

State of New Hampshire



PERSONNEL APPEALS BOARD
25 Capitol Street
Concord, New Hampshire 03301
Telephone (603) 271-3261

APPEAL OF JAMES COLBURN

DOCKET #99-D-2

DEPARTMENT OF TRANSPORTATION

August 26, 1999

On July 1, 1999, the Board received the State's Motion for Rehearing in the above-titled appeal. Appellant's Objection to Department of Transportation's Motion for Rehearing and Cross Motion for Rehearing were received on July 6, 1999.

In accordance with RSA 541:3 Motion for Rehearing:

"Within 30 days after any order or decision has been made by the commission, any party to the action or proceeding before the commission, or any person directly affected thereby, may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order, specifying in the motion all grounds for rehearing, and the commission may grant such rehearing if in its opinion good reason for the rehearing is stated in the motion."

In the Board's opinion, neither party articulated reasons sufficient to support a finding that the Board's decision dated June 23, 1999, was unlawful or unreasonable in light of the facts in evidence, the requirements of RSA 21-I:58, or the applicable Rules of the Division of Personnel. Accordingly, having found no good reason to grant either Motion, the Board voted unanimously to deny both parties' Motions for Rehearing. In so doing, the Board voted to affirm its decision dated June 23, 1999, reinstating Mr. Colburn to the position of Principal Engineer, salary grade 32, without back-pay for the period of demotion.

THE PERSONNEL APPEALS BOARD



Patrick H. Wood, Chairman



Robert J. Johnson, Commissioner



James J. Barry, Commissioner

cc: Virginia A. Lamberton, Director of Personnel, 25 Capitol Street, Concord, NH 03301

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APPEAL OF JAMES COLBURN

Department of Transportation

Docket #99-D-2

June 23, 1999

The New Hampshire Personnel Appeals Board (Wood, Johnson and Barry) met on Wednesday, June 23, 1999, under the authority of RSA 21-I:58, to hear the appeal of James Colburn, an employee of the Department of Transportation. Mr. Colburn was appealing his disciplinary demotion to Civil Engineer IV, salary grade 26, and transfer to the Bureau of Materials and Research, effective February 27, 1998. Prior to his demotion and transfer, Mr. Colburn had been employed as a Principal Engineer, salary grade 32, and had served as Administrator of the Bureau of Traffic. Mr. Colburn was represented at the hearing by Attorney Shawn Sullivan. Assistant Attorney General Kathryn Bradley appeared on behalf of the State.

The appeal was originally heard on offers of proof by the representatives of the parties (Mr. Colburn was then appearing *pro se*). On December 7, 1998, the Board notified the parties that after reviewing the evidence, it felt it had insufficient evidence upon which to fairly decide the appeal. The Board then issued an order scheduling the matter for further hearing, beginning with a prehearing conference which was to have been held on January 13, 1999. That conference was postponed at the appellant's request, and another prehearing conference was scheduled on April 28, 1999, at which time the parties agreed to present their evidence at the hearing scheduled for June 23 and June 24, 1999.

On June 22, 1999, the Board's staff received from the Appellant a Motion for Summary Disposition, as well as the State's Objection thereto.

At the hearing on June 23, 1999, the Board advised the parties that it would hold in abeyance Appellant's Motion for Summary Disposition. However, after hearing the parties' stipulation of facts, the Appellant's arguments in support of a Motion in Limine made orally at the hearing, and oral argument on the applicability to (former) Per 1001.07 of the Rules of the Division of Personnel, the Board recessed the meeting to discuss the motion in light of evidence already in the record. Having done so, the Board voted unanimously to reinstate the appellant immediately to his position as Principal Engineer, salary grade 32. For the reasons set forth below, the demotion shall be reduced to a written warning.

When the Department of Transportation became aware of conditions at the Bureau of Traffic in November, 1996, it could have demoted the appellant immediately pending the outcome of the criminal investigation involving the discharge of paint residue into the storm drains. The Department failed to avail itself of that option, however, deciding instead to issue a letter of counsel. Although that letter clearly described the offensive conduct and the possibility that discipline could be imposed at a later date, that letter does not carry the weight of a written warning contemplated by the Rules for the purposes of subsequent demotion under the provisions of [former] Per 1001.07 (a)(2). As the appellant argued, neither the first nor the second official written warnings could be considered notice to the appellant that he might be demoted for conduct occurring prior to the date of the first warning.

The appellant shall be reinstated to his title and salary grade, effective June 23, 1999, subject to the following conditions. Per-A 202 of the Board's rules clearly requires that any appeal filed be received by the Board within fifteen calendar days of the action under appeal, and that the appeal set forth the reasons why the appellant believed the action was inappropriate. Appellant's argument that the demotion violated Per 1001.07(b) by not providing the appellant with two prior warnings was not raised at any time prior to the date of today's hearing. Because the appellant failed to raise that issue in a timely fashion, the State reasonably relied upon his earlier assertion

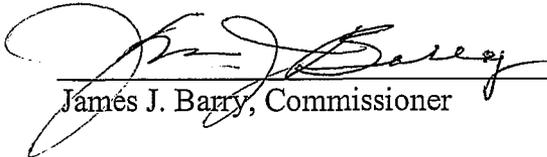
that the demotion was improper simply because he had been singled out for discipline and had not been apprised of all the information obtained by investigators during the course of their investigation. Appellant's failure to provide timely notice of the issue outlined in his Motion for Summary Disposition should not create a basis for a windfall in the form of a substantial back-pay award. Therefore, no back-pay shall be awarded for the period of demotion.

All written warnings contained in the appellant's file shall remain on file. The letter of demotion shall be rewritten as a letter of warning for failure to meet the work standard, and shall include those facts stipulated to by the parties at the June 23, 1999, hearing.

THE PERSONNEL APPEALS BOARD


Patrick H. Wood, Chairman


Robert J. Johnson, Commissioner


James J. Barry, Commissioner

cc: Virginia A. Lamberton, Director of Personnel, 25 Capitol Street, Concord, NH 03301
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APPEAL OF JAMES COLBURN

DOCKET #99-D-2

DEPARTMENT OF TRANSPORTATION

December 7, 1998

The New Hampshire Personnel Appeals Board (Bennett, Wood and Bany) met on Wednesday, August 26, 1998, under the authority of RSA 21-I:58, to hear the appeal of James Colburn, an employee of the Department of Transportation. Mr. Colburn, who appeared pro se, was appealing his demotion, effective February 24, 1998, from Principal Engineer (Administrator of the Bureau of Traffic) to Civil Engineer IV. He was demoted following an investigation into his alleged "role and failure to take appropriate administrative action in connection with environmental violations," and for continued failure to meet the work standard. Assistant Attorney General Kathryn Bradley appeared on behalf of the State.

The appeal was heard on offers of proof. The record of the hearing in this matter consists of the audio tape recording of the hearing, notices and orders issued by the Board, pleadings submitted by the parties, and numerous documents admitted into evidence as follows:

State's Exhibits:

1. Letter of disciplinary demotion dated February 24, 1998
2. Letter of warning dated January 13, 1998
3. Letter of warning dated August 11, 1997

4. Letter of counsel dated November 19, 1996
5. Performance summary dated March 25, 1997
6. Interview of James Colburn, dated November 24, 1996, December 10, 1996 and February 20, 1997
7. Interview of Jon Hanson dated November 18, 1996
8. Interview of Anne Levesque dated November 22, 1996
9. Interview of Jeffrey Jenkins dated December 5, 1996
10. Interview of Carrol Murray dated November 25, 1996
11. Interview of Jeffrey McGarry dated November 16, 1996

Appellant's Exhibits

- #A1. Sequence of events
- #A2. John Hanson AG's Interview
- #A3. John Clement AG's Interview
- #A4. Anne Levesque AG's Interview
- #A5. Press Release
- #A6. Memo on pavement marking production
- #A7. Memo on yard procedures
- #A8. Memo on equipment teardown procedures
- #A9. Mom patrol shed cleanup
- #A10. Memo on floor drains
- #A11. John Hanson memo
- #A12. Memo on environmental cleanup
- #A13. Memo on environmental issues meeting #2
- #A14. Memo on environmental issues meeting #3
- #A15. Memo on environmental issues meeting #4
- #A16. Memo on truck wash system
- #A17. Memo on best management practices
- #A18. Letter to DES
- #A19. Memo on draft truck wash RFP

- #A20. Long Range Pavement Marking Program
- #A21. Memo on review of environmental issues
- #A22. GEI Report
- #B1. Letter of demotion
- #B2. Memo from D. Graham on fall protection
- #B3. Memo from J. Colburn on fall protection
- #B4. Cover Fall Protection Program
- #B5. Policy No. 4.02
- #B6. Performance summary
- #B7. Memo - financial management plan
- #B8. Memo - administrative procedures
- #B9. Memo - consumable inventory
- #B10. Memo - financial procedures
- #B11. Memo - administrative issues
- #C1. Boulay decision
- #C2. Cover - Hazardous and Solid Waste Management Plan

Ms. Bradley argued because of Mr. Colburn's negligence, the Department was facing up to \$300,000 in fines by the Department of Environmental Services as a result of an investigation into improper handling of hazardous materials at the Traffic Bureau Facility. Ms. Bradley offered to prove that the Department learned in July, 1996, that paint residues were being washed into storm drains at the facility, and ultimately discharged onto the ground nearby. She argued that DOT Safety Officer Jon Hanson and Hazardous Waste Coordinator Anne Levesque directed Mr. Colburn to have the practice stopped immediately. However, she argued, the appellant ignored their directives and took no steps to initiate a program of mitigation or remediation. She argued that there was evidence of a subsequent discharge of paint into the same storm drain system in November, 1996, that the appellant failed to report to his own department or the Department of Environmental Services. She argued that an inspection of the Traffic Bureau Facility for which Mr. Colburn was responsible revealed numerous hazardous

waste handling violations, tripping hazards, and unmarked or mismarked disposal containers, and that the yard area was in complete disarray. She said that the appellant admitted he only inspected the yard itself several times a year. She also argued that the appellant's conduct, when viewed in light of prior poor performance evaluations, prior written warnings, and his demonstrated failure to abide by departmental policies and procedures, provided ample justification for the appellant's demotion.

Mr. Colburn argued that he first became aware of the disposal issue in July, 1996, and that it was not until November of that year that the Department undertook any measures to correct the problem or devise policies, procedures or guidelines for handling the problem. He argued that until the DES investigation, no one in the department considered the materials hazardous, and that throughout the 1996 pavement marking season, the Department's overall emphasis had been to increase production. He argued that once the paint problem had been identified, he made appropriate recommendations for mitigating the potential hazard but that the Department rejected his recommendations for mitigation, claiming insufficient funds and personnel to accomplish any long term solutions.

Mr. Colburn argued that the Department had singled him out for punishment in order to protect itself from future repercussions from the Department of Environmental Services. He noted that although investigation into the paint discharge was handled as a criminal investigation by the Environmental Protection Bureau of the Attorney General's Office, no charges had been made against him as a result of that investigation. He also argued that although he was allowed to see the Attorney General's summary of the investigation, the Department failed to provide him with access to the entire investigative file compiled by the Attorney General's Office, thereby denying him a meaningful opportunity to refute the evidence against him.

There is no dispute that as the Administrator of the Bureau of Traffic, Mr. Colburn was responsible for the overall administration and operation of that bureau. As the February

24, 1998, letter indicates, Mr. Colburn's class specification required him to "implement policy decisions relative to traffic operations and engineering and to exercise direct supervision of the bureau's staff engineers, technicians, and supervisors." His job also required him to, "evaluate plans, proposals, and design concepts to ensure compliance with policies and standards, and to establish priorities for completing required work to best utilize available personnel and resources."

The fact that Mr. Colburn was largely unaware of practices being carried out by his subordinate employees within the facility itself provides some evidence that the appellant was not meeting the work standard. There is no dispute that paint-contaminated wash water was discharged into storm drains at the facility in July, 1996, and that although he was instructed to take steps to ensure that such a discharge did not occur again, a subsequent discharge occurred in November of 1996. The evidence also reflects that Mr. Colburn was unable to achieve any long-term mitigation of the problem until after November, 1996. However, there also is ample evidence to support the appellant's assertion that apart from being ordered to correct the problem, he received little assistance from others in his department including the Safety Officer, Hazardous Waste Coordinator and Director of Operations to implement any long-term solutions. Finally, despite representations about potential fines, there was no evidence presented that any criminal charges were filed, that the Department of Environmental Services levied any fine against the Bureau of Traffic as a result of the discharges in July or November, 1996, or that the Department of Environmental Services was dissatisfied with test results after the discharge or remediation plans were submitted to them for review.

Documents offered into evidence by the appellant indicated that the bureau was using the same truck wash-out procedures it had used before switching from alkyd-based to water-based paint, and that neither the department nor the paint manufacturer had indicated that paint residue needed to be handled as a hazardous waste, or required any special handling. In his interview with the Attorney General's investigators, John Clement, Director of Operations, indicated that his major concern was the unsightliness of the paint

residue in the water, not that the residue was hazardous, because he believed it was not. Furthermore, he indicated that after the discharge in July and his conversation with the appellant, he "considered the matter taken care of," and simply instructed the appellant to follow-up with Safety Officer Hanson.

Hazardous Waste Coordinator Levesque told investigators that she met with Mr. Colburn, Mr. Jenkins, Mr. McGarry, Mr. Garstang and Mr. Hanson on July 25, 1996, at the Bureau of Traffic. Mr. Jenkins reported that Franklin Paint Company, the paint manufacturer, had told bureau employees that the paint was not hazardous and could be washed down the drains. She told investigators she instructed traffic bureau staff that even if the paint were not hazardous, it had to be kept out of the drains and should be handled in the same fashion as the toluene wastes the bureau was already shipping out via a waste hauler. Ms. Levesque agreed to take samples to find out if the paint contained hazardous waste. She did not discuss the need to report the problem to Environmental Services, something she characterized to investigators as "her biggest regret." While she was waiting for test results from Clean Harbor, Ms. Levesque simply assumed that any and all paint waste was being stored in drums. She never visited the site for verification. Further, when she received the report from Clean Harbor that all the test samples contained 100 parts per million of methyl alcohol, over the legal limit and informed Safety Officer Hanson, he instructed her to set up a meeting with Mr. Colburn and Bureau of Traffic personnel. Ms. Levesque apparently never "got around to setting up this meeting because she was busy working on an upcoming training class."

Mr. Hanson reported that he did not keep detailed notes or minutes of conversations with staff from the Bureau of Traffic during the relevant period. In a December 16, 1996, memo to Mr. Colburn, after the second discharge had been reported, Mr. Hanson responded to Mr. Colburn's request for assistance by permitting the appellant's bureau to have access to Hazardous Waste Manager Levesque's services for approximately one hour per week. He wrote that, "It should be understood that her advice, expertise or casual remark will not be documented in the form of formal minutes, and she will not be

expected to follow up each issue or observation discussed in writing." He also indicated that because the painting season was complete for the year, they expected to be able to respond to requests for assistance "in a non-emergency fashion." There was no evidence offered of any active follow-up by the Safety Officer, Hazardous Waste Coordinator or Director of Operations until they learned of an anonymous call to the Department of Environmental Services about continued discharge of paint residue into the storm drains. Mr. Clement told investigators he believed the call came from a disgruntled former employee.

On November 19, 1996, Director Clement issued a counseling memo to Mr. Colburn, noting the appellant's "lack of leadership associated with [his] position as Administrator of the Bureau of Traffic." The basis for the counseling memo was the discharge of paint from the Bureau facility in July of 1996 and again in November, 1996. Mr. Colburn was instructed to 1) develop written procedures providing instructions to pavement marking crews on proper truck and system cleaning methods, 2) provide for Mr. Jenkins or himself as a member of senior management to personally witness cleaning and flushing operations, 3) develop a long term solution to address environmental deficiencies, 4) issue a letter of counsel to Traffic Maintenance Supervisor Jenkins, and 5) keep all facilities used by the Traffic Bureau orderly and clean.

By mid-December, 1996, Mr. Colburn had submitted plans to Mr. Clement for a schedule of activities to initiate remedial measures at the Bureau of Traffic facility, and indicated which employees would be responsible or accountable for each of the tasks. The Department offered no evidence to suggest that it found the plan or activities associated with the plan unacceptable.

Nonetheless, in March 1997, Mr. Colburn received an unsatisfactory performance evaluation. In general terms, the evaluation noted deficiencies in Mr. Colburn's ability to bring activities to closure, to perform effective decision-making on his own, to manage his bureau's budget, and to follow-through with subordinate personnel to ensure that they

were performing their jobs appropriately. The evaluation made no mention of the paint discharge issue that had occurred during the review period (3-1-96 to 3-28-97)

Director Clement issued a written warning to Mr. Colburn on August 11, 1997, citing the appellant's failure to meet the work standard. Specifically, he wrote that one of the crews assigned to Mr. Colburn's bureau was observed working out of a bucket truck on a sign structure without fall protection required by Occupational Safety and Health Administration regulations, and that failure to require the appropriate safety procedures constituted a gross violation of safety standards. In the warning, Mr. Colburn is cited for failure to meet the work standard because he failed to properly discipline responsible subordinate employees as a result of the incident.

Mr. Colburn made an uncontroverted offer of proof, however, that the fall protection issue actually arose more than a year earlier, when an employee of the Bureau of Bridge Maintenance was actually injured in a fall. He offered evidence that Safety Officer Hanson was directed to develop a Fall Protection Program for the department as a whole. Mr. Colburn argued that Director Clement did not communicate the department's concern, or plans to develop a safety program. He also made an uncontroverted offer of proof that although actual injury occurred in the Bureau of Bridge Maintenance as the result of a fall, the Bureau Administrator responsible for the bridge crews was not disciplined or counseled as a result of the incident. By comparison, Mr. Colburn received a written warning for unsatisfactory performance citing his "lack of administrative oversight."

The August 11, 1997, warning also cited Mr. Colburn's failure to "prepare, monitor, adjust and supervise the accounting activities of the Bureau of Traffic's budget." Specifically, Mr. Clement wrote that Mr. Colburn anticipated a serious shortfall in operational appropriations, requiring the department to arrange for additional funding. At the close of the fiscal year, however, the bureau lapsed approximately \$146,000 that could have been used to offset the other operating expenses.

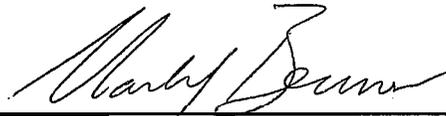
On January 13, 1998, the Department issued another warning to Mr. Colburn for failure to meet the work standard arising out of an alleged violation of DOT Policy 4.02 concerning the acquisition of data processing equipment, software and services. Specifically, the warning cited Mr. Colburn for a surplus property purchase he authorized for the acquisition of two used laser printers before receiving approval from the department's Technologies Manager. Mr. Colburn believed the policy only applied to the purchase of new data processing hardware, software and services.

On February 28, 1998, Mr. Colburn was issued his notice of immediate disciplinary demotion for his alleged "...role and failure to take appropriate administrative action in connection with environmental violations revealed in an investigation [conducted by the Attorney General's Office in 1996]..."

Mr. Colburn made an uncontroverted offer of proof that at his pre-disciplinary meeting with Director Clement, he requested a complete copy of the Attorney General's investigative file. He asked for it again prior to the hearing. Mr. Colburn was told that in order to obtain the report, he would be required to file a request under the Right to Know Law. Mr. Colburn argued that the State's refusal to disclose all the evidence upon which it relied in effecting his demotion violated Per 1001.07 (b)(2) of the Rules of the Division of Personnel, thereby requiring his reinstatement without loss of pay or benefits to his former position.

Having considered all the evidence, argument and offers of proof, the Board found that there was insufficient evidence upon which to fairly decide the appeal. Therefore, the parties are directed to appear for a prehearing conference in accordance with the attached notice, so that the matter may be scheduled for further hearing where the parties can offer live witness testimony, and cross-examine the other party's witnesses.

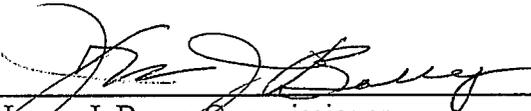
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James Colburn, Appellant