, page 40). In that letter, Mr. Janelle reminded the appellant that the Employee Assistance Program was available to help the appellant "deal with any problems that may be affecting your job performance and your personal well-being." (State's 1, page 41)

On or about December 14, 2007, in a meeting to discuss the appellant's performance evaluation, Mr. Janelle and Ms. Chase again expressed their concerns about Mr. Noel's work performance and his interactions with subordinates. They also informed Mr. Noel that his subordinates had reported smelling alcohol on his breath. Mr. Noel admitted that he was experiencing personal problems at home and was having some difficulty with work. He adamantly denied using alcohol, saying that he had not had a drink in nine years. Mr. Noel indicated that he would have no objection to taking a breathalyzer test if the Department wanted him to, and even suggested that he could bring in his own breathalyzer from home.

Until the morning of December 20th, neither Ms. Chase nor Mr. Janelle believed there was sufficient reason to ask Mr. Noel to be tested to determine whether or not he was under the influence of alcohol. December 20th, however, Mr. Janelle received a report from Phil Miles, one of Mr. Noel's subordinates, indicating that he again smelled alcohol on Mr. Noel's breath. Ms. Chase and Mr. Janelle met separately with Mr. Noel to determine whether or not they could detect alcohol on his breath. Mr. Janelle indicated that although the odor did not "blow him over," he believed there was sufficient cause to do a further evaluation of Mr. Noel's status. Ms. Chase independently concluded that the odor was sufficiently strong to warrant testing. Mr. Janelle and Ms. Chase then went to Human Resources at their agency to report their observations and advise HR that they believed it would be appropriate to go through the reasonable cause process and recommend testing.

When Mr. Noel was advised that the agency intended to request the test, he asked to meet first with a union representative. The union steward arrived at the DOT offices on Hazen Drive shortly after 10:00 a.m. and met privately with the appellant. The steward then

reviewed the policies and procedures and the "Reasonable Suspicion Behavior Record." According to Mr. Noel, "They got all the issues out on the table," and he and the steward were satisfied. The Department's Safety Officer informed the appellant that he either needed to agree to the testing or refuse. Mr. Noel was advised that if he refused, he would be placed on suspension through December 29, 2006 pending the outcome of the reasonable cause investigation. Although the union steward said he would prefer to have a blood test administered, the Safety Officer indicated that the department's standard protocol called for administration of a breathalyzer test. Mr. Noel then agreed to take the test that the department was requesting.

A breathalyzer test was administered to Mr. Noel at the Merrimack Valley Occupational Health Facility shortly after 11:00 a.m. by Dr. David Lake. The first test indicated that the appellant had a BAC of .032. A second test taken about eighteen minutes later yielded a BAC result of .028, giving evidence of the rate at which alcohol in the appellant's system was metabolizing. At the hearing, Mr. Noel testified that after learning that the test was positive for alcohol, he told the Safety Officer, "It looks like I'm out of a job." Mr. Noel was suspended with pay effective December 20, 2006, until he could attend a pre-disciplinary meeting with Mr. Janelle, Ms. Chase and Mr. Pike on January 2, 2007.

At the pre-disciplinary meeting, Mr. Noel admitted that he had gone back to drinking about six months earlier, and that he had been drinking the night before he was confronted about smelling of alcohol. At the hearing, Mr. Noel initially stated that he had consumed one or two drinks of vodka before going to bed around midnight. In later testimony, he admitted that it may have been more than two drinks, indicating that he had "a half-gallon stash" at home. Mr. Pike, the union steward, indicated that he could not recall from the pre-disciplinary meeting how much alcohol Mr. Noel had said he consumed that night, or when he consumed it

Based on the appellant's test results and information provided to Mr. Janelle by staff from the human resources office about the rate at which alcohol is metabolized, Mr.

Janelle understood that the appellant's blood alcohol content had to have been above .032 when Mr. Noel arrived at work between 6:30 and 7:00 a.m. on December 20, 2006. In any case, Mr. Janelle was certain that the appellant was "under the influence" to some degree between the appellant's arrival at work and the time when the first test was taken at approximately 11:00 a.m. that day. Mr. Janelle concluded that appellant had violated the department's zero tolerance policy.

Mr. Janelle testified that dismissal was one of several disciplinary options, and in weighing the alternatives, he considered a number of factors, including the fact that the appellant seemed to be extremely remorseful at the pre-disciplinary meeting and offered to go back to through rehab and treatment. Mr. Janelle testified that in the end, however, he considered the nature of Mr. Noel's work; the requirement for Mr. Noel to have frequent contact with property owners, contractors, legislators, staff members and interested members of the public; Mr. Noel's declining work performance and interactions with staff; the fact that the Department has a long-established policy of zero-tolerance; and the fact that on several occasions Mr. Noel refused assistance being offered to him to address any underlying personal problems. Mr. Janelle said that although Mr. Noel was remorseful at the pre-disciplinary meeting and offered evidence that he had sought treatment, Mr. Noel seemed unable to accept responsibility for the effect that his conduct could have on the workplace. According to Mr. Janelle, "He was never remorseful about being under the influence in the workplace... He admitted that it was his fault that he jumped off the wagon," but conditioned that admission by saying, "I always drank at home."

Position of the Parties:

Mr. Reynolds argued that the termination was illegal and unjust. Specifically, he argued that the breathalyzer testing performed on the morning of December 20, 2006 was "sloppy," and that the department offered no evidence that the equipment was properly calibrated, that the test was administered properly, or that there was a proper chain of custody for the samples taken. He argued that the Department violated its own policy by

requiring the appellant to take the test, as the appellant was not a “covered” employee subject to mandatory testing under Department of Transportation regulations. Mr. Reynolds argued that the Department failed to inform the appellant that he could request his own test, and failed to advise the appellant that the department “extrapolated” results from the test and believed that the appellant was at or above the legal limit when he arrived at work. He also argued that the Department’s “zero-tolerance” policy was illegal, and that the Department had applied a more stringent standard to Mr. Noel than they did to “covered” employees in “safety sensitive” positions.

Mr. Reynolds argued that the Department could not prove that the appellant was “under the influence,” arguing that it is defined by Black’s Law Dictionary as, “Deprived of clearness of mind and self-control by using drugs or alcohol.”¹ Mr. Reynolds argued that alcoholism is a disabling condition, and that the Department acted illegally by disciplining the appellant for “being off the wagon.” He argued that the appellant had “begged” for a performance evaluation in the months preceding his termination, but did not receive one until a week or so before the incident that resulted in his dismissal. Mr. Reynolds argued that the agency failed to explain what they factored into the decision to dismiss the appellant, including what was in Mr. Janelle’s mind when he made the decision to dismiss the appellant, and that by failing to disclose or address any discussions about the test results, or about the appointing authority’s thought process leading up to termination, the Department violated what Attorney Reynolds described as the “whatever evidence rule.” For those reasons, he argued, the appellant was entitled to immediate reinstatement with full pay.

Ms. Cusack argued that Mr. Noel’s supervisors had counseled him several times about performance issues, and knowing that he was an admitted alcoholic, they questioned him directly about his drinking to determine if that might be a cause of his absenteeism or his difficulties at work. Ms. Cusack argued that the appellant not only lied and told his supervisors that he had not touched a drink in nine years, he also offered to take a

¹ Mr. Reynolds did not provide a copy of that definition for the Board’s review, nor could the Board locate that exact definition in a search of the Internet or a review of Black’s Law Dictionary, 6th edition.

breathalyzer test if the agency wanted him to. She argued that he refused assistance on at least two occasions when the agency recommended counseling through the Employee Assistance Program to address any problems he might be experiencing. As such, Ms. Cusack argued, the appellant was not entitled to protection under the ADA because he lied about his use of alcohol and refused assistance when it was offered. Ms. Cusack argued that the only time Mr. Noel told the truth about his drinking was when he knew his job was on the line.

Ms. Cusack argued that the Department's policy was designed to comply with the Drug-Free Workplace Act, and that the department had an obligation to the public to ensure that persons reporting for work or remaining at work were not under the influence of alcohol or drugs. She argued that the appellant's duties and responsibilities involved frequent contact with members of the public, including property owners, realtors, property managers and legislators, and that it was unacceptable for anyone in that capacity to interact with them when he had alcohol on his breath.

On all the evidence and argument offered by the parties, the Board made the following findings of fact and rulings of law.

As stipulated by the parties in Joint Exhibit 1:

- a. Leon Noel was hired by NH DOT on October 10, 1988 as an Engineer Aid II.
- b. Mr. Noel was promoted from a Survey Team Tech I to Survey Team Tech II on 3/31/98.
- c. Mr. Noel received verification of 10 years of service with NH DOT on 9/3/98.
- d. Mr. Noel was selected as a Survey Team Technician III on 7/13/01.
- e. Mr. Noel was hired as a Tech III/Utilities Coordinator on 10/2002.
- f. Mr. Noel was promoted to Engineer Tech IV (property management) on 7/7/03.
- g. Mr. Noel was promoted to Supervisor III, Chief of Property Management) on 7/7/03.

- h. On or about 12/6/06 Mr. Noel received his most recent performance evaluation.
- i. On 12/20/06 DOT sent Mr. Noel to have an alcohol breathalyzer test done.
- j. Mr. Noel was suspended with pay on or about 12/20/06 for purpose of DOT's investigation.
- k. By letter dated 12/22/06, DOT notified Mr. Noel of a January 2, 2007 pre-disciplinary meeting.
- l. That pre-disciplinary meeting was held on 1/2/07. Victoria Chase, William Janelle, Leon Noel, and Brian Pike were in attendance.
- m. William Janelle notified Mr. Noel via telephone on or about 1/3/07 that his suspension with pay was extended until 1/10/07. Mr. Janelle then sent a letter dated January 4, 2007 confirming this extension of the suspension.
- n. A Letter of Termination to Mr. Noel was issued 1/10/07.

Additional Findings of Fact

1. In 2005, after a training session that covered the Department's Alcohol and Drug Policy, Mr. Noel admitted to Mr. Janelle that he was a recovering alcoholic.
2. As a result of concerns arising out of Mr. Noel's declining work performance, poor attendance record, interactions with staff, and observations made by staff members, Bureau Administrator William Janelle and Assistant Bureau Administrator Victoria Chase both met with Mr. Noel to counsel him and suggest that he contact the Employee Assistance Program for help addressing any personal issues that might be affecting him at work or at home.
3. When confronted by both Ms. Chase and Mr. Janelle with reports that subordinates had smelled alcohol on Mr. Noel's breath, Mr. Noel denied using alcohol and volunteered to be tested, even volunteering to bring in his own breathalyzer.
4. A Letter of Counsel that Bureau Administrator William Janelle issued to Mr. Noel on November 20, 2006, specifically advised the appellant that the department's Employee Assistance Program was available to help the appellant deal with any problems that might be affecting his job performance or his personal well-being.

5. On the morning of December 20, 2006, after receiving an email from Philip Miles that he smelled alcohol on Mr. Noel's breath, Mr. Janelle initiated procedures to determine whether or not there was reasonable cause to believe that the appellant was under the influence of alcohol in the workplace. Mr. Janelle and Ms. Chase both confirmed the odor of alcohol on the appellant.
6. Mr. Noel did not "request" a breathalyzer test the morning of December 20, 2006 to refute a reasonable suspicion that he was under the influence of alcohol. However, in a meeting between the appellant and his supervisors on December 14, 2006, Mr. Noel volunteered to be tested whenever the department wanted.
7. In accordance with DOT procedures, the appellant submitted to alcohol testing and at 11:09 a.m., approximately four hours after arriving for work, the appellant was determined to have a blood alcohol content of .032, which was considered a "positive" test and a violation of DOT's Alcohol and Drug Policy.
8. The Department's policy provides that an employee may request a retest or request a split sample for testing by another independent laboratory. Mr. Noel did not request a retest or split sample, but accepted the results of the test as they were reported, telling the Safety Officer he assumed he would be "out of a job."
9. At the pre-disciplinary meeting that Mr. Janelle held on January 2, 2007, Mr. Noel received copies of all the documents upon which the appointing authority later relied in deciding to dismiss Mr. Noel from his position as Chief of Property Management.
10. At the pre-disciplinary meeting, Mr. Noel offered evidence that he had sought treatment for alcohol dependence, including treatment at Hampstead Hospital between December 23, 2006 and December 26, 2006.

Rulings of Law

- A. DOT Policy 205.01 states, in part, "No employee shall be under the influence of any alcoholic beverage or controlled substance during working hours," and "Any employee found to have violated this policy and/or procedure shall be subject to automatic discharge as provided within Per 1000 – DISCIPLINE."

- B. Per 1002.08 (b)(7) provides for the immediate dismissal of an employee without prior warning for, “Violation of a posted or published agency policy or procedure, the text of which warns that violation of same may result in dismissal.”
- C. The pre-disciplinary meeting that Mr. Noel attended on January 2, 2007 and his subsequent termination from employment effective January 10, 2007 conformed to the requirements of Per 1002.08 (d).
- D. The Department’s decision to dismiss Mr. Noel from his employment as the Chief of Property Management was not “...related to politics, religion, age, sex, race, color, ethnic background, marital status, or disabling condition, or on account of the person's sexual orientation” nor was it “...taken in violation of a statute or of rules adopted by the director” as described by RSA 21-I:58, I.
- E. RSA 21-I:58, I allows the Board, in all cases, 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.”

Discussion

The appellant argued that it was improper for the department to rely on the results of the breathalyzer test, asserting that the Department failed to offer evidence regarding the manner of testing, the calibration of the equipment, the qualification of the examiner, or the chain of custody after the test was administered. In considering the evidence, however, the Board noted that the appellant did not raise any of those issues when the test was administered or any time thereafter until he filed his appeal.

The parties stipulated that alcohol metabolizes in a person’s body over time, although they disagree with respect to the reliability of “extrapolating” test results to determine blood alcohol concentration at an earlier point in time. While the Board makes no specific finding with regard to what the Appellant’s blood alcohol concentration was when he arrived at work on the morning of December 20, 2006, it is only reasonable to conclude that the appellant’s blood alcohol content was substantially higher at 6:30 or 7:00 a.m. than it was four or four and a half hours later when the breathalyzer test was

administered. Therefore, on a preponderance of the evidence, the Board concluded that the appellant was under the influence of alcohol when he reported for work on the morning of December 20, 2007.

DOT Policy clearly provides for the immediate dismissal without warning of any employee who reports for work or remains at work under the influence of alcohol. Although the State did not provide a definition of “under the influence” in either its policy or in its pre-disciplinary discussions with Mr. Noel, the witnesses were aware of the Department’s “zero-tolerance” concerning alcohol and drugs, and that a “positive” test result would be indicative of a person being “under the influence.” Based on discussions with human resources staff, Mr. Noel himself assumed he was “out of a job” once the tests indicated that his test results were positive, regardless of the blood alcohol content reported in the test. As such, the Board found that the appellant understood that he was subject to immediate dismissal.

With respect to the second allegation, that the appellant was unable to perform his duty assignments due to being under the influence of alcohol or drugs, the Board found insufficient evidence to support that charge. The record reflects that when the appellant’s supervisors observed the appellant’s behavior and completed their “Reasonable Suspicion Records” (State’s 1, pages 69-72), their only initial indication that the appellant may have been under the influence of alcohol was the smell of alcohol on his breath. Apart from the fact that the appellant’s subordinates and supervisors could smell alcohol on the appellant’s breath, they reported no other observable behaviors to support a finding that the appellant was physically unable to perform his duty assignments. The Board took that into consideration in determining the propriety of dismissing the appellant on the first charge. (State’s 1, pages 69-72)

The Board recognizes the difficulties faced by anyone who struggles with alcohol dependence, and understands how hard it may be to admit that the problem is significant enough to require intervention. The fact that Mr. Noel had previously undergone treatment and had apparently been sober for some period of time could be seen as a

mitigating factor. The Board also understands the difficulty that the Department faced, however, as it had already made at least two offers of assistance through the EAP to help the appellant address the underlying causes of the appellant's difficulties at home and at work.

Mr. Janelle had known since 2005 that Mr. Noel was an alcoholic reportedly in recovery. Both he and Ms. Chase asked about the appellant's health and asked specifically if the appellant was drinking again. The appellant staunchly denied that alcohol was part of the problem. He continued to make those denials up until the date of the pre-disciplinary meeting.

Under those circumstances, the Board found that the Department felt it had few options short of termination. There were obvious liabilities if the Department of Transportation allowed Mr. Noel to remain in his position as Chief of Property Management, knowing that the appellant would be interacting daily with property owners, realtors, contractors, legislators and members of the public.

Mr. Noel's longevity and his generally satisfactory work record throughout the majority of his eighteen-year career would certainly seem to mitigate in favor of his reinstatement with some lesser form of discipline. On the other hand, the appellant's dishonest statements about not using alcohol, his failure to acknowledge that alcohol was contributing to the problems he was having at work and at home, his refusal to accept assistance that the department offered through the EAP, and ultimately his unwillingness to accept responsibility for his actions all weigh in favor of the department's decision to exercise its discretion and dismiss the appellant without prior warning.

In her closing argument, Ms. Cusack said that if the appellant had admitted having a problem with alcohol and had he gone to treatment before there was a termination on the horizon, "we wouldn't be here." The Board agrees, but notes that before the appellant had attended the pre-disciplinary meeting and before he knew he was to be dismissed, he did seek treatment and brought evidence of it to the pre-disciplinary meeting he had with

Mr. Janelle and Ms. Chase. Although seeking treatment after being suspended certainly does not excuse the appellant's conduct, it does warrant consideration in determining the propriety of the decision to terminate his employment without any prior warning.

Both Ms. Chase and Mr. Janelle were well aware of concerns on the part of Mr. Noel's staff that the appellant was drinking again and that he might have been reporting to work under the influence of alcohol. Although Mr. Janelle indicated that he wanted to believe that Mr. Noel had not taken up drinking again, he clearly suspected that misuse of alcohol was at least one underlying cause of the appellant's absenteeism and failing work performance. Mr. Janelle and Ms. Chase both spoke to the appellant about getting help. There appears to be no evidence, however, that either Mr. Janelle or Ms. Chase ever cautioned the appellant that he could be dismissed immediately if he were found to be under the influence of alcohol in the workplace.

The issue of alcohol abuse was conspicuously missing from the Letter of Counsel issued to the appellant on November 20, 2006, where the discussion was limited to work performance, work schedules, and leave reporting. Although that letter advised the appellant that he could be dismissed immediately for continued absenteeism, misreporting of leave, or leave-taking without the appropriate approvals, nothing in that letter even suggested that alcohol abuse was suspected, and that the appellant faced immediate dismissal without warning if he were to test "positive" for alcohol. As such, the Board found that termination without prior warning in this instance was unjust.

Decision and Order

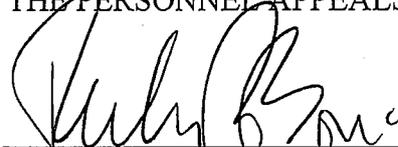
For all the reasons set forth above, the Board voted unanimously to exercise its authority under the provisions of RSA 21-I:58, I, to "...reinstate an employee or otherwise change or modify any order of the appointing authority, or make such other order as it may deem just." The Board voted to convert the appellant's termination to a suspension without pay for a period of 45 days. Although that penalty may seem severe, the Board took into consideration the appellant's lack of honesty and his apparent reluctance to accept

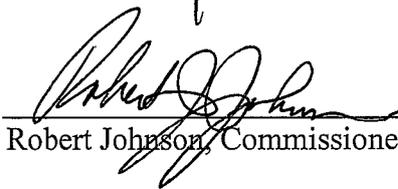
responsibility for his behavior, up to and including the date of the pre-disciplinary meeting.

Any payment of back wages following the period of suspension shall be subject to reductions as set forth in RSA 21-I:58, I which states, in part:

The employee shall be reinstated without loss of pay, provided that the sum shall be equal to the salary loss suffered during the period of denied compensation less any amount of compensation earned or benefits received from any other source during the period. "Any other source" shall not include compensation earned from continued casual employment during the period if the employee held the position of casual employment prior to the period, except to the extent that the number of hours worked in such casual employment increases during the period.

THE PERSONNEL APPEALS BOARD


Philip Bonafide, Acting Chair


Robert Johnson, Commissioner

Joseph Casey, Commissioner

cc: Karen Hutchins, Director of Personnel
Michael Reynolds, SEA General Counsel
Lynmarie Cusack, Assistant Attorney General