

State of New Hampshire



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

Appeal(s) of Karen Hildreth - Docket #2012-0-004 and #2012-0-007

Department of Health and Human Services

Personnel Appeals Board Decision on Re-hearing

September 6, 2013

The New Hampshire Personnel Appeals Board (Bonafide, Johnson and Casey) met in public session on Wednesday, August 14, 2013, under the authority of RSA 21-I:58 and Chapters Per-A 100-200 of the NH Code of Administrative Rules, to rehear the appeals of Karen Hildreth concerning a December 10, 2010 letter of warning notifying her that her salary increment was to be withheld for failure to meet the work standard, and a May 4, 2011 letter of warning for failure to meet the work standard and failure to take corrective action. SEA Grievance Representative Sean Bolton appeared on behalf of the Appellant. Attorney Jennifer Jones appeared on behalf of the Department of Health and Human Services.

Procedural background:

When Ms. Hildreth first appealed her written warnings to this Board, she had already retired from State service. The Board found that although Ms. Hildreth had made timely requests for informal settlement of those warnings at the agency level, she retired before appealing to the Board and she no longer qualified as a permanent employee affected by a decision of the appointing authority, making her ineligible to appeal under the provisions of RSA 21-I:58. The Board then voted to dismiss her appeals as matters outside the Board's jurisdiction. That decision, and the Board's subsequent denial of the Appellant's request for reconsideration, were appealed to the NH Supreme Court, which issued an Opinion on October 30, 2012, reversing the Board's decision on the question of jurisdiction, and remanding the matters for a hearing on the merits of her appeals.

On February 6, 2013, the Board heard the appeals on offers of proof, and on March 6, 2013, it issued a decision denying both appeals (copy attached). The Appellant filed a Motion for Reconsideration and/or Rehearing on April 3, 2013. The State's Objection followed.

In reviewing the record to evaluate the Appellant's Motion and the State's Objection, the Board found that its verbatim recording of the original hearing on the merits of the appeal was corrupted, and that only a portion of the oral arguments made by the representatives of the parties was available for review. Therefore, the Board voted to grant the Appellant's Motion for Rehearing, but to deny the request to take live witness testimony, as the Appellant failed to persuade the Board that it would be unable to reach a fair decision based on the documentary evidence presented and the parties' offers of proof.

The record of the rehearing in this matter consists of notices and orders issued by the Board, pleadings submitted by the parties prior to the rehearing, the digital audio recording of the rehearing on the merits of Ms. Hildreth's appeals, and the documentary record of the original hearing on the merits of Ms. Hildreth's appeals.

Exhibits in evidence

Mr. Bolton stated that when the Department disciplined the Appellant in 2010 and 2011, the Appellant did not realize that the agency had taken into consideration the letter marked as State's Exhibit 1, as that letter was supposed to have been removed from the Appellant's file as a result of a request for informal settlement. Mr. Bolton argued that any subsequent discipline therefore must be removed from the Appellant's file. Attorney Jones stated that Exhibit 1 was not used as a basis for disciplinary action in 2010 or 2011, and she noted that the exhibit had been stricken from the record at the original hearing on the merits and thus was not part of the record of the rehearing. The Board agreed that proposed State's Exhibit 1 had been stricken from the record at the original hearing on the merits of the appeal, and therefore was not a part of the record for the rehearing, or a consideration in whether or not the appeal of warnings currently before the Board should be granted or denied.

Denial of request to offer live witness testimony

In the Appellant's Motion for Reconsideration and/or Rehearing, and in oral argument before the Board at the rehearing, Mr. Bolton argued that the Board's denial of his request to schedule a full

evidentiary hearing with live witness testimony denied the Appellant an opportunity to challenge the material facts in dispute and the allegations set forth in her letters of warning. The Board does not agree.

Both parties provided numerous documents for review, and the Appellant's evidentiary submissions and offers of proof set out in detail the Appellant's ongoing disagreement with her supervisor about the Appellant's responsibilities, including what work should be performed, how work should be accomplished, how work should be evaluated, and who should be held accountable for errors when they occurred. There was ample opportunity at the original hearing on the merits of the appeal, and at the rehearing, for the Appellant to make an offer of proof regarding the testimony that any potential witness might have given to support the Appellant's position. No witnesses were identified who would provide evidence beyond that which was already in the record. Further, Ms. Hildreth was present at both the original hearing and rehearing, and certainly was available to assist Mr. Bolton in presenting any evidence or offers of proof that might demonstrate that the withholding of her salary increment or the subsequent letter of warning were unlawful, that they were issued in violation of the personnel rules, that they were unwarranted, or that they were unjust. [See: Per-A 207.12(b), NH Code of Administrative Rules] As such, the Board determined, in compliance with Per-A 207.02 (c), that it did not need to hear the testimony of witnesses in order to, "(1) Address a relevant matter involving the credibility of witnesses; or (2) Understand or fairly assess the arguments at issue."

Progressive Discipline

The Appellant argued that the agency failed to utilize progressive discipline by withholding the Appellant's salary increment as a first level of discipline instead of issuing a written warning.

The rules do not require an agency to begin the disciplinary process in all cases with a written warning. Per 1002.05 (a) states:

(a) An appointing authority may withhold an employee's salary increment for unsatisfactory work performance when:

- (1) The employee's current performance evaluation indicates that the employee's performance fails to meet expectations overall; or
- (2) The employee has failed to take those steps identified in the previous performance evaluation, written warning, or corrective action plan detailing what actions the employee was required to take in order to avoid disciplinary action.

Before issuing a written warning dated December 10, 2010, notifying the Appellant that her salary increment was to be withheld for failure to meet the work standard, the agency administered written counseling on October 14, 2009, which included a summary of deficiencies in the Appellant's work performance along with a detailed corrective action plan. As such, the agency complied with the requirements of Per 1002.05(a)(2) before it withheld the Appellant's salary increment. The subsequent letter of warning issued on May 4, 2011, referred to the prior warning and performance evaluations on file.

Burden of Proof

In the Appellant's Motion for Reconsideration and/or Rehearing, Mr. Bolton argued that the Board misapplied the burden of proof and failed to make the employer prove by a preponderance of the evidence each of the "operative facts" underlying the discipline. Mr. Bolton argued that the Appellant disagreed with the agency's assessment of her work performance, that there were no actual "facts in evidence," that the Board erred by taking the word of one party over the other, and that the Board impermissibly made the Appellant responsible for persuading the Board that the disciplinary actions were unwarranted. Again, the Board does not agree.

The Board's procedural rules, which were properly promulgated and adopted in accordance with the provisions of the Administrative Procedures Act (RSA 541-A), include the following:

Per-A 102.11 "Evidentiary hearing" means an adjudicative proceeding in which the parties to an appeal can present evidence, arguments and offers of proof to the board with respect to the facts of a matter under appeal.

Source. (See Revision Note at chapter heading for Per-A 100)
#7377, eff 10-23-00

Per-A 102.12 "Offer of proof" means a representation by a party, whether orally or in writing, as to the testimony a witness would give to the board under oath with respect to the particular facts if the witness were to testify live.

Source. (See Revision Note at chapter heading for Per-A 100)
#7377, eff 10-23-00

Per-A 207.01 Burden of Proof and Production.

(a) In all cases except as otherwise provided in Per-A 207.12 (e) the burden of proof shall be upon the party making the appeal.

(b) In appeals involving disciplinary action, removal for non-disciplinary reasons, involuntary transfer, non-selection to a vacancy, or the interpretation and application of a rule adopted by the director of personnel, the appointing authority shall have the burden of producing evidence supporting the action under appeal.

Source. (See Revision Note at chapter heading for Per-A 200)
#7378, eff 10-23-00; ss by #9205, eff 10-23-08

Both the original hearing on the merits of the appeal and the rehearing were evidentiary hearings as defined by Per-A 102.01. In each case, the Appellant and the State had the opportunity to present evidence, arguments and offers of proof, and both parties were very clear about the testimony that would have been offered under oath.

The offers of proof and documents in evidence indicate that the Appellant's supervisor determined that the Appellant had difficulty carrying out the basic responsibilities of the position and concluded that she needed more direct, on-going, hands-on supervision, including one or more meetings every week to review caseload and case activities. Specific issues in need of correction and individual performance expectations were communicated to the Appellant through meetings, a memo of counsel, detailed corrective action plans, performance evaluations and discipline. Although the Appellant showed improvement in some areas as a result of counseling and corrective action, her overall work performance still did not meet the expectations established for her position.

The Board gave due consideration to the Appellant's disagreement with the facts as asserted by the agency including her assertion that errors noted in the warnings were, to some degree, attributable to others, including her own supervisor; that she was quick to answer questions from what she describes as "other entities" in a positive and enthusiastic manner; and that she received positive feedback when she did program outreach and training. The Board understands that leave taken by the Appellant on February 14 and 15, 2011, was unexpected and unplanned but later approved, and that when she returned from leave, her supervisor did not instruct her to ensure that all participant checks were mailed before attending to other duties and responsibilities. The Board considered the fact that there was no fixed date each month for mailing participant checks, but notes that the Appellant was aware that there were specific requirements for timely payment once checks were received. The Board understands that meetings to monitor the Appellant's work were reduced from once a day to twice a week when there was improvement in the Appellant's work performance, but notes that even that reduced level of supervision should have been unnecessary. The Board understands that the Appellant had no formal discipline on file prior to the withholding of her salary increment and subsequent warning for failing to meet work standards.

Having carefully considered the evidence, arguments and offers of proof, the Board found that the facts, as asserted by the Appellant, are insufficient to overcome the Board's conclusion that the appointing authority had met its burden to show that the Appellant's work performance failed to meet work standards and that the Appellant failed to take corrective action as required.

Rulings of law

Mr. Bolton argued that the Board erred in ruling that notations of counseling are not disciplinary in nature, since counseling was used to support the withholding of the Appellant's salary increment. Mr. Bolton also argued that the Board erred in finding that performance evaluation meetings are not investigatory meetings subject to Weingarten protections, since questions might be asked during the review and discipline might be issued if the evaluation showed unsatisfactory performance. The Board does not agree and affirms its original Rulings of Law.

Counseling, whether it is provided verbally or in writing, is a form of advice and instruction to an employee regarding corrective action that the employee must take in order to improve work performance and, in some instances, avoid discipline. Counseling, in and of itself, is not a form of discipline and is not subject to an independent review on appeal. However, when written counseling is offered as evidence to support a disciplinary action, the employee has the opportunity at hearing to dispute the content of the counseling and any disciplinary action it is meant to support. The Appellant had an opportunity at both the original hearing and rehearing to dispute the contents of the counseling memo, and to challenge the withholding of her salary increment that followed.

Investigations are intended to elicit information. The performance evaluation process, including the actual written performance evaluation and discussion when the evaluation is presented, is not designed to elicit information but to transmit information to the employee that the employer has already collected, analyzed and evaluated. As such, the Board continues to find that performance evaluation meetings are not investigatory meetings, and the employee is not entitled to representation under the provisions of Weingarten, even if it is likely that the employee will be disciplined as a result for failure to meet work standards.

Decision and Order

Having carefully considered the evidence, argument and offers of proof presented by the parties at the original hearing on the merits of the appeals, and at the rehearing, the Board found that the discipline, including the December 10, 2010 withholding of the Appellant's salary increment and the May 4, 2011 letter of warning were warranted by the Appellant's failure to meet work standards and failure to take corrective action. The Board found that the warnings, which were issued in accordance with the Rules of the Division of Personnel, were lawful, reasonable and just. Therefore,

the Board voted to AFFIRM its original decision and to DENY Ms. Hildreth's appeals, thereby upholding the disciplinary action taken by the agency.

THE NEW HAMPSHIRE PERSONNEL APPEALS BOARD

/s/ Philip Bonafide

Philip Bonafide, Acting Chair

/s/ Robert Johnson

Robert Johnson, Commissioner

/s/ Joseph Casey

Joseph Casey, Commissioner

cc Karen Hutchins, Director, Division of Personnel, Department of Administrative Services
Sean Bolton, SEA Grievance Representative, State Employees Association
Jennifer Jones, Attorney, Department of Health and Human Services
Mark Bussiere, Human Resources Administrator, Department of Health and Human Services

State of New Hampshire



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Appeal of Karen Hildreth – Docket #2012-D-004 and #2012-D-007

Department of Health and Human Services

March 6, 2013

The New Hampshire Personnel Appeals Board (Bonafide, Johnson and Casey) met in public session on Wednesday, February 6, 2013, under the authority of RSA 21-I:58 and Chapters Per-A 100-200 of the NH Code of Administrative Rules, to hear the appeals of Karen Hildreth, a former employee of the Department of Health and Human Services. Ms. Hildreth, who was represented at the hearing by SEA Grievance Representative Nicholas McGinty, was appealing a December 10, 2010 letter of warning notifying her that her salary increment was to be withheld for failure to meet the work standard, and a May 4, 2011 letter of warning for failure to meet the work standard and failure to take corrective action. Attorney Jennifer Jones appeared on behalf of the Department of Health and Human Services.

On October 27, 2011, the Personnel Appeals Board had dismissed both appeals without a hearing, finding that because Ms. Hildreth had retired from State service before appealing those warnings to the Board, she was no longer eligible to appeal under the provisions of RSA 21-I:58. In response to the Appellant's Motion for Reconsideration, on December 9, 2011, the Board affirmed its order dismissing the appeal. The State Employees Association appealed the Board's decision to the NH Supreme Court. The Court issued an Opinion on October 30, 2012, reversing the Board's decision and remanding the matter for a hearing on the merits of the appeals, finding that although Ms. Hildreth had retired from State service, she was a "permanent employee" within the meaning of RSA 21-I:58, when she initiated her requests for informal settlement of the warnings.

This matter was originally scheduled for hearing on November 14, 2012, but was continued at the Appellant's request. The appeals were rescheduled for a hearing on offers of proof on January 23, 2013, and again postponed until February 6, 2013 at the Appellant's request.

The record of the hearing in this matter consists of the digital recording of the hearing on the merits of the appeals, notices and orders issued by the Board, the Supreme Court record (Appeal of Karen Hildreth, No 2011-895), pleadings submitted by the parties prior to the hearing on the merits of the appeals, and documents admitted into evidence as follows:

State's Exhibits

1. not admitted
2. Supplemental Job Description for a Business Systems Analyst
3. Notation of Counseling Session dated October 14, 2009
4. Performance Evaluation dated December 11, 2009
5. Performance Evaluation dated December 2, 2010
6. Letter of Warning, Withholding Increment dated December 9, 2010
7. Letter of Warning dated May 4, 2011

Appellant's Exhibits

February 6, 2013 "Statement of Offer of Proof"

December 12, 2012 Appellant's Pre-Hearing Submission with Numbered Attachments:

1. Weekly Status Reports
2. October 2009 Notation of Counseling
3. Federal and State Regulations re: Application Processing Timeframes
4. Statements and email from peers and co-workers
5. Meeting agendas and syllabi
6. Check Release Schedule
7. B&S S Case Overpayment Synopsis
8. Letter of Resignation

After carefully considering the parties' evidence, arguments and offers of proof, the Board made the following findings of fact and rulings of law:

Findings of Fact

1. Prior to her resignation from State service, Ms. Hildreth was employed as a Business Systems Analyst I, Salary Grade 28, for the Department of Health and Human Services, Office of Medicaid Business and Policy. As a Business Systems Analyst I, the Appellant was responsible to, "Analyze, establish and maintain information system procedures, workflow, business rules and business processes related to the Health Insurance Premium Program (HIPP) to ensure savings and cost avoidance of Medicaid expenses." (DHHS Exhibit 2)

2. Ms. Hildreth was advised in an October 14, 2009 "Notation of Counseling Session" from her supervisor Pauline Doucette that several issues discussed with the Appellant during weekly staff meetings had not been implemented adequately and required corrective action. Those issues included:
 - Applications not being processed in a timely manner
 - Communications with recipients
 - Letters mailed from the HIPP program without prior review by your supervisor
 - Focus attention on client needs that are related to the HIPP program
 - TLP communications
 - HIPP procedure changes

3. Ms. Doucette described the overall objective of the memo as a way to help the Appellant, "...organize the HIPP Program with standard procedures in order to more efficiently manage the HIPP Program. By coming up with standard procedures, this will allow Karen the opportunity to be out in the community to outreach to various organizations and clients to increase the volume of the HIPP Program while still being able to maintain the process and procedures." Ms. Doucette acknowledged the Appellant's importance to the program in particular and the agency as a whole and wrote, "Your work is very important to the NH Medicaid Program and OMBP is relying on you to meet the work and performance expectations applicable to your labor grade." Each of the issues addressed in the counseling memo included a history, status and specific corrective action steps the Appellant needed to take in order to avoid disciplinary action. (DHHS Exhibit 3)

4. The Appellant took exception to the memo, responding specifically to the issues of how long it took to "enter checks and who was responsible for updating insurance information on the "TPOI." Ms. Hildreth wrote, in part, "no edits tied to one's login and I dispute the proof offered that I enter the insurance." The Appellant did not respond to the remainder of the concerns in the

counseling memo about her communication with recipients, mailing letters from the HIPP Program without prior supervisory review or approval, focusing attention on client needs that are related to the HIPP Program, or HIPP procedure changes.

5. On December 14, 2009 the Appellant received a performance evaluation (DHHS Exhibit 2) that rated the Appellant as meeting expectations in most major categories, but below expectations in the following sub-categories:
 - Listens carefully to suggestions and information from others
 - Seeks advice as necessary
 - If he/she makes a bad decisions, he/she makes the occasion a learning experience
 - Willingly supports and accepts department policy and procedure changes
 - Plans and organizes workload in a manner that makes best use of resources

In the comments sections of the evaluation, the Appellant's supervisor noted that Ms. Hildreth needed to improve her letter writing and email communications so that they conveyed the necessary information in a professional manner without the need of corrections for spelling, formatting and emphasis. Ms. Hildreth's supervisor wrote that the Appellant needed to accept suggestions and learn from decisions that had been made in order to keep from addressing the same issues over and over. The evaluation included instructions about proper file maintenance, client interaction, and the need for Ms. Hildreth to let the clients resolve their own issues with providers and insurers. The supervisor noted that the Appellant was a "willing and helpful employee," but needed to "stay focused on her own job requirement needs before assisting others and again, the HIPP Program is her area of responsibility." Items identified as "Areas for Improvement" included letter and email writing, organization and ability to work independently without the need of daily meetings.

6. The Appellant took exception to the content of the December 14, 2009 evaluation, noting that "having a different opinion doesn't mean 'not accepting'," and that some of the concerns raised in the evaluation were the result of "incorrect info from another unit." The Appellant indicated that she did not have enough time to respond to each of the elements in the evaluation, but wrote that she was "endeavoring to adapt to the different environment that makes up the 'OMB' administration; a change from one division to another and then from within exposes challenges for all involved." Ms. Hildreth wrote that she was proud of her accomplishments over the previous eighteen months, particularly the increase in savings from \$269,000+ to \$1.34 million at the end of fiscal year 2009, with estimated savings of more than \$504,000 for the first quarter of fiscal year 2010.

7. On December 2, 2010, Ms. Hildreth received a Performance Summary that rated her overall work performance as below expectations. In the "General Comments by Supervisor" section of the review, Ms. Doucette noted that the Appellant was performing the administrative duties associated with her position, that the supervisor has taken on some of the job responsibilities to be sure the HIPP Program was being maintained, and that any outreach for which Ms. Hildreth was responsible had been "placed on hold until the administrative duties can be managed appropriately." Ms. Hildreth was directed to "...resume daily meetings with her supervisor to monitor the caseload and the HIPP Program. All other activities not related to her job duties will be submitted in writing prior to her acceptance of participation in the activities and will be approved based on her current workload status." (DHHS Exhibit 5)
8. Although the December 2, 2010 evaluation rated Ms. Hildreth as meeting expectations in many areas, the vast majority of ratings were below expectations, with the worst overall ratings under the general heading of "Decision Making," including sub-categories as follows:
 - Recognizes and addresses problems promptly
 - Gathers facts and information carefully before making decisions
 - Seeks advice as necessary
 - If he/she makes a bad decision, he/she makes the occasion a learning experience
 - Makes decisions in a timely, appropriate manner
9. Ms. Hildreth noted her disagreement with the evaluation in general and indicated that she "invoked [her] Weingarten Rights twice during the meeting [to discuss the review] and was denied." She did not provide a further response or comment regarding the substance of the evaluation.
10. On December 9, 2010, Ms. Doucette issued a written warning to the Appellant, advising her that because the Appellant failed to meet the work standard, and failed to meet expectations overall, the Appellant's salary increment was to be withheld for a period of six months. The warning gave a general summary of issues addressed in the December 2, 2010, performance evaluation, and set forth a detailed corrective action plan that the Appellant was expected to follow in order to avoid additional disciplinary action. (DHHS Exhibit 6)
11. In requests for informal settlement of the written warning and withholding of her increment, the Appellant argued generally that the warning and withholding of her increment were unfair, that she was meeting reasonable work expectations, that the performance evaluation failed to take

her achievements and improvements into account, and that the evaluation underlying the discipline did not accurately reflect her overall work performance.

12. On May 4, 2011, Ms. Hildreth received a second letter of warning for failure to meet work standards and failure to take corrective action as required, which had included a prohibition against Ms. Hildreth sending emails that had not been approved by her supervisor prior to distribution. The Appellant admitted that she sent the email in question, but only after making what she considered reasonable efforts to have supervisory personnel review the email before sending it. The Appellant denied that the email was HIPP information to be validated, as defined by the corrective action plan, describing the email as “an advance warning email intended to warn staff of a potential issue” that she was told “would be brought to the attention of people of higher authority.”

Rulings of Law

- A. There is no rule specifically describing written counseling letters, nor is there any prohibition against including such documents in an employee’s agency personnel file, or referring to them in an employee’s performance evaluation. The only reference in the Personnel Rules to counseling letters appears in Per 1501.03(a)(4) of the NH Code of Administrative Rules which permits appointing authorities to place “performance evaluation forms and related counseling letters” in employees’ personnel files.
- B. The written warnings and notice of salary increment withholding issued to the Appellant on December 9, 2010 and May 4, 2011, complied with Per 1002.04 (a) of the NH Code of Administrative Rules, which defines the written warning as, “the least severe form of discipline used by an appointing authority in order to correct an employee’s unsatisfactory work performance or conduct,” including “failure to meet any work standard” and Per 1002.05(a), which authorizes an appointing authority to withhold an employee’s salary increment when that employee’s performance evaluation reflects that the employee has failed, overall, to meet performance expectations of the position to which the employee is assigned.
- C. Although an employee may be disciplined as a result of that employee’s failure to meet work standards, meetings to discuss an employee’s performance evaluation are not investigatory meetings or interviews and therefore not subject to “Weingarten Rights” as described in Article XIII, Section 12.8. of the Collective Bargaining Agreement.

Position of the Parties

Mr. McGinty argued that the Appellant's supervisors did not evaluate the Appellant's work performance fairly, completely or accurately. He argued that the evaluations failed to note the Appellant's many accomplishments, the improvements in her work over time, or the efforts that the Appellant made to adhere to the directives listed in a counseling letter and performance evaluations. Mr. McGinty argued that Ms. Hildreth's supervisor held the Appellant responsible for errors that actually were made by the supervisor including several calculation errors that resulted in overpayment to clients.

Mr. McGinty argued that the corrective action plan the Appellant was expected to follow was unrealistic and internally contradictory, ultimately making it more difficult for the Appellant to produce work to her supervisor's satisfaction. Mr. McGinty argued that the Appellant's supervisors faulted her for not asking questions or clarifying directions, but criticized her for being negative and unwilling to accept advice when she did ask questions. He also argued that the agency demonstrated its lack of effort to help the Appellant be successful in her position by not engaging in good faith discussions of the Appellant's need for a reasonable accommodation.

Mr. McGinty argued the Appellant made significant improvements in the HIPP Program, creating brochures, designing a web page, expanding the program, and saving the State millions of dollars. Mr. McGinty argued that the agency failed to prove any of the allegations detailed in the written warnings, and asked the Board to find that both warnings were unjust under any circumstances. Mr. McGinty argued that both warnings should be removed from her file, and that the Appellant should be granted the salary increment that had been denied.

Attorney Jones argued that the Appellant resigned from her position before the agency could complete discussions of any requested accommodation, noting that the accommodations sought were not actually related to the work being performed. Attorney Jones likened those requests to someone with a walking disability asking for a different lunch period.

Attorney Jones agreed that Ms. Hildreth had saved the State substantial amounts of money through the HIPP Program, but argued that the savings could have been even greater if the Appellant had performed her work as directed. Attorney Jones argued that the agency had taken all appropriate steps to point out deficiencies in the Appellant's work in the initial counseling letter, and told the Appellant specifically what she needed to do to correct those deficiencies. Attorney Jones argued that the Appellant's failure to heed her supervisor's instructions and incorporate the supervisor's

directives into the workflow resulted in the Appellant being unable to successfully complete the administrative portion of the position, therefore making her unable to perform the appropriate level of training and outreach. Attorney Jones argued that the agency applied the principles of progressive discipline and in all respects complied with the Rules of the Division of Personnel in its attempts to correct the Appellant's unsatisfactory work performance.

Standard of Review

In accordance with the provisions of Per-A 207.12 (b), "In disciplinary appeals, including termination, disciplinary demotion, suspension without pay, withholding of an employee's annual increment or issuance of a written warning, the board shall determine if the appellant proves by a preponderance of the evidence that: (1) The disciplinary action was unlawful; (2) The appointing authority violated the rules of the division of personnel by imposing the disciplinary action under appeal; (3) The disciplinary action was unwarranted by the alleged conduct or failure to meet the work standard in light of the facts in evidence; or (4) The disciplinary action was unjust in light of the facts in evidence."

Decision and Order

At the Appellant's level of classification and compensation (salary grade 28), the agency was entitled to hold the Appellant to high standards of performance, expecting her to organize and prioritize her own work, complete multiple, complex tasks accurately and on time, and expand the HIPP Program through development of policies, procedures, training and outreach initiatives. As Mr. McGinty noted, the evidence reflects that the Appellant's outreach and training efforts had been well-received. However, the evidence also reflects that because of the Appellant's difficulties completing the administrative portion of the job accurately or on time, outreach initiatives and training, which represented significant elements of the job, had to be curtailed.

While it is clear that the Appellant disagreed with her supervisor's evaluation of her work performance and the resulting discipline for failure to meet work standards and failure to take corrective action, the Appellant did not persuade the Board that the withholding of her annual increment or subsequent letter of warning were unlawful, or that they violated the Rules of the Division of Personnel. The Appellant also failed to provide evidence or argument to persuade the Board that the written warnings or the withholding of her salary increment were unwarranted by her failure to meet the work standard in light of the facts in evidence, or that they were unjust in light of the facts in evidence.

For the reasons set forth above, the Board voted unanimously to DENY the Appeals of Karen Hildreth (Docket #2012-D-004 and #2012-D-007).

THE NEW HAMPSHIRE PERSONNEL APPEALS BOARD

/s/ Philip Bonafide

Philip Bonafide, Acting Chair

/s/ Robert Johnson

Robert Johnson, Commissioner

/s/ Joseph Casey

Joseph Casey, Commissioner

cc Karen Hutchins, Director, Division of Personnel, Department of Administrative Services
Nicholas McGinty, SEA Grievance Representative, State Employees Association
Jennifer Jones, Attorney, Department of Health and Human Services
Mark Bussiere, Human Resources Administrator, Department of Health and Human Services

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Appeals of Karen Hildreth

Docket #2012-D-004 and #2012-D-007

Department of Health and Human Services

Personnel Appeals Board Decision on Appellant's Motion for Reconsideration

December 9, 2011

By letter dated November 23, 2011, SEA Grievance Representative Nicholas McGinty requested reconsideration of the Personnel Appeals Board's October 27, 2011, decision dismissing the above-titled appeals as moot. In dismissing the appeals, the Board found that when the Appellant voluntarily retired from her position as a permanent State employee, she no longer qualified as a permanent employee eligible to appeal to the Board under the provisions of RSA 21-I:58.

In support of his Motion for Reconsideration, Mr. McGinty argued that in dismissing the appeals, the Board had misinterpreted the Court's decision in the Appeal of Carol Higgins-Brodersen and William McCann (1990) 133 N.H. 576, 578, asserting that although the Appellant had voluntarily retired from her position and was no longer employed by the State, she had timely filed requests for informal settlement before retiring, and only needed to demonstrate that she had been affected by a decision of the appointing authority while she was employed in order to preserve her right to appeal.

The Board does not agree. As the Court wrote in its decision in Higgins-Brodersen, "The term 'permanent' reflects a degree of mutual commitment between employer and employee and an expectation that their relationship will be long-term." Once an employee has voluntarily retired, there is no further expectation of a relationship of any kind. As noted in the Board's original decision, the Court wrote:

"In reviewing RSA 21-I:58, it is clear to us that the legislature intended to confer upon State employees a specific right of appeal to the Board based upon permanent status. Permanent employees have completed a working-test period and have been recommended for permanent appointment by the proper appointing authority.... The term 'permanent' reflects a degree of mutual commitment between employer and employee and an expectation that their relationship will be long-term. It is quite reasonable for the legislature to accord employees holding permanent status greater opportunity to challenge personnel

decisions affecting them. It is also reasonable to conclude that the legislature did not intend RSA 21-I:58 to confer upon such employees a right to challenge all personnel decisions, but only ones involving the application of a personnel rule which affects them while they hold their permanent status." (Emphasis added.)

The Court did not say that employees have the right to challenge personnel decisions that affected them *when* they held their permanent status, but those affecting them *while* they hold their permanent status.

Therefore, as set forth above, the Board, voted to affirm its decision dismissing the appeals of Karen Hidreth, Docket #2012-D-004 and #2012-D-007, as moot.

The New Hampshire Personnel Appeals Board



Patrick Wood, Chair



Philip Bonafide, Vice-Chair

Robert Johnson, Commissioner

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Appeal of Karen Hildreth Docket #2012-D-004 and #2012-D-007 Department of Health and Human Services

October 27, 2011

The New Hampshire Personnel Appeals Board (Wood, Bonafide, and Johnson) met on Wednesday, October 12, 2011, and reviewed the Board's list of pending appeals for purposes of scheduling hearings. Included in that review were two appeals filed on behalf of Karen Hildreth, a former employee of the NH Department of Health and Human Services, who was appealing a December 9, 2010, letter of warning notifying her of the withholding of her salary increment (Docket #2012-D-004), and a May 4, 2011, letter of warning (Docket #2012-D-007).¹ According to documents submitted by the Appellant, appeals of both the withholding of a salary increment and subsequent letter of warning were filed with the Board on August 2, 2011.

Documents submitted in connection with the two appeals indicate that the Appellant had filed requests for informal settlement as described by Chapter Per 205 of the NH Code of Administrative Rules, seeking to reverse the appointing authority's decision to withhold her salary increment, and to have the letters of warning removed from her personnel file. The record reflects that deadlines established in connection with the process of informal settlement were extended by mutual agreement. The record also reflects that the Appellant resigned from State service effective June 1, 2011, before either of the letters of warning had been resolved through the process of informal settlement described. By resigning and voluntarily giving up her status as a permanent employee, the Appellant also relinquished her right to appeal decisions of the appointing authority that affected her status as an employee while she held her permanent position.

¹ The August 2, 2011, notices of appeal refer to Ms. Hildreth receiving a "letter of disciplinary suspension without pay," a "letter of disciplinary demotion" and an "allowable immediate termination." According to the attachments, Ms. Hildreth was not suspended, demoted, or dismissed from service.

NH RSA 21-I:58 provides a right of appeal to, "Any permanent employee who is affected by any application of the personnel rules..." The NH Supreme Court addressed the definition of "employees" in its decision in the Appeal of Carol Higgins-Brodersen and William McCann (1990) 133 N.H. 576, 578. In that decision the Court wrote:

"In reviewing RSA 21-I:58, it is clear to us that the legislature intended to confer upon State employees a specific right of appeal to the Board based upon permanent status. Permanent employees have completed a working-test period and have been recommended for permanent appointment by the proper appointing authority.... The term 'permanent' reflects a degree of mutual commitment between employer and employee and an expectation that their relationship will be long-term. It is quite reasonable for the legislature to accord employees holding permanent status greater opportunity to challenge personnel decisions affecting them. It is also reasonable to conclude that the legislature did not intend RSA 21-I:58 to confer upon such employees a right to challenge all personnel decisions, but only ones involving the application of a personnel rule which affects them while they hold their permanent status."

The Board notes that in reaching its decision in that case, the Court did not say that employees had the right to challenge personnel decisions that affected them *when* they held their permanent status, but those affecting them *while* they hold their permanent status. The letters of warning issued to the appellant under the authority of Chapter Per 1000 may have affected the appellant while she was still employed on a full-time basis as a "permanent employee." Having left her position voluntarily, however, Ms. Hildreth no longer qualifies as a permanent employee whose employment status is affected by the warning. As a result, the Board found that the instant appeals should be dismissed as moot.

In reaching that decision, the Board notes that the Appellant is not without recourse in addressing the substance of the written warnings. The Appellant already enjoys the protection of RSA 275:56, II, which states,

"If, upon inspection of his personnel file, an employee disagrees with any of the information contained in such file, and the employee and employer cannot agree upon removal or correction of such information, then the employee may submit a written statement explaining his version of the information together with evidence supporting such version. Such statement shall be maintained as part of the employee's personnel file and shall be included in any transmittal of the file to a third party and shall be included in any disclosure of the contested information made to a third party."

Prior to her resignation from State service, the Appellant did submit one or more written statements explaining her version of the facts in dispute. In compliance with the provisions of RSA 275:56, II, the State is required to maintain the Appellant's statements along with copies of the disputed warnings as long as those warnings remains in the file.

With respect to the withholding of her salary increment (Docket #2012-D-004), the Appellant argues that, "The denial of the completion of the informal settlement process denies the appellant their right to an appeal under the personnel rules. The denial of Ms. Hildreth's opportunity to appeal denies her an opportunity to address the financial detriment

to her pension that resulted from the department withholding her step increment." (Appeal letter, page 4) As logical as that argument may appear on its face, the fact remains that the Appellant chose to resign and left her position voluntarily before completing the appeals process that she and her representative had initiated. By resigning, the Appellant also forfeited her right to appeal as a permanent employee.

Therefore, for all the reasons set forth above, the Board, on its own motion, voted to DISMISS the appeals of Karen Hidreth, Docket #2012-D-004 and #2012-D-007, as moot.

The New Hampshire Personnel Appeals Board



Patrick Wood, Chair



Philip Bonafide, Vice-Chair

Robert Johnson, Commissioner

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