

State of New Hampshire



PERSONNEL APPEALS BOARD
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APPEALS OF TRENT HOWARD
DOCKET #99-D-3, 99-D-4, 99-D-10
DEPARTMENT OF HEALTH AND HUMAN SERVICES

February 11, 1999

The New Hampshire Personnel Appeals Board (Wood, Johnson and Barry) met on Wednesday, December 30, 1998, to hear the appeals of Trent Howard, an employee of the Department of Health and Human Services. Mr. Howard, who was appealing three written warnings, was represented at the hearing by SEA Field Representative Kate McGovern. Attorney John Martin, Human Resources Manager Sandra Platt, and Business Administrator Debra Bourbeau appeared on behalf of the State.

Over the appellant's objection, the appeals were heard on offers of proof by the representatives of the parties. The record of the hearing in each appeal consists of the pleadings submitted by the parties prior to the hearing, notices and orders issued by the Board, the audio tape recording of the hearing on the merits, and documents admitted into evidence as follows:

99-D-3	MARCH 3, 1998, REVISED AND RE-ISSUED MAY 6, 1998 WRITTEN WARNING - RUDE, OFFENSIVE, INAPPROPRIATE, DISRUPTIVE BEHAVIOR
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State's Exhibits

1. October 24, 1997, memo from Richard Figari to Robin McBrearty
2. Report captioned C-97-039 from the Department of Health and Human Services
3. May 6, 1998, written warning issued to Trent Howard by Dianne Luby
4. March 2, 1998 letter from Jim Fredyma
5. March 3, 1998 memo from Sandra Platt

Appellant's Exhibits

The appellant offered no exhibits, only copies of correspondence related to his request for informal settlement of the written warning.

99-D-4	APRIL 27, 1998 WRITTEN WARNING - FAILURE TO MEET THE WORK STANDARD
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State's Exhibits

1. Performance summary dated September 5, 1996
2. Performance summary dated August 28, 1997
3. Office of Finance Office Policy
4. Memo of Counsel dated March 31, 1998, from Lynne Beckwith
5. E-Mail message from Lynne Beckwith dated April 3, 1998, and single page of sign out sheet
6. Performance Summary dated April 27, 1998, with analysis of leave time taken
7. Letter of warning dated April 27, 1998, with corrective action plan

Appellant's Exhibits

- A. Performance summary dated September 5, 1996

- B. Mr. Howard's 12/24/96 application for promotion to Claims Processor I position #14733
- C. Performance summary dated August 28, 1997
- D. May 12, 1998 letter to James Fredyma from SEA Field Representative Jean Chellis
- E. August 21, 1998 letter to Thomas Manning from SEA Negotiator Brian Mitchell

99-D-10	SEPTEMBER 10, 1998 WRITTEN WARNING AND WITHHOLDING OF ANNUAL INCREMENT - FAILURE TO MEET THE WORK STANDARD
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State's Exhibits

- 1. Counseling memo dated May 14, 1998, from Debra Bourbeau
- 2. Counseling memo dated July 13, 1998, from Debra Bourbeau
- 3. Counseling memo (second) dated July 13, 1998, from Debra Bourbeau
- 4. Performance Summary dated September 9, 1998
- 5. Letter of warning dated September 10, 1998
- 6. E-Mail message from Trent Howard dated May 14, 1998
- 7. Letter of termination dated September 16, 1998, from Lynne Beckwith
- 8. Examples of Mr. Howard's work errors

Appellant's Exhibits

- A. August 21, 1998 letter to Thomas Manning from SEA Negotiator Brian Mitchell

#99-D-3	March 3, 1998, warning revised and reissued May 6, 1998, for rude, offensive, inappropriate, disruptive behavior
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Ms. McGovern advised the Board that all outstanding discovery issues had been resolved for Dockets #99-D-4 and #99-D-10. For Docket #99-D-3, however, Ms. McGovern argued that the appellant was still entitled to the names of every person interviewed during the course of the State's sexual harassment investigation, copies of the witnesses' statements, any notes that the investigators made, and any reports that they generated. She argued that in its decision in the Appeal of Edward A. Boulay, the New Hampshire Supreme Court established the obligation under the Personnel Rules for agencies to provide full disclosure of evidence obtained during the course of an investigation.

Mr. Martin argued that such broad disclosure would have a completely chilling effect on the State's ability to secure the cooperation of potential witnesses. He also argued that although the State had declined to list the names of every person interviewed during the investigation, it had turned over to Mr. Howard a list of witnesses by job title, and that Mr. Howard would have been able to ascertain from that list who had been interviewed. Mr. Martin asserted that there were no written witness statements, and that any notes the investigators may have taken were discarded after the final report of the investigation was prepared.

Having reviewed the information provided to the appellant, and having considered the arguments offered by the parties, the Board found the following:

1. Per 1001.08 (c) of the Rules of the Division of Personnel provides that, "No appointing authority shall dismiss a classified employee under this rule until the appointing authority: (1) Offers to meet with the employee to discuss whatever evidence the appointing authority believes supports the decision to dismiss the employee. (2) Offers to provide the employee with an opportunity to refute the evidence presented by the appointing authority... (3) Documents in writing the nature and extent of the offense."
2. Neither the original warning dated March 3, 1998, nor the revised warning issued on May 6, 1998, is a notice of dismissal.
3. The appointing authority met with the appellant to discuss the evidence upon which the Department relied in issuing the written warning, and provided an opportunity for Mr. Howard to refute that evidence.
4. The Department disclosed to Mr. Howard the position titles of those persons interviewed during its investigation of possible sexual harassment.

The State failed to persuade the Board that the disclosure of names of people interviewed would have a completely chilling effect on the State's abilities to secure the cooperation of witnesses. In addition, the appellant failed to persuade the Board that the State's failure to disclose the names of persons interviewed by investigators prevented him from conducting his own investigation and presenting a defense to the charges against him.

Having considered the evidence, argument and offers of proof, the Board is not persuaded that the offenses in question were so egregious as to warrant a written warning under the optional dismissal provisions of the

rules. Therefore, the Board found that a written warning without prior counseling was inappropriate in this instance, and his appeal for removal of the written warning from his personnel file is GRANTED.¹

The Board considers it significant that at least two of the individuals interviewed during the course of the State's investigation had seen the "birthday card" that prompted the State's sexual harassment investigation before, and had not reported it. Further, the State's own investigators reported that "dirty" or sexual jokes were frequently told in the office, and that while the appellant's stories may have been more "extreme" than some, there was no evidence that the appellant's jokes "...differed substantially from the norm." (Appellee Exhibit 2, page 8.) The Board emphasizes, however, that it has a very low tolerance for this type of behavior and for administrators who allow this behavior to become "the norm." The decision in this case is based more on principles of equity and fairness. It should not in any way be considered as acceptance or condoning Mr. Howard's behavior.

99-D-4	April 27, 1998, written warning for failure to meet the work standard
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The appellant began his assignment as a Claims Processor I in the Office of Finance on March 4, 1998, under the supervision of Doris Hunter and Lynne Beckwith. They met with Mr. Howard at the time of his transfer, gave him a copy of the office policy for the finance office, and discussed with him both his use of leave and the requirement that he sign in and

¹ Mr. Howard's original appeal was limited to the written warning, not his involuntary transfer. Therefore, the Board found the issue to be untimely, and ruled that the involuntary transfer was not properly before the Board for review.

out whenever he was to be out of the office, whether on personal business or for activities related to his assignment as an SEA steward.

Mr. Howard met with Ms. Hunter on March 11th, with Ms. Bourbeau and Ms. Beckwith on March 18th, and again with Ms. Bourbeau on March 25th to discuss Mr. Howard's failure to sign out properly in accordance with the office policy. On March 31, 1998, Ms. Beckwith issued a Memo of Counsel to Mr. Howard concerning "Observance of Office Policy." In that memo, she indicated that March 11th, March 17th and March 25th, Mr. Howard failed to sign out when leaving his work area. He was instructed to indicate "SOPS" (State Office Park South) or "Dolloff" when he was out of the office to attend meetings to satisfy the corrective action plan on his earlier warning. He was also expected to indicate his absences for meetings as an SEA Steward as "Steward," and to use the standard leave slip designation for all other leaves (i.e., A for annual leave, S for sick leave, FH for Floating Holiday, etc.). Mr. Howard was warned that failure to adhere to the office policy would result in disciplinary action. Despite those warnings, on April 2, 1998, Mr. Howard signed out at 2:45 p.m. indicating, "NBBM - Work related appt." Mr. Howard admitted that the notation meant "Nobody's Business But Mine."

On April 27, 1998, Ms. Hunter completed an evaluation of Mr. Howard's performance as a Claims Processor I during his first two months in the finance office. Ms. Hunter noted that Mr. Howard's frequent absences were affecting his ability to complete his work properly, and that he had yet to master mail distribution for the unit, processing of the legal liability forms, and keying of data in the keymaster. She noted that he was only managing to complete about four hours of work within a seven

hour working day. On the form (Appellee Exhibit 6) under Quantity of Work, which was rated at below expectations, she wrote,

“It is of concern that on 3/24/97, I asked Trent what the orange papers were that he was putting into envelopes. Trent mentioned that he did not have anything to do and that these were SEA ballots. Trent was advised that it is his responsibility to report to me when his work is completed and he is prepared to move to the next task. He was also advised that it was inappropriate for him to be conducting non-Steward SEA business during his work hours.”

Ms. Hunter marked the appellant as “below expectations” in the vast majority of the sub-categories under the headings of Quality of Work, Job Knowledge, Communications, Dependability and Cooperation. Under the Cooperation heading Ms. Hunter wrote, in part:

“Trent joined the Office of Finance on March 4, 1998. The Billing Unit staff was very glad to hear that we would be getting a person to fill a long time vacancy. When Trent was asked to identify his planned or intended vacation period, he stated that he didn't plan to be here that long. On March 4, 1998, Trent asked if he could have headphones in the office. He was told that he could not, but on March 5, 1998 Trent had on headphones. ...”

On April 27, 1998, Ms. Beckwith issued the appellant a written warning for failure to meet the work standard. Ms. Beckwith briefly summarized the findings reported in the performance evaluation, and advised the appellant that she had also attached a

corrective action plan that included written procedures and goals to measure his progress during the coming month.

Mr. Howard signed the letter under protest writing, "I believe there is a different standard for Union Stewards to abide by that are more strigent [sic] than other employees. In 4 years of state service I have never had a bad review from any other job, regarding quantity and quality of work. These supervisors present are very biased, in fact Lynn Beckwith already has [several] grievances filed against her on my behalf."²

The Corrective Action Plan dated April 24, 1998, called for Mr. Howard to review detailed written instructions on completing his work assignments, to meet daily with his supervisor to review his completed work and to get answers to questions he had about information on the instruction sheets, to make additional notes for future reference on billing procedures, to limit the number of personal phone calls made or received by him during working hours, to lower his voice so comments made by him about other staff would not be overheard, and to observe the office policy, making proper notations on the sign-out sheet when he was leaving the work unit. Mr. Howard wrote on the bottom of the plan, "I asked why when I had signed out on the sheet, why Doris and Deb [his supervisors] didn't. Additionally when I came back and signed back in, they didn't sign back in."

² At the hearing, the appellant mentioned nine grievances filed by him on behalf of employees who had not received their mileage reimbursements in a timely fashion. He offered no evidence of grievances filed on his own behalf.

In his appeal, Mr. Howard argued that he had received insufficient training to perform his assignments properly, and he argued that he believed his work was of sufficient quantity and quality to meet expectations. The appellant argued that, "Mr. Howard believes his transfer to the Office of Finance was in direct response to his activities as an active member of the SEA and as a steward. Mr. Howard believes a letter of warning after less than two months in his new position is further indication that the transfer to the Office of Finance was retaliatory for his union activity."³

At the hearing, the appellant argued that the work he was expected to perform was "over his head." He asserted that all the other position titles in the office had the word "accounting" in them, and that it was unreasonable for him to be expected to complete accounting functions. He also argued that he was the only person in the office required to report specifically where he was when he left the office on anything other than personal business. The appellant argued that the warning for failure to meet the work standard should be overturned because it was the wrong work standard for a claims processor.

The State argued that it had reviewed the appellant's job duties with staff from the Division of Personnel to determine whether or not the assignments were consistent with the specification for Claims Processor I. Mr. Howard was certified as meeting the minimum qualifications for the position, and his supervisors believed he was capable of performing all of the assignments satisfactorily. The State argued that Mr. Howard simply failed to apply himself, refused to adhere to office policies, and

³ As to the question of the retaliatory nature of the transfer, see Note 1.

failed to take advantage of the training and supervision offered to him by Ms. Hunter and Ms. Bourbeau.

The duties described by both the State and the appellant are consistent with those listed on the class specification for Claims Processor I, including the following characteristic duties and responsibilities:

- Screens, checks and compares data on claims forms for completeness and accuracy prior to data entry.
- Processes corrections and adjustments based upon computer generated transaction and error listings.
- Processes updated information on case records to maintain computer master file.
- Retrieves rejected claims information for computer system for transmittal to proper area of disposition.
- Processes vendor claims for payment by calculating payment amount.
- Enters claims data into computer system to ensure accurate case record maintenance.

Based on the appellant's description of his prior work experience, the Board found that he possessed the minimum qualifications, listed on the class specification as follows:

MINIMUM QUALIFICATIONS:

Education: High school diploma, G.E.D. or its equivalent. Each additional year of approved formal education may be substituted for one year of required work experience.

Experience: Two years' experience involving forms or claims examination or similar audit and verification activities

Contrary to the appellant's assertion, there is no evidence that the warning should be considered retaliatory, or that the Board should find that the appellant was treated any differently than his co-workers because of his status as a union steward. In fact, the Board finds it very revealing that the appellant did not receive a warning at an earlier date for disparaging remarks made by him over the telephone about his

administrator in his supervisor's presence that, "She's lying and I don't know what the problem is; she just doesn't get it. I don't know - maybe it's a mental illness.') Equally revealing is the fact that Ms. Hunter did not complain of the time spent by the appellant as a steward, expressing instead her concern that Mr. Howard was using work time to perform union business that was not related to his duties as a steward.

The State offered sufficient evidence of Mr. Howard's failure to meet the work standard, and the Board found that he had sufficient opportunity between the date of his transfer on March 4, 1998, and his first evaluation on April 27, 1998, to master the tasks he was required to perform. It is clear from the evidence that the appellant was unhappy about his transfer to the Office of Finance, and made his displeasure known almost instantly as evidenced by his comment that he didn't plan to be there long enough to have to worry about vacation schedules. His "Nobody's Business But Mine" notation on the sign-out sheet, his direct disobedience of his supervisor's instructions about wearing headphones in the office, and his documented comments about supervisory staff give a further indication that the appellant was not making an effort to succeed.

Having reviewed the evidence and having considered the parties' oral arguments and offers of proof, the Board voted to sustain the warning and to DENY Mr. Howard's appeal of his April 27, 1998, written warning.

99-D-10	September 10, 1998, written warning and withholding of annual increment for failure to meet the work standard
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The appellant argued that the work he was expected to perform was far more complex than the work a Claims Processor I should be expected to

perform. He asserted that the detailed instruction manual to which he was expected to refer in carrying out his assignments was incomplete, and that much of the information he received from the district offices for processing contained errors that he was expected to find and correct. He argued that from the first day he was assigned to work in the Office of Finance, his supervisors and administrators were angry with him about his union activities, and established different standards for him than they had for other employees in the unit.

The appellant argued that on September 10, 1998, the very day the written warning was issued, the union was engaged in what they believed to be good faith negotiations with the department through the Bureau of Employee Relations in an attempt to transfer Mr. Howard to some other office. Instead, he was disciplined, and terminated from his employment six days later before a transfer option could be identified or arranged.⁴

The State argued that in spite of intensive training efforts on the part of the appellant's supervisors, the appellant continued to perform his work with an unacceptable rate of errors, particularly with respect to his processing of financial liability forms as well as referrals to his supervisor for re-billings where appropriate. The State offered as evidence a number of documents processed by the appellant that were incomplete or

⁴ The parties agreed that the matter of Mr. Howard's termination from employment has not been appealed to this Board and that the appellant has waived any right to appeal that termination to this Board. The parties also agreed that regardless of the Board's decision on any of the warnings currently under appeal, it would have no effect on the termination itself.

inaccurate. The State argued that if the detailed procedure manual was incomplete, it was because Mr. Howard had failed to carry out the assignment he'd been given, to work with his supervisor to revise it in a fashion that would make it more useful to him. The State argued that the appellant's continuing failure to stay focused on his work, to show some initiative and to work with his supervisors in a cooperative, constructive fashion were at the heart of the problem.

Having reviewed the documentary evidence, and having considered the parties' oral arguments and offers of proof, the Board found that the appellant's work was not meeting expectations, that an unsatisfactory performance evaluation was warranted because of his failure to take the corrective measures outlined in prior evaluations, counseling and warnings, and that the State was justified in issuing a written warning and withholding the appellant's annual increment. Accordingly, the Board voted to DENY the appeal of Mr. Howard's September 10, 1998, written warning and withholding of his annual increment.

Claims of Steward Discrimination;and Anti-Union Bias

Throughout the hearing on each of the warnings, the appellant claimed that he had been the victim of "steward discrimination" and bias as a result of his union activities. While there is ample evidence that the agency was frustrated by Mr. Howard's failure to manage his time effectively, and that much of his time in and out of the office appeared to be related to union activities, there is no credible evidence to support his claim of steward discrimination or anti-union bias. There is no credible evidence that the agency attempted to interfere with his filing of grievances, attending steward meetings, or participating in any way as a

steward. Rather, there is evidence that the agency expected him to understand the difference-between spending time working in his capacity as a steward, and using paid work time to conduct other union business, such as preparing and mailing out SEA ballots.

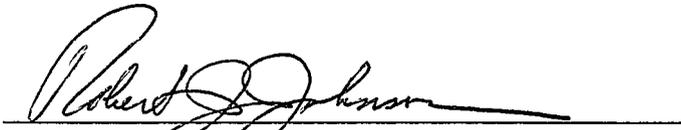
The evidence reflects that the appellant's supervisors and administrators noted and acknowledged those instances where the appellant's work product or work attitude improved. When the quantity and quality of his work declined, they counseled him and provided meaningful plans of corrective action. Although the appellant's supervisors asked Mr. Howard to conduct his personal business outside of business hours, they did not in any way restrict or interfere with the appellant's activities as a steward. Even when supervisors and co-workers overheard the appellant complaining to attorneys or union personnel about his work assignments, the office and the office staff, his supervisors merely asked him to lower his voice so as not to disturb the rest of the staff.

The appellant was transferred to an office that was grateful for the addition of staff to handle the mail and billings. There was ample evidence that while his supervisors and administrators were firm about his maintaining a schedule that would permit him to complete his work in a timely fashion, there is no evidence of any attempts by them to prohibit or restrain him in any way from carrying out his duties as a steward. There is also no credible evidence that the appellant's administrators and supervisors were interested in anything other than the quantity and quality of the appellant's work, as long as his conduct did not disrupt the work being performed by others in the office. When the appellant's behavior became disruptive or disrespectful, he was counseled. When he failed to take corrective action, he was warned.

When neither his work nor his attitude about his work improved, he was disciplined. The appellant offered virtually no credible evidence or argument to persuade the Board that the discipline imposed was the result of "steward discrimination" or anti-union bias.

THE PERSONNEL APPEALS BOARD


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State of New Hampshire



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APPEALS OF TRENT HOWARD
DOCKET #99-D-4 AND #99-D-10
DEPARTMENT OF HEALTH AND HUMAN SERVICES
RESPONSE TO APPELLANT'S REQUEST FOR RECONSIDERATION

May 4, 1999

By letter dated March 15, 1999, addressed to the Board, SEA Field Representative Kate McGovern requested that the Board reconsider its decisions in the above-referenced appeals. Her letter gives no indication that a copy was provided to the Department of Health and Human Services.

Per-A 206.02 (c) of the Rules of the Personnel Appeals Board provides that:

"Copies of all papers filed by any party shall, at or before the time of filing, be served by a party or person acting for him [or her] on all other parties to the case. Service on a party represented by another shall be made on such representative."

Whereas the appellant failed to indicate that a copy of the reconsideration request was provided to the other party, the Board found that the request was filed in violation of Per-A 206.02 (c) of the Board's Rules.

In general, a request for reconsideration must either allege that the Board has made an error of law or must present additional facts that were not available at the original hearing. In order to request a rehearing, the party dissatisfied with the Board's order must set forth every ground upon which it is alleged that the Board's decision is unlawful or unreasonable. The Board may grant a rehearing if, in its opinion, good reason for such rehearing is stated in the motion.

With respect to Doctet #99-D-4, Ms. McGovern wrote that there were "outstanding questions concerning the suitability of Mr. Howard for the job that he was assigned to in COAF." She also argued that in Doctet #99-D-10, State's Exliibit #8 was "difficult to review in the fonn in which it was presented." For those reasons, she aslted the Board to reconsider its decision and order a full evidentiary hearing.

Having reviewed the appellants request in conjunction with the Board's decision in these cases, the Board found that there was no good reason for rehearing the appeals. Both parties had the opportunity to offer documents into evidence and to malte offers of proof witli respect to Mr. Howard's suitability for the position into which he was transferred, and the work errors attributed to him in the performance of those duties. The appellaiit has failed to explain how an evidentiayi hearing would reveal any evidence that could not have been submitted for the Board's consideration in the original hearing.

The Board voted unanimously to DENY the request and to AFFIRM the decision denying their request for retroactive compensation.

THE PERSONNEL APPEALS BOARD


Patrick H. Wood, Commissioner


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