

State of New Hampshire



PERSONNEL APPEALS BOARD

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APPEAL OF TROOPER JOSEPH MC HUGH

Division of State Police

Docket #94-D-45

June 1, 1994

The New Hampshire Personnel Appeals Board (Bennett, Rule and McGinley) met December 8, 1993, February 23, 1994, and April 5, 1994, to hear the letter of warning appeal of Joseph McHugh, an employee of the Division of State Police, Department of Safety. The appellant was represented by Attorney Francis X. Quinn. Major Thomas F. Kennedy appeared on behalf of the Division of State Police.

Mr. McHugh's June 14, 1993 letter of warning arose from a charge that he had violated the Division's Rules and Regulations, Section 1.5.1 Personal Behavior by allegedly failing to maintain his temper, patience, and discretion through the use of disrespectful and willfully insubordinate behavior directed at Sgt. Wolkowski [his immediate supervisor].

By letter dated September 17, 1993, Attorney Quinn filed a notice of appeal on behalf of Mr. McHugh. In support of the appeal, Mr. Quinn attached a copy of the appellant's July 27, 1993 appeal to State Police Director Col. Presby. He also argued that he intended to pursue additional issues on appeal, including but not limited to the following:

- "A. Whether the employer properly followed its internal policies, statutes and regulations regarding (1) involuntary transfer and (2) performance upgrade;
- B. The severity of the penalty imposed;
- C. Whether there were grounds for sanction of relief from duty;
- D. Whether the conduct in question was provoked;

E. Whether the conduct in question is consistent with the regulations and statutory and decisional laws promulgated by the Public Employees Labor Relations Board."

By letter dated September 23, 1993, Attorney Quinn requested that the Board schedule a prehearing conference in the matter to address the scope of the appeal, and also filed Petitioner's Motion to Enlarge Time to Take an Appeal.¹

By letter dated October 13, 1993, Maj. Kennedy acknowledged receipt of the appeal on behalf of the State Police. He agreed that the appeal could be considered timely, but objected to any attempt by the appellant to expand the scope of the appeal to anything which occurred subsequent to issuance of the letter of warning. Specifically, Maj. Kennedy argued that by failing to take a timely appeal of any personnel actions which occurred after the letter of warning was issued, the appellant had failed to preserve his right to appeal those decisions.

The appeal was accepted by the Board as timely filed, and was scheduled for a prehearing conference on December 8, 1993. At that meeting, after hearing argument by both parties, the Board voted to limit Mr. McHugh's appeal strictly to the issue of his June 14, 1993 letter of warning, finding that the appellant had failed to file a timely appeal of either his involuntary transfer or his denial of upgrading to corporal. At that meeting, the Board also directed the State Police to complete the exchange of information required by Per-A 202.08 of the Rules of the Personnel Appeals Board by forwarding to the Board and to the appellant any information concerning the informal settlement procedures which had not been provided to date. The appellant was also directed to file an amended statement of the basis for his appeal, stating the action complained of and a detailed description of why the appellant believed the action was inappropriate, as required by Per-A 202.01(b) of the Rules of the Personnel Appeals Board.

¹ The appellant's original request for hearing had been misdirected to the Public Employee Labor Relations Board and was not received by the Board within fifteen calendar days of the date of the action giving rise to the appeal.

The Division of State Police complied with the Board's verbal prehearing order on December 10, 1993, forwarding to the Board and to Attorney Quinn copies of all previous requests and decisions in the possession of the Division of State Police concerning the Informal Settlement Process completed by the parties in addressing the letter of appeal. The appellant failed to provide any further statement of the basis for his appeal.

At the February 23, 1994 hearing, Maj. Kennedy requested that the Board dismiss the appeal in light of the appellant's failure to comply with the Board's direct order to file a more detailed statement of the basis for his appeal. The Board denied that request, finding that the absence of a more detailed statement did not unduly prejudice the State. The Board again ruled that the hearing would be limited to the letter of warning, and would not be expanded to address any of the alleged ramifications of that warning, including the appellant's subsequent involuntary transfer and denial of upgrading to corporal.

The complaint that Trooper McHugh had violated State Police Regulation Section 1.5.1 (Personal Behavior) arose from an incident which occurred on the morning of May 15, 1993. Trooper McHugh, who was then assigned to the Motorcycle Unit, was scheduled to participate with the Aviation Unit in a traffic patrol on Route 93. Trooper McHugh and Trooper Cargill were initially directed to report to an area at the Campton exit, where Trooper McHugh was to have been part of the ground support team. When the pilot of the aircraft called in to say that traffic in that area was very light, the location of the assignment was changed, and revised orders were radioed to Troopers McHugh and Cargill to meet at the Sanbornton exit. Trooper Palmer, who was also assigned to the detail, had failed to report to duty on time, further delaying the start time of the assignment. While en route, Troopers McHugh and Cargill had also received orders indicating that Trooper McHugh would be assigned to the aircraft instead of the ground support team. Before Troopers McHugh and Cargill had arrived, another change of location was ordered to the Northfield exit. Trooper McHugh was in uniform for motorcycle duty and was unhappy that he would have to work in the aircraft wearing motorcycle boots and pants, which would be uncomfortable.

Sgt. Wolkowski, who was head of the Motorcycle Unit and in charge of the detail that morning, had called to headquarters to find out where Troopers McHugh and Cargill were since they had not yet signed on to the area radio frequency. He advised headquarters that Trooper McHugh was not going to be required to serve in the aircraft after all and advised that the unit would meet at northbound Exit 19, the Northfield exit. Because of the transmission range, Sgt. Wolkowski and Trooper McHugh were not yet on the same radio channel. At approximately 7:30 a.m., when Sgt. Wolkowski learned that Troopers McHugh and Cargill were still in the vicinity of the Manchester/Hooksett town line, he told headquarters to radio them to proceed "directly" to the Northfield exit without stopping. They arrived approximately one half-hour later.

Almost immediately after Troopers McHugh and Cargill had arrived at the site of the traffic detail, Trooper McHugh and Sgt. Wolkowski engaged in a very brief, very volatile verbal exchange. As a result of that exchange, Trooper McHugh was ordered off the detail and relieved of duty. Trooper McHugh admitted to shouting at Sgt. Wolkowski and using obscene language. However, he insisted that the Sergeant provoked the incident by first directing obscene language at Trooper McHugh and belittling him in front of his peers. The State alleged that Trooper McHugh initiated the argument, and conducted himself in such a manner as to warrant his immediate relief from duty. The parties have very different versions of what occurred when Troopers McHugh and Cargill arrived at the site of the detail.

In his May 17, 1993 written report to Col. Presby, Trooper McHugh asserted that on the morning in question, he signed on with Troop A at 6:00 a.m., met Trooper Cargill at the intersection of Routes 51 and 111 in Exeter at 6:30 a.m., and stopped with Trooper Cargill in Epping to fuel their motorcycles and get coffee. He said that en route, he had received notice by radio that he would be observing from the aircraft on the detail. He said that when he signed on Chanael 1, headquarters asked for his location. After he replied he was at the Manchester/Hooksett line, he was told to go "directly to Sanbornton, do not stop."

Trooper McHugh said he and Trooper **Cargill** received another change in orders while en route, and were directed to Northfield Exit 19. He stated that upon arriving at the detail site, Sgt. Wolkowski rolled down the window of the van in which he was sitting and the appellant said to him, "Well we made it." He said that Sgt. Wolkowski then said, sarcastically, "What, did you f i n g guys stop for breakfast on the way up here or what." He alleged that he responded that they had made several vehicle stops along the way, in keeping with directions from the sergeant at a prior unit meeting. He said that Sgt. Wolkowski then left the van and stood in front on him. Trooper McHugh stated that he told the sergeant, "you know I've gotten four different sets of orders since I've signed on", at which point he said the sergeant cut him off and said, "You did all the f i n g talking yesterday and now you're going to listen to what I have to say."

Trooper McHugh stated that he replied, "I'm not going to listen to you talk to me that way," and that Sgt. Wolkowski replied, "The f you're not, and if you **don't** like it than you can get the f___ out of here." He reported that he responded, "**F___** you and the unit. You cause too much f___ing stress around here anyway and I **don't** need it". He said that after a further exchange, the details of which he did not recall, Sgt. Wolkowski then said, "**You're** out of here, you go home right now." Trooper McHugh said he responded, "Fine," that he got on his motorcycle and rode as far as Epping before being radioed to return to headquarters to report to Lt. Dodd who then told him that he was relieved from duty until **9:00** a.m., Monday, ~~May~~ 17, 1993.

Sgt. Wolkowski's report of the incident, also dated May 17, 1993, is substantially different from Trooper **McHugh's**. In that report, he claimed that when the appellant arrived at the detail, he approached the van in which the sergeant was sitting with another Trooper. He said the appellant said that he and Trooper **Cargill** were late because they had made several vehicle stops en route. Sgt. Wolkowski reported that when he exited the van, approached the appellant and made reference to the time, Trooper McHugh interrupted him and said, "I'm not f i n g kidding. ~~We~~ were late because of the stops just like you f i n g told me to do at the unit meeting. You know I'm really f i n g tired'of your bullshit." He reported that when he tried to reassure the appellant that there **wasn't** a

problem, Trooper McHugh started to yell again, saying, "I'm telling you, I'm not f____ing fooling we did stop some cars and I'm really f i n g tired of your cheap bullshit, and you ragging on me all the f i n g time."

According to Sgt. Wolkowski's report, the exchange continued, with Trooper McHugh calling him a " f i n g asshole" and a "mother f____er", to which he responded, "Hold it right there. I listened to your shit yesterday now I'm talking and it's time for you to listen to me." He stated that Trooper McHugh then said, " F you, you're a f i n g asshole, nobody likes working for you and everyone on this f i n g unit thinks you are a f i n g asshole, just ask any one of them. They will f i n g tell you." He said he then told Trooper McHugh to leave, that he was done for the day. He reported that the appellant responded, "Ill be glad to f i n g leave because I don't want to work with this f i n g unit anymore. F____you, I'm going back to Troop A and work my own area." He said he then told the appellant that was to go home, not to work his area at Troop A, and that as far as he was concerned, the appellant was off the unit permanently. He said that Trooper McHugh replied, "F____ you. I'm glad to be off here." He said that Trooper McHugh then rode away rapidly, but still in control of his motorcycle.

Sgt. Wolkowski reported that he asked Trooper Cargill if he knew what had set-the appellant off. He said that Trooper Cargill told him that the appellant had been irritated by the repeated changes of orders, but that he was unaware of any other circumstances which could have lead to the outburst by Trooper McHugh. He said that Trooper Cargill had already begun making notes of the exchange in anticipation of being asked to report on the incident.

The day after the incident, Sgt. Wolkowski called Trooper Cargill and Trooper Palmer, who had been in the van with Sgt. Wolkowski on the morning of the incident, to report to the Raymond Police Station to write "yellow letters" (Inter-Department Communication) detailing the incident. Troopers Cargill and Palmer supported Sgt. Wolkowski's statement that he had asked them to give a complete report of the incident. They both testified during the hearing that Sgt. Wolkowski remained in the station while they were completing the reports and had not told them what to write, only that they were to leave blank the name of the addressee.

Trooper Cargill's written report of the incident prepared on May 16, 1993, described the incident as follows:

We arrived at Exit 19 and pulled off the roadway. The NHSP aircraft van was also parked at this location with Sgt. Wolkowski and Trp. Palmer sitting in it. Trp. McHugh dismounted his motorcycle and went over to the van and spoke with Sgt. Wolkowski. As they were talking I was dismounting my motorcycle. The next thing I saw was Sgt. Wolkowski get out of the van and he and Trp. McHugh continued to talk. Trp. McHugh began rising his voice at Sgt. Wolkowski. Trp. McHugh stated that he's received 4 changes of orders this morning and was sick of this bull shit. Sgt. Wolkowski stated to Trp. McHugh to hold it right there. He stated to Trp. McHugh that he listed to Trp. McHugh yesterday and now that it's his turn to talk. Trp. McHugh continued to yell at Sgt. Wolkowski using vulgarity and at one point calling him a f___ing asshole. It was at that point that Sgt. Wolkowski stated to Trp. McHugh "you're out of here". Trp. McHugh continued to yell at Sgt. Wolkowski saying good I am out of here. I am sick of your bull shit. I dare you to ask anyone in this unit. They're sick of your bull shit, too. Sgt. Wolkowski again stated to Trp. McHugh that he was out of here. Trp. McHugh stated good I will go work somewhere else. I will get my activity somewhere else.

Trooper Cargill's written report of the incident concluded by stating that he had advised Sgt. Wolkowski he had no clue what had set Trooper McHugh off.

Trooper Palmer's written report of the incident, also dated May 16, 1993, gives a similar, although far less detailed account of the incident. According to Trooper Palmer, when Troopers McHugh and Cargill arrived at the detail, he was in the van writing out his summonses for the detail. He said that Sgt. Wolkowski exited the van, and he noted that Trooper McHugh was yelling. He said he heard him tell Sgt. Wolkowski that he "was sick of his shit". He said he then heard the sergeant loudly telling the appellant, "I'm talking now", to which Trooper McHugh responded, "I'm sick of your shit". Trooper Palmer said he was trying not to listen to what was being said because he felt that it did not concern him, but that he

could not help from hearing the remarks because of how loud they were. Nonetheless, he said he heard Sgt. Wolkowski tell Trooper McHugh, "You're out of here", to which Trooper McHugh responded, "Fine, I'll go work my own area". He said that when Trooper McHugh rode off very rapidly, and that he was concerned for Trooper **McHugh's** safety because he appeared extremely upset.

Troopers McHugh, Palmer and **Cargill** were all interviewed as part of the investigation of the incident. A disciplinary hearing was subsequently held by Col. Lynn Presby, after which the Colonel decided to sustain the charge that Trooper McHugh had violated the "Personal Behavior" section of the State Police Rules and Regulations addressing personal behavior. A letter of warning was then issued to Trooper McHugh on June 14, 1993. Trooper McHugh then initiated a request for informal settlement of the warning by letter addressed to Col. Lynn M. Presby, State Police Director, dated June 21, 1993.

In his memo to Col. Presby, appealing the warning, Trooper McHugh argued that the investigation into the incident was not thorough enough to determine all the facts of the incident, and was based largely on reports written by subordinate troopers under the direction of Sgt. Wolkowski. He argued that key elements of the incident were intentionally left out of the letters by the troopers for fear of retaliation. He concluded by saying that the discipline imposed upon him had been inequitable, arguing that the sergeant had violated the same Rules and Regulations which he had violated.

Maj. Thomas Kennedy responded to Trooper McHugh by memo dated July 2, 1993, advising him that his appeal failed to provide a detailed description of those factors which formed the basis for his appeal. He directed Trooper McHugh to provide a detailed written report addressing why Trooper McHugh felt the internal investigation was not thorough and what facts were not reported and/or considered, Trooper **McHugh's** grounds for claiming that the reports of witnesses at the scene were biased or incomplete, and what facts could support the claim that the discipline imposed was "inequitable".

Trooper McHugh responded by memo dated July 5, 1993. Trooper McHugh said that internal investigation was not thorough because

the witnesses' statements did not report Sgt. Wolkowski's question of, "What, did you f i n g guys stop for breakfast on the way up here, or what?", or his statement that "You did all the f i n g talking yesterday, and now you're going to listen to what I have to say". He said these statements were key to what started the volatile conversation that ensued and which had resulted in the letter of warning. Trooper McHugh also stated that the statements submitted by Troopers Cargill and Palmer were biased because both officers had been taken from their patrol by Sgt. Wolkowski to the local police department where, with Sgt. Wolkowski present, they were ordered to write their accounts of the incident. Having already admitted to his own conduct, Trooper McHugh's underlying complaint was that the incident was "in all reality an argument that was provoked by Sgt. Wolkowski when he lost his temper, and began to yell at and belittle [the appellant] in front of [his] peers and the motoring public." He reiterated his position that he should not have been disciplined when, in fact, Sgt. Wolkowski had also violated the Rules and Regulations concerning personal behavior.

In Step I and Step II of the informal process for settlement of disputes, the letter of warning was affirmed, first by Col. Presby, then by Assistant Safety Commissioner Robert Dunn. Through his representative, Attorney Francis Quinn, the appellant then filed his request for hearing before this Board by letter dated September 17, 1993.

Standard of Review

Per 1001.03 Written Warning

- (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 ...

In his closing argument, the appellant posed the following two questions for review by the Board:

1. Was the letter [of] warning properly issued if the evidence establishes that Sergeant Wolkowski provoked McHugh's conduct on May 15, 1993.
2. Whether the Division's failure to adhere to their own rules, regulations and policies with regard to the incident is grounds to reverse the Division's issuance of the letter of warning.

The evidence does not clearly establish that McHugh's conduct on May 15, 1993 was provoked. In addition, the Board finds that provocation is not a sufficient basis for reversal of the letter of warning, because verbal provocation would not justify Trooper McHugh's admitted use of obscene language and uncooperative or disruptive behavior with a superior officer.

The record reflects that on the Friday preceding the incident, during discussions on the appellant's annual performance evaluation, the appellant asked Sgt. Wolkowski to approach Lt. Furlone and Maj. Sullivan about promoting him to corporal. He was concerned about the impending promotion of a less experienced member of the Motorcycle Unit to Corporal while he still held the rank of Trooper. He asked the sergeant to speak to Lt. Furlone and/or Maj. Sullivan about expediting his promotion rather than making him wait the additional period as scheduled. According to the appellant, he was concerned that if Trooper Lombardi returned to the Motorcycle Unit as a Corporal, the appellant would no longer be the "second in command". Sgt. Wolkowski had told him that it was "outside his realm", but that if it were up to him personally, he would promote the appellant.

The record also reflects that Trooper McHugh was agitated when he arrived at the detail in Northfield on the morning of May 15, 1993. He was cold after the long ride from the Seacoast. He was irritated at having received three to four changes in orders while en route, including one change in which he was advised that he would have to serve as the aircraft observer when he was not properly or comfortably dressed for that assignment. He was suspicious of the way in which the last set of orders had been relayed, considering it highly unusual that he and Trooper Cargill had been directed to report to the detail "without stopping".

Almost immediately after arriving at the detail, Trooper McHugh began defending the time of his arrival by reporting that vehicle stops made en route were made only to satisfy the sergeant's instructions from a prior unit meeting.

In his own report of the incident, Trooper McHugh characterized the remark allegedly made by Sgt. Wolkowski as "sarcastic". While the Board does not condone the use of obscene or vulgar language in the workplace, the Board does not consider the remarks attributed to Sgt. Wolkowski by the appellant sufficiently provocative to warrant Trooper McHugh's response. Trooper McHugh admitted that he told his commanding officer, "F___ you and the unit!" That conduct is clearly violative of Section 1.5.1 of the State Police Rules and Regulations regarding personal behavior, as well constituting an offense as described by Per 1001.03 (a)(5) and (a)(6) of the Rules of the Division of Personnel, using obscene language and exhibiting uncooperative or disruptive behavior.

In his closing arguments, the appellant also asked whether the Division's failure to adhere to their own rules, regulations and policies with regard to the incident would provide grounds to reverse the Division's issuance of the letter of warning. Again, the record does not reflect that the Division of State Police failed to adhere to their own rules, regulations and policies in this instance. Therefore, the Board need not reach the question of whether such a failure would constitute grounds for removal of the warning.

The appellant has alleged that the investigation into the incident was tainted by the fact that the "yellow letters" written by Troopers Cargill and Palmer were produced at the direction of Sgt. Wolkowski. The record reflects that Sgt. Wolkowski directed Troopers Cargill and Palmer to report to the Raymond Police Station to make their reports. Although he instructed them to leave the "addressee" section of the memo blank, he gave them no other instructions except to give a complete report of the incident.

There is no evidence to suggest that Sgt. Wolkowski made any attempt to influence Troopers Cargill and Palmer to include or exclude information from their reports. In fact, although Sgt. Wolkowski directed both men to leave the "addressee" section of the

memo blank, Trooper Cargill addressed his memo to Col. Presby, believing that to be proper procedure. Further, the appellant failed to offer any evidence or argument to suggest that Sgt. Wolkowski's presence in the station while the statements were being produced had any bearing upon the completeness or accuracy of the reports made by those troopers. The record also reflects that Lt. Furlone, not Sgt. Wolkowski, was responsible for investigating the incident, reviewing the reports and interviewing the witnesses. The Board did not find evidence which would support a finding that Trooper McHugh was not afforded a full and fair investigation into the incident.

The appellant argued that RSA 21-I:58 provides the authority for the Board to change or modify any order of the appointing authority or made such other order as it may deem just. The appellant argued that the evidence establishes that the Division violated two of its own rules: (1) by failing to discipline Sgt. Wolkowski for violation of the personal behavior standards contained in 1.5.1 of the Division of State Police Rules and Regulations, and (2) by failing to clearly follow the "letter of rule 1.7.7" regarding relief from duty.

In spite of very lengthy presentations by both parties on the collateral issues of commanding officer status, proper procedures for "relief from duty", and whether or not Sgt. Wolkowski used profane language in violation of Section, 1.5.1. of the Division of State Police Rules and Regulations, the only issues before this Board are the question of whether or not Trooper McHugh engaged in a course of conduct which violated the State Police Rules and Regulations addressing personal behavior, and whether that behavior rose to the level of an offense as described by the Rules of the Division of Personnel.

By his own admission, Trooper McHugh argued with his commanding officer in full view of other members of the unit. He admitted to telling his commanding officer, "F___ you and the Unit", as well as telling him, "You cause too much f i n g stress around here anyway and I don't need it." Trooper McHugh admitted to a further exchange with Sgt. Wolkowski involving more profanity which the Board believes is most accurately described in Trooper Cargill's May 16, 1993 memo.

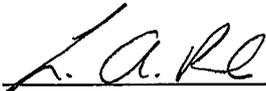
The Board found that Trooper McHugh did engage in conduct which violated Section 1.5.1. of the Rules and Regulations of the Division of State Police, as well as Per 1001.03 (a) (5) and (6) of the Rules of the Division of Personnel. Accordingly, the Board found that the Division of State Police acted within its discretion in issuing Trooper McHugh a letter of warning as the least severe form of discipline for correcting an employee's unsatisfactory work performance.

Accordingly, the Board unanimously voted to deny Trooper McHugh's appeal.

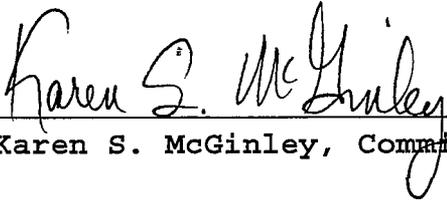
THE PERSONNEL APPEALS BOARD



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cc: Virginia A. Lamberton, Director of personnel

Maj. Thomas F. Kennedy, Division of State Police

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