

State of New Hampshire



PERSONNEL APPEALS BOARD

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Appeal of Diane Pierce, Docket #2010-T-013 New Hampshire Department of Employment Security

November 4, 2010

The New Hampshire Personnel Appeals Board (Wood, Bonafide, and Johnson) met in public session on Wednesday, October 13, 2010, to hear the appeal of Diane Pierce, a former employee of the New Hampshire Department of Employment Security. Ms. Pierce, who was represented at the hearing by Attorney Shawn Sullivan, was appealing her April 12, 2010, termination of employment from her position as a Clerk Interviewer for allegedly violating a posted or published agency policy, the text of which clearly warns of termination for violation of that policy. Attorney Maria Dalterio 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:

Exhibit 1: 3-page memorandum dated March 30, 2010, from James Coviello to Colleen O'Neill forwarding the 2-page sworn statement of Mark J. Sacco

Exhibit 2: NH Department of Employment Security "Posted Rule" Number 2030-5 PR, Service to Individuals

Exhibit 3: October 26, 2009, Letter of Warning issued to Diane Pierce for violating Directive 2030-5 PR, Service to Individuals

Exhibit 4: January 4, 2010, Second Letter of Warning issued to Diane Pierce for violating Directive 2030-5 PR, Service to Individuals, and for failing to take corrective action outlined in the October 26, 2009, Written Warning

Exhibit 5: Performance Summary for Diane Pierce for the period of November 1, 2008, to November 1, 2009

Exhibit 6: April 8, 2010, Pre-Disciplinary Meeting notice and April 12, 2010, Dismissal notice issued to Diane Pierce



At the Appellant's request, the witnesses were sequestered. The following persons gave sworn testimony:

Mark J. Sacco, Complainant

Leanne Topolosky, Manchester Local Office Manager

Linda Huard, SEA Steward

Diane Pierce, Appellant

Procedural issues:

The Board first discussed the Appellant's Motion for Discovery with respect to her request for any and all agency records, filings and submissions relative to Mark Sacco, the complaining witness. Ms. Dalterio argued that the information being requested by the Appellant is confidential, and that Mr. Sacco's unemployment claims themselves are irrelevant to the issue at hand. Ms. Dalterio argued that the agency is legally barred from disclosing unemployment compensation benefits records without the claimant's permission. She also argued that when the agency receives a complaint from a claimant about a member of the staff, the agency must be allowed to rely on the testimony of that claimant without disclosing his or her compensation benefits records; otherwise, the agency would be unable to act on those complaints and take appropriate action.



Mr. Sullivan argued that without access to information relative to Mr. Sacco's unemployment claim and his record with the agency, he would be unable to properly defend Ms. Pierce. Mr. Sullivan argued that without an opportunity to look at Mr. Sacco's file, and the ability to discover Mr. Sacco's background, Mr. Sullivan would be unable to conduct a full and fair cross-examination. Mr. Sullivan reported that he had spoken with Mr. Sacco on the morning of the hearing, and that Mr. Sacco refused to waive his right to confidentiality. Mr. Sullivan asked the Board to exclude Mr. Sacco's testimony unless the Board granted the request to see Mr. Sacco's records. Mr. Sacco confirmed at the outset of his testimony that he would not consent to release of his file to Appellant's counsel.

After further inquiry, the Board concluded that Mr. Sacco's complaint was limited to his interaction with Ms. Pierce on March 9, 2010, not the status of his claim for compensation. The Board also concluded that Mr. Sullivan would have an opportunity at the hearing to question Mr. Sacco under oath on any number of issues, including Mr. Sacco's background and employment history. The Board therefore voted unanimously to deny both the Appellant's Motion for Discovery and his request to exclude Mr. Sacco's testimony.

At the conclusion of the hearing on the merits of the appeal, Ms. Dalterio submitted the State's Requests for Findings of Fact and Rulings of Law. To the extent that those requests are consistent with the decision below, they are granted. Otherwise, they are denied.

Narrative Summary:

Prior to her dismissal, the Appellant was employed as a Clerk Interviewer with the Manchester Local Office of the NH Department of Employment Security. She was assigned to work in the front reception area and was the first point of contact for individuals arriving at the office to meet, or request a meeting, with an employment counselor, certifying officer or supervisor, or to use one of the office's twenty-five public access computers to file unemployment claims, update claims records, or search for employment.

On October 26, 2009, Ms. Pierce received a first written warning for violating Directive 2030-5 PR, dated 10/8/2008, Service to Individuals, as a result of her interaction with two customers. That warning was never appealed, and remains a part of the Appellant's file.

On January 11, 2010, Ms. Pierce signed a summary of her performance that had been completed by Leanne Topolosky, the office manager. That performance summary, covering the period of November 1, 2008 to November 1, 2009, rated Ms. Pierce's performance overall as below expectations. Specific performance criteria that were rated below expectations included the following:

Quality of Work: Ms. Pierce was rated below expectations in the section that reads, "When mistakes are made, learns from them and does not repeat the same mistake." In her written comment, Ms. Topolosky wrote, "Part of quality of work is interacting with customers and co-worker. When Diane is challenged by a customer or co-workers, it has lead to confrontations. Diane and the Manager have agreed that Diane will get the Manager if when the situation becomes confrontational. At times Diane does not back down and continues to speak in a confrontational manner towards customers and co-workers. The quality of customer service has been an on-going issue. Even though there has been only two documented complaints, one complaint is too many."

Communication: "Speaks with the public and co-workers in a courteous and helpful manner," and "When necessary, expresses information in an appropriate fashion," were both rated below expectations. Ms. Topolosky wrote, "On June 10, 2009 Diane received a counseling memo in regards to an incident that occurred on April 28, 2009. It referenced an incident between her and a co-worker which elevated to shouting. On October 26, 2009 Diane received a written warning in reference to an incident between her and a customer. Both incidents involved Diane's

interaction in regards to customer service. Diane was advised to review Directive 2030-5 PR "Service to Individuals." Customer service is the agency's primary responsibility. This has been an on-going issue for Diane."

Dependability: Ms. Pierce was rated below expectations under, "Follows policy and procedural guidelines and instructions in an appropriate, effective way." Specifically, Ms. Topolosky wrote, "Part of dependability is following policy and procedural guidelines. Due to the counseling memo and written warning, Diane did not follow the guidelines set forth in Directive 2030-5 PR "Service to Individuals"..."

In her written response to the performance summary, the Appellant wrote,

"Since we are seeing a greater volume of clients coming into the local office everyday who are frustrated, angry, rude, and sometimes belligerent, and also the fact that someone brought a gun into the office raises my concern over safety in the workplace especially for those of us who work at the front counter. Although there is a State Trooper here on Mondays and Tuesdays, the rest of the time is void of any security officer. I brought these issues to the attention of Leanne during my review and previous conversations with her about related issues.... Claimants, for the most part, are polite. Unfortunately, as the economy has worsened, there has been an increase in the amount of disgruntled claimants.... I've worked in this office for almost 5 years and have always given 100%. I have good work ethics, integrity and honesty and I care about all the people who come into the office every day. I have received compliments for the service I have provided as noted on my review. It is discouraging that as a result of two incidents out of the thousands of claimants that I have serviced my review reflects does not meet expectations in several areas. I strongly disagree and take exception to that rating. My recommendation is that thorough training is needed for all employees inclusive of management in dealing with difficult people. I also requested that we take safety issues seriously and develop a strong process to protect employees and educate employees on this process in the future. In order for management to get a flavor of what we have to deal with I suggest we have management work the front counter for a period of time to gain better insight and understanding. No matter how hard we try, there will always be clientele that are upset and unfortunately will continue to complain about how they were treated."

On January 4, 2010, Ms. Pierce received a second written warning for violation of Directive 2030-5 PR, dated 10/8/2008, Service to Individuals. The warning was issued after the department received a written complaint from a customer following her interaction with the Appellant. That warning was never appealed and remains a part of the Appellant's file.

On March 11, 2010, after returning from a two-day leave, Leanne Topolosky received a message that Mark Sacco, a claimant, that indicated he wanted to speak to a supervisor. When Ms. Topolosky called Mr. Sacco, he asked to

meet with Ms. Topolosky to discuss an incident that occurred in the Manchester Local Office on March 9, 2010. Mr. Sacco came to Ms. Topolosky's office on March 11, 2010, and discussed his interaction with Ms. Pierce on March 9, 2010. In response to Ms. Topolosky's request for Mr. Sacco to put his complaint in writing, Mr. Sacco sent Ms. Topolosky an email that same afternoon, March 11, 2010, reiterating what he and Ms. Topolosky had discussed earlier that day.

According to the complaint, Mr. Sacco went to the Manchester Local Office on March 9, 2010, and told Ms. Pierce that he wanted to speak with a supervisor about his claim. Ms. Pierce reportedly told him that he could not see a supervisor and instead needed to tell her what his concern was; she would then decide whether he should talk to a counselor or not. According to his statement, when Mr. Sacco told Ms. Pierce what his issue was, she picked up a clipboard, slammed it down in front of him and told him to "sign the G—D—sheet." Mr. Sacco claimed that when he asked if he could make an appointment to speak with a supervisor, the Appellant told him to, "shut the hell up and get the hell out of here." Mr. Sacco reported that another employee came over to him and that he explained his concerns about needing to see a supervisor. He reported that later that day, in the parking lot at about 4:30 p.m., the Appellant walked past him and said, "At least I have a job." He alleged that the Appellant told him that if he said anything to anyone about the incident, the Appellant could make sure that his claim would be denied because, "She knows people in that department." Mr. Sacco indicated that in addition to feeling violated by the way in which he was treated, he had also later learned that his claim had been denied.

Mr. Sacco testified that when he visited the Manchester Local Office on March 9th, he wanted to speak with a supervisor about his claim. His testified that his subsequent request to speak with a supervisor, and his meeting with Ms. Topolosky on March 11, 2010, were solely for the purpose of registering his complaint against Ms. Pierce regarding her treatment of him on March 9, 2010.

Ms. Topolosky and her supervisor, James Coviello, met with Mr. Sacco on March 30, 2010, to further investigate the complaint. According to Mr. Coviello's memorandum to Colleen O'Neill, Assistant to the Commissioner (Exhibit #1), Mr. Sacco was willing to discuss the incident involving Ms. Pierce and himself, but he was reluctant to provide a further written statement, telling Mr. Coviello that he, "wanted his original email dated 03/11/10 to be his statement and said that he did not want to make any other statement." According to Mr. Coviello's report, Mr. Sacco could not understand why he was being questioned again and asked for a sworn statement when he was the victim. Mr. Coviello reported that he, "did not press [Mr. Sacco] further as he appeared very reluctant and nervous." Mr. Sacco did agree to sign a sworn statement attesting to the truthfulness of his earlier email. Ms. Topolosky signed the statement as a witness. Mr. Coviello wrote, "He seemed concerned about being questioned for details and about making the sworn statement. Leanne and I explained that the Department takes these kinds of allegations very

seriously and they are investigated." Ms. Topolosky testified that they did not discuss the status of Mr. Sacco's unemployment claim, and that discussion was limited to the Appellant's alleged misconduct on March 9, 2010.

Ms. Topolosky met with Ms. Pierce on April 12, 2010, to review Mr. Sacco's allegations. Ms. Pierce denied that the incident occurred. In her testimony before this Board, Ms. Pierce stated that if Mr. Sacco had visited the local office on March 9, 2010, he would have been required to sign in if he wanted to meet with an interviewer, but he would not need to sign in with anyone in particular. She said that Mr. Sacco comes into the office so frequently that he already knows the procedures. She stated that she does not remember seeing Mr. Sacco, that it was very busy, and that 250 – 350 people would have come through the office that day. Ms. Pierce testified that whenever anyone came to the front desk and asked about speaking with a supervisor, "I always get them a supervisor. If there isn't one available, I take their name and number." She stated, "I've always accommodated them in that regard." Ms. Pierce testified that she did not remember taking any names or numbers that day for anyone who wanted to see a supervisor.

Ms. Pierce also testified that claimants will meet with a counselor if they want to get into some kind of training. She said that claimants are not able to meet with counselors immediately "...because they're too busy." She said that whoever is working the front desk will give claimants a card and instruct them to call the counselor directly. Ms. Pierce stated, "We've been asked at the front desk not to interrupt the counselors because they are so loaded with work. It would not be my decision. When they're given the card, they call up the counselor and they speak with them direct." She said she did not recall giving out any cards that day. When questioned about the allegation that she picked up a clipboard, slammed it down in front of Mr. Sacco, and told him to "sign the G— D— sheet," she said she would have had no reason to pick up the clipboard unless someone had asked her about how long the wait would be to meet with an interviewer. She testified that everyone who comes into the office is required to sign in, "because the Commissioner wants a count." She said that if someone came in asking to speak with a supervisor, that person would still be required to sign in, "because the Commissioner wants to know who's using the facility."

Ms. Pierce testified that she was aware of the consequences she would face if she were to mistreat any of the claimants, and said she would have had no reason to deny Mr. Sacco or any other claimant access to her supervisor. Ms. Pierce testified that she never threatened to interfere with Mr. Sacco's claim to compensation, saying that she had no authority to grant or deny an unemployment claim, and had never threatened to influence any claim in any way. Ms. Pierce testified that she did not recall any interaction with Mr. Sacco on March 9, 2010, and did not recall speaking to anyone in the parking lot that afternoon as she was leaving work.

Ms. Topolosky testified that she had supervised Ms. Pierce since February, 2005, when Ms. Pierce transferred to the Manchester Local Office from Benefits Adjudication. Ms. Topolosky testified that even before coming to work in the local office, the Appellant had been sent to two different trainings on communications and how to deal with difficult people. Ms. Topolosky testified that she had received a number of complaints, some written and some verbal, about the Appellant's interactions with customers and co-workers. Ms. Topolosky testified that she had counseled the Appellant, given the Appellant "below expectation" ratings on her performance evaluation, and had issued her two formal written warnings as a result of her inappropriate interactions with customers and co-workers. Ms. Topolosky testified that although the Appellant generally denied any inappropriate conduct at any time, Ms. Topolosky herself had witnessed the Appellant's inappropriate conduct following an incident that occurred on November 20, 2009, involving a claimant.

Ms. Topolosky testified that she had repeatedly coached the Appellant on appropriate communications and even recommended that the Appellant contact the Employee Assistance Program if she felt she needed help with any personal issues or issues at work. Ms. Topolosky testified that after coaching or counseling, "Diane did improve in the way that she spoke to the customers, but it always came back to another complaint." Ms. Topolosky testified that when she confronted the Appellant with customer complaints, "[Ms. Pierce] became very defensive; it was very uncomfortable for her. She felt she was working very hard giving good customer service and she felt she was being harassed. Why was it always her -- the workload and number of customers; they were more angry." When asked if the Appellant acknowledged the substance of customer complaints, Ms. Topolosky said, "More often, not." She testified that she and the Appellant had had numerous discussions about appropriate communications and customer service. Ms. Topolosky testified that Mr. Sacco had never complained about any other member of the staff, and that there had been no complaints of any kind since Ms. Pierce was dismissed.

Ms. Topolosky testified that when she met with the Appellant and her representative, SEA Steward Linda Huard, on April 12, 2010, to review the evidence supporting a decision to dismiss the Appellant from her position, Ms. Topolosky provided the Appellant with copies of any written complaints that had been received about Ms. Pierce and that had been considered in determining the appropriate level of discipline. She also testified that she gave the Appellant and Ms. Huard a copy of a statement from Danijela Bjelogric, another employee at the facility, who confirmed Mr. Sacco's allegation about Ms. Pierce slamming a clipboard down in front of him.¹

¹ While Ms. Bjelogric's statement was never offered into evidence, and Ms. Bjelogric was never called to testify, neither the Appellant nor her witness, Ms. Huard, contested the fact that the statement was provided during the pre-termination meeting, or that the statement confirmed one of Mr. Sacco's allegations about his interaction with Ms. Pierce on March 9, 2010.

Standard of review

In accordance with the provisions of Per-A 207.12 (b) of the NH Code of Administrative Rules:

(b) 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.

Discussion of the Evidence

In evaluating the evidence, the Board took the following factors into consideration:

1. By all accounts, Mr. Sacco was a frequent visitor to the Manchester Local Office and was fully aware of the procedures to access services. Prior to March 11, 2010, he had never filed a complaint about any employee in that office, including Ms. Pierce, and has not filed any complaints with the department since that date.
2. Determinations of eligibility for unemployment compensation are based solely on a claimant's application for benefits, record of employment and subsequent job searches, not how well the claimants have been treated by the department's employees. Mr. Sacco would not have benefited in any way by making a complaint against Ms. Pierce or any other employee of the Department of Employment Security.
3. When making his complaint about Ms. Pierce's behavior toward him, Mr. Sacco would not have known that the Appellant had received below expectation ratings previously on her performance evaluation as a result of her communications and inappropriate interactions with clients and co-workers, nor would he have known that the Appellant had received formal counseling and two prior written warnings for conduct with other claimants that was notably similar to that described by Mr. Sacco in his written complaint.
4. The Appellant testified that the incident with Mr. Sacco never occurred. At the hearing, however, Ms. Topolosky testified without dispute that another employee witnessed Ms. Pierce slamming a clipboard down in front of Mr. Sacco, and that Ms. Pierce and her representative, SEA Steward Linda Huard, were given a copy of that employee's statement at the pre-termination meeting conducted by Ms. Topolosky on April 12, 2010.

According to Black's Law Dictionary (6th Edition), preponderance of evidence means, "Evidence of great weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not... It is not determined by the number but by the greater weight of all evidence." Based on a preponderance of the evidence, the Board concluded that Ms. Pierce engaged in the conduct as alleged and was therefore subject to appropriate disciplinary action.

1. In accordance with the provisions of Per 1002.03 of the NH Code of Administrative Rules, an appointing authority may consider a number of factors in determining the appropriate form of discipline including, but not limited to "(a) The nature and severity of the conduct or offense in relation to the employee's position classification, responsibilities, and accountabilities, and the functions of the agency; and (b) The employee's past record of performance and discipline, including whether or not the employee has been disciplined in the past for the same or a similar offense."
2. The evidence reflects that Ms. Pierce was fully aware of New Hampshire Employment Security's October 8, 2008 Directive 2030-5 PR, "Service to Individuals," and that the policy itself warned of disciplinary action up to and including dismissal without prior warning for any violation of that policy.
3. Ms. Pierce had been coached, counseled and evaluated as below expectations with respect to her service to individuals, and had received two formal written warnings for violating the agency's directive regarding "Service to Individuals." Neither of the written warnings was appealed.
4. Per 1002.08 (b) of the NH Code of Administrative Rules states, in pertinent part, (b) An appointing authority may dismiss an employee without prior warning for offenses such as, but not necessarily limited to... (7) Violation of a posted or published agency policy or procedure, the text of which warns that violation of same may result in dismissal..." When Ms. Pierce treated Mr. Sacco rudely and disrespectfully, and later threatened to interfere with approval of Mr. Sacco's application for unemployment compensation benefits, she violated New Hampshire Employment Security Directive 2030-5 PR, which clearly warns that any employee violating that policy may be dismissed without prior warning.
5. Ms. Pierce and her SEA Steward had an opportunity at their April 12, 2010, meeting with Ms. Topolosky, to review and refute the evidence supporting Ms. Pierce's dismissal.

Decision and Order

In light of the fact that the Appellant had been trained, coached, counseled, and formally disciplined by issuance of two written warnings prior to the March 9, 2010, incident for being rude and disrespectful to co-workers and clients, the agency could reasonably conclude that any further warning would be ineffective. With or without prior warnings, it also was reasonable for the agency to decide that dismissal was the appropriate level of discipline to take once it determined that the Appellant had violated the policy by mistreating Mr. Sacco, but that she also had threatened to interfere with Mr. Sacco's application for unemployment. The fact that Ms. Pierce had no actual authority to affect the outcome of his application for benefits is immaterial. Mr. Sacco would not have known that it was an empty threat.

The Board was unpersuaded that the disciplinary action was unlawful; that the appointing authority violated the rules of the division of personnel by imposing the disciplinary action under appeal; that the disciplinary action was unwarranted by the alleged conduct or failure to meet the work standard in light of the facts in evidence; or that the disciplinary action was unjust in light of the facts in evidence. Accordingly, the Board voted unanimously to DENY Ms. Pierce's appeal.

THE NEW HAMPSHIRE PERSONNEL APPEALS BOARD



Patrick Wood, Chair



Philip Bonafide, Vice-Chair



Robert Johnson, Commissioner

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Appeal of Diane Pierce – NH Employment Security Docket #2010-T-013

PAB Response to Appellant's Motion for Discovery

September 9, 2010

By letter dated August 25, 2010, Attorney Shawn Sullivan filed a Motion for Discovery pursuant to Per-A 206.09, in the above-titled appeal. To date, the Board has received no response to that Motion from the State.

On June 16, 2010, with the agreement of the parties, this matter was scheduled for a September 1, 2010, hearing on the merits of the appeal. By letter dated August 20, 2010, Attorney Sullivan filed Appellant's Assented to Motion to Continue, as he had a scheduling conflict with another case in Belknap Superior Court. Five days later, Attorney Sullivan submitted the Appellant's Motion for Discovery. Had the hearing proceeded as scheduled on September 1, 2010, the Motion for Discovery clearly would have been untimely. However, in light of the agency's assent to the Motion to Continue, and in the absence of any objection to the Motion for Discovery, the Board has considered the Motion for Discovery and responds as follows:

1. Attorney Sullivan has requested copies of "video and/or audio materials for the date, time and places where Ms. Pierce was accused of misconduct for which she was terminated." If those materials exist, and if production of same would not violate the confidentiality provisions of RSA 282-A:118¹, the State shall provide copies to the Appellant as requested.
2. Attorney Sullivan also has requested "any and all DES records, filings and submissions relative to the complaining witness, Marc Sacco." To the extent that the department has filings or submissions which

¹ **282-A:118 Reports or Statement; Confidentiality.** – The commissioner or his authorized representatives and the chairman of any appeal tribunal may require from any employing unit any sworn or unsworn reports or statements, with respect to persons employed by it, which either deems necessary for the effective administration of this chapter. Information thus obtained or obtained from any individual, claimant or employing unit pursuant to the administration of this chapter shall be held confidential and shall not be published or open to public inspection in any manner revealing the individual's or employing unit's identity except [as permitted in accordance with this statute].

would not be subject to the confidentiality provisions of RSA 282-A:118, the State shall provide that information to the Appellant as requested.

3. The Department shall have fifteen (15) calendar days from the date of this order in which to provide to the Appellant the requested information or, in the alternative, a written explanation why the requested information is either unavailable or confidential as described in RSA 282-A:118. A complete copy of the agency's response shall be forwarded simultaneously to the Board.

FOR THE PERSONNEL APPEALS BOARD



Patrick Wood, Chair

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