

State of New Hampshire

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PERSONNEL APPEALS BOARD
State House Annex
Concord, New Hampshire 03301
Telephone (603) 271-3261

APPEAL OF JAMES BENNETT

DEPARTMENT OF SAFETY - DIVISION OF ENFORCEMENT
(N.H. Supreme Court Case No. 88-273, Voluntary Remand)

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

December 5, 1991

The New Hampshire Personnel Appeals Board (Bennett and Rule) met Wednesday, November 20, 1991, to consider the appellant's request for reconsideration and the State's objection to same in the above-captioned appeal.

In its order dated October 24, 1991, the Board found that the appeal was not timely filed and further, that if Bennett's appeal had been timely filed, the appeal should be denied on the merits.

After considering the substance of both the appellant's request and the State's objection, the Board found that the appellant raised no issues which the Board had not already considered and addressed in its decision of October 24, 1991. Accordingly, the Board voted to deny the instant request and to affirm its earlier order.

THE PERSONNEL APPEALS BOARD

Handwritten signature of Mark J. Bennett in cursive.

Mark J. Bennett, Acting Chairman

Handwritten signature of Lisa A. Rule in cursive.

Lisa A. Rule

cc: Virginia A. Vogel, Director of Personnel
Jean Chellis, SEA Field Representative
E. James Daley, Director, Division of Enforcement, Department of Safety
David S. Peck, Senior Assistant Attorney General, Department of Justice

State of New Hampshire

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PERSONNEL APPEALS BOARD

State House Annex
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APPEAL OF JAMES BENNETT

Department of Safety - Division of Enforcement
Supreme Court Case No. 88-273, Voluntary Remand

October 24, 1991

The New Hampshire Personnel Appeals Board (Bennett and Rule) met Wednesday, October 16, 1991, to consider the appeal of James Bennett, an employee of the Department of Safety, Division of Enforcement, relative to his August 5, 1987 appeal of "...a decision of the Director of the Division of Personnel in the matter of a reorganization and the resulting reclassification within the Department of Safety". On April 4, 1988, the Board dismissed the appeal, finding that the request for hearing had not been timely filed. The appellant filed a request for reconsideration of that decision, which the Board denied in its order of June 20, 1988. The appellant, through his representative SEA General Counsel Michael Reynolds, filed an appeal by petition with the New Hampshire Supreme Court on July 20, 1988.

In an order dated September 23, 1988, the Court remanded the matter for hearing, stating, "State's motion for voluntary remand is granted. Case is remanded to the personnel appeals board for hearing."

In compliance with the Court's order, the Personnel Appeals Board heard Mr. Bennett's appeal at its meeting of October 16, 1991. Virginia A. Vogel, Director of Personnel, appeared on behalf of the Division of Personnel. Jean Chellis, SEA Field Representative appeared on behalf of the appellant.

At the hearing, the Director of Personnel argued that the matter had been given full consideration by the Board in 1988, and that the Board had appropriately found the appeal to be untimely. She testified that having read the petitioner's brief as filed with the Supreme Court, it was her impression that the State's Motion for Voluntary Remand was submitted solely to address a concern of the Attorney General's Office that the appellant had not been allowed to offer testimonial evidence in support of his claim that his original appeal had been timely.

She argued that having the matter remanded for hearing by the Court did not automatically prohibit the Board from dismissing the matter as untimely, or to decline to hear Mr. Bennett's appeal on the merits because he had failed to allege any specific application or violation of a Personnel Rule. In support of that position, she argued that the Board's jurisdiction was limited to appellate review of decisions by appointing authorities or the Director of Personnel, when appeals of same were timely filed. In Mr. Bennett's case, she argued that the Board lacked jurisdiction to hear his appeal, arguing it should be considered a late-filed complaint that the Commissioner of Safety had declined to support an upgrading of his position.

Ms. Chellis objected to the Director's characterization of the Motion for Voluntary Remand, and read the text of the Motion into the record as follows:

"Now comes the State of New Hampshire, on behalf of the Department of Safety, and requests that the Court enter an order remanding this matter to the Personnel Appeals Board for the purpose of conducting an appropriate hearing on the April 29, 1987 decision to reclassify James R. Bennett from a Safety Inspector, Supervisor to a Safety Inspector at the Department of Safety.

"Counsel for the Petitioner has been consulted and consents to this motion. Both parties intend for the Court's order of remand to be the final resolution of this case."

Ms. Vogel informed the Board that until the order remanding the case was received, she had been unaware that such a motion had been filed.

Ms. Chellis offered to provide the Board with a copy of the Motion presented for the Court's consideration as well as the Court's order in response. Upon receipt and review of that filing, the Board confirmed that the Director had properly represented her lack of familiarity with the Motion, noting that the Motion had been filed by Assistant Attorney General Douglas Jones on behalf of the Department of Safety. The only other party to receive a copy of the Motion as filed on September 19, 1988, was Michael Reynolds, counsel of record for Mr. Bennett.

Several problems arise by virtue of this Motion having been filed and granted:

1. Pursuant to RSA 21-I:46, the Personnel Appeals Board is charged with hearing and deciding appeals as provided in RSA 21-I:57 and 58, and those arising out of the application of rules adopted by the Director

of Personnel. The Board does so in the manner prescribed by its procedural rules, properly adopted under the authority of RSA 21-I:46, VII. No statutory enactment or administrative rule provides for the Commissioner of any department, or his agent, with the concurrence of any other party to an appeal, to collectively decide to over-turn a decision of the Board and request that the Court order a hearing when the Board has already decided the matter was not timely filed within the statutorily defined timeframes.

2. Nothing in the record of the appeal as presented to the Supreme Court would indicate that Bennett and the Department of Safety were the parties in the action giving rise to the appeal. The appellant's own pleadings in his original request to the Board for a hearing cited "a decision of the Director of Personnel" as the basis of his complaint.

In addition to finding it highly irregular for a State agency to request that the Court remand a matter for hearing by the Board when the Board had already decided the matter on the issue of timeliness, the Board found it equally incomprehensible that a State agency would consider it proper to petition the Court to remand a matter for hearing when the decision allegedly in question was made not by the agency, but by the Director of Personnel.

Notwithstanding the jurisdictional concerns raised above, the Board convened a hearing on the merits, which it believes to be in compliance with the apparent intentions behind the Court's order. After considering the testimony and evidence received, the Board made the following findings of fact:

1. On February 13, 1985, the Department of Safety requested that the Department of Personnel review positions of Safety Inspector, and requested that Personnel forward position classification questionnaires to the Department of Safety for completion.
2. The appellant was not asked to complete a questionnaire, nor did he request the opportunity to complete a questionnaire and have his own position of Safety Inspector Supervisor (salary grade 16) reviewed.
3. The completed questionnaires, filed as part of the proposed Department of Safety reorganization plan, were returned to the Department of Personnel for review on July 26, 1985. The review package included a letter from Safety Commissioner Flynn recommending certain titles and salary grades for various positions in the Safety Inspector class series.

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4. During the field audit conducted by the Department of Personnel, Mr. Bennett's supervisor, Howard Hemeon, reported that Bennett was performing work at the level of Safety Inspector (salary grade 14) rather than at the level of Safety Inspector Supervisor (salary grade 16).
5. The Department of Personnel, following its review of the positions in question, recommended the elimination of the title "Safety Inspector Supervisor", finding that the positions in that series should be consolidated at the single classification of Safety Inspector. The Department recommended upgrading that classification to salary grade 15. In spite of the title change in his position, and the allocation of Safety Inspector positions at salary grade 15, the appellant's salary was held at salary grade 16, pursuant to Per 304.01 (g)(1).
6. The Department of Safety appealed the Director of Personnel's decision to the Personnel Commission, challenging the reallocation of Safety Inspectors to salary grade 15. Safety had requested reallocation of those positions to salary grade 16.
7. In March, 1987, immediately after her appointment as the new Director of Personnel, Director Vogel was asked by Commissioner Flynn to reconsider the matter then pending before the Personnel Commission.
8. On April 3, 1987, Director Vogel agreed to allocate Safety Inspectors at salary grade 16 and to reallocate certain positions to Corporal, salary grade 18. Vogel requested that the Department of Safety provide specific point assignments, and recommend which positions numbers were to be assigned at which classification titles.
9. Commissioner Flynn provided the required information, including his specific recommendation that the appellant's position remain classified as a Safety Inspector, salary grade 16.
10. The Director issued her written decision approving the reorganization plan on April 29, 1987.
11. Deputy Safety Commissioner Patch notified the affected employees by memorandum dated May 20, 1987.
12. Ms. Chellis met with Commissioner Flynn and Deputy Commissioner Patch on June 17, 1987, to discuss the appellant's complaint that several positions of Safety Inspector had been reclassified to Corporal, salary grade 18,

and that his position had not been so classified. Chellis, on the appellant's behalf, requested "further review" by the Director of Personnel by letter dated June 22, 1987. The Director's response, dated July 24, 1987, provided her rationale for agreeing with Safety Commissioner Flynn's recommendation for the classification of the appellant at the level of Safety Inspector.

13. No evidence was presented by the appellant concerning a comparison of his actual duties to those of Wayne Peasley, whose position was reclassified to Corporal.
14. The appellant, through his own testimony, admitted that he was not interested in performing the duties of a Corporal, had never requested that his position be reviewed for possible reallocation to the title of Corporal, and had never applied for promotion to a vacant position of Corporal.
15. The appellant testified he had certain supervisory responsibilities in 1984 or 1985, but had no such supervisory responsibility in 1987. The appellant believed that because several of his co-workers had received retroactive compensation upon reallocation to Corporal (salary grade 18), he too should be entitled to receive back-pay.

In the appellant's December 21, 1987 request to "clarify" his appeal, filed as a response to the Board's December 14, 1987 request for additional information, the appellant asked several questions have some bearing upon the proper disposition of this matter. (See Chellis letter of December 21, 1987, Appendix to Appeal by Petition Pursuant to RSA 541:6, page 25) Those questions, and the Board's findings regarding their relevance to the instant appeal:

"Why did the Department choose to have Wayne Peasley and not Jim Bennett complete a questionnaire?"

Per 303.04 (a) of the Rules of the Division of Personnel provides that, "Appointing authorities shall give written notice within 60 days to the director of material changes in the duties and responsibilities of the positions occupied by their employees. If an appointing authority fails to so notify the director, the employee may file a written request with the director that his position be studied."

Had the appellant believed that material change in the duties and responsibilities of his position warranted an upgrading of his position, he was free to request that his position be reviewed by the Director under the provisions of Per 303.04(a). Such a request would have required neither

consent nor concurrence by the Commissioner of Safety. The appellant made no such request.

"Why did the Department request only one of two Safety Inspector Supervisor positions be reallocated upwards?"

Absent material changes in the duties and responsibilities of the appellant's position, the Commissioner of Safety was under no obligation to request that Bennett's position be reviewed, or to recommend that his position be upgraded, regardless of the recommendations he may or may not have made for any other position. The field audit conducted by the Department of Personnel did disclose that the appellant was no longer functioning in a supervisory capacity, an assessment which was confirmed by the appellant during his testimony before the Board.

Accordingly, the Department of Personnel re-titled his position "Safety Inspector". That change had no effect on his salary grade, other than to continue compensating him at the same salary grade as when he did have supervisory responsibility. No evidence was presented to suggest that the appellant's position should have been reclassified to Corporal.

"Why was Mr. Bennett's position the only one out of all the positions affected by the reorganization, not assigned a higher labor grade?"

Throughout the lengthy history of this appeal, the only evidence offered to the Board involved Mr. Bennett's own position. The appellant did not offer evidence to support a finding that his was the only position not to be upgraded. Further, even if that were the case, the evidence offered by the appellant does not support upgrading his position. What did or did not happen to other positions as a result of the review is irrelevant.

The applicable provisions of RSA 21-I:58 I in effect on the date Bennett's appeal was filed state, in pertinent part:

"Any permanent employee who is dismissed, demoted, or suspended, or otherwise affected by any action, except those exempted from appeal under RSA 21-I:46, I, may appeal the decision to the personnel appeals board within 15 calendar days after such dismissal, demotion or suspension.. ."

The final decision eliminating the position classification of "Safety Inspector Supervisor" was issued by the Department of Personnel on August 7, 1986. Arguably, the last possible date on which any of the position incumbents might have appealed that decision would have been August 22, 1986.

The appeal which was filed with the Personnel Commission by Commissioner Flynn objecting to the allocation of all Safety Inspectors at salary grade 15 was rendered moot by the current Director's decision to reconsider the proposed reorganization and allocate all such positions at salary grade 16.

Although the appellant, in Chellis' letter to the Board dated December 21, 1987, should not be considered "a strict classification/evaluation appeal", that was the only issue addressed in the State's Motion for Voluntary Remand, which was consented to by the Petitioner. The Director's decision on the reorganization proposal resulting in the reclassification of Bennett's position title from Safety Inspector Supervisor to Safety Inspector was issued April 29, 1987. The last date on which an appeal might have been timely filed with the Appeals Board was May 14, 1987.

The appellant argued that the Board should consider May 20, 1987, the date Deputy Commissioner Patch notified the affected employees of the Director's decision, as the actual date of the decision from which the appeal arises, and suggested that such an appeal was subject to the procedures for adjustment and appeal described by Per 306.04 of the Rules of the Division of Personnel. Even if the Board were to consider May 20, 1987 to be the actual decision date, an appeal to the Board must have been filed no later than June 4, 1987, to be considered timely.

In so ruling, however, the Board notes that the memorandum Deputy Commissioner Patch sent to the employees was not a decision which either he or the Commissioner of Safety would have been at liberty to amend. By law, the sole authority to allocate positions within the classified service is vested in the Director of Personnel. Therefore, the Board does not find that "notice" to be subject to the adjustment and appeal procedure outlined in Per 306.04. Accordingly, the Board must find that Bennett's appeal is untimely.

The Board further found that even if Bennett's appeal had been timely, it would have to be denied on the merits. The Division of Personnel ultimately upgraded the Safety Inspector classification from salary grade 14 to salary grade 16. Mr. Bennett, whose position had previously been classified as Safety Inspector Supervisor, salary grade 16, remained at salary grade 16.

By his own admission, the appellant was not performing the duties of a Corporal and had no desire to perform the duties of a Corporal. The record reflects that the appellant was compensated at salary grade 16, during the time he had supervisory responsibilities as well as after he no longer was

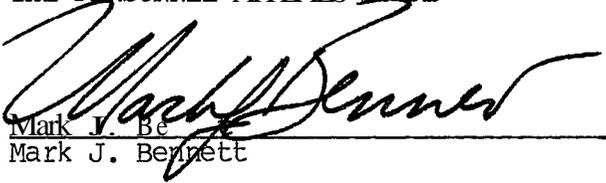
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required to supervise a group of subordinates. He offered no evidence to warrant upgrading his position to Corporal.

In consideration of all the testimony and evidence received, the Board found that the appellant failed to file a timely appeal of the April 29, 1987 decision involving reorganization of his work unit within the Department of Safety. Further, the Board found that had Bennett filed a timely appeal, the evidence he presented would not support a reclassification of his position, or an award of retroactive compensation.

THE PERSONNEL APPEALS BOARD


Mark J. Bennett
Mark J. Bennett

Lisa A. Rule

cc: Virginia A. Vogel, Director of Personnel
E. James Daley, Director, Division of Enforcement
Jean Chellis, SEA Field Representative
Douglas N. Jones, Assistant Attorney General

State of New Hampshire

WPP ID622



PERSONNEL APPEALS BOARD

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APPEAL OF JAMES BENNETT

Response to Motion for Reconsideration - Docket #90-D-3

November 13, 1990

By letter dated August 8, 1990, SEA Representative Dennis Martino filed a Motion for Reconsideration of the Board's August 1, 1990 decision in the matter of James Bennett's letter of warning appeal. The appellant argues that he was "under duress" and had been placed in a "damned if he did, damned if he didn't situation" regarding the issuance of either a warning or a summons for an overweight violation, despite his knowledge that the vehicle was within the legal overweight tolerance. Appellant therefore argues that the warning should be rescinded.

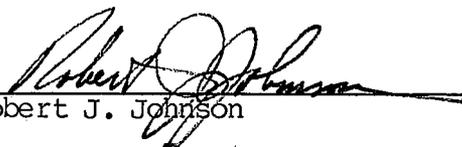
The Board does not agree. As provided in its decision, Officer Bennett's job duties require that he be knowledgeable of overweight vehicle statues and overweight tolerances which are legally allowable. Bennett's duties also require that he be familiar with Department of Safety and Division of Enforcement procedures that an officer should employ when he believes he has been instructed, either through a suggestion or a direct order from a superior officer, to take some action which he believes he should not legally take.

Appellant raised both of these issues during the course of his hearing, and both were addressed in the Board's subsequent order. Nothing in the appellant's Motion for Reconsideration supports a finding that the Board's order was either unreasonable or unlawful in light of the record before it.

Based upon the foregoing, Appellant's Motion for Reconsideration and/or Rehearing is denied.

THE PERSONNEL APPEALS BOARD


Mark J. Bennett


Robert J. Johnson

cc: Dennis T. Martino, Education and Training Director, SEA
Douglas Patch, Esq., Assistant Commissioner of Safety
Virginia A. Vogel, Director of Personnel

State of New Hampshire

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PERSONNEL APPEALS BOARD

State House Annex
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APPEAL OF JAMES BENNETT

Docket #90-D-3

Department of Safety/Division of Enforcement

August 1, 1990

The New Hampshire Personnel Appeals Board (Bennett, Cushman and Johnson) met Wednesday, July 11, 1990, to hear James Bennett's appeal of a letter of warning dated October 3, 1989. Officer Bennett was represented at the hearing by SEA Representative Dennis T. Martino. Assistant Safety Commissioner Douglas Patch, Esq., represented the Department of Safety. Those offering sworn testimony were Cpl. Wayne Peasley, Edward James Daley, Director of the Division of Enforcement, Lt. Paul Davis, and the Appellant, James Bennett.

Before opening the hearing on the merits, the Chair asked if either party to the appeal knew of any reason why any member of the Board should not hear this appeal. Neither party had any objection. Mark Bennett, acting as chairman for the purposes of this hearing, also noted for the record that he is not related to the appellant, nor is he acquainted with the appellant.

Officer Bennett's appeal arises from his receipt of a letter of warning from E. James Daley, Director of the Division of Enforcement. The Division issued an amended letter of warning to Officer Bennett on October 3, 1989, for unsatisfactory work, improper conduct, and actions which reflected discredit upon himself and the Division of Enforcement. The incident for which Bennett received the warning occurred on March 30, 1989, when Officer Bennett issued a summons, charging Manchester Sand and Gravel with an overweight violation.

On the date in question, Director Daley and Cpl. Peasley were travelling south on the Route 28 bypass. Near the Manchester/Hooksett Town line, they noticed a vehicle loaded with gravel which appeared to be overweight. They stopped the vehicle and requested that the driver produce his license, registration, and overweight certificates.. Neither Cpl. Peasley nor Director Daley work on a regular basis with overweight violations, nor were they in possession of portable scales. Neither Daley nor Peasley could issue a summons for overweight violation, even if such a violation were evident,

Officer Bennett was on duty at the time of the suspected violation in the area of the Route 28 bypass. Peasley radioed Bennett and asked if he had portable

scales in his vehicle. Having confirmed that he had scales in his truck, he was then directed by Peasley to report to the location of the stopped vehicle to review the documentation and determine whether or not the gravel truck was operating in violation of the State's overweight laws. Before Bennett's arrival, he was contacted again by Peasley and asked what tolerance he would normally allow on an overweight. Bennett answered that he would allow "very little" tolerance.

The driver of the vehicle produced weigh slips, which were reviewed by Bennett, indicating a gross vehicle weight of 74,500 lbs. The legal weight limit for the vehicle, however, was 73,000 lbs. Officer Bennett briefly discussed the issue with Cpl. Peasley, and Peasley commented that if he were in Bennett's position, he would issue a summons. Officer Bennett responded that maybe a simple warning would be sufficient. Peasley reiterated that he would still issue a summons. Director Daley and Cpl. Peasley then left the scene, leaving Bennett in charge. Bennett did issue a summons to the driver for an overweight violation.

A representative of Manchester Sand and Gravel contacted the Department of Safety, charging that the summons had been improperly issued, as the vehicle had been within the 5% overweight tolerance, a mandatory tolerance under the provisions of State law. An investigation of the incident was initiated, and it was determined that Bennett had improperly issued the summons. The case against Manchester Sand and Gravel was not prosecuted.

According to the Department of Safety, Officer Bennett issued the summons, knowing that the Manchester Sand and Gravel vehicle was within the legally established tolerances. The Department then found him to be in violation of Department of Safety rules and regulations for unsatisfactory performance, personal conduct, and actions which reflected discredit upon himself and the department.

Cpl. Peasley testified that when Bennett arrived at the Manchester/Hooksett town line, Bennett's vehicle was parked just over the line of his patrol area. He first made a comment to Peasley about hoping they weren't trying to draw him out of his patrol area to get him in trouble. Peasley confirmed that he had provided Bennett with the documentation he had obtained from the driver of the vehicle. Bennett did not weigh the vehicle with his portable scales, nor was he required to do so, as the driver did present weigh slip(s) from the Manchester Sand and Gravel scales. Peasley also confirmed that before he and Daley left the scene, he had told Bennett that if it were up to him, he would issue a summons, believing that the vehicle was in violation. When Bennett had suggested that a warning would be sufficient, Peasley did say he'd write the driver up on an overweight violation.

Officer Bennett testified that at the time of the incident, he believed the vehicle was within the legal overweight tolerance. He insisted, however, that

he does not always receive communications from the Department of Safety in a timely fashion, and the possibility existed that the overweight statutes had been amended and enacted without his knowledge of the change. Since Cpl. Peasley had seemed insistent that a summons was in order, Bennett assumed that he should issue the summons in any case. When asked why he had not questioned what he believed he was being directed to do, Bennett responded, "I know what I was being told to do. I was not about to question it. I had already been disciplined for not following orders in an earlier case". When asked if he had received a direct order to issue the summons from either Daley or Peasley, he replied that he had not, but that he believed that was what both Daley and Peasley wanted him to do.

Officer Bennett's April 13, 1989 report of the incident to Director Daley confirms the parties' testimony.

"...I received a radio transmission from Cpl. Peasley at approximately 0800 hours asking if I had scales. I replied in the affirmative. ... I advised that I was en route. While I was en route, Cpl. Peasley called back to inquire how much I allow over permitted weight and I advised very little. ...

"Believing the vehicle in question to be within the mandatory tolerance of five percent, I suggested to Cpl. Peasley that a warning would suffice. Cpl. Peasley replied 'If it was me, I'd write him', and he and the Director departed the scene.

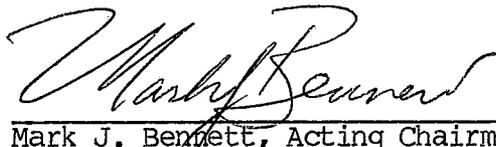
"Realizing that laws and regulations changed in the past and that I had not been notified for some time, I interpreted Cpl. Peasley's reply to mean that he and or the Director desired that a summons be issued in this case, which I did."

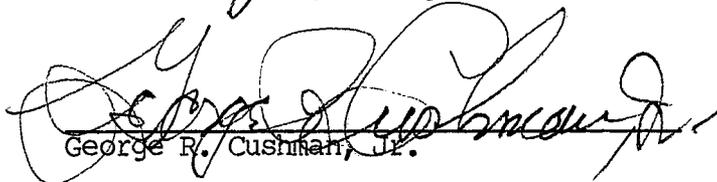
In consideration of the evidence and testimony received, the Board found that Officer Bennett, in the performance of his duties as a Highway Enforcement Officer, is responsible for knowledge of the statutes relating to overweight. If a superior officer suggested that Bennett issue a summons in violation of those statutes, Officer Bennett had an obligation to explain his understanding of the statutory provisions and request that the superior officer clarify his position. Even if faced with a direct order to take action in violation of State law, Officer Bennett is obliged to have such order clarified.

By his own admission, Bennett was under no direct orders to issue a summons to Manchester Sand and Gravel for an overweight violation. He did not request an explanation from Cpl. Peasley of his rationale for issuing a summons when, in Bennett's professional judgment, the vehicle was within the mandatory 5% tolerance. He offered no explanation of why he had suggested a warning instead of a summons when, in his professional judgment, the vehicle was within the lawful, mandatory 5% tolerance.

The Board found that Officer Bennett did issue the summons to Manchester Sand and Gravel in violation of RSA 266:18-b, despite his belief that there was no legal basis for the issuance of that summons. The Board found this action to demonstrate poor professional judgment on Officer Bennett's part, as well as violation of the rules and regulations of the Department of Safety. As such, the Board unanimously voted to uphold the letter of warning, finding such discipline to be consistent with the Rules of the Division of Personnel. In so doing, the Board voted to grant the Department of Safety's Requests for Findings of Fact and Rulings of Law, number 1 - 17 inclusive, a copy of which is attached to this decision. The Board noted that the warning would expire as a basis for discharge two years after the date of issue, but would remain in Officer Bennett's personnel file, as provided by the Rules of the Division of Personnel, Per 308.03 (4)f.

THE N. H. PERSONNEL APPEALS BOARD


Mark J. Bennett, Acting Chairman


George R. Cushman, Jr.

August 1, 1990


Robert J. Johnson

cc: Dennis Martino, SEA Representative
Douglas L. Patch, Esq., Assistant Commissioner, Department of Safety
E. James Daley, Director, Division of Enforcement
Virginia A. Vogel, Director of Personnel
Civil Bureau, Office of the Attorney General

Appeal of James Bennett
Department of Safety - Division of Enforcement
Docket# 90-D-3

Request for Findings and Rulings

Now comes the New Hampshire Department of Safety pursuant to Per-A 204.04 and respectfully requests the Personnel Appeals Board to make the following findings of fact and rulings of law:

1. Highway Enforcement Officer James Bennett has been employed by the Department of Safety since 1978 as a Safety Inspector or Highway Enforcement Officer and since 1972 as a certified police officer, in New Hampshire.
2. One of Highway Enforcement Officer Bennett's primary responsibilities up until the time that he was transferred to the Motor Carrier Safety Assistance Program on December 29 of 1989, has always been weighing trucks.
3. At the time of the incident in question, March 30, 1989, Officer Bennett was familiar with RSA 266:18-b, the statute governing weight restrictions on vehicles certified for the additional weight limit.
4. RSA 266:18-b took effect January 1, 1987 and Officer Bennett had been responsible for enforcing this law since it became effective.
5. RSA 266:18-b requires, and did at the time of the incident, that a five percent tolerance be given on the weight limits.
6. The truck stopped during the incident in question was certified to carry 73,000 pounds.
7. The truck stopped during the incident in question weighed 74,500 pounds.
8. Because the truck was certified and because of the five percent tolerance the truck was authorized to carry 76,650 pounds.
9. The truck stopped during this incident was carrying a legally acceptable load pursuant to RSA 266:18-b.
10. Officer James Bennett inappropriately and, contrary to RSA 266:18-b, issued a summons to the truck in question for an overweight violation.
11. Officer James Bennett knew or should have known that the summons being issued during the incident in question was issued illegally.
12. If Officer Bennett believed that he was being told by a supervisor to issue a summons even though the truck did not exceed legal weight limits, he had an obligation to tell the supervisor that the summons would be issued illegally or to confer with a higher authority.
13. Officer James Bennett failed to tell the supervisor that it would be illegal to issue a summons to the vehicle in question and also failed to confer with a higher authority.

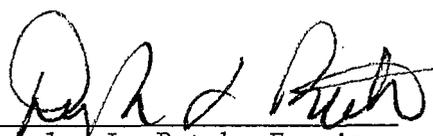
14. Officer James Bennett was appropriately issued a letter of warning for issuing an overweight summons to the truck in question on March 30, 1989.

35. Officer James Bennett was appropriately issued a letter of warning for failing to request a clarification from his supervisor about issuing the summons or for failing to confer with a higher authority within the Department.

16. Officer Bennett was appropriately issued a letter of warning for unsatisfactory performance as a result of him issuing an overweight summons contrary to RSA 266:18-b.

17. Officer James Bennett was appropriately issued a letter of warning for reflecting discredit on himself, the Division of Enforcement and the Department of Safety by issuing an overweight summons contrary to RSA 266:18-b.

Respectfully Submitted
New Hampshire Department of Safety



Douglas L. Patch, Esquire
Assistant Commissioner

cc: Dennis Martino, State Employees Association