

State of New Hampshire



PERSONNEL APPEALS BOARD

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APPEAL OF JEAN SAMMS

Department of Revenue Administration

Docket #2006-D-003

January 10, 2007

The New Hampshire Personnel Appeals Board (Wood, Casey and Bonafide) met in public session on Wednesday, August 30, 2006, under the authority of RSA 21-I:58 and Chapters Per-A 100-200 of the NH Code of Administrative Rules, to hear the appeal of Jean Samms, an employee of the Department of Revenue Administration. Ms. Samms, who was represented at the hearing by Attorney Peter Callaghan, was appealing her demotion, effective August 15, 2005, from Business Administrator III, salary grade 27, to Municipal Accounts Auditor, salary grade 24. Assistant Revenue Counsel Michael Williams appeared on behalf of the Department of Revenue Administration.

The record of the hearing in this matter consists of pleadings submitted by the parties, notices and orders issued by the Board, the audiotape recording of the hearing on the merits of the appeal, and documents admitted into evidence as follows:

Department's Exhibits

- A. Authorization of Limited Power of Attorney (admitted over Appellant's Objection)
- C. Operations Committee Minutes, Monday, November 15, 2004
- D. Emails (2)
- E. Emails (4)
- G. April 8, 2003 Memo from Stanley R. Arnold to Division Directors

- I. Code of Ethical Conduct for State of New Hampshire Department of Revenue Administration Employees
- J. Confidentiality of Information Memorandum dated 1/29/04 to Department Employees and Vendor Employees
- K. Emergency Contact Information and Annual Sign-Offs of Policies
- N. August 12,2005 Letter of Demotion from Commissioner Blatsos to Jean Samms

Appellant's Exhibits

- 3. "Refinancing in New Hampshire and the Real Estate Transfer Tax" article written by Stanley R. Arnold
- 4. Email message dated December 28,2004
- 7. RSA 21-J:14 (Lexstat print)

The following persons gave sworn testimony:

G. Philip Blatsos, DRA Commissioner
Stanley Arnold, former DRA Commissioner
Barbara Reid, former Assistant DRA Commissioner
Jean Samms, Appellant, Municipal Accounts Auditor

At the State's request, the witnesses were sequestered.

At the conclusion of the hearing, both parties submitted Requests for Findings of Fact and Rulings of Law. To the extent that those requests are consistent with the decision below, they are granted; otherwise, they are denied.

Narrative Summary

In November 2004, Governor-Elect John Lynch began forming a transition team in preparation for assuming office in January 2005. Stanley Arnold, former Commissioner of the Department of Revenue Administration was appointed to that team and approached Revenue Commissioner Philip Blatsos about allowing Barbara Reid, then the Department's Assistant Commissioner, to serve on the team because of her experience in budget preparation. Commissioner Blatsos agreed to permit Ms. Reid to work on the transition team, but decided to suspend her duties as Assistant Commissioner, as he felt it would represent a conflict for her to serve in both capacities. At a regular Operations Meeting held in the Department of Revenue Administration on November 15, 2004, the Commissioner informed staff of the change in Ms. Reid's duties. He also indicated that if anyone from the Transition Team contacted DRA for information, those requests should be submitted to the Commissioner's office to ensure that the Department "spoke with one voice and got it right." According to the minutes of the meeting, the Commissioner also informed staff that although he might assign someone to respond to requests from the transition team, that person would be notified in advance of such assignments. He also informed staff that he was to be notified about all direct contact with the Transition Team, and those contacts should be recorded. Although Ms. Samms was not present at the November 15th meeting, she did receive and read the minutes.

Between mid-November 2004 and January 2005, Commissioner Blatsos and Mr. Arnold spoke frequently, and the Commissioner allowed Mr. Arnold to receive copies of the some of the same reports that the Department provided as a courtesy to the legislature. On December 28, 2004, Commissioner Blatsos emailed a report to Mr. Arnold that included revenue forecasts. In his message, Mr. Blatsos wrote, "Here are some of the base sheets, they are good to get a broad look but there are still some problems. Jeanne is out till tomorrow and she did the first cut and we need to go over that information tomorrow. I will follow up with any corrections...." (Blatsos Exhibit 4)

The following morning, Ms. Samms sent Mr. Arnold an email with various reports attached. In her email, Ms. Samms wrote, "Some reports (refund, revenue and forecast) update automatically

every month so I don't have those specifically for November. The trend, business, retail and tobacco are for November. If you would like, I can send a paper copy of the refund, revenue and forecast reports for November. I'm assuming that this was cleared with Phil, he never mentioned it to me." (State's Exhibit D)

Mr. Arnold's December 29, 2004 email response to Ms. Samms read, "Jean, Thanks for the reports. Phil sent me some 'reports' also, but pretty bare bones. I didn't specifically ask him for the reports from you and I don't plan on even letting him know what I now have. His 'reports' raise enough questions for me to ask. These reports will allow me to confirm his answers. I never want to get you into trouble, but if anything were to happen I assure you the governor would step in at my request." Ms. Samms responded, "That's good enough for me."

In the ensuing months, throughout the transition, after Ms. Reid's resignation, and after Governor Lynch's inauguration, Ms. Samms continued sending reports to Mr. Arnold without consulting Commissioner Blatsos or obtaining his permission. On April 13, 2005, Ms. Samms sent Mr. Arnold an email concerning "March reports," writing, "I'm not sure if you want these or not. Just finished them this morning." Mr. Arnold replied by email on April 14, 2005, writing, "Jeanne, Thanks for the reports and I hope you haven't gotten into trouble for sending them to me. If anything happens you let me know immediately. I would appreciate it (if you are able to) send me the same daily reports you did last month until the end of this month. Thank you so much. Stan." Ms. Samms replied a few minutes later, writing, "There have been subtle comments but nothing outright, so I guess I'm ok. I will continue to send them (if I don't forget)!" (State's Exhibit E)

In April 2005, Commissioner Blatsos received a request from the Governor's Budget Director for a report on the real estate transfer tax. Commissioner Blatsos did not recall sending that report or authorizing the release of that report. When Budget Director Dolan provided a copy of an earlier report as an example of what he was looking for, Commissioner Blatsos realized that someone in the office was sending out reports without his knowledge, and without a review by his office to determine whether or not the reports were confidential.

Commissioner Blatsos believed that there had been inappropriate contact and an exchange of information between current and former department employees. Commissioner Blatsos requested information from the Office of Information Technology concerning outgoing emails, and discovered that there were a number of emails with reports attached that Ms. Samms had sent to Mr. Arnold. Commissioner Blatsos also requested an investigation by the Attorney General's Office. On June 6, 2005, Ms. Samms was suspended with pay pending the outcome of that investigation.¹

On August 9, 2005, following the investigation, Commissioner Blatsos met with Ms. Samms and her attorney to review the investigative findings and recommendations and review options for disciplinary action. By letter dated August 12, 2005, citing Per 1001.07 of the Rules of the Division of Personnel, Commissioner Blatsos informed Ms. Samms that she was being demoted for willful violation of the Department of Revenue Administration's Code of Ethical Conduct and Confidentiality of Information Memorandum.

Position of the parties.

Attorney Callaghan admitted that Ms. Samms released various reports to Mr. Arnold, but argued that the reports did not contain individual taxpayer information and were not confidential, as described by either RSA 21-J:14 or the agency's Code of Ethical Conduct. Attorney Callaghan argued that Ms. Samms had sent similar reports to others in the past, and that no one had ever suggested that the information was confidential. Ms. Samms testified that she was operating on instructions given to her on November 12, 2004, by Barbara Reid, who was then the Assistant Revenue Commissioner. Ms. Samms indicated that Ms. Reid had told her that Commissioner Blatsos had authorized the release of those reports. Ms. Samms testified that she continued to send reports to Mr. Arnold in accordance with Ms. Reid's instructions.

Attorney Callaghan argued that Ms. Samms committed no offense that warranted her demotion, and that if her conduct constituted a violation of the law or the Department's Code of Ethical

¹ The Board received no direct evidence concerning the conduct of the investigation, the investigative findings, or the investigators' or Attorney General's recommendations for disciplinary action.

Conduct, the violation was not intentional. Attorney Callaghan argued that the letter of demotion itself was flawed, in that it failed to apprise the appellant of the specific offenses for which she was being demoted.

Attorney Williams argued that Ms. Samms violated the Department's Code of Ethical Conduct by releasing information gathered by the Department without first submitting it to the Commissioner or the Commissioner's designee for review to determine whether or not that information was confidential. Attorney Williams argued that Ms. Samms knew the extent of her authority, as indicated by her signature on the "Limited Power of Attorney" presented as Department's Exhibit A, and that Ms. Samms knew that on November 15, 2004, Commissioner Blatsos had suspended Ms. Reid's authority within the Department of Revenue Administration while Ms. Reid was serving on the transition team. He argued that Ms. Reid did not have the authority as Assistant Commissioner to determine which records were or were not confidential, and that any directive she may have given on November 12, 2004 concerning the release of information to the transition team would have been superceded by Commissioner Blatsos' instructions to staff on November 15, 2004, that they were to refer any direct inquiries from any member of the transition team to the Commissioner's office.

Standard of Review

In accordance with the provisions of Per-A 207.12 (b) of the NH Code of Administrative Rules (Rules of the Personnel Appeals Board), in order to prevail on appeal, the appellant must prove by a preponderance of the evidence that: "(1) The disciplinary action was unlawful; (2) The appointing authority violated the rules of the division of personnel by imposing the disciplinary action under appeal; (3) The disciplinary action was unwarranted by the alleged conduct or failure to meet the work standard in light of the facts in evidence; or (4) The disciplinary action was unjust in light of the facts in evidence."

Discussion of the Evidence

The evidence reflects that Ms. Samms sent several reports to Mr. Arnold, both in his capacity as a member of the Governor-Elect's transition team, and in his capacity as a lobbyist for the Rath Law Firm after the Governor's Inauguration in January 2005. Despite Ms. Samms' assertion that she believed she was operating on instructions that she received from Assistant Commissioner Barbara Reid on Friday, November 12, 2004, Commissioner Blatsos made it clear in the operations meeting held on November 15, 2004 that all communications from the transition team were to be directed through his office. Ms. Samms admitted that she received and read a copy of the minutes of that meeting, and the Board found that the instructions from the Commissioner in that regard were unequivocal.

Ms. Samms testified that the information she provided to Mr. Arnold was similar to information she had provided in the past to others outside the department, and that the reports were not confidential. Attorney Callaghan referred the Board to RSA 21-J:14, IV which says that, "...records and files deemed confidential and privileged under this section shall not include records or files related to the following areas of the department's activities... (b) Tax related statistics, reports, summaries or other data prepared by the department which do not identify, or permit identification of, particular tax returns, reports, or related documents." The question of whether or not the information disclosed by Ms. Samms could or should be deemed confidential depends on how and by whom such determinations are made.

The Department of Revenue Administration's "Code of Ethical Conduct," Section 6 C states, "All requests for public records should be directed to the Commissioner or his/her designee who shall determine whether the requested documents are public records in accordance with RSA 21-J:14." That same message was reflected in the minutes of the operations meeting held November 15, 2004, in which Commissioner Blatsos indicated that all contact with members of the transition team should be recorded, and that any request for information should be forwarded through his office.

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Ms. Samms testified that there was nothing confidential in the reports she was sending to Mr. Arnold so it never occurred to her that she might be violating the Code of Ethical Conduct or the Confidentiality of Records Memo. She also testified that she saw no reason to obtain the Commissioner's permission to release various reports to Mr. Arnold as she had already received permission from Ms. Reid. Ms. Samms testified that if she had gone directly to the Commissioner about releasing the records, "he would have said fine."

There is nothing in the email message between Ms. Samms and Mr. Arnold to suggest that Commissioner Blatsos "would have said fine" to information being transmitted directly from Ms. Samms to Mr. Arnold without the Commissioner's express permission. First, as soon as Ms. Reid was appointed to the transition team, Commissioner Blatsos declared a conflict of interest and suspended her authority. The Commissioner directed all employees to record any direct contact from the transition team. The Commissioner specifically directed employees to route any inquiries from the transition team to the Commissioner's office. As the meeting minutes reflect, "The Commissioner advised that he might assign someone to respond [to requests from the transition team], that person will be notified in advance if assigned to take care of different tasks."

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At 5:00 p.m. on December 28, 2004, Commissioner Blatsos sent Mr. Arnold some revenue spreadsheets, informing him that the information included "some of the base sheets." The Commissioner wrote, "Jeanne is out till tomorrow and she did the first cut and we need to go over that information tomorrow. I will follow up with any corrections." Although it is apparent that Commissioner Blatsos expected Ms. Samms to assist him in preparing information for the transition team, there is nothing authorizing Ms. Samms to respond directly to requests from the transition team, nor is there an invitation to Mr. Arnold to request information directly from Ms. Samms.

At 11:03 a.m. the following day, Ms. Samms emailed a number of reports to Mr. Arnold. Commissioner Blatsos was not copied on that email. Instead, Ms. Samms sent Commissioner Blatsos the same reports in a separate email. Although Ms. Samms claimed to be certain of her

authority to send those reports to Mr. Arnold, her email to Mr. Arnolds said, "I'm assuming that this was cleared with Phil, he never mentioned it to me."

Mr. Arnold replied by email that Commissioner Blatsos had sent Mr. Arnold some "pretty bare bones" reports. Mr. Arnold went on to say, "I didn't specifically ask him for the reports from you and I don't plan on even letting him know what I now have. His 'reports' raise enough questions for me to ask. These reports will allow me to confirm his answers." If, as Ms. Samms testified, she was certain that Commissioner Blatsos had, or would have, approved a request to provide the information she was providing to Mr. Arnold, there would have been no reason for her to question whether or not her activity "was cleared with Phil." Similarly, there would be no reason for Ms. Samms to ask that question if she truly believed she was operating under legitimate directives that she had received from Barbara Reid on November 12,2004 before Ms. Reid's duties as Assistant Commissioner were suspended by Commissioner Blatsos on November 15,2004.

When questioned during the hearing by the State's attorney about the email exchange, Ms. Samms testified that Mr. Arnold's comment that, "I never want anything to happen to you..." referred simply to her ongoing friendship with Mr. Arnold. The Board found that testimony less than credible, given both the content of the email and Mr. Arnold's admission that he had no intention of letting Commissioner Blatsos know what information and what reports Mr. Arnold had obtained. Mr. Arnold wrote, "I never want to get you into trouble, but if anything were to happen I assure you the governor would step in at my request." Ms. Samms responded by email, stating, "Ok. That's good enough for me."

On all the evidence and argument offered by the parties, the Board made the following findings of fact and conclusions of law:

Facts

1. In her capacity as Business Administrator III, Commissioner Blatsos authorized Ms. Samms to approve and sign payment vouchers, travel vouchers, requisitions, agency orders, field purchase orders, transfer of appropriations, transfer of expense, payroll

forms and airport parking authorization. Ms. Samms was not authorized to determine which records should be deemed confidential.

2. As an employee of the Department of Revenue Administration, Ms. Samms was subject to the permissions and prohibitions outlined in RSA 21-J and the Department of Revenue Administration's Code of Ethical Conduct and Confidentiality of Information Memorandum.
3. On November 12, 2004, Barbara Reid instructed Jean Samms to send various reports to Stanley Arnold for use by the Governor-Elect's transition team. Ms. Samms received no such instruction or permission from Commissioner Blatsos.
4. On November 15, 2004, Commissioner Phil Blatsos informed his senior staff that in order to avoid a conflict of interest, he had suspended Ms. Reid's authority as Assistant Commissioner while Ms. Reid was serving on the transition team.
5. The Commissioner's decision concerning Ms. Reid's role was transmitted in minutes from the Operations Meeting held on November 15, 2004.
6. In the November 15, 2004 meeting, Commissioner Blatsos directed staff to submit any requests for information from the transition team to the Commissioner's office for response. Commissioner Blatsos also directed staff to record any contacts made directly by members of the transition team.
7. Ms. Samms received and read the minutes of the November 15, 2004 meeting, and requested that she be allowed to attend future Operations Meetings.
8. On December 28, 2004, Commissioner Blatsos emailed two spreadsheets to Mr. Arnold, promising to follow-up with additional information at a later date after reviewing the information with Ms. Samms.
9. On December 29, 2004, Ms. Samms sent reports via email to Mr. Arnold without advising Commissioner Blatsos of what she had sent, without requesting Commissioner Blatsos' permission to send additional reports, and without recording that she had been contacted directly by a member of the transition team, in direct contravention of directions given by Commissioner Blatsos at the November 15, 2004 Operations Meeting.
10. In her December 29, 2004 email to Mr. Arnold, Ms. Samms asked whether or not Mr. Arnold's requests for information had been "cleared" by the Commissioner.

11. Mr. Arnold replied that he had not specifically asked Commissioner Blatsos for reports from Ms. Samms and had no intention of letting Commissioner Blatsos know what information Mr. Arnold had obtained from Ms. Samms.
12. Ms. Samms continued sending reports to Mr. Arnold without Commissioner Blatsos' knowledge or consent until at least April 14, 2005.
13. In an email to Ms. Samms dated April 14, 2005, Mr. Arnold wrote, "Thanks for the reports and I hope you haven't gotten into any trouble for sending them to me. If anything happens you let me know immediately. I would appreciate it (if you are able to) send me the same daily reports you did last month until the end of this month." Ms. Samms replied, "There have been subtle comments but nothing outright, so I guess I'm ok. I will continue to send them (if I don't forget)!"
14. In April 2005, with assistance from the Office of Information Technology, Commissioner Arnold discovered that Ms. Samms had been communicating directly with Mr. Arnold at the Rath Law Office, and that information and reports had been released to Mr. Arnold without the Commissioner's knowledge or consent. Commissioner Blatsos requested that the Attorney General's Office conduct an investigation for possible violation of the Department's Code of Ethics and Confidentiality Memo.
15. On June 6, 2005, Ms. Samms was placed on administrative suspension with pay pending the outcome of the Attorney General's investigation.
16. A meeting was held with Ms. Samms and her attorney on August 9, 2005 to review the evidence supporting disciplinary action.
17. On August 12, 2005, Ms. Samms was advised in writing that she was being demoted from Business Administrator IV to Municipal Auditor for violating the Department's Code of Ethics and Confidentiality Memo.

Conclusions

- A. Employees of the Department of Revenue Administration are subject to the provisions of the Code of Ethical Conduct for State of New Hampshire Department of Revenue Administration Employees which states at Section 2, A (3), "Each employee is required to know the Code of Ethical Conduct and rules contained herein; to seek information

from his/her director, the director's designee or the Commissioner in case of doubt or misunderstanding as to their application."

- B. Section 2 A (2) of the Code of Ethical Conduct for State of New Hampshire Department of Revenue Administration Employees states, "The Code is not to be considered all-inclusive. The absence of a specific published rule of conduct does not mean nor imply that any act of misconduct tending to discredit an employee is condoned or permissible or would not result in disciplinary action, up to and including termination."
- C. Records that Ms. Samms provided to Mr. Arnold are described by RSA 21-J:14, IV, which states, in pertinent part, "The records and files deemed confidential and privileged under this section shall not include records or files related to the following areas of the department's activities: ... (b) Tax related statistics, reports, summaries or other data prepared by the department which do not identify, or permit identification of, particular tax returns, reports, or related documents."
- D. In accordance with Section 6 C of the Code of Ethical Conduct for State of New Hampshire Department of Revenue Administration Employees, only the Commissioner or the Commissioner's designee is authorized to determine which records would identify, or permit identification of, particular tax returns, reports, or related documents. "All requests for public records should be directed to the Commissioner or his/her designee who shall determine whether the requested documents are public records in accordance with RSA 21-J:14." [Code of Ethical Conduct]
- E. In her role as Assistant Commissioner, Barbara Reid could not independently determine which tax records or reports were or were not confidential, unless authorized to do so by the Commissioner under the authority of RSA 21-J:4, II, which states, "The assistant commissioner [of the department of revenue administration] shall perform such duties as are assigned by the commissioner. The assistant commissioner shall assume the duties of the commissioner in the event that the commissioner is unable for any reason to perform such duties."
- F. The August 12, 2005 letter of demotion that Commissioner Blatsos issued to Ms. Samms, which cites the Rules of the Division of Personnel, the Code of Ethical Conduct, and the Confidentiality of Information Memorandum, provides sufficient and fair notice to Ms. Samms of the basis for her demotion under the provisions of Per 1001.07 (a), which

authorizes an appointing authority to demote an employee: "(1) In lieu of termination; (2) Pending the outcome of an investigation of alleged criminal wrongdoing which is in conflict with the assigned duties of the employee's position; or (3) For offenses including, but not limited to: a. Failure to meet any work standard..."

Decision and Order

On a preponderance of the evidence, the Board found that the demotion was lawful and did not violate the rules of the Division of Personnel. The Board found that demotion was warranted by the appellant's offense, particularly in light of the fact that Ms. Samms violated the Department's Code of Ethical Conduct and Confidentiality of Information Memorandum, and disobeyed the Commissioner's explicit instructions about contact with the transition team by communicating directly with Mr. Arnold and releasing reports to him without first advising the Commissioner or allowing the Commissioner an opportunity to determine whether or not the information should be deemed confidential. Finally, in light of the facts in evidence, the Board found that the disciplinary action just. Under the provisions of the Department's own Code and the Rules of the Division of Personnel, the Department of Revenue Administration was authorized to take disciplinary action up to, and including, Ms. Samms' dismissal.

RSA 21-I:58, I, provides, in pertinent part, "In all cases, the personnel appeals board may reinstate an employee or otherwise change or modify any order of the appointing authority, or make such other order as it may deem just." In this instance, the Board did not believe there were sufficiently mitigating circumstances to warrant reinstatement to the appellant's former position, or modification of the order of the appointing authority.

Therefore, for all the reasons set forth above, the Board voted unanimously to DENY Ms. Samms' appeal and to affirm the Department's decision to demote her from Business Administrator III to Municipal Auditor.

NEW HAMPSHIRE PERSONNEL APPEALS BOARD

/s/

PATRICK WOOD, CHAIRMAN

/s/

JOSEPH CASEY, COMMISSIONER

/s/

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