

# State of New Hampshire



**PERSONNEL APPEALS BOARD**  
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## **Appeal of John Rocheleau – Docket #2011-T-011** **New Hampshire Department of Transportation**

April 11, 2012

The New Hampshire Personnel Appeals Board (Wood, Bonafide, Johnson) met in public session on Wednesday, February 15, 2012, 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 John Rocheleau, a former employee of the NH Department of Transportation. Mr. Rocheleau, who was represented at the hearing by Attorney Benjamin King, was appealing his March 13, 2011, termination from employment as a Highway Maintainer III, for allegedly violating the following Personnel Rules:

- Per 1002.08(b)(5) Theft of valuable goods or services from the State or from any other employee or individual served by the agency
- Per 1002.08(b)(8) Threatening the life, health or safety of another employee or individual served by the agency
- Per 1002.08(b)(7) Violation of a posted or published agency policy or procedure, the text of which warns that violation of same may result in dismissal
- Per 1002.08(b) Disruptive, disorderly or disrespectful behavior in the workplace
- Per 1002.08(b) Failure to report a theft of State property by a co-worker
- Per 1002.08(b) Failure to be forthcoming during an investigation

Senior Assistant Attorney General Karen Schlitzer appeared on behalf of the Department of Transportation.

Originally, this matter was scheduled for a hearing on the merits of the appeal on Wednesday, October 29, 2011. That meeting was cancelled at the request of the parties after the parties advised the Board that they had reached an agreement in principle to settle the appeal. The parties were unable to reach final agreement, however, and the appeal was returned to the Board's docket for scheduling at the next available date.

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

### State's Exhibits

- A. March 16, 2011 Letter of Dismissal (with 7 numbered attachments) issued to the Appellant by Pamela Mitchell
- B. New Hampshire Department of Transportation Policy 401.03, Firearms or Dangerous Weapons Prohibited
- C. John A. Rocheleau statement dated December 7, 2010
- D. John A. Rocheleau statement dated January 5, 2011
- E. John A. Rocheleau statement dated February 9, 2011

### Appellant's Exhibits

- 1. Performance Evaluations for John Rocheleau dated 9/29/09, 9/16/08, 10/10/07, 9/29/06, 9/30/05, 10/13/04, 9/30/03, 9/9/02, 9/4/01, 7/27/00 and 8/16/99

The following persons gave sworn testimony:

- Pamela Mitchell, District 5 Engineer (retired)
- Mark Brady, Highway Maintainer III
- Thomas Sexton, Investigator, NH Department of Transportation
- John Rocheleau, Appellant

After carefully reviewing the evidence and argument offered by the parties, the Board made the following findings of fact and rulings of law with respect to the Appellant's past record of performance, and each of the alleged violations as described in the Appellant's March 16, 2011, Letter of Dismissal:

### Findings of Fact

- 1. Appellant's work history and record of performance
  - a. The Appellant has worked for the Department of Transportation since September, 1985.
  - b. The Appellant's performance evaluations are all satisfactory, and frequently describe him as exceeding expectations in his role as a Highway Maintainer III.
  - c. Until the date of his dismissal, the Appellant had never been disciplined for any conduct or work performance.
- 2. Per 1002.08(b)(5) – Theft of valuable goods or services from the State or from any other employee or individual served by the agency, specifically [the Appellant's] misuse of time and materials in building a "cannon."
  - a. The Appellant used property belonging to the State, including a welding rod, acetylene, shop tools, a welder and a piece of scrap pipe approximately 20 inches in length, to construct a device that

- the agency later described as a "cannon." It took roughly 20 minutes for the Appellant to complete the project during his lunch break.
- b. It was common practice in the 527 shed for employees to work on their own vehicles during their lunch breaks and to use State tools and supplies like the welder and acetylene when performing that work.
  - c. Regular use of tools and supplies, including the welder, welding rods and acetylene, occurred with the foreman's permission.
3. Per 1002.08 (b)(8): Threatening the life, health or safety of another employee or individual served by the agency, specifically by building a "cannon" and firing it inside the shed.
- a. The Appellant constructed a device, akin to what was described by the witnesses as a "potato gun," out of scrap pipe pieces. Department of Transportation employees referred to it as a "cannon."
  - b. Twice, with the assistance of two co-workers, the Appellant fired "the cannon." When fired the first time, the device was not fitted with any sort of projectile. The second time, the end of the device was fitted with a small plastic cup which split into four pieces and landed approximately five feet away when the device was fired.
  - c. The Appellant was charged with threatening the life, health or safety, of another employee or individual served by the agency because he fired the "cannon." Neither of the co-workers who assisted in firing the cannon was dismissed as a result of that incident.
  - d. In a separate incident that occurred a few years before the "cannon" incident involving the Appellant, another employee brought a "potato gun" to work. He and a co-worker loaded the barrel of the potato gun with handi-wipes and fired the potato gun into the yard. The handi-wipes caught fire and flew into the yard at the shed. Neither of those employees was dismissed as a result of that incident.
4. Per 1002.08 (b)(7) – Violation of a posted or published agency policy or procedure, the text of which warns that violation of same may result in dismissal, specifically, New Hampshire Department of Transportation (NH DOT) Policy 401.03, Firearms or Dangerous Weapons Prohibited.
- a. Some time around Christmas, 2009, the Appellant brought an unloaded Kimber .45 caliber handgun to the shed and showed it to his co-workers, allowing them to handle the weapon. The Appellant also brought a muzzleloader cap and a 209 shotgun shell into the shed to use in igniting the device that the agency later described as a "cannon."
  - b. NH DOT Policy 401.03 includes, "Any form of ammunition for use in a handgun, rifle, or shotgun," as well as, "Any form of explosive," in its definition of "firearm or dangerous weapon."
  - c. It was not uncommon for employees to bring weapons into the workplace at the 527 shed, even after adoption of the firearms policy. During the course of the investigation conducted by the

Department of Transportation, at least two of the other Highway Maintainers admitted that they had brought weapons into the workplace on several occasions. Neither of those employees was dismissed for violation of a posted or published agency policy warning of dismissal.

5. Per 1002.08 (b) – Disruptive, disorderly or disrespectful behavior in the workplace

- a. The Appellant was directed to attend a meeting held on December 6, 2010, at Shed #527, so that he could be present while crew members and supervisors discussed equipment assignments and “discord in Shed #527.” During the meeting, the Appellant refused to answer questions about the allegations from the earlier investigation that allegedly created the discord. The Appellant left the meeting without the supervisor’s approval.
- b. On December 7, 2010, the Appellant and three co-workers went to DOT headquarters to speak with staff in Human Resources about what had happened. They did not inform the foreman that they were going to Concord instead of reporting for duty at the shed.
- c. The Appellant admitted that he and other employees would sometimes urinate outside on the ground between trucks parked at the shed, and it was possible that urine may have hit a plow owned by his foreman’s brother.

6. Per 1002.08 (b) – Failure to report a theft of State property by a co-worker

- a. In 2006, the Appellant saw two employees in Patrol Shed #527 loading guardrail posts onto a DOT truck. The next day or so, the two employees told the Appellant that the posts would be used in building a garage for one of the two employees.
- b. Twice between September and October 2010, on two of the Appellant’s scheduled days off, co-workers arrived at his house during the workday to collect items that the Appellant was giving away to his foreman, Ed Coulombe.
- c. Some time in the fall of 2010, Ed Coulombe informed the Appellant that he had given another employee time off without loss of leave so that the co-worker could complete work on a deck being built on Mr. Coulombe’s property.
- d. The Appellant was not questioned in the original investigation involving the theft of guardrail posts, as he was not then assigned to that shed. He also did not volunteer information about possible thefts. The Appellant was questioned during a follow-up investigation of alleged harassment of, and retaliation against, persons who participated in the original investigation. The Appellant responded truthfully to questions from Investigator Sexton during that investigation.
- e. Other employees who failed to report possible theft of time and materials were not disciplined.
- f. The individual who assisted in loading the guardrail posts onto the DOT truck for delivery to the other employee’s residence was not dismissed, but was suspended for a period of two weeks.

7. Per 1002.08 (b) – Failure to be forthcoming during an investigation
- a. Investigator Sexton believed that the Appellant was the only person he interviewed during the course of his investigation who did not lie.
  - b. Investigator Sexton concluded that although the Appellant did not volunteer information during the investigation, of all the crew members interviewed, the Appellant was the most truthful.

#### Rulings of Law

- A. While Per 1002.08 authorizes an appointing authority to dismiss an employee without prior warning for a number of different offenses, the rule does not require the dismissal of an employee who commits any of the listed, or similar, offenses.
- B. Per 1002.08 (b)(5) provides for immediate dismissal for, "Theft of valuable goods or services from the state or from any other employee or individual served by the agency." The State offered no evidence to support its assertion that the small amount of scrap metal, the welding rod, or acetylene gas used by the Appellant, or the twenty minutes he spent building the device during his lunch break, could reasonably be described as "theft of valuable goods or services," particularly in light of the evidence that employees routinely used State-owned welding equipment and supplies to work on their personal vehicles during their lunch breaks.
- C. Per 1002.08 (b)(7) provides for immediate dismissal for, "Violation of a posted or published agency policy or procedure, the text of which warns that violation of same may result in dismissal." The Appellant admitted that he brought ammunition<sup>1</sup> into the shed to use in his noise cannon, and that he brought in a newly acquired handgun to show his co-workers. The evidence also reflects that weapons were fairly common in the workplace, that for several years State police officers brought their weapons into the shed to be cleaned by one of the crew, and that it was fairly common for several members of the crew to bring weapons to work to show or trade or sell. Other employees found to be in violation of the weapons policy were not dismissed, but subjected to significantly lower forms of discipline.
- D. Per 1002.08 (b)(9) provides for immediate dismissal, without prior warning, for "Endangering the life, health or safety of another employee or individual served by the agency." While the Appellant's decision to ignite the noise cannon inside the shed represented a dangerous lapse in judgment, and could have resulted in injury or property damage if it had not functioned as the Appellant expected, a similar incident several years earlier involving the use of a potato gun represented a similar risk. None of the employees involved in that incident were dismissed for endangering the life, health or safety of another employee or individual served by the agency.

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<sup>1</sup> Contrary to the Appellant's position that a muzzleloader cap and 209-shotgun shell primer should not be considered "ammunition," the definition of "ammunition" (Dictionary.com Unabridged. Random House, Inc. 15 Mar. 2012) includes, "the means of igniting or exploding such material, as primers, fuses, and gunpowder."

- E. In most cases, "Disruptive, disorderly or disrespectful conduct in the workplace, including the use of insulting, abusive or obscene language or gestures," would, at most, be deemed sufficient reason for an employee to receive a written warning under the provisions of Per 1002.04.
- 1) Visiting the agency human resources office to file a complaint without first receiving a supervisor's permission, particularly if the supervisor's conduct may be the basis for the complaint, would not be considered disruptive, disorderly or disrespectful conduct in the workplace.
  - 2) Urinating in a parking lot between vehicles instead of using easily accessible restroom facilities is crude and unprofessional. However, when that behavior is relatively common in a particular work setting, it would not represent disruptive, disorderly or disrespectful conduct, particularly if only one of the participating employees is disciplined for that behavior.
  - 3) An employee should not be required to answer a supervisor's questions about an investigation in an open meeting among that employee's co-workers. Refusing to answer such questions, and leaving a meeting when pressed for answers, would not qualify as disruptive, disorderly or disrespectful conduct.
- F. Employees may be disciplined for offenses that are not specifically enumerated in Chapter Per 1000 of the NH Code of Administrative Rules, and it is reasonable to conclude that an employee could be disciplined for , "Failure to report a theft of State property by a co-worker," or, "Failure to be forthcoming during an investigation," provided that the agency consistently applies the same standard for all employees who are similarly situated, and who are found to have committed similar offenses. When employees who actually engage in theft of State property are not dismissed, however, it is simply unfair to terminate the employment of another employee who may have been aware of the theft but did not report it. Further, failure to volunteer additional information during the course of an investigation is not synonymous with failure to be forthcoming, particularly when an investigator determines that the employee disciplined for that offense was the most forthcoming of any employee interviewed during that investigation.
- G. In accordance with Per 1002.03, "In determining the appropriate form of discipline under Per 1002.04 through 1002.08, an appointing authority may consider factors 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."
- H. RSA 21-I:58, I, provides, in pertinent part, "In all cases, the personnel appeals 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."

### Position of the Parties

Senior Assistant Attorney General Schlitzer argued that the Department of Transportation's decision to dismiss the Appellant was lawful, and that the level of discipline imposed was appropriate for the nature and severity of the violations committed. Ms. Schlitzer argued that while the department recognized the Appellant's significant length of service and his history of satisfactory performance, the Appellant's conduct and his admitted violation of departmental policies warranted dismissal.

Ms. Schlitzer argued that at the time of his dismissal, the Appellant was the most senior Highway Maintainer III on the crew assigned to the 527 shed. In that capacity, she argued, he not only had supervisory responsibilities, but he was expected to serve as a role model when carrying out his responsibilities in a manner to ensure the safety of the traveling public. Ms. Schlitzer argued that the Appellant violated the agency's firearms policy by bringing a firearm to the worksite for his co-workers to inspect, by manufacturing a cannon at work, by firing the cannon at work, and by bringing in a muzzle loader cap and a shotgun primer to use in the cannon, which was discharged twice inside the shed. Ms. Schlitzer argued that the Appellant acknowledged those violations, but did not want to be held accountable. She argued that by violating those policies, the Appellant created a serious risk to the safety, life and health of others in the shed, and that if the cannon had malfunctioned or exploded, it could have been disastrous. Ms. Schlitzer argued that the Appellant had no good reason for doing what he did, and that his assertion now that he should not have done it, or that he would not do it again, should not be deemed a sufficient basis for reversing the dismissal decision or imposing some lesser form of discipline. Ms. Schlitzer argued that although there were others who also engaged in misdeeds and who may have received some lesser form of discipline, that did not diminish the seriousness of the Appellant's offenses, and should have no bearing on the outcome of his appeal.

Attorney King argued that in deciding to dismiss the Appellant, the Department of Transportation failed to properly consider the factors set forth in Per 1002.03, including the Appellant's past record of performance. Mr. King also argued that the agency exaggerated or misstated the facts set forth in the letter of dismissal, including its allegation that the Appellant was not forthcoming during the course of the investigation. Mr. King noted that Investigator Sexton had described the Appellant as the most cooperative witness. Mr. King argued that the decision to dismiss the Appellant was unjust and inequitable given all the factors involved. Mr. King argued that while the agency asserted that discipline was administered in a manner that was fair and consistent, several other employees in the same shop who had the same position title and the same level of responsibility as the Appellant, and who committed similar violations, were not dismissed.

Mr. King acknowledged that the Appellant brought in a Kimber .45 pistol once, thereby violating the firearms policy, but noted that other employees who repeatedly brought weapons to work were suspended instead. Mr. King also noted that while the Appellant was dismissed for failing to report a theft from the State, one of the

employees actually involved in the theft was not dismissed, but suspended for two weeks. Mr. King argued that the same standards should have been applied to the Appellant as to his co-worker who brought a potato gun to work and fired it. He argued that the other employee's offenses were far more serious, and yet that employee was suspended for three weeks, while the Appellant was dismissed. Mr. King argued that the Appellant understood that some level of discipline would have been appropriate, but that it should have been similar to that imposed on other employees who committed similar infractions. Mr. King asked the Board to reinstate the Appellant with retroactive pay and benefits from April 9, 2011, through the date of his reinstatement.

### Decision and Order

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."

The evidence reflects that the Appellant engaged in inappropriate, unprofessional and, in at least one instance, potentially dangerous behavior. The Appellant admits that he violated the firearms policy, which provides for dismissal without any prior warning. The Appellant also admits that he used State equipment and supplies to build a noise cannon which, when fired, could have caused injury or property damage if it had functioned differently than he expected. As such, the Appellant failed to prove by a preponderance of the evidence that the agency's decision to dismiss him was unlawful, that it violated the Rules of the Division of Personnel, or that it was unwarranted by the Appellant's conduct.

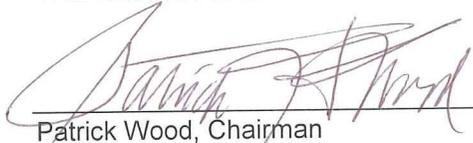
While those offenses could have been sufficient cause for dismissal, however, the Board can not consider the evidence in a vacuum. Despite Ms. Mitchell's insistence that she, "worked closely with HR and the Commissioner's office to come up with fair and consistent discipline," other employees who were similarly situated who committed similar offenses during roughly the same period of time were not dismissed. Instead, they were suspended without pay for varying lengths of time. In light of the Appellant's long service to the department, and the similarity of the Appellant's conduct and offenses to that of his peers, the Board found that his dismissal was unjust in light of the facts in evidence. As a result, the Board voted to exercise its equitable authority, as set forth in 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 Appellant held a responsible position as a Highway Maintainer III. He admitted to conduct that violated policies and procedures. His offenses were more than simple careless acts; they represented a substantial disregard for workplace safety, so the discipline imposed should address the nature and severity of those offenses. The Board also considered the level of discipline imposed on his co-workers who committed similar offenses, but concluded that it should not be bound by the decisions made by the agency regarding the length of suspension. As such, the Board voted to order the Appellant suspended without pay for periods of time consistent with the nature and severity of the violations he committed.

After carefully considering the evidence and argument offered by the parties, the Board voted unanimously to reinstate the Appellant to a position of Highway Maintainer III following a three month disciplinary suspension without pay for violation of the agency's weapons/firearms policy, and a six month suspension disciplinary suspension without pay for engaging in conduct that threatened the health and safety of his co-workers. The Department of Transportation shall restore the Appellant to his position of Highway Maintainer III, effective December 13, 2011. The Department shall be authorized to assign the Appellant to any of the patrol areas within District 5. Such reinstatement shall occur within thirty calendar days of the date of this order.

As set forth above, the appeal of John Rocheleau is therefore GRANTED IN PART.

THE NEW HAMPSHIRE PERSONNEL APPEALS BOARD

  
Patrick Wood, Chairman

  
Philip Bonafide, Commissioner

  
Robert Johnson, Commissioner

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