

State of New Hampshire



PERSONNEL APPEALS BOARD
25 Capitol Street
Concord, New Hampshire 03301
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APPEAL OF LINDA MACKAY

DOCKET #01-D-1

NEW HAMPSHIRE DEPARTMENT OF FISH AND GAME

DECISION ON STATE'S MOTION FOR RECONSIDERATION AND APPELLANT'S OBJECTION TO MOTION

June 6, 2001

On March 26, 2001, the New Hampshire Personnel Appeals Board received the State's Motion for Reconsideration of the Board's February 28, 2001, decision granting Ms. MacKay's appeal of a written warning. The Board received the appellant's objection to the motion on April 4, 2001.

In accordance with Per-A 208.03 (e) of the NH Code of Administrative Rules, Rules of the Personnel Appeals Board, "A motion for rehearing in a case subject to appeal under RSA 541 shall be granted if it demonstrates that the board's decision is unlawful, unjust or unreasonable."

After carefully considering the State's Motion and Appellant's Objection in light of the evidence presented and the Board's decision in the appeal, the Board voted unanimously to RECONSIDER AND CLARIFY its original decision, and to AFFIRM its finding that the written warning issued to Ms. MacKay was unjust in light of the facts in evidence.

The State argued that the Board "erroneously recessed the hearing so that Mr. Steve Perry could return to the Department Offices to retrieve the investigative file, and obligated the Department to disclose the information to Ms. MacKay. The board's reliance on the Department's so-called 'failure to disclose' at the hearing and in its *Order* constitutes reversible error." The State also argued that, "The Board's indication during the course of the hearing...that New Hampshire law requires disclosure of an investigative file in this context is unsupported by statute, administrative rule, or case law" [Motion, pp. 2-31. The State argues that "no discovery motion was ever filed by Ms. MacKay under Per-A 206.08 or 206.10 seeking disclosure of the contents of the Department's investigative file regarding the incident. Had such a motion been filed, the Department would have considered and responded to such an inquiry. Absent such a request, however, the Department does not unilaterally distribute files unless required by law."

First, Per-A 207.08 of the Board's procedural rules sets forth very clearly the Board's authority to compel the production of additional evidence, and the Board did so without objection by the State.¹ Next, the Board continues to find that its ruling is well-supported by case law, administrative rule, statute, and contract. Although the Rules of the Division of Personnel provide no definition for term "personnel file," the Collective Bargaining Agreement does in Article XVI, Section 16.2:

"Every employee shall be informed as to the existence and location of all personnel files. A personnel file shall be defined as any file kept by a supervisor or custodian of official records which relates directly in any way to an employee's status as an employee."

Clearly, disciplinary action relates directly to an employee's status as an employee. A report developed specifically for the purposes of assessing the seriousness of an incident and which

¹ "If at any time before the close of the record the board determines that it has insufficient evidence to fairly decide the appeal, the board, upon its own motion or if the board agrees with the motion of a party, shall vote to compel the production of additional evidence including the testimony of witnesses or additional witnesses" [Per-A 207.081.

summarizes evidence collected in the workplace in support of a written warning certainly constitutes a "personnel file" as soon as the warning is issued. Therefore, the Board affirmed its decision that the appellant was entitled to know of the existence of the report and to receive a copy of it.

The State's claim that the investigative report was protected from disclosure is unsupported by the language of RSA 275:56, I. The law allows an employee access to his/her file except as set forth in paragraph III, for material that is "a) Information in the personnel file of a requesting employee who is the subject of an investigation at the time of his request if disclosure of such information would prejudice law enforcement; or (b) Information relating to a government security investigation." (emphasis added)." The investigation into Ms. MacKay's conduct was completely unrelated to law enforcement or a government security investigation, and therefore is not protected from disclosure.

NH RSA 21-I:58, I authorizes the Board, "in all cases," to "...reinstate an employee or otherwise change or modify any order of the appointing authority or make such other order as it may deem just." On the evidence and argument, the Board found that the warning issued to Ms. MacKay was unjust under the facts in evidence. Although the Board ordered the removal of the warning from Ms. MacKay's file, it did so having noted that Ms. MacKay had to take responsibility for her own behavior and follow her supervisors' directives, including directives about how she is to communicate within the department.

Having considered the arguments offered by the parties in support of and in opposition to the State's Motion to Reconsider, the Board voted to affirm its decision granting Ms. MacKay's appeal.

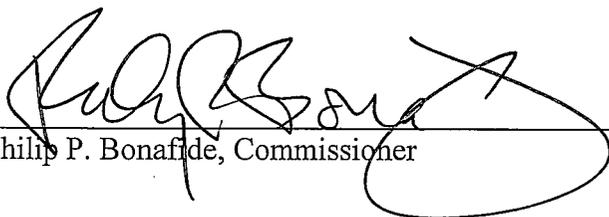
The Board also voted to reconsider its decision and clarify its original order. Under the provisions of RSA 21-I:42, every employee is entitled to clearly defined performance expectations. In this instance, establishing clear work expectations for Ms. McKay may require

more than simply reviewing the appellant's class specification and supplemental job description. Therefore, the Board also voted to clarify its original decision by directing the department to update the appellant's work expectations through a counseling memorandum wherein the State can describe in detail the manner in which it expects communications within the Department to occur and the consequences of failing to communicate in that fashion, as well as any other performance expectations consistent with Ms. MacKay's job classification.

THE PERSONNEL APPEALS BOARD



Patrick H. Wood, Chairman



Philip P. Bonafide, Commissioner

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Appeal of Linda MacKay

Docket #01-D-1

New Hampshire Fish and Game Department

February 28, 2001

The New Hampshire Personnel Appeals Board (Wood, Barry and Bonafide) met on Wednesday, December 7, 2000, under the authority of RSA 21-I:58 and the Rules of the Personnel Appeals Board, NH Code of Administrative Rules Chapters 100-200, to hear the appeal of Linda MacKay, an employee of the New Hampshire Fish and Game Department. Ms. MacKay, who was represented at the hearing by SEA Field Representative Linda Chadbourne, was appealing a July 10, 2000 letter of warning issued to her for her "...continued confrontational and emotional approach to resolving issues with [her] supervisors and co-workers [thereby disrupting the workplace] because of their threatening and intimidating nature" (Initial Pleadings and SEA Exhibit D). Attorney Craig S. Donais appeared on behalf of the Fish and Game Department.

The record of the hearing in this matter consists of the appellant's September 11, 2000 notice of appeal (with attachments), the State's Appearance, the audio tape recording of the hearing on the merits, notices and orders issued by the Board, and documents admitted into evidence as follows:

Appellant's Exhibits

- A. Linda MacKay's account of events dated June 9, 2000
- B. Memo from Linda MacKay to Steve Perry dated June 9, 2000
- C. Statement of Richard J. Tichko dated August 10, 2000
- D. Written Warning dated July 10, 2000
- E. (marked for identification but not admitted)

F. Letters of Recommendation

The State objected to admission of Appellant's Exhibit E, arguing that this document was created in response to the appellant's appeal at the departmental level, but was never agreed to by the parties, and was therefore irrelevant to discussion of the warning the original letter of warning. The Board sustained that objection. The State also objected to Appellant's Exhibit F, arguing that the warning under appeal was not a result of complaints about the appellant's work product or about her relationship with others individuals in and outside of the Department, but about the manner in which Ms. MacKay communicated during the June 9th incident, and the disruptive effect that her conduct had created in the workplace. The Board overruled the objection, admitting the letters as an exhibit, with the understanding that the Board would give that evidence whatever weight it deserved.

The State offered to provide for the Board's review a copy of a prior written warning issued to Ms. MacKay in 1998 for allegedly similar reasons. The appellant objected to its admission, arguing that the State had not disclosed the earlier warning as a possible exhibit. The appellant also argued that the warning was the result of a single incident occurring in June, 2000, and that the hearing should be limited to that one incident. The State argued that although the July 10, 2000 warning issued to Ms. MacKay did relate to a single, discreet incident, that incident was similar to the one that had resulted in the issuance of a written warning in 1998, and admission of the letter into the record of the hearing would provide a more complete picture for the Board's review. The Board decided not to include that warning in the record.

Originally, this matter was scheduled for a hearing on offers of proof as described by Per-A 207.02 (b) of the NH Code of Administrative Rules (Rules of the Pel-solme1 Appeals Board). However, after hearing the offers of proof made by the parties, the Board found that it had insufficient evidence upon which to fairly decide the appeal. Since Mr. Peny and Ms. MacKay, the persons primarily involved in the incident giving rise to the warning, were present in the hearing room and available to testify, the Board exercised its authority under the provisions of Per-A 207.08 of the Rules to call for additional evidence, including the testimony of witnesses.

Having carefully considered the pleadings, evidence, arguments, and offers of proof, the Board made the following findings of fact and rulings of law:

Findings of fact

1. Ms. MacKay, a sixteen-year employee of the New Hampshire Fish and Game Department, works as a Biologist I in the Division of Inland Fisheries under the direct supervision of Duncan McInnes, Special Projects Coordinator.
2. On the morning of June 9, 2000, after picking up brook trout from the New Hampton Hatchery, Ms. MacKay went to Fish and Game Headquarters in Concord, New Hampshire, to pick up the seasonal employee assigned to help her.
3. Ms. MacKay planned to give Mr. McInnes her leave slips for the following Monday and Tuesday, and planned to discuss with him her plans for the remainder of the week. She also intended to speak to Bob Fawcett, Hatcheries Supervisor, about her proposed changes to the stocking schedule.
4. When Ms. MacKay saw Mr. McInnes sitting in his office, she stopped in his doorway to speak with him.
5. After briefly discussing the proposed changes to the stocking schedule, Mr. McInnes indicated that Don Miller, the Region II Biologist, also needed to be apprised of the changes since they would directly affect his work area.
6. Ms. MacKay told Mr. McInnes that she would rather have him or Mr. Fawcett notify Mr. Miller of the changes because she didn't trust Mr. Miller.
7. Ms. MacKay believed that Mr. Miller had lied about her in the past about a work issue, and she believed that the resulting incident had been the cause of her transfer out of Region II, as well as her having received a written warning.
8. When Mr. McInnes persisted, Ms. MacKay reiterated her distrust of Mr. Miller, indicating that unless Mr. Miller apologized to her and admitted that he had lied about her, she would never trust him.
9. Steve Perry, Chief of the Fisheries Bureau, was sitting in his office approximately 25 feet away and overheard the exchange.

10. Mr. Perry left his office and approached Ms. MacKay in the hallway.
11. In her written report of the incident (SEA Exhibit A), Ms. MacKay said that when Mr. Peny approached her and confronted her on the issue of trusting Don Miller, she looked Mr. Perry "right in his eyes and said to him very clearly, 'Steve, Don lied to me, and he lied to you, and I can't trust him'. He said something like 'I had to' and I said something like 'no way.'"
12. In the exchange that followed, as Ms. MacKay walked away signaling that she wanted time to cool down, Mr. Perry said that she already had one written warning and needed to calm down or she'd receive another.
13. Mr. Perry insisted that he entered the conversation in order to defuse the situation, which had become loud, confrontational, and disruptive.
14. Ms. MacKay considered Mr. Perry's conduct during the encounter to be angry and threatening.
15. Mr. Peny asked his own supervisor, Dan Lynch, to speak with the other employees in the area to find out what they may or may not have heard.
16. As a result of his interviews with Duncan McInnes, Robert Fawcett, Stephen Perry, John Greenwood, Zoe Owers, and Vicki Leonard, Mr. Lynch concluded that the incident had been disruptive, a conclusion he then shared with Mr. Perry.
17. On July 10, 2000, Mr. Perry issued a written warning to Ms. MacKay for disruptive conduct.

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 or misconduct for offenses including, but not limited to: (1) Failure to meet any work standard..." [Per 1001.03 (a)1]
- B. "Each written warning shall: (1) Contain a narrative describing in detail the reason for the warning..." [Per 1001.03 (b)(1)]
- C. "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....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]

Standard of Review

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

The Board has no doubt that Ms. MacKay's behavior was disruptive. The evidence reflects that Ms. Lenoard was sufficiently uncomfortable that she felt obliged to leave the work area, that in order to avoid the situation, Mr. Greenwood felt uncomfortable about leaving his own work area, that Ms. Owers left the building in order to avoid the situation, that Mr. Fawcett considered Ms. MacKay's behavior unprofessional, and that Mr. McInnes considered Ms. MacKay's conduct to be loud and confrontational. The Board also has no doubt that Mr. Perry's decision to have the incident reviewed by his own supervisor before deciding to issue the written warning was both reasonable and appropriate. However, in fairness to the appellant, information gathered by Mr. Perry and his own supervisor should have been disclosed to Ms. MacKay prior to the issuance of the warning so that she might have been able to respond to their complaints.

Moreover, Mr. Perry, Mr. Fawcett and Mr. McInnes were all well aware of Ms. MacKay's difficulties in dealing with Mr. Miller. Until the date of the incident giving rise to the warning,

Mr. Fawcett and Mr. McInnes had transmitted information between Ms. MacKay and Mr. Miller, presumably to avoid the very problem that occurred on the morning of June 9th. Although it hardly excuses Ms. MacKay's conduct, if Mr. Perry, Mr. Fawcett or Mr. McInnes had some intention of changing the practice in this regard, they had some obligation to apprise Ms. MacKay of that fact. Had they done so, and had the confrontation occurred as reported to this Board, the warning might have been sustained. However, having failed to do so, the agency all but created a situation in which Ms. MacKay would, predictably, react as she did.

Having considered the evidence and argument offered by the parties, the Board found that the disciplinary action was unjust in light of the facts in evidence. Accordingly, the Board voted to GRANT Ms. MacKay's appeal. However, in doing so, the Board notes that Ms. MacKay bears responsibility for her own behavior. If the agency has new expectations with respect to Ms. MacKay's communication with Mr. Miller or others within the department, it should make those expectations known to her. Having been duly warned of those expectations, Ms. MacKay should realize that her performance and her behavior will be judged accordingly.

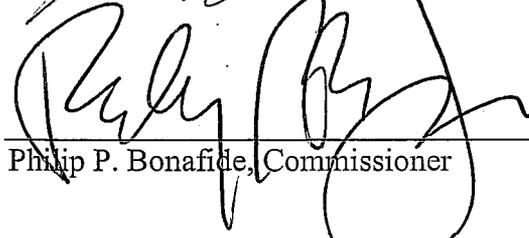
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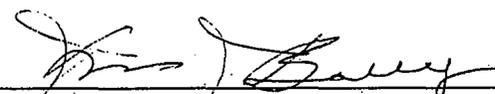
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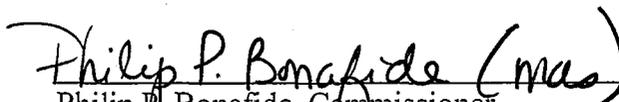
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