

State of New Hampshire



94-T-931

PERSONNEL APPEALS BOARD
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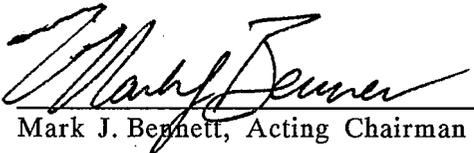
APPEAL OF DENNIS SZANTO
Docket #94-T-31
Department of Corrections
Response to Appellant's May 11, 1995 Motion for Reconsideration

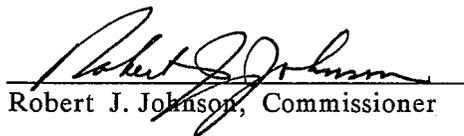
June 7, 1995

By letter dated May 11, 1995, SEA General Counsel Michael Reynolds requested that the Board reconsider its April 26, 1995 decision, denying Dennis Szanto's appeal of his termination from employment prior to completion of his probationary period. Mr. Reynolds argued that the termination was arbitrary, illegal, capricious, and/or made in bad faith because the Department of Corrections' standards used to judge the Appellant's performance in the weapons qualification were arbitrary, illegal, capricious and/or made in bad faith. Mr. Reynolds also argued that there was no evidence that any Department of Corrections employee "has to know how to shoot the particular gun that Mr. Szanto had trouble with in order to be an adequate correctional officer."

After reviewing its decision in this matter, and the arguments presented by Appellant's representative, the Board determined that the appellant's representative had failed to demonstrate that the Board's decision, on the facts in evidence, was either unlawful or unreasonable. Therefore, the Board voted unanimously to deny Appellant's Motion for Reconsideration, affirming its decision that Mr. Szanto's termination was neither arbitrary, capricious, illegal, or made in bad faith.

THE NEW HAMPSHIRE PERSONNEL APPEALS BOARD


Mark J. Bennett, Acting Chairman


Robert J. Johnson, Commissioner


Lisa A. Rule, Commissioners

cc: Virginia A. Lamberton, Director of Personnel
Michael C. Reynolds, SEA General Counsel
John Vinson, Esq., Department of Corrections

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APPEAL OF DENNIS SZANTO
Docket #94-T-31
Department of Corrections

April 26, 1995

The New Hampshire Personnel Appeals Board (Bennett, Johnson and Rule) met Wednesday, March 15, 1995, to hear the appeal of Dennis Szanto, a former probationary employee of the Department of Corrections. Mr. Szanto, who was represented at the hearing by SEA Legal Intern Andrea Lehtonen, was discharged from his position of Correctional Officer Trainee, effective May 17, 1994, when he failed to attain weapons certification, thereby failing to successfully complete the prescribed course of training for the Correctional Academy. Mr. Szanto, through his representative, alleged that the Department of Corrections provided insufficient training in weapons handling, and that it did not provide him the same opportunity to pass the weapons qualification that it had afforded his classmates in Corrections Academy #46.

Attorney John Vinson, who appeared on behalf of the Department of Corrections, argued that as a probationary employee, Mr. Szanto had the burden of proving that the State's decision to terminate his employment was arbitrary, illegal, capricious, or made in bad faith. He argued that the evidence would demonstrate that when Mr. Szanto originally failed the weapons qualification, the Department of Corrections could have dismissed him for failing to meet the work standard; instead, the Department allowed him an additional 60 days in which to improve his skills and complete the course. Mr. Vinson said the evidence would prove that not only did Mr. Szanto fail to qualify on the firing range, but the instructors considered him to be dangerous on the range, and described him as being untrainable at that time.

The record in this matter consists of the audio tape recording of the hearing, the documents submitted by the parties prior to the hearing and documents entered into the record at the hearing. Those offering sworn testimony were: Dennis Szanto, Warden Michael Cunningham, and Lt. Jeffrey Noyes. At the conclusion of the hearing, Ms. Lehtonen submitted proposed findings of fact and rulings of law. The Board is mindful of its obligations to respond to proposed findings of fact and rulings of law, and finds them helpful in focusing the Board's review on the material facts in dispute. However, detailed, compound findings such as those submitted in this case do not help to focus on the issues, or assist the Board in reaching a decision. Accordingly, the Board will make its own findings in this case. To the extent that the proposed findings are consistent with the Board's decision, they are granted. Otherwise, they are denied.

Standard of Review

Code of Administrative Rules, Per 1001.02 (a):

"At any time during the initial probationary period an appointing authority may dismiss an employee who fails to meet the work standard provided that the dismissal is not: (1) arbitrary; (2) illegal; (3) capricious; or (4) made in bad faith."

Findings of Fact

1. At all relevant times, Mr. Szanto was a probationary employee subject to termination at any time prior to completion of the probationary period for failure to meet the work standard.
2. Mr. Szanto, was hired by the Department of Corrections on October 29, 1993, and entered the Correctional Academy on January 24, 1994. Mr. Szanto understood that in order to attain a permanent position as a Correctional Officer, he had to successfully complete the Correctional Academy, which included a course in weapons certification involving use of a revolver, rifle and shotgun.
3. During the weapons qualification, individuals may be disqualified on the firing range for putting too few shots on target in the amount of time allowed. Individuals also may be disqualified when, in the opinion of the firearms instructors, the individual must be removed from the range repeatedly for posing a threat to himself/herself or others on the firing range.
4. On March 3, 1994, while attempting to remove some homemade knee pads which he had constructed for himself out of automobile insulation and duct tape, Mr. Szanto cut his left hand with a utility knife, resulting in an injury which required three stitches. Mr. Szanto is right handed.
5. Although Mr. Szanto had reasonably good classroom grades, approximately an 87% average, he had a difficult time with any of the "hands on" assignments.
6. On March 4, 1994, Mr. Szanto's squad in the Corrections Academy was scheduled for firearms familiarization training. Although Mr. Szanto participated in the classroom portion of the presentation, he was not allowed to handle the weapons or take any practice shots until he received clearance from his physician because of the injury to his hand. Mr. Szanto returned to the academy with a note from his physician's office, signed by the nurse practitioner, indicating that he would be able to handle and fire weapons by Monday, March 7, 1994.
7. On March 7, 1994, Mr. Szanto elected to attempt to qualify on the firing range with the rest of his squad, even though he had been unable to handle any of the weapons during firearms familiarization training.
8. Mr. Szanto received a brief one-on-one review with a firearms instructor before

attempting to qualify.¹ Mr. Szanto did not qualify, and had to be removed from the range several times for unsafe weapons handling, and for displaying an inability to execute commands without the instructor having to repeat his instructions. Because he was removed from the firing range for being a "safety violator" Mr. Szanto did not get to take as many practice shots as his classmates.

9. Mr. Szanto was declared a "training failure" after his first weapons qualification attempt. He was accompanied by Lt. Noyes to Warden Cunningham's office where he was verbally notified of his termination from the academy, and dismissal from his position of probationary Correctional Officer Trainee.
10. Mr. Szanto told the Warden that he had not received as much training or as many practice shots as his peers had received. After consulting with Corrections Academy training personnel, the Warden reconsidered his decision to terminate the appellant, allowing him up to 60 additional days in which to practice on his own and obtain additional training. The Warden informed the appellant that he would be allowed one additional opportunity to qualify on the range.
11. Mr. Szanto signed a statement on March 18, 1994, in which he acknowledged that he had failed the firearms qualifications standard, and that his failure to qualify could have resulted in his immediate termination from employment as a Correctional Officer Trainee. The statement also acknowledged the appellant's understanding that he would be allowed up to 60 additional days from the date of the notice to complete the qualification, and that any retraining would have to be completed at his own expense and on his own time. After being advised by Sgt. Beltrami that he would probably be dismissed if he failed to sign the acknowledgement of the 60 day extension, Mr. Szanto signed the letter, although he was displeased with its content.
12. Over the next two months, Mr. Szanto undertook training on his own, including 5 hours of formal instruction with a registered NRA instructor. Mr. Szanto also practiced with fellow officers, setting up a practice course of his own in a sand pit.
13. On average, Correctional Officer trainees will fire approximately 100 rounds of ammunition during the training at the academy. While training on his own, and at a commercial firing range, Mr. Szanto fired between 1500 and 2000 rounds.
14. Mr. Szanto was scheduled to complete the qualification on May 17, 1994 with one of his classmates from the academy, Michael Correia. Both men were allowed a single chance to qualify. Mr. Correia qualified on the revolver, getting 43 of the 50 shots (86%) on target. Mr. Szanto failed, putting only 27 of the 50 shots (54%) on target in the time allotted.
15. Both men were given a single opportunity to qualify. Mr. Szanto failed to get enough shots on target in the first phase, failing to qualify on the revolver. Mr. Szanto became upset, insisting that he had been told he would get practice shots before attempting to

¹ Mr. Szanto was given an opportunity to delay his first attempt at qualification, but chose instead to take the examination with the members of his squad. He was confident that he could qualify, but discovered he had substantially more difficulty with the revolver than he had imagined..

qualify, and would have two chances to qualify on the course because he had missed the opportunity for additional practice shots during the academy.

16. Mr. Szanto was discharged from his position of Correctional Officer Trainee effective May 17, 1994, for failing to meet the work standard because he was unable to achieve weapons qualification.

Rulings of Law

As a probationary employee, Mr. Szanto could have been dismissed from his trainee position when he first failed to qualify on firearms. The Department of Corrections was under no obligation to give Mr. Szanto another opportunity to pass the firearms qualification. Although Mr. Szanto did not agree that he should be terminated if he again failed the weapons certification, and did not want to sign the 60 day extension, he did sign the letter and he understood that it was his responsibility to seek out additional training on his own time and at his own expense to enable him to qualify on the firing range.

Mr. Szanto's claim that he did not have as many opportunities as his classmates to fire practice, pre-qualification or qualification shots at the firing range on March 7, 1994, is not dispositive of this appeal. Mr. Szanto would have had similar opportunities to fire on the range if he had responded appropriately to commands from the firearms instructors and had not committed repeated safety violations, requiring his removal from the range.

The Board found that there was insufficient evidence to support the appellant's claim that the injury to his hand affected his ability to successfully complete the weapons qualification on his first attempt on March 7, 1994. The injury which Mr. Szanto accidentally inflicted upon himself was not to his firing hand, and his physician's office had certified that he would be medically able to participate in the weapons qualification on March 7, 1995. Mr. Szanto chose to participate in the weapons qualification with the rest of his classmates from Corrections Academy #46, believing that he would be able to qualify on the range.

The Department of Corrections had the authority to terminate Mr. Szanto's employment at that time, particularly in light of the finding by Corrections Academy personnel from New Hampshire Police Standards and Training that he was "untrainable." However, the Department allowed him up to sixty additional days to improve his skills and again attempt to qualify. During that time Mr. Szanto availed himself of private firearms instruction. By his own admission, he fired approximately 10 to 20 times the number of rounds during that training than any of his classmates were likely to have fired during the academy.

There was insufficient evidence to warrant a finding that Mr. Szanto should have been given more than one opportunity to qualify at the end of the 60 day extension which he was granted by Warden Cunningham after initially failing the weapons qualification. Mr. Szanto's classmate, Mr. Correia, also received only one chance to qualify. A passing rating on qualification for the revolver was 40 out of 50 shots on target (80%) in the time allotted. Mr. Szanto was only able to put 27 of the 50 shots on target (54%) in that time period, thereby resulting in his failure to qualify.

The appellant failed to persuade the Board that his termination was either arbitrary or in bad faith. The Board found that under the provisions of Per 1001.02 of the Rules of the Division of Personnel, the Department of Corrections had the authority to dismiss Mr. Szanto at any time prior to completion of his probationary period for failure to meet the work standard. Mr.

Szanto was aware that weapons certification was one of the components of satisfactorily completing his probationary period. When he initially failed to qualify, he was given a second chance to successfully complete the course, even though the Department of Corrections was under no obligation to provide him such an opportunity.

Mr. Szanto's appeal is hereby denied.

THE NEW HAMPSHIRE PERSONNEL APPEALS BOARD



Mark J. Bennett, Acting Chairman



Robert J. Johnson, Commissioner



Lisa A. Rule, Commissioners

cc: Virginia A. Lamberton, Director of Personnel
Andrea Lehtonen, SEA Legal Intern
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