

State of New Hampshire



PERSONNEL APPEALS BOARD
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APPEALS OF DAVID HART

Docket #98-D-6 (August 29, 1997, Written Warning)

Docket #98-T-7 (September 15, 1997, Termination)

NH Department of Corrections

Thursday, May 07, 1998

The New Hampshire Personnel Appeals Board (Bennett, Wood and Barry) met on Wednesday, March 25, 1998, under the authority of RSA 21-I:58, to hear the appeal of David Hart, a former employee of the New Hampshire Department of Corrections. Mr. Hart was represented at the hearing by SEA General Counsel Michael Reynolds. John E. Vinson, Corrections Counsel, appeared on behalf of the State. At its meeting of February 4, 1998, the Board, with the consent of the parties, voted to consolidate these matters for the purpose of hearing.

The record in these matters consists of the audio tape recording of the hearing; notices, orders and decisions issued by the Board; pleadings submitted by the parties; and documents admitted into evidence as follows:

State's Exhibits

1. Unofficial transcript of David Hart's November 6, 1997, Department of Employment Security Appeals hearing
2. August 29, 1997, written warning for sexual harassment
3. September 2, 1997, handwritten memo from David Hart to John Martin advising that Mr. Hart had reviewed the DOC/NHSP PPD 2.39 on sexual harassment
4. September 24, 1992, acknowledgment signed by Mr. Hart that he had received, read and understood the State of New Hampshire Policy on Sexual Harassment
5. June 13, 1995, acknowledgment signed by David Hart that he had attended and understood the contents of a training session on sexual harassment

6. June 13, 1995, certification that Mr. Hart had completed a course entitled "The Issue is Respect"
7. September 5, 1997, memo to all Medium Custody North staff, signed by Unit Manager John Martin and by David Hart, acknowledging Mr. Hart's receipt of the department's and the State's sexual harassment policies, and acknowledging his participation in a refresher briefing on the subject by the Unit Manager
8. July 15, 1997, statement given by Mr. Hart to Marilee Nihan in response to Kathy Lohnes' complaint of sexual harassment
9. November 24, 1997, letter from David Hart to the Commissioner of Employment Security appealing the Appeal Tribunal's findings with respect to his application for unemployment compensation benefits
10. December 29, 1997, handwritten letter from David Hart further appealing Employment Security's decision denying him unemployment compensation
11. NH Department of Corrections Policy and Procedure Directive 2.39 (Subject: Sexual Harassment)
12. Photocopy of three letters to the editor of the Concord Monitor responding to David Hart's letter, published June 2, 1997
13. June 11, 1997, memo from Michael Cunningham to Donald White regarding a counseling session with David Hart

Appellant's Exhibits

- A. Complaint of sexual harassment by Kathy Lohnes against the Department of Corrections, and the Department's response thereto
- B. September 12, 1997, statement of Joanne Ferry concerning an incident involving David Hart at her birthday party on September 11, 1997
- C. September 12, 1997, statement of Paul Bell concerning an incident involving David Hart at Joanne Ferry's birthday party on September 11, 1997
- D. September 12, 1997, statement of Walter Davies concerning an incident involving David Hart at Joanne Ferry's birthday party on September 11, 1997
- E. Typed letter signed by David Hart, addressed to "Sir" outlining his concerns about job assignments, caseloads and supervision of Correctional Counselors/Case Managers at the State Prison

- F. Letter to the editor of the Concord Monitor written by David Hart, published June 2, 1997, entitled "Cause for crowding: Prison is too cushy"
- G. Documents including an August 28, 1997, letter to Mr. Hart from Governor Shaheen, undated letter to Mr. Hart from Commissioner Brodeur, April 21, 1997, letter to Mr. Hart from William Lepine, and performance summaries dated 1/97, 1/96, 2/95, 1/94, and 2/93
- H. Performance summary dated 6/13/97
- I. Handwritten letter dated September 19, 1997, from Mr. Hart to (Acting) Commissioner Pishon
- J. Excerpts from the Report of Sexual Harassment Investigation for the Attorney General in response to a complaint by Kathleen Lohnes
- K. Typed, undated memo from David Hart to Acting Commissioner Pishon requesting a copy of the official transcripts of the sexual harassment investigation, particularly as they pertained to Mr. Hart

The following persons gave sworn testimony:

David Hart
 Kathleen Lohnes Gauthier
 Keith A. Phelps
 Joanne L. Ferry
 Paul Bell

Walter Davies
 Thomas Hogan
 John Martin
 Michael J. Cunningham
 Wayne Brock

The witnesses were sequestered at the request of the parties.

Mr. Reynolds argued that the appellant was not guilty of any conduct that would warrant his immediate termination from employment. He argued that while the appellant's conduct admittedly was inappropriate, it was not sexual harassment. Mr. Reynolds alleged that although the appellant had always been evaluated as performing above-average work in his position as a Unit Manager, Warden Cunningham was angered by a letter that Mr. Hart wrote to The Concord Monitor complaining about conditions being too comfortable for inmates at the prison. He argued that following publication of that letter, Warden Cunningham's treatment of the appellant changed dramatically, and that discipline subsequently imposed for alleged sexual harassment was merely retaliation, in violation of the appellant's right to free speech. Mr. Reynolds argued that the State had no persuasive evidence of the comment allegedly made to Ms. Lohnes, and therefore should not have disciplined him for allegedly repeating that comment at Ms. Ferry's

birthday party. Finally, Mr. Reynolds argued that Warden Cunningham dismissed the appellant without providing him copies of witness statements collected by the department following the party incident. He argued that the Warden's refusal to provide the statements constituted a violation of Per 1001.08 (f), therefore rendering the termination illegal. He argued that the appellant therefore must be reinstated with full pay.

Mr. Vinson argued that throughout 1996 and 1997, until the time of his termination, the appellant had the proclivity to make inappropriate remarks in the work place, and that the remarks were of a crude or sexual nature. In particular, he argued that the evidence would prove that the appellant had repeated to Corrections Officer Kathy Lohnes a remark made by an inmate which was sexually threatening. He argued that the appellant subsequently engaged in crude, sexually oriented conduct at Ms. Ferry's birthday party, and that when one of those attending told the appellant his conduct was inappropriate, he repeated the remark earlier made to Ms. Lohnes.

After considering the evidence and argument offered by the parties, the Board made the following Findings of Fact and Rulings of Law:

Factual Findings

1. At all relevant times, Mr. Hart was employed by the Department of Corrections as a Corrections Counselor/Case Manager assigned to the Adult Correctional Facility in Concord, New Hampshire.
2. Mr. Hart was familiar with Kathy Lohnes, who was working at the time as a Corrections Officer.
3. In the spring of 1997, Corrections Officer Kathy Lohnes asked the appellant, who was a Notary Public, to notarize some paperwork for her. When Ms. Lohnes asked about paying for the service, the appellant answered that since he didn't charge inmates for notary work, he wouldn't charge staff members.
4. Mr. Hart was aware that an inmate had said of Ms. Lohnes that he would like to, "bend her over the desk and F--- her like a red-headed step child."
5. When Mr. Hart and Ms. Lohnes were discussing payment for the notary work, Mr. Hart made a remark that instead of payment, perhaps he should just bend her over the desk.

6. Ms. Lohnes later filed a written complaint, and following investigation of the complaint, Mr. Hart was issued a letter of warning on August 29, 1997, charging him with violation of the State's and the Department's Sexual Harassment Policies, and for failing to meet the work standard.
7. Ms. Lohnes resigned from her position immediately after having been reprimanded by her supervisor for willful insubordination. She subsequently filed charges of sexual harassment against the Department of Corrections. She had made no complaint prior to her separation from service.
8. On Thursday, September 11, 1997, Mr. Hart attended a birthday party for Joanne Ferry, a fellow Unit Manager.
9. When Mr. Hart arrived at the party, someone mentioned gifts that Ms. Ferry received, and Mr. Hart pointed to the zipper of his pants and made a remark about having her present right there.
10. Ms. Ferry told the appellant that he was "crossing the line."
11. Sgt. Bell, who also had attended the party, heard the remark and asked Mr. Hart if he hadn't gotten himself into enough trouble with that sort of remark. Mr. Hart responded that Sgt. Bell should just be quiet, or Mr. Hart would bend him over the desk and treat him like a stepchild.
12. Walter Davies also attended the birthday party. He witnessed Mr. Hart's gesture toward his groin area and heard his remark about having Ms. Ferry's present for her. He heard Sgt. Bell make a remark to the effect that Mr. Hart had made them all witnesses in his next sexual harassment investigation, and he heard Mr. Hart say, "I'll bend you over that desk like a red-headed step child."
13. Mr. Davies went back and reported the incident to his supervisor, the Administrator of Security.
14. A report of the incident was relayed to Warden Cunningham, who then met with Joanne Ferry, Paul Bell and Walter Davies that afternoon to hear their description of what had occurred. Warden Cunningham then asked them to reduce their oral statements to writing.
15. Warden Cunningham met with Mr. Hart on September 12, 1997, and told him that Ferry, Bell and Davies had observed his conduct and heard the remark he had made. Mr. Hart neither admitted nor denied his conduct.

16. Warden Cunningham told Mr. Hart he could have "the weekend to think it over." He told Mr. Hart he would meet with him again on Monday, September 15, 1997.
17. Mr. Hart and Warden Cunningham met again on Monday, September 15, 1997, to review the allegations. At the conclusion of the meeting, Warden Cunningham told the appellant that he was to be dismissed, and that his letter of termination would be forthcoming.
18. Mr. Hart had a union representative at the meeting on September 12, 1997, and at the meeting on September 15, 1997.
19. At his meeting of September 15, 1997, Mr. Hart requested copies of the written statements from Ferry, Bell and Davies. Warden Cunningham refused to provide the statements, and told Mr. Hart he would have to request them from Mr. Pishon.

Rulings of Law

- A. "An appointing authority shall be authorized to use the written warning as the least severe form of discipline to correct an employee's unsatisfactory work performance for offenses including, but not limited to: (1) Failing to meet the work standard; ...(7) Sexual Harassment..." [Per 1001.03 (a)]
- B. "Dismissal without prior warning. An appointing authority shall be authorized to take the most severe form of discipline by immediately dismissing an employee without warning for offenses such as, but not necessarily limited to, the following: ...(3) Violation of a posted or published agency policy, the text of which clearly states that violation of same will result in immediate dismissal." [Per 1001.08 (a)(3)]
- C. "An appointing authority shall be authorized to immediately dismiss an employee who commits more than one of the offenses listed in Per 101.08(b) during the previous 2 years." [Per 1001.08 (c)]
- D. "No appointing authority shall dismiss a classified employee under this rule until the appointing authority: (1) meets with the employee to discuss whatever evidence the appointing authority believes supports the decision to dismiss the employee prior to issuing notice of dismissal. (2) provides the employee an opportunity at the meeting to refute the evidence presented by the appointing authority...; (3) documents in writing the nature and extent of the offense; (4) lists the evidence the appointing authority used in making the decision to dismiss the employee." [Per 1001.08 (f)]

E. "Any permanent employee who is affected by any application of the personnel rules, except for those rules enumerated in RSA 21-I:46, I and the application of rules in classification decisions appealable under RSA 21-I:57, may appeal to the personnel appeals board within 15 calendar days of the action giving rise to the appeal. The appeal shall be heard in accordance with the procedures provided for adjudicative proceedings in RSA 541-A. If the personnel appeals board finds that the action complained of was taken by the appointing authority for any reason related to politics, religion, age, sex, race, color, ethnic background, marital status, or disabling condition, or was taken in violation of a statute or of rules adopted by the director, the employee shall be reinstated without loss of pay, provided that the sum shall be equal to the salary loss suffered during the period of denied compensation less any amount of compensation earned or benefits received from any other source during the period. "Any other source" shall not include compensation earned from continued casual employment during the period if the employee held the position of casual employment prior to the period, except to the extent that the number of hours worked in such casual employment increases during the period. 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." [RSA 21-I:58, I]

Decision and Order

Docket #98-D-6 (Written Warning)

The Board voted unanimously to uphold the Department's decision to issue a written warning to Mr. Hart for sexual harassment arising out of his conduct with Kathy Lohnes. Although the appellant argued that his conduct was no worse than that exhibited by Ms. Lohnes throughout their the period of their acquaintance, Mr. Hart's remark that he would "bend her over the desk and ---- her like a stepchild," is completely inexcusable. Contrary to the appellant's assertion, it is not merely crass or inappropriate, it is the kind of remark that conveys both disrespect and a sexually explicit threat. The Board was not persuaded to overturn the warning on the strength of the appellant's assertion that he neither intended the "sexual banter" to be harassing or threatening. The appellant had received, and acknowledged receipt of, the Department's and the State's policy on sexual harassment, which defines harassment as, "Acts that ... include, but are not limited to, unwelcome sexual advances, suggestions or requests for sexual favors and other

verbal or physical conduct of a sexual nature when: A. Submission to such conduct is either explicitly or implicitly a term or condition of an individual's employment..."

The appellant argued that his communications with Ms. Lohnes should be construed as nothing more than "smokin' and jokin'" with a fellow employee. However, Mr. Hart was the senior employee and held a supervisory position within the department. In light of the testimony of less senior departmental employees, it was clear that putting up with Mr. Hart's behavior was implicitly a condition of their employment. Although the employees may not have felt threatened by Mr. Hart, they were, nevertheless, subjected to his sexually oriented comments on a regular basis. The incident involving Ms. Lohnes represents just one such occasion, and the Department acted appropriately by disciplining Mr. Hart.

Docket #98-T-7 (Termination)

The Board found that the Department of Corrections did not violate Mr. Hart's rights under the provisions of Per 1001.08 (f) in dismissing him from his employment. In accordance with Per 1001.08 (f), the appointing authority did meet with the employee to present whatever evidence the appointing authority believed supported the decision to dismiss the employee. The evidence supporting the dismissal was in the form of eye-witness reports from Ms. Ferry, Mr. Bell and Mr. Davies.

The appellant argued that the Warden's failure to produce the written statements at their meeting of September 15, 1997, should render the termination invalid. The Board does not agree. All the evidence supporting the dismissal was presented to Mr. Hart at his September 12, 1997, meeting with the Warden, when he was confronted with the substance of the verbal reports from Ms. Ferry, Mr. Bell and Mr. Davies. Mr. Hart knew both the source and substance of the reports, and therefore was presented the evidence upon which the appointing authority relied in deciding to dismiss the appellant, and the appellant had an opportunity to refute all the evidence.¹

¹ In Boulay, the Court cited Ackerman v. Ambach, 530 N.Y.S.2d 893, 894 (App. Div. 1988): "The dates and nature of the alleged misconduct must be sufficiently precise, when considered with information available to the charged individual, to allow the presentation of an intelligent defense."

The Board did not find that the termination was effected as a form of retaliation for the appellant's letter to The Concord Monitor, although clearly his work and his communications were being monitored more closely by management at the Department of Corrections following publication of the letter. The Board also found that the Department could have terminated Mr. Hart for sexual harassment, with or without prior written warning under the provisions of the State's Policy on Sexual Harassment. However, under the equitable authority granted to the Board under the provisions of RSA 21-I:58, I, the Board voted to reinstate the employee, and to treat the period of termination as a disciplinary suspension without pay.

All of the witnesses described a work environment where sexually explicit remarks and conduct are relatively commonplace, and it is clear that efforts by the department to correct such conduct have been less than consistent throughout the agency. Equitably, the Board can not affirm the separation of a 17 year veteran where there is no evidence that any of his evaluations contained any critiques of Mr. Hart's remarks and conduct. Mr. Hart's conduct, however, can not and will not be condoned by the Board, and returning him to work without substantial penalties for his outrageous conduct would represent an equally inequitable solution.

Accordingly, the Board voted to reduce the termination to a disciplinary suspension. Should the agency have further occasion to discipline the appellant for a documented instance of sexual harassment, the appellant will be subject to immediate dismissal without further warning.

THE PERSONNEL APPEALS BOARD


Mark J. Bennett, Chairman

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Patrick H. Wood, Commissioner

Concurrence of Commissioner Barry

While I agree with the result reached by the Board, I do not agree with its reasoning because I conclude that it was appropriate that Mr. Hart be terminated. Although I am persuaded that Mr. Hart was apprised of the source and substance of the evidence supporting his termination, I do not feel that Mr. Hart was provided with all of the documents reasonably available to Warden Cunningham prior to notice of termination being issued.



James J. Barry, Commissioner

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