

State of New Hampshire



PERSONNEL APPEALS BOARD

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APPEAL OF STEPHEN WOODBURY Docket #94 -T-32

Department of Health and Human Services
Office of Child Support Enforcement

April 26, 1995

The New Hampshire Personnel Appeals Board (Bennett, Johnson and Rule) met Wednesday, February 15, 1995, to hear the termination appeal of Stephen Woodbury, a probationary employee of the Department of Health and Human Services, who was terminated from his employment as an Attorney I in the Office of Child Support Enforcement, effective June 6, 1994, for failing to meet the work standard. Mr. Woodbury was represented at the hearing by SEA Legal Intern Andrea Lehtonen. Sandra Platt, Human Resources Administrator, represented the Department of Health and Human Services. The record in this matter consists of the documents filed by the parties prior to the completion of the hearing, the audio tape recording of the hearing, and the exhibits admitted into the record at the hearing. The following witnesses offered sworn testimony: Catherine Keane, Kerry Barnsley, Denise Warren, Deborah LaClair, Stephen Woodbury, Robert Woodward and Thomas Hardiman.

Mr. Woodbury's notice of termination was dated June 6, 1994, and signed by Catherine Keane, Mr. Woodward's immediate supervisor throughout the five months of his probationary period. The basis for the termination, allegedly failing to meet the work standard, was described as follows:

"The reason for your termination is your repeated inappropriate staff interaction and unauthorized use of the office electronic mail system. For example, on several occasions during work hours you have composed and sent poems and other messages that are entirely unrelated to your job function to fellow employees through the electronic mail system. The composition of such poems and messages interferes with your work performance and causes you to be unable to work on your caseload. For example, on April 27, 1994, after you wrote a poem to Valerie Reed, I asked you to seek appropriate work. However, you used the electronic mail system for composing and sending a poem and other non-work related messages after that date."

Ms. Platt argued on behalf of the Department of Health and Human Services that Mr. Woodbury's termination from employment was reasonable, and that the appellant would be unable to meet his burden of proving that the termination was arbitrary, illegal, capricious, or made in bad faith. Ms. Platt argued that Mr. Woodbury's interactions with other staff were offensive and intrusive, and that in spite of the supervisory guidance he received on both his personal and professional relationships in the Office of Child Support, Mr. Woodbury engaged in inappropriate staff interactions and thereby failed to meet the work standard. Ms. Platt argued that the appellant was treated fairly and reasonably, and that the appointing authority

had the discretion to terminate Mr. Woodbury's employment prior to the end of the probationary period for failing to meet the work standard.'

Ms. Lehtonen argued that Mr. Woodbury was meeting the work standard, and had been complimented on the quality of his work. She argued that it was not uncommon for employees in the office to use the electronic mail system to send or receive personal messages, and that Mr. Woodbury had never been told not to send personal messages to co-workers. Ms. Lehtonen said the evidence would prove that in five months, Mr. Woodbury had spent less than an hour composing and sending electronic mail messages. Ms. Lehtonen also argued that the content of the messages, not the time taken to compose them or the use of the office computer was at the heart of the termination. Ms. Lehtonen said the evidence would show that the message to Ms. Warren in which Mr. Woodbury intended to say, "No blondes down here," contained a typographical error so that the note said, "No blonds [sic] done here," and was construed as having sexual overtones. Ms. Lehtonen argued that if the agency believed sexual harassment had occurred, it had an obligation to undertake an investigation, during which Mr. Woodbury would have had the opportunity to hear the charges against him and explain what he would characterize as misunderstandings.

Discussion of the evidence

Mr. Woodbury received his notice of termination on the afternoon of June 6, 1994, in a meeting with Catherine Keane, Supervisor VII and Kathleen Kerr, Chief Counsel for the Office of Child Support Enforcement/Legal. Shortly after 1:00 p.m., Ms. Keane instructed the appellant to come to the Director's office at 3:00 p.m. for a meeting. Mr. Woodbury did not appear as scheduled, and Ms. Keane had to have Mr. Woodbury called to remind him of the meeting. At approximately 3:10 p.m., when Mr. Woodbury did arrive, he was told he could either resign his position or be fired. He was given a copy of the termination letter to read. The letter asserted that Mr. Woodbury's inappropriate correspondence with other employees disrupted their ability to perform their jobs, requiring "the expense of managerial resources on issues that are unrelated to the child support work" performed by the office. Mr. Woodbury asked specifically for clarification of the term "inappropriate staff interactions." Ms. Keane insisted it was "just the poems." Early in the meeting, Mr. Woodbury asked, "You're going to end a person's legal career for this?"

Because the letter made reference to composition of the poems interfering with his ability to work on his caseload, the appellant told Ms. Keane and Ms. Kerr that writing the poems had taken less than an hour over the course of five months. He asked them to reconsider their decision. They would not. Mr. Woodbury also asked for permission to call the union before deciding whether or not to resign in lieu of discharge. He was not granted that permission. Mr. Woodbury was given until 4:00 p.m. to decide if he wished to resign instead of being dismissed. Mr. Woodbury refused the offer of resignation in lieu of discharge and was discharged.

Attorneys and support staff in the Office of Child Support Enforcement/Legal are assigned by county, and although the attorneys do not directly supervise the secretaries or paralegals, they do assign work to them. Deborah LaClair, the Supervising Paralegal was assigned to the

¹ Per 1001.02 (a) of the Rules of the Division of Personnel: "At any time during the initial probationary period an appointing authority may dismiss an employee who fails to meet the work standard provided the dismissal is not: (1) arbitrary; (2) illegal; (3) capricious; or (4) made in bad faith."

same county as Mr. Woodbury. The record reflects that there was a personality conflict between Mr. Woodbury and Ms. LaClair. Ms. LaClair testified that there had always been a give and take between the attorneys and paralegals in preparing cases to even out the workload. However, she said that Mr. Woodbury had given her his backlog of cases to handle, and that in her opinion, he was not doing his share of the specialized pleadings in those cases. Ms. LaClair testified that she had worked well with a number of people, but that Mr. Woodbury was "different". She testified that he did not always act respectfully toward her, and in one exchange had called her an "air head." She testified that on another occasion when she had called him about a case, he began complaining about being in the office, saying that his co-workers didn't like him. She testified that in trying to smooth it over, she went to see him, and he told her, "State your business and be on your way!"

On April 18, 1994, Mr. Woodbury E-mailed a poem he had written to Ms. LaClair. He testified that the poem was complimentary and was intended as a "thank you" for her hard work. Mr. Woodbury also hoped it would improve their working relationship. In the poem, Mr. Woodbury referred to himself as the "office poet" and "a clown who does not know it." He described Ms. LaClair as "the office workhorse, the one with power and force" and "the one with style and grace." Ms. LaClair testified that although she knew what the poem said, she didn't understand what it was about. She testified that it was "out of the blue" and it made her feel weird. Mr. Woodbury testified that he thought Ms. LaClair liked the poem, since she had sent a message back to him via E-mail which said he was a good poet and told him, "...this workhorse is going on vacation -See you in a week."

On April 26, 1994, Mr. Woodbury E-mailed a poem he had written to Denise Warren, another of the paralegals in the office. Ms. Warren was going through a divorce at the time and had spoken with several people in the office, including the appellant, about it. The appellant testified that the poem he sent to Ms. Warren was meant to be supportive and to cheer her up. He testified that she responded in a very positive way, telling him, "You sure know how to put a smile on someone's face." He testified that he took her reaction as a signal that she "wanted more attention."

Ms. Warren testified that receiving the original poem hadn't bothered her until she considered it in the context of later remarks by Mr. Woodbury. Ms. Warren testified that her divorce hearing was held May 17, 1994. She said that a day or two later, Mr. Woodbury came to her work area and remarked, "So, Dee, you're a free woman. So what are you doing Friday night?" She said she didn't know how to take the remark, and wondered if Mr. Woodbury was asking for a date, or thought there could be more to their relationship than as co-workers. She said she thought "he might just be reaching out." She said she became more uncomfortable when he made a later remark about her spending "lonely weekends" and warned her, "You need to be careful out there. There are a lot of bad men out there."

On May 26, 1994, Ms. Warren received an E-mail message from Mr. Woodbury which said, "There are no blonds [sic] done here!!!!!!!!!!!!!!!!!!!!" Mr. Woodbury testified that he knew Ms. Warren had recently had a luncheon engagement with a blonde gentleman and was not interested in seeing him again. He testified that he was only trying to reassure her that the individual in question was not in the office. Ms. Warren testified that she took the message as a personal affront, and forwarded a copy of it to Cynthia Williams the following day, looking for advice on how to handle it. Several days later, Mr. Woodbury came upstairs where Ms. Warren's office was located and said, "There are no blondes downstairs". Ms. Warren said she told Mr. Woodbury they needed to talk, and she wanted him to define "blondes". She testified that he just walked away.

Mr. Woodbury testified that he had no inkling that the word "done" had a sexual connotation, and had no intention of making a harassing remark to Ms. Warren, who is blonde. Mr. Woodbury testified that if he had known that the message said "no blonds [sic] done here" instead of "no blondes down here", and how offended Ms. Warren could have been, he would have sought her out to apologize. However, he testified that when Ms. Warren approached him and "barked" at him, he walked away, resolving not to speak with her for a few days.

In her testimony before this Board, and in her February 15, 1994 interview with SEA Legal Intern Andrea Lehtonen, Ms. Keane stated that Mr. Woodbury used his time improperly, composing poems when he should have been working on his open cases. When asked if she had discussed this issue with him, Ms. Keane said that on April 27, 1994, the appellant had sent her a copy of the poem which he had written to Valerie Reed, one of the attorneys on staff. Ms. Keane testified that she was quite annoyed and told Mr. Woodbury to speak to Ms. LaClair, the Supervising Paralegal, if he needed some work to do. Mr. Woodbury testified that he didn't realize the comment was intended as a directive not to write any more poems, or that she was angry with him for wasting time. He said he decided that Ms. Keane simply didn't understand his poems, and he decided not to send any more of them to her.

Ms. Keane testified that Mr. Woodbury had overstepped his bounds by comparing Valerie Reed to a "ghost" in the poem he sent to her, and quipping that, "...we never saw her face, [s]he was never in this place." Ms. Keane said that how much time Ms. Reed spent away from the office was a supervisory issue, and that Mr. Woodbury's poem made it appear that Ms. Keane had been discussing Ms. Reed with the other attorneys on staff. Ms. Keane did not address the content of the memo with Mr. Woodbury, nor did she tell him that he was interfering with supervisory relationships in the office. She also did not inform him that wasting office time writing poems could result in disciplinary action, up to and including termination.

Ms. Keane testified that Mr. Woodbury's inappropriate communication with staff had required unnecessary supervisory intervention. She testified that the remark in the Warren poem about "scoring like a dart" was particularly offensive in light of the later "blonde" remarks which the appellant made to Ms. Warren. There was no evidence, however, that Ms. Keane availed herself of the process available to her as a supervisor if she believed that Mr. Woodbury's remarks might have constituted harassment.

Ms. Keane argued that the poems must have taken more time to compose than Mr. Woodbury claimed. She said that instead of writing poetry, the appellant should have been concentrating on the special referrals assigned to him. While Ms. Keane implied that she was annoyed by Mr. Woodbury's literary attempts, there was no evidence that she told Mr. Woodbury to stop wasting time writing poems to his co-workers.

Ms. Keane testified that although the office did not have a written policy on the use of E-Mail, Mr. Woodbury's use of the computer system for sending personal messages was a clear indication of his failure to meet the work standard. When asked to compare Mr. Woodbury's poems and messages to the one written by Attorney Kerry Barnsley (Appellant's Exhibit K), Ms. Keane testified that Mr. Woodbury's messages were personal and inappropriate, whereas the one written by Mr. Barnsley about his promotion to the rank of Major in the Marine Corps Reserves addressed a professional accomplishment. She testified that it demonstrated that another organization and other supervisors held Mr. Barnsley in equally high regard.

The E-Mailmessage Kerry Barnsley sent out on May 25, 1995 to thirty-one people in the office, read:

"News of the Day...

"I know some of you may not really appreciate the significance of this, and some may genuinely not care... however, I spend more of my waking hours here than anywhere, so I wanted to share this important event...

"Today I was informed that I have been selected for promotion to the rank of Major in the United States Marine Corps Reserve. Superficially, this means that when I pin it on, someday, my drill pay for my one weekend a month will increase. However, my father was a Major in the Marine Corps from the time I was five to when he retired when I was seventeen. To become 'Major Barnsley' is a mixed bag of emotions. I am kind of amazed, myself, and I wanted to share that amazement, along with a healthy dose of pride, with the people that I see everyday.

"Money would be inappropriate; but cards, letters and small, expensive tokens of congratulations are acceptable.:"

Mr. Woodbury testified that although he didn't know Mr. Barnsley well, they had traveled together to Grafton County and Mr. Barnsley had shared some personal information about himself and his father. Mr. Woodbury testified that since he hadn't received any negative responses to his earlier poems to other staff members, and since Mr. Barnsley had asked other staff members for recognition of his promotion, he thought it would be appropriate to write a poem for Mr. Barnsley.

Mr. Barnsley did not react positively to the poem, testifying that it made him uncomfortable. Mr. Barnsley testified that the references to his father, particularly about following in his father's footsteps and avoiding "drinking in swills", were extremely personal and offensive. Mr. Barnsley testified that he had heard that several female staff persons had received poems from Mr. Woodbury, and that it had become something of an office joke wondering which woman might receive the next one. He also testified that according to the office gossip, the other poems contained something of a sexual or intimate nature. He said that when he then received the poem from Mr. Woodbury, his reaction was, "Yuck!"

On Thursday, June 2, 1994, Cheryl Williams forwarded to Ms. Keane a copy of the E-mail message from Ms. Warren to Ms. Williams about Mr. Woodbury and his "no blondes" message and remarks. On that same date, Mr. Barnsley sent a copy of the poem he had received from Mr. Woodbury to Ms. Keane, at her request. In his message to her, he noted that another staff member had seen the poem because she was standing nearby when he received the poem, and that he had sent it to another staff person when the issue "...came up in conversation, electronically." Mr. Barnsley indicated he had neither discussed the poem nor shown it to anyone else. On Monday afternoon, June 6, 1994, Mr. Woodbury was discharged from his employment for "continued inappropriate staff interaction and unauthorized use of the office electronic mail system." According to Ms. Keane's testimony, she was not aware that Mr. Woodbury had also sent poems to Anissa Smith and Deborah Laclair.

Standard of Review

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.

The alleged reasons that Mr. Woodbury failed to meet the work standard, and the Board's findings with regard to each allegation, are as follows:

1. "...repeated inappropriate staff interaction and unauthorized use of the office electronic mail system."

While there is no question that Mr. Woodbury's interaction with staff was fairly bizarre, there is no evidence that Ms. Keane, in her capacity as Acting Chief Legal Counsel and direct supervisor to the appellant, took steps to correct that behavior. Ms. Keane testified that when she received the copy of the poem to Valerie Reed, she told Mr. Woodbury that if he needed something to do, he should get some work from Ms. LaClair. Ms. Keane did not advise the appellant that his behavior was inappropriate, offensive, or intrusive. Ms. Keane did not inform the appellant that she considered his poem to Ms. Reed an intrusion into the relationship between supervisor and subordinate. Ms. Keane did not tell Mr. Woodbury that she had concerns about the amount of time he was spending on his caseload. In fact, on the contrary, Ms. Keane testified that except for the poems, she was fairly satisfied with the appellant's work.

The Board considers Ms. Keane's complaint about the improper use of the electronic mail system to be little more than make-weight. The evidence clearly demonstrates that there was no consistently applied standard for using E-mail, and although the Board appreciates the difference between a personal memo to co-workers and Mr. Woodbury's attempts at poetry, the fact remains that Mr. Barnsley, Mr. Woodbury and others, it would appear, used the electronic mail system for personal messages. Particularly after receiving Mr. Barnsley's message about his promotion, Mr. Woodbury would not have had reason to believe that sending personal E-mail messages could result in his termination.

2. "...your inappropriate correspondence with employees in the office disrupts the ability of the recipients to perform their jobs."

The State's witnesses testified that receiving poems from the appellant did not affect their ability to do their work. The larger disruption appeared to have resulted from office gossip engendered by the poems.

3. "Several of the employees who have received poems from you have brought the poems to the attention of a supervisor thereby causing the expense of managerial resources on issues that are unrelated to the child support work that this office performs."

The record reflects that only one of the witnesses brought the matter of the poems to a supervisor. Ms. Keane was aware of the Reed poem because Mr. Woodbury had sent her a copy of it. Ms. Keane became aware of, and requested a copy of, the Barnsley poem. Ms. Keane received a copy of the Warren poem from Cynthia Williams. The LaClair poem was uncovered during the investigation which followed Mr. Woodbury's termination. The "expense of managerial resources" might have been spared if Ms. Keane had discussed the question of appropriate staff interaction with Mr. Woodbury when she first saw the Reed poem. Rather than telling the appellant to find some work to do, she might have explained that she considered the poem an intrusion into supervisory relationships, inappropriate communication with other staff, and a waste of time and computer resources.

Ms. Keane testified that although she had needed to speak with Mr. Woodbury repeatedly about putting his title and phone number on memos he sent out of the office, and that she was still working with him on "judgment calls", he was otherwise performing his work satisfactorily. Mr. Barnsley's testimony confirmed that Ms. Keane thought very highly of Mr. Woodbury's work, although Mr. Barnsley testified that he couldn't understand how Ms. Keane had developed an impression so different from that of the rest of the staff. When asked if the other staff interacted with Mr. Woodbury, Robert Woodward, one of the appellant's fellow attorneys, testified that people would speak to Mr. Woodbury if he spoke to them first. Mr. Barnsley testified that Ms. Keane repeatedly told the other staff members to "give [the appellant] a chance".

The Board ruled as follows on the Appellant's Requests for Findings of Fact and Rulings of Law:

#1 and #2 are denied. The Board did not find Mr. Woodbury's termination to be arbitrary, capricious or in bad faith. The Board concludes that the termination was unlawful. The Board finds that Mr. Woodbury's job performance overall failed to meet the work standard. The appointing authority gave Mr. Woodbury its reasons for termination. However, on the very narrow issue of the poems themselves, the Board found that termination was too severe and that Mr. Woodbury did not meaningfully receive his rights pursuant to Per 1001.02(b)(2).

#3 is denied. The evidence does not support the conclusion that Mr. Woodbury would not have been dismissed if a more detailed discussion of his interactions with staff had occurred. On the contrary, if the appointing authority had discussed all the relevant issues and had not retreated to its position that the poems by themselves were sufficient to warrant termination, the State's decision might have been upheld.

#4 is neither granted nor denied. The Board agrees that if the termination had been based solely on the appellant's use of the electronic mail system, the termination could be deemed arbitrary, since other employees in the Office of Child Support Enforcement also used the E-mail system for sending personal messages. However, Mr. Woodbury's termination did not arise solely from the use of E-mail, although this fact, in light of the procedure followed, does not sustain the termination.

#5 is denied. The record reflects that Mr. Woodbury received both positive and negative feedback about his work product. However, Mr. Woodbury's termination arose from his personal conduct rather than the quality of his work product. The record reflects that Mr. Woodbury avoided his co-workers when they confronted him with any negative feedback about his personal interactions with them, as evidenced by his testimony about Ms. Keane's reaction to the Reed poem, his conclusion that Mr. Barnsley's negative reaction to his poem was non-committal, and his decision not to speak with Ms. Warren when she confronted him about his "blondes" comments.

#6 is denied. The reference to "inappropriate staff interactions" does not necessarily lead to the conclusion that there are "other unspecified allegations which are left up to the imaginations of the reader". Similarly, the Board did not find that a charge of "inappropriate staff interactions" would be any more damaging to an attorney than it would to any other employee, and can not be used to support the claim that his termination was made in bad faith. Rather, such an allegation, without more, is too vague to support termination in this case.

#7 and #8 are granted to the extent that they are consistent with the Board's decision below. Otherwise, they are denied.

Although the State is correct in its assertion that the Personnel Rules provide for termination of probationary employees without prior warning at any time during the probationary period

for failure to meet the work standard, the Rules also require the appointing authority to meet with the employee to "discuss the appointing authority's reason(s) supporting the decision to dismiss the employee." [Per 1001.02 (b)(1)] In this instance, the appointing authority told Mr. Woodbury that the poems were the only basis for the termination.

Although the Department of Health and Human Services, Office of Child Support Enforcement might well have terminated Mr. Woodbury's employment for failing to meet the work standard if it had actually addressed his personal conduct and its effect on his ability to work with others, the appointing authority failed to support its very limited claim that writing and sending the poems interfered with Mr. Woodbury's performance of his duties or constituted "repeated inappropriate staff interactions."

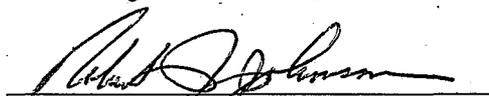
The appointing authority failed to take responsibility for apprising Mr. Woodbury that his conduct as a whole demonstrated failure to meet the work standard. The record reflects that Mr. Woodbury made his co-workers uncomfortable. His own witness testified that people in the office avoided him whenever possible. Although the appellant demonstrated technical abilities to perform the duties of his position, his inability to establish and maintain harmonious, effective working relationships with his co-workers and his tendency to flee from any confrontation about those relationships damaged his ability to contribute to the unit in general. The appointing authority had an obligation to address those issues but did not. Ultimately when the appointing authority met with Mr. Woodbury to discuss his termination from employment, the appointing authority retreated from its original findings, narrowing the basis for termination to the poems alone. By not addressing the totality of the appellant's actions, the appointing authority effectively denied the appellant an opportunity to hear, discuss and understand his failure to meet the work standard. See, *inter alia*, Per 1001.02 (b)(2).

The Board voted unanimously to grant Mr. Woodbury's appeal, but only to the extent that he is to be reappointed to his position of Attorney I in the Office of Child Support Enforcement. That reinstatement shall be made without benefit of back-pay, retirement service credit, seniority credit or credit toward accrual of leave. Furthermore, upon reinstatement, Mr. Woodbury shall commence a new probationary period which shall be not less nor more than 12 months, beginning on the date of reappointment.

THE PERSONNEL APPEALS BOARD



Mark J. Bennett, Acting Chairman



Robert J. Johnson, Commissioner



Lisa A. Rule, Commissioner

cc: Virginia A. Lamberton, Director of Personnel
Andrea Lehtonen, SEA Legal Intern
Sandra Platt, Administrator, Health and Human Services