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State of New Hampshire



PERSONNEL APPEALS BOARD
State House Annex
Concord, New Hampshire 03301
Telephone (603) 271-3261

APPEAL OF GORDON WEST

Docket #91-T-14

Response to Appellant's Motion for Reconsideration

January 16, 1992

The New Hampshire Personnel Appeals Board (Bennett, Johnson and Rule) met Wednesday, December 4, 1991, to consider SEA General Counsel Michael Reynold's October 16, 1991 Motion for Reconsideration of the Board's September 26, 1991 Order denying the appeal of Gordon West. The Board also considered the State's Objection, filed on behalf of the Department of Corrections on October 22, 1991, by Attorney Michael K. Brown.

Having considered both the Motion and Objection in conjunction with its September 26, 1991 decision, the Board found that the appellant's Motion raised no grounds which were not already raised or considered by the Board during the appellant's hearing on the merits of his appeal.

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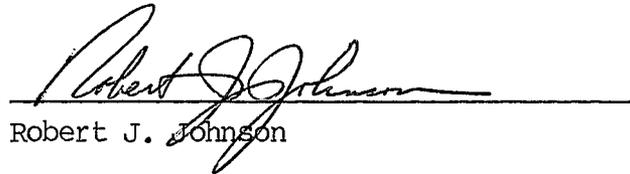
Among the arguments raised by the appellant in support of his Motion was that Corrections denied him the right to a hearing prior to discharge. Inasmuch as his separation was the result of a resignation rather than a disciplinary action, the State has argued correctly in its Objection that no such hearing would have been warranted.

Per-A 204.06 (b) of the Rules of the Personnel Appeals Board requires that Motions for Rehearing "...shall set forth every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable". Having failed to establish such grounds, the appellant's Motion is denied. Accordingly, the Board voted to affirm its decision of September 26, 1991, denying Mr. West's appeal.

THE PERSONNEL APPEALS BOARD



Mark J. Bennett



Robert J. Johnson



Lisa A. Rule

cc: Virginia A. Vogel, Director of Personnel
Michael K. Brown, Staff Attorney, Department of Corrections
Michael C. Reynolds, **SEA** General Counsel

State of New Hampshire

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PERSONNEL APPEALS BOARD

State House Annex
Concord, New Hampshire 03301
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APPEAL OF GORDON WEST Docket #91-T-14

Division of Field Services
New Hampshire Department of Corrections

September 26, 1991

The New Hampshire Personnel Appeals Board (Bennett, Johnson and Rule) met Wednesday, August 21, 1991, to hear the appeal of Gordon West, a former employee of the Division of Field Services, Department of Corrections. Mr. West was represented at the hearing by SEA General Counsel Michael Reynolds. Michael K. Brown, Staff Attorney, appeared on behalf of the Department of Corrections.

In his March 11, 1991 letter of appeal to the Board, the appellant argued that the Department of Corrections had mistakenly construed his January 23, 1991 memo to Chief Probation and Parole Officer Dina Bock, Field Services Regional Administrator Michael Dunfey, and Director of Field Services Thomas Tarr as a letter of resignation. He further argued that, "Even if [his] actions were a voluntary attempt at resignation, such action would not be effective until formally and finally accepted by the appointing authority. Although some paperwork may have been processed, nobody from DCC approached Mr. West and either orally or in writing told him that this resignation was formally accepted. His 3/1/91 memo then operated to nullify any effect his previous 'resignations' may have had." The appellant argued in his appeal to the Board that since he had stated the effective date of the supposed resignation, he had retained the right to withdraw or rescind any effect his letters had until the effective date.

The appellant argued that the department's refusal to allow the withdrawal of his resignation constituted a de facto termination. He contended that the concerns raised by him about dissatisfaction with his pay and with the performance of his supervisor had created substantial hostility on the part of the Department, and that the Department's refusal to accept the withdrawal of his resignation was an act of retaliation.

One of the other issues initially raised on appeal was the appellant's assertion that his actions during January, February and March, 1991, resulted in part from recurring episodes of post-traumatic stress disorder. He claimed that the outbreak of hostilities in the Persian Gulf, and his desire to re-enter active duty with the United States Air Force precipitated his notice to the Department of Corrections that he intended to leave State Service. During closing arguments on the date of hearing, however, the appellant agreed that he had effectively waived that argument.

Neither party submitted requests for findings of fact or rulings of law. Accordingly, the Board, after considering the testimony and evidence presented, found the following.

Gordon West was originally hired by the Department of Corrections in a position of Probation Parole Officer Trainee. Prior to his employment with the Division of Field Services, he had been a commissioned officer holding the rank of Major in the United States Air Force last stationed at Pease Air Force Base.

Upon appointment, Mr. West was informed that Probation/Parole Officers, upon successful completion of mandatory training through Police Standards and Training, and successful completion of a probationary period, are automatically promoted to Probation/Parole Officer I. He was also informed that Probation/Parole Officers, because of the manner in which their positions are established, were also eligible for promotion and salary increases within their positions to Probation/Parole Officer II or III upon submission of proof of additional formal education within the field.

In June, 1989, the legislature imposed a blanket moratorium on position reclassifications. The appellant failed to provide proof of eligibility for upgrading prior to implementation of the moratorium. Consequently, the Department of Corrections was unable to effect the position and salary upgrading discussed with the appellant at the time he was hired. In spite of his eventual acceptance of the Department's inability to address the issue of his salary grade increase, the appellant was also dissatisfied with the relationship he had with his supervisor.

On January 7, 1991, the appellant called Michael Dunfey, Division of Field Services Regional Administrator, at his home and informed Mr. Dunfey that he was planning to terminate his employment due to his frustrations with both his salary and his supervisory relationship. Dunfey met with West and his supervisor, Dina Bock on January 10, 1991, to see if the problems could be ironed out. After that meeting, he concluded that there were serious problems between the two, but hoped that they could work out their differences sufficiently to allow for a reasonable working relationship. He reported the results of that meeting to Thomas Tarr, Director of the Division of Field Services.

Periodically during the month of January, both Dunfey and Tarr met with West in an attempt to explain the salary issue to his satisfaction, as well as to try finding an alternative work setting for the appellant so that he would not resign. West was offered the opportunity to apply for transfer to another Division Field Office in Manchester, as well as an opportunity to apply for transfer into the Shock Incarceration Unit of the State Prison system. West indicated an interest in both positions.

Dunfey arranged for West to visit the Manchester Field Office on January 22, 1991, to meet the staff there. Although West did not meet the office supervisor during that visit, he did meet the officers and staff. Dunfey believed that West intended to apply for the transfer, and understood that West would be calling him the following day to give confirmation. When West did not call as planned, Dunfey called him. West said he'd discussed the matter with his wife and had spoken with representatives of the Air Force, and had decided it would be best if he resigned, since he believed he'd probably be called to active duty in the near future.

During that same period of time, West had discussed both the Shock Unit position and the Manchester Field Office position with Thomas Tarr. Tarr indicated his interest in keeping West in the Department. West told Tarr that he might be interested in taking one of the positions if he were allowed a 60 day leave of absence; otherwise, because of personal commitments, he would have no choice but to resign. Tarr informed him that between the number of employees already absent because of active military service, vacancies which were unfilled because of the budget crisis, and increased case loads, the Department would not be able to grant such a request.

On January 23, 1991, West submitted a memo addressed to CPPO Bock, Mike Dunfey and Tom Tarr stating:

"Because of the instability in the War in the Middle East and the mobilization of the Ready Reserve, I anticipate recall to active military service. Therefore it is my intention to leave State Service with the Department of Corrections effective 8 February 1991."

February 8, 1991, was a Friday, and the bi-weekly pay cycle ended on Thursday. Dunfey arranged with West that the last day of work would be Thursday, February 7, 1991.

On January 31, 1991, West again wrote to Bock, Dunfey and Tarr. His memo addressing "Request for adjustment of termination date" stated:

"I would like to request that my date of termination be adjusted from 2/7/91 to 3/15/91. The reason for my request is twofold in that it would allow me more time to prepare my case load for transfer, while at the same

time easing the burden on the other members of the Exeter staff. This field office recently lost an officer to Operation Desert Storm and the other members of the staff are currently reacting to that crisis, and I do not want to add to their dilemma by leaving on short notice."

The Department allowed an adjustment to the "termination date". Again, because 3/15/91 was a Friday, and the pay cycle ended on Thursday, the Department arranged with West that his last day of work would be Thursday, March 14, 1991.

On March 1, 1991, the appellant wrote to Bock, Dunfey and Tarr, stating:

"Effective immediately I would like to withdraw my resignation indefinitely. It is my opinion that some of the issues which originally caused me to want to leave have been resolved, and that I remain confident that I can continue to provide the level of dedication and loyalty [sic] which this department requires of its officers."

West was notified by memo dated March 7, 1991 that his request to withdraw his resignation was denied. The memo stated, "Accordingly, your notice of resignation remains in effect and will be effective on March 15, 1991. Your last day of employment will be Thursday, March 14, 1991."

By handwritten memo dated 14 March 1991, addressed to Bock, Dunfey, Tarr and Commissioner Powell, the appellant stated:

"I do not understand what I did or why you chose to fire me. I did not want to leave my position but you people forced me to make a [sic] employment decision when it was not required. You also approved my extension and now your [sic] firing me..."

The appellant, in support of his claim that he was entitled to withdraw his resignation at any time prior to its effective date cited a New Hampshire Supreme Court appeal involving an employee of the Department of Safety. The Board reviewed that order (Appeal of Department of Safety, Division of State Police, 123 N.H. 284) and found that appeal to have presented an entirely different set of circumstances.

The employee in question had been found removing tires, without purchasing them, from a store in Bedford on Christmas Eve. The employee had worked a fifteen hour shift the day before, and was functioning without adequate sleep. Although he was never charged criminally, he "broke down" when questioned by the security officer on the scene. He was subsequently confronted at the scene by members of the Bedford Police Department and a representative of the State Police. The employee met with the State Police Colonel and asked to be placed on sick leave. That request was denied, and the employee was told to resign or be fired. He submitted a one-line letter

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of resignation on December 28th. On January 8th, claiming that his resignation was a result of depression and was work related, he asked to be allowed to withdraw his resignation. The response he received from the State Police on January 26th stated, in pertinent part, "If there are extenuating circumstances that caused you to resign, you may appeal this decision to the Personnel Commission." The then Personnel Commission found that the appellant had not voluntarily resigned, and it had received considerable evidence on that point, including the testimony of a clinical psychologist.

In the instant appeal, West verbally indicated his intention to leave State service for personal reasons. The Department took extraordinary steps in trying to persuade him not to resign, including offering him the opportunity for several transfers within the department. In spite of those offers, he tendered his written resignation. The Department honored his request to change the effective date of resignation. When the appellant realized that his personal circumstances had changed, and that remaining with the Department would be in his own best interests, he asked to withdraw his resignation.

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The Board found that the appellant was not acting under any duress when he submitted his original resignation. Further, when he submitted his request that his termination date be extended, he gave a rationale which was "...twofold in that it would allow me more time to prepare my caseload for transfer, while at the same time easing the burden on the other members of the Exeter staff."

The case involving the Department of Safety employee focuses primarily on the fact that the employee never wished to leave State service, but only tendered his resignation when he believed that failing to do so would result in his dismissal. In Mr. West's case, when the employee attempted to withdraw his resignation, there was not so much as a suggestion that the employee had given his resignation under duress. His attempt to withdraw the resignation stated, in part, "It is my opinion that some of the issues which originally caused me to want to leave have been resolved.. ."

In consideration of all the evidence and testimony the Board found as follows:

1. The Commissioner of Corrections, or his designee, was acting within his authority in accepting West's voluntary resignation.
 2. The Department of Corrections violated no rule or law by refusing West's request to withdraw his resignation, since the resignation was given without duress.
 3. West's request to extend the date of termination was made eight days after the initial letter of resignation. The appellant had ample opportunity to consider the consequences of his actions. The fact that he requested an
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extension of the termination date is, in the Board's opinion, evidence that he was fully aware that his first letter constituted notice of resignation, and that he understood the department's authority to grant or deny his request to amend its effective date.

5. The Department's discussion with West regarding the effective date of separation constituted its first acceptance of his resignation. The Department's subsequent approval of West's request to extend the termination date constitutes a further acceptance of West's resignation.
5. The fact that West requested permission to withdraw his resignation prior to its effective date has no bearing upon the Department's authority to grant or deny that request.
6. Without proof of coercion, West's resignation is not tantamount to a termination and the Board lacks the authority to compel the Department of Corrections to provide him the relief requested.

Accordingly, the Board voted unanimously to deny the appeal.

THE PERSONNEL APPEALS BOARD



Mark J. Bennett, Acting Chairman



Robert J. Johnson



Lisa A. Rule

cc: Virginia A. Vogel, Director of Personnel
Michael K. Brown, Esquire, Department of Corrections
Michael C. Reynolds, SEA General Counsel