

State of New Hampshire



PERSONNEL APPEALS BOARD
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APPEAL OF DONALD BELANGER
Docket #91-D-7 (Demotion)
and
#91-O-12 (Involuntary Transfer)

October 21, 1993

The New Hampshire Personnel Appeals Board (Bennett, Johnson and Rule) met Wednesday, May 13, 1992, to hear the appeal of Donald Belanger, an employee of the New Hampshire Department of Corrections, regarding his involuntary transfer from the first to the second shift, effective October 19, 1990, and his demotion from Corrections Sergeant (salary grade 17) to Corrections Corporal (salary grade 15) effective November 5, 1990. The appellant was represented at the hearing by SEA Field Representative Stephen J. McCormack. Warden Michael Cunningham appeared on behalf of the State Prison, N.H. Department of Corrections.

On December 14, 1990, the Department of Corrections filed a motion to dismiss Mr. Belanger's demotion appeal, arguing that there was no dispute that the appellant had made a derogatory remark about Viola Lunderville, the Prison's Administrator of Security, and that the appellant had admitted to making the remark. The Department argued that the only issue in dispute was whether or not the appointing authority acted within its discretion by demoting the appellant.

State's Exhibit A, a statement allegedly given to Prison Investigators Dugal and Mills, signed by the appellant, admitted to having made the insulting remark about Ms. Lunderville in front of an inmate and in the presence of Corrections Corporal Moulton. Appellant's Exhibit #8, a statement later signed by the appellant, states that the appellant denied any recollection of having made derogatory remarks about Ms. Lunderville to, or in the presence of, any inmates or staff. Finding that there were material facts in dispute, the Board scheduled the matter for a hearing on the merits of Mr. Belanger's appeals..

This appeal was originally scheduled for hearing on June 5, 1991, but was continued when the Department of Corrections notified the Board that Warden Cunningham would be out of state and unable to represent the agency in the appeal. The matter was returned to the Board's docket for scheduling as time permitted. A consolidated hearing was scheduled on May 13, 1992.

On May 5, 1992, eight days prior to the scheduled hearing, SEA Field Representative McCormack forwarded to the Board the list of witnesses and exhibits he intended to offer on Mr. Belanger's behalf at the hearing on the merits of his appeals. He asked the Board to order the Department of Corrections to "...produce and give the appellant, through the State Employees' Association, all investigatory records, names of all witnesses and all depositions or affidavits received regarding the two cited matters, Demotion and Transfer of Donald Belanger." He referred the Board to the attached "Exhibit #12", his December 31, 1991 letter to the Board addressing the earlier continuance of the hearing, and requesting that a hearing

be scheduled at the earliest possible date. Mr. McCormack also requested in that letter that the Board schedule a prehearing conference to address materials he was seeking from the Department in preparing the case for hearing. That letter gave no indication that the materials had been requested from the Department of Corrections, or that the request had been denied.

At the outset of the hearing on the merits, Mr. McCormack asked that both appeals be granted without evidentiary hearing, arguing that the appellant had not been provided access to information he had requested months earlier for the purposes of presenting his case. The Board denied the motion, finding that the Department of Corrections had provided the list of witnesses and exhibits it intended to introduce at the hearing, and upon which it would rely in support of its decisions. The Board further found that neither the appellant's December 31, 1991 letter to the Board, nor his May 5, 1992 letter, constituted properly filed motions for discovery requiring any action on the Board's part.

Per-A 204.02 (a) and (b) of the Board's rules state:

(a) Except as hereinafter provided prehearing discovery shall be limited to the procedures set forth in Per-A 202.05 [the scheduling of a prehearing conference].

(b) In exceptional cases, either party may request that the Board order formal discovery, including requests for admissions, requests for production, interrogatories and depositions. The requesting party shall set forth those factors which it believes support its requests for additional discovery.

Having failed to substantiate the need for a prehearing conference to obtain the information listed in the December 31, 1991 letter to the Board, no prehearing conference was scheduled. If the appellant was unable to obtain otherwise discoverable materials, his remedy was found in Per-A 204.02 (b), in which case he should have timely filed a motion, setting forth those factors which required the Board to issue an order for the production of documents. The appellant's letter to the Board eight days prior to the scheduled hearing did not meet the requirements for a timely filed motion for discovery in exceptional cases. Inasmuch as the Department of Corrections relied solely on the appellant's own signed statement, and the testimony of the investigator to whom he gave that statement, the Board did not find his appeal to have been prejudiced. Further, the Board did not find that procedural defects or delay in scheduling warranted granting the appeal without evidentiary hearing.

Mr. McCormack asked, in the alternative, that the Board disallow the testimony of Lt. McGill, or the introduction of Mr. Belanger's signed statement to Lt. McGill, and that the Board exclude any evidence the Department of Corrections attempted to offer, arguing that the Department of Corrections had failed to provide sufficient notice of the exhibits or testimony which it intended to offer into evidence. The Board's record contains a letter dated May 5 1992, from Warden Cunningham to the Board, copied to Mr. McCormack, indicating what evidence the Department intended to offer. Therefore, the Board found that to say no evidence should be considered would be absurd.

In spite of those findings, the Board must again admonish the Department to abide by its own policies and procedures, and to give reasonable meaning and effect to the Rules of the Division of Personnel and the Rules of the Personnel Appeals Board. Regardless of the difficulties or supposedly unique problems which the Department of Corrections may face in managing its employees to operate an efficient correctional program, they are not exempt from compliance

with the rules and standards which govern all employment within the State classified system. The Department of Corrections' reluctance and delay in producing materials which are clearly relevant and discoverable in the normal course of an administrative or adjudicative proceeding is equally absurd and contrary to administrative economy.

In his original requests for hearing, the appellant asserted that prior to his transfer, he was assigned to supervise inmate work crews on assignment outside of the Prison. When management at the State Prison decided to curtail the practice of employing inmate "road crews", Prison employees supervising those inmates had to be reassigned. Mr. Belanger stated that he was advised that the only available position for him was a second shift Sergeant's position in Medium Custody South. He received written notice dated October 3, 1990, of his transfer, to be effective October 19, 1990.

Mr. Belanger alleged that on October 9, 1990, after having received notice of his transfer, he learned through the State Employees' Association that a vacant position of Investigations Sergeant was posted, and that instead of being transferred to the second shift in Medium Custody South, he should have been offered the first shift position in Investigations. The appellant argued that the Department of Corrections gave insufficient notice to the employees supervising outside "road crews" that they were to be reassigned, and should have given them sufficient notice to allow them to apply for other vacancies as they occurred, rather than subjecting them to involuntary transfer and change of shift.

Mr. Belanger asserted that in addition to changing shifts, the reassignment to Medium Custody South also resulted in a change in his scheduled days off from Saturday and Sunday to Wednesday and Thursday. He argued that the combination of change in assignment, change in shift, and change in scheduled days off caused him both personal and medical problems.

On October 5, 1990, after receiving notice of his reassignment, the appellant was supervising inmates on a work assignment outside of the prison. While on the bus with the inmates, Mr. Belanger allegedly made derogatory remarks in front of the inmates about Viola Lunderville, the Prison's Administrator of Security, calling Ms. Lunderville a "big titted bitch". In its notice of demotion to the appellant, the Department of Corrections characterized the remark as a verbal attack warranting the appellant's immediate demotion from Sergeant to Corporal.

In consideration of the evidence, the Board made the following findings of fact:

The appellant was notified in writing on October 3, 1990 that he was to be transferred, effective October 19, 1990, to the second shift Sergeant's position in Medium Custody South at the State Prison. At the time, he was assigned to supervise inmate work crews outside of the prison, first shift, Monday through Friday. After receiving notice of his transfer, Mr. Belanger went to speak with Ms. Lunderville, Administrator of Security and Major Ash, the ranking uniformed officer in the Prison. He asked if there were other positions available on the first shift, complaining that a second shift assignment without weekends off would create "family problems" for him. He was informed by both Lunderville and Ash that there were no other positions available into which he could be transferred and that the assignment was a "permanent position". He considered Major Ash's attitude during the meeting to have been threatening and believed the transfer decision was being made without any concern on the part of management for the difficulties the transfer would cause to him personally. The appellant

felt that there were few other employment options for a man of his age and experience and accepted the transfer.

The Department of Corrections provided the appellant with the fourteen day notice required by the Collective Bargaining Agreement. The Department relied upon the transfer provisions of the Rules of the Division of Personnel in assigning the appellant to the new post and schedule. In addition to abolishing the outside "road crew" assignments, the Prison wanted to fill a second shift Sergeant's position which had been vacant for several months.

On October 5, 1990, while on an assignment outside of the prison supervising a work crew of approximately 30 inmates, the appellant was working with Corrections Corporal Stan Moulton. One of the inmates later reported to prison authorities that while they were on the bus, the appellant had been complaining about Viola Lunderville and called her a "big titted bitch". The prison undertook a preliminary investigation. The appellant and Corporal Moulton were both interviewed by Investigations staff.

Corporal Moulton spoke with Investigations and told them he was on the bus and did not hear the appellant make the alleged insulting remark. In his testimony, Corporal Moulton said the Board should take into consideration the fact that inmates are constantly making up statements about employees, and that they can fabricate stories without fear of punishment from the prison authorities.

In the appellant's interview with Lt. McGill, during which he was allowed to consult with a union representative, the appellant was advised that an inmate had reported a derogatory remark being made about Ms. Lunderville during a road crew assignment. Initially, the appellant did not want to make a statement. He was reminded that if it should be found later that he had lied during an official investigation, he could be discharged from his position. The appellant asked Lt. McGill what would happen if he admitted to having made the remark about Ms. Lunderville. McGill went to consult with the Warden, and returned saying that he believed the appellant would be demoted. He told the appellant that if he had made the remark but denied it, and an investigation disclosed that his statement was a lie, he would be discharged. The appellant admitted to having made the remark about Ms. Lunderville and signed a statement to that effect.

The appellant later claimed that he did not remember having made any remark about Ms. Lunderville, and only signed the statement admitting to the infraction because he was under duress. He insisted the interview with McGill left him no choice but to admit to something he did not remember having done, or be fired. He argued that the inmates did not like him because he was a known disciplinarian, and suggested that the inmate lied about him for that reason.

The appellant asked the Board to find that although management might have the authority to effect involuntary transfers, it had transferred him without regard to his personal circumstances, knowing that it would cause problems for both him with regard to both his family and his health. He argued that the agency had an obligation to consider the interests of the employee, as well as an obligation under the Rules of the Division of Personnel [former Per 102.01(e)], "That state service, as far as practicable, be made attractive as a career, encouraging each employee to render his best service to the state".

On the matter of the demotion, the appellant argued that he was virtually powerless to defend himself against inmate allegations, and that the Board must consider the inmates' motives in

making such allegations against staff. He argued that even if he had made the statement about Ms. Lunderville, which he denied under oath during the hearing, he did not recall making the statement. He further argued that the only reason he signed a statement admitting to the remark, he had done so only because of the duress he suffered, knowing that if he failed to admit to the infraction he would be discharged.

The Department of Corrections argued that the evidence supported a finding that Mr. Belanger made an extremely derogatory remark about the Administrator of Security, and that an offense of that magnitude within the context of a correctional institution could be serious enough to warrant discharge from employment. The Department further argued that supervisors in a correctional setting need to understand their responsibilities, and that insulting an administrator in front of inmates erodes the administrator's ability to function effectively. On that basis, the Department argued that the demotion was warranted. The Department also asked the Board to find that Mr. Belanger's transfer from the "road crew" to Medium Custody South was accomplished within the requirements of the Rules of the Division of Personnel, and was in the best interest of the agency.

With regard to the appeal of involuntary transfer, the Board found the Department of Corrections was authorized, under the provisions of (former) Per 302.05 (b) of the Rules of the Division of Personnel, to transfer the appellant between positions of Sergeant, provided that the transfer was made in the best interests of the agency. Former Per 302.05 (b) states:

It is the prerogative of management to determine who and when employees are to be transferred, keeping in mind that they can be made only for the best interests of the agency. Such transfers are subject to appeal to the [Personnel Appeals Board] by the employee affected if he feels that the transfer was made for some other reason.

In the instant appeal, Mr. Belanger failed to persuade the Board that the transfer was made for some reason other than taking advantage of the discontinuation of the "road crew" supervisory assignments to staff the second shift Sergeant's position in Medium Custody South. Although the Board is sympathetic to Mr. Belanger's desire to remain on the first shift with weekends off, employees who accept positions in 24 hour per day, 7 day per week occupations such as Correctional Officers always run the risk of reassignment to a less than favorable shift or duty assignment. Absent persuasive evidence that the Department of Corrections violated its own policies or the Rules of the Division of Personnel in effecting the appellant's transfer, the Board can only admonish the agency to adhere to its own procedures. Without evidence of a violation, however, the instant appeal must be denied.

With regard to the demotion appeal, the Board found the evidence to be supportive of a finding that Mr. Belanger did make the remark about Ms. Lunderville and therefore was subject to disciplinary action. On the basis of Mr. Belanger's own statement confirming the inmate's allegation, the Department of Corrections reasonably concluded that Mr. Belanger had made the remark about Ms. Lunderville, as does the Board. The fact that Corporal Moulton did not hear or did not recall hearing the remark is not dispositive of the appeal.

The Board does not accept the appellant's proposition that he only admitted to making the remark because he was under duress. The evidence would more readily support a conclusion that when faced with the alternatives, the appellant chose to tell the truth and be demoted rather than run the risk of being discharged for lying in any subsequent investigation of the incident.

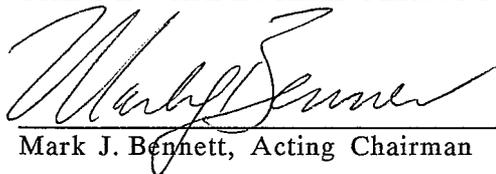
The appellant has not met the burden of proving duress or interference and undue pressure from the Warden. There are sufficient admissions, both through the appellant's statement to Lt. McGill and his pleadings in connection with this appeal, to reasonably conclude that Mr. Belanger made the remark which resulted in his demotion.

Although the appellant argued that demotion was too strong a penalty for the offense in question, the Board found that demotion was one of the available disciplinary options in this instance. While the discipline may seem heavy-handed, (former) Per 308.02 (c) of the Rules of the Division of Personnel provides the following:

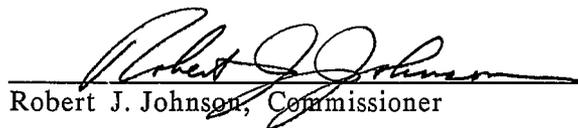
Immediate demotion. Subsections (a) and (b) of Per 308.02 shall not apply in the case of an employee who is demoted in lieu of discharge or in emergency cases where immediate demotion without warning is necessary to preserve the efficiency and integrity of state service.

As the Department of Corrections is quick to point out, Corrections personnel are responsible for more than their mere custodial tasks. They must serve as role models for the inmate population and should be ever mindful of their responsibilities to demonstrate respect for their peers and their superiors in the chain of command. A remark such as Mr. Belanger's in front of prisoners constitutes a serious breach of policy and is unacceptable behavior for a Correctional Officer, particularly one of Mr. Belanger's former rank. Therefore, on the evidence, the Board voted to deny Mr. Belanger's appeal, finding that the Department of Corrections acted within its discretion in demoting him from the rank of Sergeant to the rank of Corporal.

THE NEW HAMPSHIRE PERSONNEL APPEALS BOARD



Mark J. Bennett, Acting Chairman



Robert J. Johnson, Commissioner



Lisa A. Rule, Commissioner

cc: Virginia A. Lamberton, Director of Personnel
Stephen J. McCormack, SEA Field Representative
Warden Michael Cunningham, New Hampshire State Prison
Lisa Currier, Human Resources Administrator, N.H.D.O.C.