

state of *New Hampshire*

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PERSONNEL APPEALS BOARD

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Concord, New Hampshire 03301
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APPEAL OF ANDREW TARBELL

Docket #92-T-3
Department of Labor

February 27, 1992

The New Hampshire Personnel Appeals Board (Rule and Johnson) met Wednesday, January 29, 1992, to hear the appeal of Andrew Tarbell, a former employee of the Department of Labor. Mr. Tarbell, who was represented at the hearing by SEA General Counsel, appeared appealing his termination effective August 8, 1991 by receipt of a third and final letter of warning for unsatisfactory work. Commissioner Richard Flynn, Deputy Commissioner David Wihby and Wage and Hour Administrator Cynthia Paveglio appeared on behalf of the Department of Labor.

Mr. Reynolds argued that Mr. Tarbell's termination was invalid because the three letters of warning received by him were not for the same "offense". He argued that although the letters generally addressed the same subject matter, only two of them actually used the phrase "unsatisfactory work". He also contended that disciplinary action from 1986 had been part of the "basis" for the termination, and that no weight should be given to any action against the appellant which had occurred more than two years prior to the date of termination. He further argued that letters of complaint about the appellant's work had not been placed in his personnel file and should not, therefore, be considered as the appellant was not given an opportunity to rebut those complaints until his termination hearing. He also argued that the appellant had not been afforded a pre-termination conference, and that the decision to discharge him had already been made when the appellant met with Commissioner Flynn on the date of termination. He asked the Board to conclude that the termination was legally invalid and order Mr. Tarbell reinstated with back pay and benefits.

In his opening statement Commissioner Flynn argued that Mr. Tarbell was unable to consistently conduct himself in a professional and appropriate manner. He argued that the Department had counselled and warned Mr. Tarbell about his performance, and that in spite of that counselling the Department had received more complaints about Mr. Tarbell than any of the other Labor Inspectors. Commissioner Flynn argued that in performing his inspection duties, Mr. Tarbell often exceeded his authority, performed his inspections in a manner which unduly interfered with work at those businesses, and left the business owners feeling angry and intimidated. Commissioner Flynn argued that 85% of a Labor Inspector's role involves public relations, educating employers on Labor Law and encouraging their full compliance with those laws,

The technical question of whether or not the letters of warning can be deemed warnings for "the same offense" must be resolved before addressing the merits of Mr. Tarbell's appeal. If the Board were to find that the warnings do not comport with the Personnel Rules, the discharge decision should be over-turned.

Per 308.03 (4), in pertinent part, provides the following:

"e. Employees who receive 2 written warnings for the same offense may be discharged by receipt of a final written notice of subsequent violation for the same offense. ...

"f. Each written warning shall expire as a basis for discharge 2 years after its date but shall be kept in the employee's file in the [Division] of Personnel."

The letters of warning issued to the appellant were dated May 31, 1990, March 7, 1991, and August 8, 1991, with the letter of August 8, 1991, serving as the final warning and notice of discharge. Neither the warning of May 31, 1990 nor the letter of March 7, 1991 had expired as a basis for discharge when the final letter was issued to the appellant.

The offense cited in the May 31, 1990 warning was "unacceptable and unprofessional behavior as a Labor Inspector as well as falsification of your daily visitation sheet according to the Rules of the Division". The offense cited in the second warning dated March 7, 1991 was "willful insubordination and unsatisfactory work due to your unacceptable and unprofessional behavior as a Labor Inspector II". The final warning dated August 8, 1991 notified the employee of his termination "for unsatisfactory work due to your unacceptable and unprofessional behavior as a Labor Inspector II".

While Per 308.03 (c) offers a list of "other offenses" for which an employee may be disciplined, it describes them as "Other offenses, such as... "

lateness, absenteeism without approved leave, practical joking, obscene language, unsatisfactory work and lack of cooperation. The Board does not find the absence of the phrase "unsatisfactory work" in the May 31, 1990 warning to be dispositive of this appeal. In each of the warnings, the appellant was advised that he was being disciplined for "...unacceptable and unprofessional behavior as a Labor Inspector". Therefore, the Board found that the warnings did comport with the Rules of the Division of Personnel as three warnings for the same offense.

The Board also did not find the absence of a pre-termination conference dispositive of the instant appeal. This discharge was not accomplished under the mandatory discharge provisions of the rules and therefore was not classified as immediate discharge without prior warning. The disciplinary action was taken over a period of fifteen months and was cumulative discipline for repetition of the same offense.

Pre-termination conferences are generally for the purpose of allowing an employee the opportunity to refute charges made against him. In the instant appeal, given that the charges have been consistent throughout the 15 month period between the first warning and notice of termination, the appellant had ample opportunity to refute the charges. The appellant did not appeal his first letter of warning, and challenged the second warning resulting in suspension only to the extent that the matter would be considered settled if the charge of willful insubordination were removed from the warning. The settlement agreement required that the appellant make that stipulation in writing. The record reflects that the stipulation was never completed and that no further action was taken on the appeal. The Board notes, however, that removal of the phrase "willful insubordination" from the second letter of warning would not have precluded its use as a basis for termination. Accordingly, the Board found that the absence of a pre-termination conference would not constitute grounds for reversing the termination decision.

Additionally, in the absence of a pre-termination conference, the appellant could have requested an informal meeting with Commissioner Flynn to discuss the termination and attempt to "adjust the problem". From the record, it does not appear that the appellant and/or his chosen representative requested such a meeting as provided under the Rules of the Division of Personnel.

"Whenever possible, before any type of disciplinary action appealable to the personnel [appeals board] is taken by an appointing authority or within 10 working days from the date of the action, the employee shall be entitled, with representation if requested, to a hearing (an informal meeting) between an employee and/or his chosen representative for the purpose of attempting to adjust the problem before said appointing authority." [See: Per 308.03(4) i.]

The appellant argued that the F.A. Gray inspection was not as described by the State's witness, Susan Gray. According to the appellant, the audit had been completed in a timely manner and that he had given no assurance to the management at F.A. Gray that there would be no civil penalties or fines.

First, the Board was not persuaded that the appellant's description of the F.A. Gray audit was more credible than that offered by Ms. Gray. The behavior described by Ms. Gray was consistent with that described by other State's witnesses. Second, the Department of Labor's decision to discharge the appellant arose from the Department's continuing dissatisfaction with his lack of professionalism and his inability to conduct his inspections in an appropriate manner. Therefore, even if the Board were to have found that the appellant had conducted himself at the F.A. Gray inspection in an appropriate and professional manner, that finding alone would not have been sufficient reason to reverse the decision to discharge Mr. Tarbell from his position of Labor Inspector II.

The appellant argued that the Department of Labor had violated the Collective Bargaining Agreement by not showing him the August 2, 1991 F.A. Gray letter (State's Exhibit B) prior to the date of termination. He argued that the Agreement required that any letters of complaint or commendation received by the Department must be placed in the employee's personnel file. The Board does not agree.

The Agreement states at Article XVI, Section 16.1.1, "An employee shall be provided with a copy of letters of complaint by a third party and letters of commendation at the same time such letters are placed in the personnel file." The F.A. Gray letter was not received until August 7, 1991, one day prior to the appellant's termination. The following day, he was notified of receipt of the letter and it was then placed in his file.

The appellant argued the Department of Labor has used "as a basis for discharge" an August 27, 1986 notice of verbal warning. He argued that because the warning had occurred more than two years prior to the actual date of termination, and because that warning was given consideration in deciding to discharge the appellant, the termination must be rescinded. Again, the Board does not agree.

The Personnel Rules, in providing that any type of disciplinary action will "expire as a basis for discharge" in two years, do not contemplate consideration of discharge decisions predicated solely upon an employee's performance during a 24 month period. The Rules intend to protect an employee from discharge by receipt of a third letter of warning for the same offense when those three letters have been issued over a period of more than 24 months.

While the Rules of the Division of Personnel clearly require that any warning expire as a basis for discharge two years from its date of issue, the Rules also provide that such warning remain on file in an employee's permanent personnel record. Therefore, the Board is of the opinion that the purpose of the Rule is to provide an over-view of the employee's performance throughout the course of his employment and the likelihood that a lesser discipline may have been appropriate by considering the employee's performance as a whole in determining the propriety of a termination from employment.

Having addressed the legal arguments raised by the parties, in consideration of the evidence before it, the Board made the following findings of fact:

Andrew Tarbell had been employed by the Labor Department as an Inspector from 1985 until his termination from employment on August 8, 1991. During most of his employment with the Labor Department, Cynthia Paveglio served as Mr. Tarbell's immediate supervisor. Mr. Tarbell received training equivalent to that received by other individuals employed as Labor Inspectors.

Mr. Tarbell had been counselled repeatedly by Ms. Paveglio, Mr. Wihby and Commissioner Flynn regarding his performance both in the office and in the field. Labor Inspectors are assigned to work in the central office on a rotating basis to answer calls from the public and from businesses. Four of Mr. Tarbell's fellow Inspectors testified that when they were assigned office duty with Tarbell, they believed he did not carry his share of the work. They testified that he was often away from his desk, did not answer as many calls, and on several occasions either unplugged his telephone or forwarded his calls to their desks. Because of the complaints received, Ms. Paveglio and Commissioner Flynn stopped scheduling Mr. Tarbell to work in the office.

The Board found that Mr. Tarbell did engage in inappropriate and unprofessional conduct. While the Board makes no specific findings concerning whether his conduct lead to a business owner being reduced to tears, his reporting that occurrence to other business owners demonstrates highly unprofessional and inappropriate conduct. Similarly, the Board found that Mr. Tarbell's remarks to various business owners about what fines or penalties might be assessed or should be assessed for violations discovered during an investigation constituted inappropriate behavior. The Board also found that Mr. Tarbell's investigations at Carney Drug and Papa Gino's Pizza were unnecessarily disruptive and compromised the effectiveness of any instruction he might have made as part of the investigation to bring the business into compliance.

The appellant argued that during the period in question, his performance had been affected by personal and financial problems he was having. While the Board might otherwise consider these to be mitigating factors, the record

reflects that Commissioner Flynn had previously suggested the appellant seek counselling for similar problems. The Board found that the Department of Labor had attempted to address the problems affecting the appellant's performance and therefore should not now be accountable for the appellant's decision not to take the advice which was given. Moreover, the personal difficulties described by the Appellant would not sufficiently justify the conduct found the Board.

The Board makes no finding with regard to the dispute arising out of which portion of a Labor Inspector's duties could be or should be considered "public relations" as the term was not clearly defined by either party. Even if there were a specific definition for "public relations" as applied to the duties of a Labor Inspector, the Commissioner of the Department of Labor has the authority to direct and supervise his employees and to discipline and ultimately remove an employee who failed to perform in keeping with those directions. As an employee of the Department of Labor, Mr. Tarbell failed to carry out the duties and responsibilities of his position in keeping with the directions of the appointing authority. Accordingly, his appeal is denied.

THE PERSONNEL APPEALS BOARD



Lisa A. Rule, Acting Chairman



Robert J. Johnson

cc: Virginia A. Vogel, Director of Personnel
Richard M. Flynn, Commissioner, Department of Labor
Michael C. Reynolds, SEA General Counsel

State of New Hampshire

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Response to Appellant's Motion for Reconsideration
APPEAL OF ANDREW TARBELL
Docket #92-T-3
(Department of Labor)
May 7, 1992

By letter dated March 11, 1992, SEA General Counsel Michael Reynolds filed a Motion for Reconsideration of the Board's February 27, 1992 Decision in the above-captioned appeal. By letter dated March 16, 1992, Labor Commissioner Richard Flynn filed the State's Objection.

In consideration of the record before it, the Board voted to deny the Motion for Reconsideration. The grounds for reconsideration raised by the appellant in his Motion were raised in his hearing on the merits and considered by the Board in deciding to sustain the termination and thereby deny the appeal.

Inasmuch as the Board did not find the final warning arose solely from the incident at F. A. Gray, the appellant is incorrect in asserting that the termination was legally invalid. Both the State and the appellant offered evidence to support a finding that the appellant understood the Department's concerns about his work performance and that the appellant understood a third and final warning for unprofessional behavior would result in his termination.

The Board voted to affirm its decision upholding Mr. Tarbell's termination for unacceptable and unprofessional behavior as a Labor Inspector II.

THE PERSONNEL APPEALS BOARD



Lisa A. Rule



Robert J. Johnson

cc: Richard M. Flynn, Commissioner, Department of Labor
Michael C. Reynolds, SEA General Counsel
Virginia A. Vogel, Director of Personnel