

# State of New Hampshire



## PERSONNEL APPEALS BOARD

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### *Appeal of Mark Kirouac*

*Docket #2006-D-006*

*NH Fish and Game Department*

May 23, 2007

The New Hampshire Personnel Appeals Board (Bonafide, Johnson and Casey) met in public session on Wednesday, November 29, 2006, under the authority of RSA 21-I:58 and Chapters Per-A 100-200 of the NH Code of Administrative Rules (Rules of the Personnel Appeals Board) to hear the appeal of Mark Kirouac, an employee of the Department of Transportation, concerning a written warning issued to him on October 14, 2005 while he was employed by the NH Fish and Game Department as a Public Works Project Manager. Stephen McCormack, SEA Senior Field Representative, appeared on behalf of the appellant. Executive Director Lee Perry appeared on behalf of the Fish and Game Department.

In accordance with the provisions of Per-A 207.02 (b)(4), the appeal was heard on offers of proof by the representatives of the parties. The record of the hearing in this matter consists of pleadings submitted by the parties, notices and orders issued by the Board, the audio tape recording of the hearing on the merits of the appeal, and documents admitted into evidence as follows:

Exhibit A (with objection)

- Sub-exhibit 1 January 25,2006 letter from Karen Levchuk, Director, NH Division of Personnel to Stephen J. McCormack, NHSEA Re: Appeal of Mark Kirouac
- Sub-exhibit 2 January 26,2006 appeal letter from Stephen J. McCormack, NHSEA to Karen Levchuk, Director Re: Appeal of Mark Kirouac
- Sub-exhibit 3 December 30,2005 letter from Lee E. Perry, Executive Director, NH Fish and Game to Stephen J. McCormack, NH SEA Re: Appeal of Mark Kirouac
- Sub-exhibit 4 October 20,2005 appeal letter from Stephan J. McCormack, NH SEA to Lee E. Perry, Executive Director NH Fish and Game Re: Appeal of Mark Kirouac
- Sub-exhibit 5 October 14,2005 Letter of Warning issued to Mark Kirouac
- Sub-exhibit 6 June 30,2005 E-Mail from Lee E. Perry to Mark Kirouac Re: Land Authorization
- Sub-exhibit 7 E-Mails relative to alleged incident of insubordination
- Sub-exhibit 8 October 11,2005 E-Mail from Lee Perry to Mark Kirouac Re: Issue Letter of Warning
- Sub-exhibit 9 Additional E-Mails relative to Letter of Warning issued to Mark Kirouac, dated October 14,2005
- Sub-exhibit 10 Status of Construction Projects at NH Fish and Game
- Sub-exhibit 11 Documentation regarding Baker River Project, NH Fish and Game
- Sub-exhibit 12 Documentation regarding Laconia WTP Compound Site, Winnisquam Lake, Water Street, Laconia, NH Project, NH Fish and Game
- Sub-exhibit 13 E-Mail Correspondence regarding Hawkins Pond Project, NH Fish and Game
- Sub-exhibit 14 E-Mail Correspondence regarding Pleasant Lake Scenic Road Project, NH Fish and Game
- Sub-exhibit 15 E-Mail Correspondence regarding Large Lake Access Projects Re: Expectations

Sub-exhibit 16 State of New Hampshire Performance Summary for Mark Kirouac,  
dated 10/19/04 .

**State's Exhibit 1 (admitted over the appellant's objection)**

Sub-exhibit A September 27, 2004 letter from Mark Kirouac to Lee Perry with  
attachments (25 pages)

Sub-exhibit B Hand-written meeting notes re: appellant's failure to attend July 28, 2005  
meeting

**State's Exhibit 2** Organizational Chart, NH Fish and Game Department (3 pages)

Mr. McCormack argued that approximately two-thirds of the State's exhibits should be excluded, and that the Board should limit its review to those documents "at the time of the warning." In reviewing the documents submitted by both parties, however, the Board found that the appellant's exhibits date back as far as October 19, 2004, and refer to work performed by the appellant as early as July 2003. As such, the Board concluded that it would be unfair to exclude the State's evidence while admitting the appellant's evidence for the same time period. Accordingly, the Board voted to admit those documents offered into evidence and to give the evidence the weight that the Board deems appropriate in relation to the letter of warning currently under appeal.

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

Findings of Fact

1. The Appellant began work for the Fish and Game Department in 2001, and was assigned to the Access and Engineering Section as a Public Works Project Manager, 'salary grade 27.

2. When Mr. Perry became the department's Executive Director in September 2003, he was aware of concerns that had been raised by the public and members of the department about the department's apparent lack of progress in creating and building public access boat launch facilities. He also was aware of concerns that had been raised within the department about the level of support being provided by Access and Engineering, as well as poor working relations within that division.
3. After meeting with division heads and after having a workplace analysis conducted by Peter Gamache of the Division of Personnel, Director Perry decided to reorganize within his department. In July 2004, as part of that reorganization, the appellant was placed in charge of the Facilities Construction and Maintenance Section of the newly created Support Services Division under the supervision of Kathy LaBonte. The appellant was directed to assume responsibility for managing all aspects of the division's public works program.
4. In October 2004, despite continuing concerns about the appellant's work performance, Director Perry agreed to grant the appellant a salary increment, noting that reorganization had resulted in changes in the appellant's level of accountability within the newly created Support Services Division. Director Perry told the appellant he could start "with a clean slate," but would be expected to show improvement in his ability to work cooperatively with his own unit and with the public, as well as managing his projects to insure cost effectiveness in their planning, design and timely completion.
5. In the ensuing months, the Director continued to receive negative reports and comments about the appellant's work performance in relation to projects on the Baker River, Pleasant Lake, and Lake Winnisquam. The consulting/engineering firm of Fay, Spofford and Thorndike also expressed concern that they were getting conflicting directives from the appellant, causing rework, project delays and increased costs.
6. By email message dated June 30, 2005, Director Perry informed the appellant that he was no longer authorized to obligate the Department to any contractual work with FST, and that Dan Lynch, the Assistant Director, would be "the only Department

official authorized to approve tasks, scope of work and expenses associated with the FST contract." (Notice of appeal, attachment LP-2)

7. In July, 2005, Kathy LaBonte, Chief of Support Services, reported that things weren't going well and asked Director Perry and Assistant Director Lynch to schedule a meeting for all those employees involved with the Boat Access Program so they might open communications and develop a coordinated plan of work.
8. On Wednesday, July 20, 2005, at 10:37 a.m., the Director's assistant, Tanya Croteau, sent an email message to Kathy LaBonte, William Ingharn, Mark Kirouac, Carol Henderson, Rich Tichko, Bob Talon, Alan Moody, and Patrick Tate, stating, "This is to advise you that there will be an Access Program Meeting on July 28<sup>th</sup> at 9:00 a.m. in the east conference room. Please mark your calendars accordingly as this is an important meeting that requires your attendance." In a post script, Ms. Croteau also asked Mr. Kirouac to inform Jeff Preve of the meeting.
9. The appellant replied the following day, by email dated July 21, 2005 at 7:07 a.m., addressed only to Ms. Croteau, "Tanya, I am fully booked next week and will not be able to attend this meeting. I have informed Jeff."
10. On Monday, July 25, 2005 at 8:58 a.m., Ms. Croteau emailed Mr. Kirouac, stating, "I've let Dan [Lynch] know. He may contact you."
11. At 10:09 a.m. on Monday, July 25, 2005, Mr. Lynch emailed Kathy LaBonte, William Ingharn, Mark Kirouac, Carol Henderson, Rich Tichko, Bob Talon, Alan Moody, and Patrick Tate stating, "There have been a few questions regarding attendance at this meeting [scheduled for July 28<sup>th</sup>]. You are required to attend this meeting so please arrange schedules accordingly."
12. The appellant replied to Mr. Lynch by email delivered on Tuesday, July 26<sup>th</sup> at 6:05 a.m. "Dan, This is to confirm that I will be unable to attend this meeting as indicated earlier to Tanya. I am fully booked all week."
13. By email dated Wednesday, July 27<sup>th</sup> at 4:08 p.m. addressed to Mr. Kirouac and copied to Ms. LaBonte, Assistant Director Lynch wrote, "Mark: Please consider my original message as a direct order. You are being ordered to be at this meeting." Mr. Lynch printed off a copy of the message and left it in the appellant's office.

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14. Of those directed to attend the meeting, only the appellant failed to appear as scheduled.

Position of the parties:

Mr. McCormack argued that because the appellant was responsible for multiple projects, his supervisor, Ms. LaBonte, had allowed the appellant to "use his best judgment" prioritizing assignments and establishing his work schedule. Mr. McCormack argued that in the appellant's best judgment, it was more important for him to be at the Powder Mill Hatchery overseeing contractors on the morning of July 28, 2005 than it was for him to attend the Access Program meeting in Concord.

McCormack argued that the appellant was the Fish and Game Department's only certified engineer, and the only employee in the department with the credentials to accept or reject work performed by contractors and employees. He argued that before the appellant had received notice of the July 28, 2005 meeting, the appellant was already scheduled to be out of the office working at the Powder Mill Hatchery. Mr. McCormack argued that the appellant gave appropriate notice to Ms. Croteau and Assistant Director Lynch that he would not be available for the meeting, and did not receive Mr. Lynch's "direct order" until after the meeting had already taken place. Mr. McCormack argued that instead of sending a "direct order" by email, and leaving a print-out of that email on the appellant's office chair, Mr. Lynch could have telephoned the appellant before the meeting to inform him that attendance was mandatory, or he could have driven out to the job site where the appellant was working to instruct him to return to Concord for the meeting. Mr. McCormack argued that the appellant was not willfully insubordinate, as the appellant would have attended the meeting if he had received timely notice. Mr. McCormack also argued that the appellant often raised legitimate issues and concerns based on his professional opinion as an engineer. He argued that appellant's disagreements with management should not be deemed unsatisfactory work performance or refusal to accept a job assignment.

Director Perry argued that the appellant's position was a "management and leadership position, not just an engineer in the field." He argued that there had been "considerable unrest" in the department, particularly in the Facilities Construction and Maintenance Section, and that employees involved in the various projects felt they were getting poor direction. He argued that Ms. LaBonte, the appellant's supervisor, was the one who had requested the meeting on July 28<sup>th</sup> in order to allow everyone to "get on the same page at the same time so they could move forward." Director Perry acknowledged that the appellant was responsible for multiple projects, but noted that in addition to the project at Powder Mill, there was a project "going very badly" at Sand Pond, and it was critical for the appellant to attend the meeting to address outstanding issues. He argued that the appellant had ample time to rearrange his schedule without shutting down work at Powder Mill, and noted that ten other employees with equally challenging schedules managed to make time for the meeting, while the appellant did not. Director Perry argued that the appellant acknowledged receiving the emails from Ms. Croteau and Mr. Lynch, and regardless of Ms. LaBonte's general instruction to the appellant to "use his best judgment" in prioritizing assignments, the first and second email made it perfectly clear that the appellant's attendance at the July 28<sup>th</sup> meeting was required.

### Rulings of Law

- A. Per 1001.03 (a) of the NH Code of Administrative Rules authorizes the appointing authority "...to use the written warning as the least severe form of discipline to correct an employee's unsatisfactory work performance or misconduct..."<sup>1</sup>
- B. Refusal to accept a job assignment is listed as an optional dismissal offense in former Rule Per 1001.08 (a)(6).
- C. Willful insubordination is listed as an optional dismissal offense in former Rule Per 1001.08 (a)(9).
- D. In order to prevail in an appeal of a written warning, the appellant must prove by a preponderance of the evidence that, " (1) The disciplinary action was unlawful; (2)

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<sup>1</sup> Those rules enumerated in the written warning expired on October 18, 2006, and were replaced by the Rules of the Division of Personnel currently in effect.

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," as required by Per-A 207.12 (b) of the NH Code of Administrative Rules.

### Decision and Order

Having carefully considered the evidence, arguments and offers of proof; the Board found that Mr. Kirouac's failure to attend the Boat Access program meeting on July 28, 2005 constituted refusal to accept a job assignment and willful insubordination. Accordingly, the Board found that Director Perry was justified in issuing the appellant a written warning for failure to meet work standards.

Although the appellant argued that he was never ordered to attend the meeting on July 28<sup>th</sup>, Ms. Croteau's original email clearly informed all employees on the distribution list "this is an important meeting that requires your attendance." When the appellant indicated he would not be attending, Assistant Director Lynch repeated that attendance was required, writing, "There have been a few questions regarding attendance at this meeting [scheduled for July 28<sup>th</sup>]. You are required to attend this meeting so please arrange schedules accordingly."

The appellant's assertion that he should not be disciplined because he never received a "direct order" is, at best, an unacceptable excuse for inappropriate, unprofessional, insubordinate behavior. By any reasonable standard, Ms. Croteau's email was a polite but direct order to attend the meeting on July 28, 2005. "Please mark your calendars accordingly as this is an important meeting that requires your attendance." (Emphasis added.) When the appellant treated the original order as if it was merely a request, telling Ms. Croteau he would be unable to attend the meeting, Assistant Director Lynch's follow-up message was more than sufficient under any standard to qualify as a direct order: "There have been a few questions regarding attendance at this meeting. You are

required to attend this meeting so please arrange schedules accordingly." (Emphasis added.) The appellant's contention that he should not be considered willfully insubordinate in this instance because his immediate supervisor had always given him discretion to set his own schedule and priorities is simply unpersuasive in light of Mr. Lynch's explicit instructions that the appellant and others were required to attend the meeting. The appellant reports to Ms. LaBonte, Ms. LaBonte reports to the Director and Assistant Director. Assistant Director Lynch called the meeting, and Ms. LaBonte was one of those directed to attend. As such, it is unreasonable to believe that Ms. LaBonte's general instruction to the appellant to "use his best judgment" would carry more weight than a specific directive from the Assistant Director to attend the meeting.

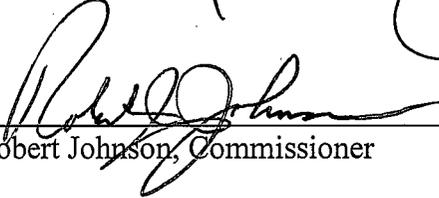
Having carefully considered the evidence and arguments offered by the parties, the Board voted unanimously to DENY Mr. Kirouac's appeal, upholding the Department's decision to issue him a written warning as the least severe form of discipline to correct his unsatisfactory performance.

THE PERSONNEL APPEALS BOARD



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Philip Bonafide, Chair



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Robert Johnson, Commissioner



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Joseph Casey, Commissioner

cc: Karen Hutchins, Director of Personnel, 25 Capitol St., Concord, NH 03301  
Lee Perry, Executive Director, NH Fish and Game Department, 11 Hazen Drive,  
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