State of New Hampshire

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

Appeals of Bruce Ciccone and Tab Colby

Docket #96-D-11 and #96-D-12

New Hampshire Department of Corrections

June 11, 1997

The New Hampshire Personnel Appeals Board (Miller, Bennett and Johnson) met on Wednesday, March 5, 1997, under the authority of RSA 21-I:58, to hear the consolidated appeals of Bruce Ciccone and Tab Colby, employees of the Department of Corrections, concerning letters of warning received by the appellants for allegedly lying during the course of an official investigation. John Vinson, Esq., appeared on behalf of the Department of Corrections. Jean Chellis, State Employees' Field Representative, appeared on behalf of the appellants.

The appeal was made on offers of proof by the representatives of the parties. The record in this matter consists of the audio tape recording of the hearing, pleadings submitted by the parties prior to the hearing, orders issued by the Board and the parties' responses to those orders. The underlying facts are not in dispute:

Sgt. Ciccone and Cpl. Colby were both involved in an investigation of alleged sexual harassment of a female Corrections Officer. Throughout the investigation, both appellants denied having made inappropriate remarks or engaging in conduct which could have been construed as sexual harassment. At the conclusion of the investigation, both officers met with Warden Michael

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Cunningham, who informed them that as a result of their conduct, they might be issued a letter of warning, be suspended, be demoted or be terminated.

During those meetings, Warden Cunningham told the appellants that if they would admit to the alleged misconduct and submit to "verbal counseling," no further disciplinary action would be taken. Both officers requested, and were permitted, to confer privately with their union representatives[1] who were also present at the meetings. During those conferences, Warden Cunningham interrupted and asked the officers if they were married, what their ages were, whether or not they had children, and how they would feel if their families were to pick up a copy of the Concord Monitor some day and see stories that they had been charged with sexual harassment.

Cpl. Colby, in Mr. Boermeester's presence, accepted the offer along with Warden Cunningham's assurance that there would be no warning placed in his file. Sgt. Ciccone asked for additional time to consider the offer. He was permitted to do so, but instructed not to discuss the matter with anyone but Mr. Casio. The following day, he also accepted the offer, with assurances from Warden Cunningham that he would be counseled, but no written warning would be placed in his file.

Approximately two weeks after the meetings with Warden Cunningham, Corrections Commissioner Paul E. Brodeur issued written warnings to Sgt. Ciccone and Cpl. Colby citing violation of Per 1001.03(a)(1), failure to meet the work standard and violation of Department of Corrections Policy and Procedure Directive 2.16 for making false official statements and obstructing investigative activity. Specifically, Commissioner Brodeur wrote in both letters:

> "On February 28,1996, you had a meeting with Warden Cunningham who presented two options to you on how he could proceed based on the findings. You were informed that if you were truthful with him, he would not issue a letter

[1] SEA Representative Marty Boermeester was present during the meeting with Cpl. Colby. SEA Steward Paul Casio was present in the meeting with Sgt. Ciccone.

of warning. At which point you admitted to the charges and the Warden counseled you about your actions related to the sexual harassment findings and a letter of counseling was issued. Upon notification and review of this case, I am concerned that I have an officer who made false official statements..."

Both Sgt. Ciccone and Cpl. Colby, through their SEA Representative, filed timely appeals. They argued that Warden Cunningham was acting in his official capacity as the appointing authority when he informed the appellants that if they admitted to misconduct and accepted counseling, they would be subject to no further disciplinary action. The appellants asked the Board to find that by agreeing to the terms specified by Warden Cunningharn, they had entered into enforceable agreements with the Department of Corrections, and that Commissioner Brodew violated the terms of that agreement by issuing written warnings to the appellants.

The appellants argued that the instant appeal should be resolved consistent with an earlier order of the Board in the Appeal of Bridget Whalen (Department of Health and Human Services). In that case, Ms. Whalen had appealed a written warning, and in the course of an informal settlement meeting, the Commissioner's designee had agreed to remove the warning from her file. However, the Commissioner disagreed with that decision and ordered the warning to remain on file. Ms. Whalen appealed that decision to the Board, arguing that having delegated authority to one of her subordinates to hear the matter, she was bound by the subordinate's decision to remove the warning. The Board granted her appeal. In its decision, the Board stated, "[A]bsent any illegality in the agreeinent, the board found that the agreement was enforceable. Because the letter of warning was issued by the appointing authority, the board found that the appointing authority could agree to withdraw it."

On March 21, 1996, the Board issued an order directing the Department of Corrections to show cause why its agreement with the appellants should not be enforced. Specifically, the Board asked the Department to respond in light of the Whalen order.

In response to the Board's order, Mr. Vinson argued that the principles applied in the Whalen decision did not apply. Specifically, he argued that the Board had probably resolved the appeal on the basis of its "equitable authority under RSA 21-I:58" rather than on the underlying facts of the discipline, and the decision therefore had no "legal precedence." He also argued the appropriate legal remedy would have been to "put the parties back to the position they were in had the bargain not been struck." He argued that in the Whalen case, "The Agency did not get the benefit of its bargain. Instead, the Board decided that the Agreement for the removal of the Letter of Warning should be enforced against the Agency."

The Department also argued that the facts in the instant appeals were different from those in Whalen in that there were two separate issues: sexual harassment and lying during the course of an official investigation. He argued that verbal counseling which the appellants received for sexual harassment, to which they admitted, was not discipline under the terms of the Rules of the Division of Personnel. As such, he argued that Warden Cunningham had kept the bargain by not taking disciplinary action against the appellants for that offense. However, he asserted that when Commissioner Brodeur learned of their admissions and discovered that the appellants had lied during the investigation, he was within his rights to discipline them for that offense. The Board does not agree.

On the facts in evidence, it appears that the Department of Corrections believed that Sgt. Ciccone and Cpl. Colby were guilty of sexual harassment[2], and that they also were guilty of lying during the investigation of those charges. While the Department might have disciplined the appellants for both offenses if the evidence warranted, the Department instead elected to coerce the appellants to admit to the first alleged offense, then disciplined them for the second.

[2] The Board received no evidence on the harassment allegations or the ensuing investigation, and makes no findings thereto.

The evidence reflects that the appellants would not have admitted to any misconduct but for the fact that Warden Cunningham threatened, in the presence of witnesses, to publicize the sexual harassment charges and discipline both officers unless they admitted to misconduct. The Board does not believe that admissions procured under those circumstances have any weight as evidence that the appellants were lying when they denied the allegations in the first instance.

On the evidence, argument and offers of proof, the Board voted to grant the appeals of Bruce Ciccone and Tab Colby. Accordingly, the Department of Corrections is hereby ordered to remove the written warnings, and any reference thereto, from its records. The Board also requests that the Division of Personnel also remove the letters of warning from the appellants' personnel files.

FOR THE NEW HAMPSHIRE PERSONNEL APPEALS BOARD

Mary Ann Steele

Mary Ann Steele, Executive Secretary

cc: Virginia A. Lamberton, Director of Personnel
Thomas Hardiman, SEA Director of Field Operations
John Hardiman, SEA Director of Field Operations

State of New Hampshire

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APPEAL OF BRUCE CICCONE

Department of Corrections

Letter of Warning Appeal

Docket #96-D-11

June 3, 1994

By Order dated March 21, 1996, the New Hampshire Personnel Appeals Board directed the Department of Corrections to show cause why the Board should not order the State to remove a ietter of warning dated March 7,1996, signed by Corrections Commissioner Paul Brodeur, and received by the Mr. Ciccone on March 12, 1996, from Mr. Ciccone's personnel file. The Board permitted the State fifteen days in which to file its response, and allowed the Appellant five days from the date of receipt of the State's answer in which to file his rebuttal.

On April 5, 1996, the New Hampshire Personnel Appeals Board received a letter from Department of Corrections Staff Attorney John Vinson transmitting an unsigned, undated document entitled, "Response to the Appeal of Bruce Ciccone." There is no indication that a copy of the response was provided to the Appellant[1]. Furthermore, in addition to being improperly filed the Department's reply is unresponsive to the Board's March 21, 1996, Order.

In its Order of March 21, 1996, the Board stated, in part:

> "Mr. McCormack asserted that the following day, Warden Cunningham personally assured Mr. Ciccone, in the presence of two witnesses, that if he admitted to a sexual harassment offense, he would rcceivc a counselling letter that would bc kept in the Warden's files, but that would not be placed in any other files. Allegedly, Warden Cunningham <u>also assured Mr. Ciccone that the matter had been settled, and that no other action would be taken against him.</u>" (Emphasis added)

While the Department of Corrections has asserted that sexual harassment and lying during the course of an investigation are separate offenses, there is neither evidence nor argument to suggest that Warden Cunningham's offer of immunity from further discipline was limited to the sexual harassment allegations. On the contrary, the Appellant's unrefuted allegations describe an offer of settlement which would bring the entire incident to a close.

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[1] Per-A 202.03 and Per-A Per-A 206.02 of the Rules of the Personnel Appeals Board require that all communication with the Board on any matter pending before the Board shall be in writing, and that copies shall be served on the other party to the appeal.

The Department of Corrections shall have ten days from the date of this order in which to file an amended reply to the Board's original show cause order. The Department's response shall be filed in accordance with Per-A 202.03 and Per-A 206.02 of the Rules of the Personnel Appeals Board, so that the Appellant may have an opportunity to respond. The response shall be deemed incomplete if it is not dated and signed. Finally, if the Department of Corrections files an incomplete, untimely, procedurally improper or unresponsive reply to this Order, the Board shall issue an order requiring the Department of Corrections to remove the March 7, 1996, letter of warning from Mr. Ciccone's file.

THE NEW HAMPSHIRE PERSONNEL APPEALS BOARD

Patrick J. McNicholas, Chairman

Mark J. Bennett, Commissioner

Lisa A. Rule, Commissioner

cc: Virginia A. Lamberton, Director of Personnel
Lisa Currier, Human Resources Administrator, Department of Corrections
John E. Vinson, Esq., Commissioner's Office, Department of Corrections
Stephen J. McCormack, Field Representative, State Employees' Association

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APPEAL OF BRUCE CICCONE

Department of Corrections

Letter of Warning Appeal

Docket #96-D-11

March 21, 1996

By letter dated March 15, 1996, SEA Field Representative Stephen McCormack filed a request that the New Hampshire Personnel Appeals Board issue an order enforcing what was described as an agreement between Warden Michael Cunningham and Sergeant Bruce Ciccone concerning counselling for an incident of alleged sexual harassment involving Sgt. Ciccone. In his request, Mr. McCormack alleged that when Mr. Ciccone met with Warden Cunningham to discuss possible disciplinary action as a result of the sexual harassment complaint and investigation, Warden Cunningham refused to consider that Mr. Ciccone may have been innocent of the charge. He alleged that Warden Cunningham told the appellant that Mr. Ciccone could admit to the conduct in question and submit to verbal counselling, with the assurance that there would be no further action against him. Otherwise, if Mr. Ciccone insisted upon maintaining his innocence, he would be disciplined with a letter of warning, suspension, demotion or possible termination.

Mr. McCormack alleged that after allowing Mr. Ciccone to meet privately with SEA Steward Paul Casio, but before hearing the appellant's response to the Warden's options, Warden Cunningham interrupted and asked the appellant if he was married and had a daughter, what was his age and where did he live. Mr. McCormack alleged that after Mr. Ciccone gave him answers to those questions, Warden Cunningham asked how Mr. Ciccone would feel one day if his wife or daughter picked up the Concord Monitor and read that the appellant had been charged with sexual harassment. Mr. McCormack asserted that Mr. Ciccone became quite upset and asked, and was permitted, to have until the following day to decide. However, he was told

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not to discuss the matter with anyone but Paul Casio.

Mr. McCormack asserted that the following day, Warden Cunningham personally assured Mr. Ciccone, in the presence of two witnesses, that if he admitted to a sexual harassment offense, he would receive a counseling letter that would be kept in the Warden's files, but that would not be placed in any other files. Allegedly, Warden Cunningham also assured Mr. Ciccone that the matter had been settled, and that no other action would be taken against him.

On March 7, 1996, Superintendent Paul Brodeur issued a letter of warning to Mr. Ciccone for failing to meet the work standard and violation of Department of Corrections P.P.D. 2.16 IV J and IV S by making false official statements and obstructing investigative activity. In his letter (provided as an attachment to the request for an order enforcing the agreement between Mr. Ciccone and Warden Cunningham) Commissioner Brodeur stated:

> "On February 28, 1996, you had a meeting with Warden Cunningham who presented two options to you on how he could proceed based on the findings. You were informed that if you were truthful with him, he would not issue a letter of warning. At which point you admitted to the charges and the Warden counselled you about your actions related to the sexual harassment findings and a letter of counseling was issued."

Mr. McCormack argued that Warden Cunningham was and still is the duly authorized officer to settle matters regarding possible discipline, and that once Warden Cunningham had offered a settlement agreement acceptable to Mr. Ciccone, the Department of Corrections was barred from any further adverse action against Mr. Ciccone arising out of the incident. Mr. McCormack referred the Board to its decision in the Appeal of Bridget Whalen (December 28, 1988). In that instance, an agreement was reached between Ms. Whalen and the duly authorized hearings officer, acting as the Health and Human Services Commissioner's designee, to remove a letter of warning from Ms. Whalen's file. The Commissioner's subsequent decision to reverse that decision and affirm the warning gave rise to Ms. Whalen's appeal.

In its decision in Whalen, the Board stated:

> "...[A]bsent any illegality in the agreement, the Board found that the agreement was enforceable. Because the letter of warning was issued by the appointing authority, the Board found that the appointing authority could agree to withdraw it."

Under the authority of Per-A 202.03 and Per-A 202.04 of the Rules of the Personnel Appeals Board, the Department of Corrections shall be permitted fifteen days from the date of this order in which to show cause why this matter should not be resolved consistent with the Board's

ruling in the Appeal of Bridget Whalen. Upon receipt of the Department's response, the Appellant shall have an additional five days in which to rebut any of the issues or arguments raised therein.

THE NEW HAMPSHIRE PERSONNEL APPEALS BOARD

Patrick J. McNicholas, Chairman

Mark J. Bennett, Commissioner

Lisa A. Rule, Commissioner

cc: Virginia A. Lamberton, Director of Personnel
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