

The State of New Hampshire

Supreme Court

No. 97-474 *Appeal of John Barakis*

TO THE CLERK OF NH PERSONNEL APPEALS BOARD #97-D-4

*I hereby certify that the Supreme Court has issued the following order
in the above-entitled action:*

*December 5, 1997. Appeal from administrative agency is declined.
See Rule 10(1).*

January 2, 1998

Attest: *Carol A. Belmain*
Carol A. Belmain, Deputy Clerk

NHDOP JAN05'98 AM 9:36

State of New Hampshire



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

APPEAL OF JOHN BARAKIS

Department of Safety

June 2, 1997

Response to Appellant's Request for Reconsideration and Department's Objection

Docket #97-D-4

On April 9, 1997, the Board received the Appellant's April 8, 1997, Request for Reconsideration of the Board's March 13, 1997, decision denying his appeal of a written warning. The State's Objection was received on April 15, 1997. Having reviewed the Request and Objection in conjunction with the Board's March 13, 1997, decision in this matter, the Board voted unanimously to deny the appellant's Request for Reconsideration.

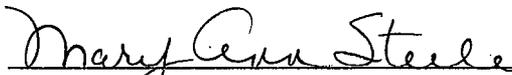
First, the parties were notified in writing that the appeals would be made on offers of proof (PAB Notice of Receipt, Docketing and Scheduling, December 19, 1996). The appellant did not object to that hearing format until he had received a decision which was not favorable to him. His objection to the format of the hearing, some four months later, is untimely.

The appellant also argued that the Department of Safety failed to interview someone whom he considered to be a material witness. He then asserted that by choosing to accept the evidence offered by the State in support of the warning, the Board was unfair and denied the appellant due process.

The appellant's claim might have some merit if the Board had excluded any of the evidence that he offered. However, no evidence was excluded. If the appellant believed the agency had some other motivation for the warning, as suggested by his questions concerning the outcome of the audit, or if he believed that the Board needed additional evidence to properly and fairly decide his appeal, it was his burden to produce that evidence.

Absent persuasive evidence or argument to support a claim that the Board's decision was either unlawful or unreasonable, the Board voted to deny Appellant's Request for Reconsideration (Motion for Rehearing).

FOR THE PERSONNEL APPEALS BOARD



Mary Ann Steele, Executive Secretary

cc: Virginia A. Lamberton, Director of Personnel, 25 Capitol St., Concord, NH 03301
Thomas Hardiman, SEA Director of Field Operations, State Employees
Association, PO Box 3303, Concord, NH 03302-3303
Clarence E. Bourassa, Esq., Department of Safety, James H. Hayes Safety
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State of New Hampshire



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APPEAL OF JOHN BARAKIS

Docket #97-D-4

Department of Safety

March 13, 1997

The New Hampshire Personnel Appeals Board (Miller, Bennett and Barry) met Wednesday January 8, 1997, under the authority of RSA 21-I:58, to hear the appeal of John Barakis, an employee of the Department of Safety. Mr. Basakis was represented at the hearing by SEA Director of Field Operations Thomas Hardiman. Clarence E. Bourassa, Esq., appeared on behalf of the Department of Safety. Mr. Barakis was appealing a Masch 14, 1996, written warning issued under the provisions of Per 1001.08(b) - Optional Dismissal for allegedly using obscene language. The record in this matter consists of the pleadings submitted by the parties prior to the hearing, the audio tape recording of the hearing on the merits and the pleadings and exhibits admitted into evidence at the hearing.

In the letter of warning issued to Mr. Barakis on March 14, 1996, signed by Safety Commissioner Richard M. Flynn, the appellant was charged with violation of Per 1001.08(b) of the Rules of the Division of Personnel for using profane and insulting language concerning the General Manager of McDevett Transportation. The letter stated, in pertinent part, "Your position as an auditor puts you in a position requiring you to exercise professional conduct toward the licensees that you are auditing. You are also acting as a representative of the state, and actions of the type reported bring the entire Department of Safety in disrepute in the eyes of the public. Under the provisions of Per 1001.08(b), any further violations of that section may result in immediate discharge."

A number of facts are not in dispute:

1. Mr. Barakis has been employed at the Department of Safety as a Road Toll Auditor II since April 27, 1973.
2. In his capacity as an Auditor, Mr. Barakis conducts on-site audits at various commercial concerns to audit their files and records in order to ensure that the appropriate "road tolls" or motor fuel taxes will be collected.
3. On March 7, 1996, during the eighth day of an audit at McDevitt Transportation Services in Manchester, New Hampshire, Mr. Barakis parked his vehicle and entered the McDevitt offices.
4. Ron Lacey, an employee of McDevitt Transportation Services, told Mr. Barakis that he had parked in a place where the general manager usually parked. He asked the appellant to move his vehicle.
5. Although the space where Mr. Barakis had parked was not marked as reserved, he returned to the lot to move his vehicle as directed.

The State asserted that on March 7, 1996, at 9:10 a.m., Kathleen Morrill of the Road Toll Bureau received a telephone complaint from Mick Myles, General Manager of McDevitt Transportation, complaining that Mr. Barakis had used profane and abusive language with Mr. Naugler, one of the employees, and had exhibited a condescending manner. Ms. Morrill related the complaint to Administrator John Gould who then called Mr. Myles to confirm the substance of the complaint. Mr. Gould met with the appellant on March 7, 1996, to discuss the complaint. Mr. Baraltis denied that he had a conversation with Mr. Naugler or any other employee of McDevitt after he had moved his car,

The State asserted that Mr. Gould visited McDevitt Transportation Services on March 8, 1996, to speak with Mr. Naugler, who told Mr. Gould that after Mr. Baraltis had moved his vehicle as requested, he returned to the building and made an offensive comment about the general manager. Mr. Gould did not form the impression that there was any animosity between Mr. Naugler and Mr. Barakis. By letter dated March 8, 1996, addressed to Mr. Gould, Mr. Naugler reiterated the substance of the allegation. Mr

McDevitt, he saw neither Mr. Lacey nor Mr. Naugler. The appellant alleged that Mr. Naugler had the reputation of doing or saying anything to curry favor with management, asserting that some time after the incident, McDevitt Transportation Services had dismissed Mr. Naugler for demonstrating an "inability to get along with people." The appellant complained that during the investigation of the incident, no one spoke with Mr. Lacey, who would have testified at a hearing that the incident was "taken out of context."

The appellant argued that the process of informal settlement had been a sham, as neither Commissioner Flynn nor Personnel Director Lamberton would schedule a hearing to allow Mr. Barakis to tell his side of the story. Finally, the appellant argued that even if the Board were to find the appellant had used "obscene language," the Board should vote to overturn the warning as too harsh a punishment for the alleged offense.

With respect to its investigation of the incident, the Department of Safety argued that there was no need to interview Mr. Lacey, as he was not present during the conversation between Mr. Naugler and Mr. Barakis. The State also argued that Mr. Naugler's termination from McDevitt Transportation was irrelevant to the incident in question. The Department also asked the Board to find that under the Rules the Division of Personnel, the written warning is described as the least severe form of discipline to correct an employee's unsatisfactory work performance. The Department argued that Mr. Barakis is expected to conduct himself as a professional, particularly when he is in the field performing audits, and that the nature of the offense he committed was sufficiently egregious to warrant the issuance of a written warning under the Optional Dismissal provision of the Rules.

Having considered the evidence, arguments and offers of proof, the Board voted to sustain the warning. In disciplinary appeals, the appellant bears the burden of proof. The appellant failed to persuade the Board that the warning issued by the Department of Safety was inappropriate.

Accordingly, the Board voted unanimously to deny Mr. Barakis' appeal.

THE PERSONNEL APPEALS BOARD



Lawrence H. Miller, Chairman



Mark J. Bennett, Commissioner



James J. Barry, Commissioner

cc: Virginia A. Lamberton, Director of Personnel
Thomas F. Hardiman, SEA Director of Field Operations
Clarence E. Bourassa, Esq., Litigation Office, Department of Safety