

State of New Hampshire



PERSONNEL APPEALS BOARD

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APPEAL OF BARRY OSBORN

Docket #98-D-7

Department of Corrections

January 18, 2000

The New Hampshire Personnel Appeals Board (Rule, Johnson and Barry) met on Wednesday, September 22, 1999, under the authority of RSA 21-I:58, to hear the appeal of Barry Osborn, an employee of the Department of Corrections, Division of Field Services. Attorney Jack McGee appeared on behalf of the appellant. Attorney John Vinson appeared on behalf of the Department of Corrections.

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 prior to the hearing, orders and notices issued by the Board, the audio tape recording of the hearing on the merits, and documents admitted into evidence as follows:

State's Exhibits

1. Affidavit of Michael K. Brown
2. December 10, 1996 letter to Barry Osborn from William Knowles
3. Jail Overcrowding Study Committee Meeting Minutes, February 21, 1997, submitted by William Knowles
4. Strafford County Jail Advisory Committee Recommendations #1 dated 3-11-97
5. Jail Advisory Recommendations report with handwritten notes/amendments

6. 3-21-97 Final Draft Proposed Recommendations to the Jail Advisory Committee from Barry Osborn
- 6a. Manchester Union Leader article, 3/13/97 titled "Strafford County Officials Debate Excessive Bail Report"
- 6b. Foster's Daily Democrat article 3/14/97 titled "Probation blasts new \$10m jail proposal"
7. Memo to Paul Brodeur from Raymond Bower dated March 13, 1997 re: Barry Osborn's Report
8. Foster's Daily Democrat article 3/14/97 titled "Probation officer blasts new \$10m jail proposal" with handwritten notes signed by Ray Bower
9. Letters of apology from Barry Osborn to Mr. Knowles dated March 20, 1997
10. April 18, 1997 letter to Commissioner Brodeur from Raymond Bower
11. Assorted correspondence between Mr. Osborn and others
12. March 7, 1997 letter from Paul McEachern to Michael Ramsdell
13. March 13, 1997 letter from Michael Ramsdell to Barry Osborn
14. May 6, 1997 letter from Michael Ramsdell to Barry Osborn
15. May 15, 1997 letter from Barry Osborn to Michael Ramsdell
16. April 18, 1997 letter from Raymond Bower to Michael Ramsdell
17. June 30, 1997 letter to Barry Osborn from Lincoln Soldati
18. July 8, 1997 letter from Barry Osborn to Lincoln [Soldati]
19. May 15, 1997 form letter/letter of apology signed by Barry Osborn
20. June 23, 1997 letter to Barry Osborn from the Strafford County Commissioners' Office
21. Undated letter from Barry Osborn addressed, "Dear Chairperson"
22. Print-out of Foster's Online article titled "Judge: Convicted child pornographer David Cobb was not eavesdropped upon in jail"
23. Series of memos from Barry Osborn to Mr. Brown
24. June 18, 1998 Progress Report/Strategy Plan
25. Correspondence related to appeal

Appellant's Exhibits

1. Supplemental Job Description dated August 15, 1988 and Classification: Probation/Parole Officer III
2. Memo of Barry Osborn to Milte Brown, dated September 4, 1997
3. Memo of Barry Osborn to Milte Brown, dated August 7, 1997
4. Letter of Lincoln Soldati to Barry Osborn, dated June 30, 1997
5. Memo from Barry Osborn to Milte Brown, dated July 9, 1997
6. Letter from Barry Osborn to Lincoln Soldati, dated July 8, 1997
7. Letter from George Maglaras, et al to Barry Osborn dated June 23, 1997
8. Letter of Barry Osborn to Chairman of Strafford County Commissioners in response to June 23, 1997 letter
9. Memo of Barry Osborn to Mike Brown, dated June 18, 1997
10. Memo of Barry Osborn to Milte Brown, dated June 9, 1997
11. Memo of Barry Osborn to Michael Brown dated May 28, 1997 (15-day progress report)
12. Memo of Barry Osborn to Michael Brown, dated May 28, 1997 (interagency cooperation)

13. Memo of Barry Osborn to Michael Brown, dated May 23, 1997
 14. Memo of Barry Osborn to Michael Brown, dated June 9, 1997
 15. Performance evaluations of Barry Osborn for the following dates: June 10, 1996; April 17, 1996; March 27, 1995; April 4 & 5, 1995; March 28 & 30, 1994; April 30, 1993; September 17, 1992; March 7, 1991; April 22, 1988; February 20, 1985
 16. May 20, 1996 letter from Robert LeClair to Paul Brodeur
 17. March 19, 1996 memo from Paul Brodeur and Michael Brown to Barry Osborn, et al
 18. February 26, 1996 letter from Trooper Edward Wall to Paul Brodeur
 19. November 16, 1994 memo from Michael Brown to Barry Osborn
 20. May 27, 1994 memo from Don Parish to Barry Osborn, et al
 21. July 17, 1991 letter from Representative Carl Johnson to Barry Osborn
 22. July 18, 1988 letter from Sr. Assistant Attorney General Gregory Swope and Assistant Attorney General Michael Ramsdell to Barry Osborn
 23. October 23, 1987 letter from Sgt. Kenneth J. McGee relative to work done by Barry Osborn, et al
 24. May 18, 1987 letter from Town Administrator William Frasier to Barry Osborn
 25. June 25, 1986 letter from Director Thomas Tarr to Barry Osborn
 26. June 17, 1986 memo from Marshall Quandt to Director Thomas Tarr
 27. May 11, 1990 note from Barry Osborn to Commissioner Powell with handwritten note from Commissioner thanking Barry Osborn for excellent work
 28. May 16, 1995 letter from Michael Brown to Barry Osborn
 29. Article in "From the Outfield" August 31, 1997 concerning domestic violence program
 30. Statement of Donald L. Parish dated January 20, 1998
- *Also admitted into evidence was the Deposition of Michael K. Brown, taken by agreement of counsel at the New Hampshire Department of Corrections on February 3, 1998.

Having considered the evidence and arguments offered by the parties, the Board made the following findings of fact and rulings of law:

Findings of Fact

1. Mr. Osborn is employed by the New Hampshire Department of Corrections, Division of Field Services, as a Probation/Parole Officer, assigned to work in Strafford County.
2. On November 26, 1996, Foster's Daily Democrat ran an article by Phil Lemos titled, "Strafford County jail is busting at the seams - blamed on too many pre-trial prisoners," in which Mr. Lemos discussed over-crowding at the County Jail, and advised readers that the County Commissioners would be putting together a study committee to look at the jail's problems.

3. In December 1996, Mr. Osbom was invited to sit as a member of that committee. The letter from Rep. William Knowles inviting Mr. Osbom to participate on the Committee stated, "This overcrowding issue at the House of Corrections is one of the most important issues to face Strafford County in recent times. We are relying on your expertise and commitment to assist us."
4. The Committee charge detailed in Mr. Knowles letter was:: "To review all data, including House of Corrections population trends, inmate classification procedures, sentencing trends, court and sentencing diversion programs, electronic monitoring, impact of inmate overcrowding and any other related issues, all relating to and with specific recommendations to solving House of Corrections space concerns, including cost estimates for any recommended remedies."
5. Michael Brown, then serving as Director of the Division of Field Services, discussed the request with Mr. Osbom and approved his participation on the committee. Mr. Osbom received no instructions from Mr. Brown, either verbally or in writing, to define the Department's expectations of Mr. Osbom or limitations on his service as a member of the committee.
6. The Committee asked Mr. Osbom to prepare and submit to the Committee, at its scheduled March 14, 1997 meeting, a report on electronic monitoring and alternatives, or program options.
7. Mr. Osbom released a copy of that report on March 11, 1997, to Derek Rose, a reporter for the Manchester Union Leader, while they were discussing another matter.
8. On March 13, 1997, an article by Mr. Rose titled "Strafford County Officials Debate Excessive Bail Report" appeared in the Union Leader. In that article, Mr. Rose wrote, "Building a new facility may not be necessary, Osbom argues in a 14-page report to be presented to a jail study committee tomorrow. 'Nobody's given me any facts or figures that justifies what they're doing,' he said. 'I'm just amazed they're a little too quick to jump on the bricks and mortar.'"
9. Also quoted in the Union Leader article were Strafford County Administrator Ray Bower, Strafford County Attorney Lincoln Soldati and Attorney Stuart Dedopoulos. According to

the article, County Administrator Bower characterized the report as "...riddled with inaccuracies."

10. In that same article, in response to the question raised in Mr. Osborn's report about whether the courts were perhaps, "detaining people today who need not be detained, people who pose no risk of flight, nor threat to the community," County Attorney Soldati was quoted as saying, "To suggest the court is somehow arbitrarily ordering people held is ludicrous."
11. County officials reacted immediately, telephoning Commissioner Paul Brodeur and forwarding a copy of the report to him. In a March 13, 1997 memorandum to Commissioner Brodeur, Strafford County Administrator Ray Bower wrote, "As per your conversation with Strafford County Commissioner Paul Dumont, I am forwarding Barry's report to you for your review and action. Beyond the many misrepresentations in the report, I am very angry that Barry decided to release this document to Derek Rose a local Manchester Union Leader reporter on Tuesday March 11, 1997."
12. On March 14, 1997, Foster's Daily Democrat ran an article titled, "Probation officer blasts new \$10m jail proposal." Phil Lemos, the author of that article, wrote, "Bower also faulted Osborn for leaking the report prior to Friday's meeting." Mr. Osborn spoke to, but declined to be interviewed by, Mr. Lemos for the Foster's article.
13. On March 14, 1997, Mr. Brown and Commissioner Brodeur met in Dover, New Hampshire, with the Strafford County Commissioners and County staff to discuss the situation that had developed with release of the appellant's report. With the exception of County Attorney Lincoln Soldati, those present at the meeting that day, particularly County Administrator Bower, indicated that they would be unable to work effectively with Mr. Osborn in the future.
14. On the return trip from Dover, Commissioner Brodeur told Mr. Brown that, at the very least, he wanted Mr. Osborn transferred out of Strafford County.
15. On or about March 18, 1997, Mr. Brown met with Mr. Osborn and Corrections Regional Administrator Don Pan-Isli, the appellant's immediate supervisor, to discuss "damage control."

16. Mr. Brown directed the appellant to provide a copy of the report to him, to apologize to the committee for having disclosed the report, and the manner in which he had disclosed it, and to develop a strategy for repairing the relationship with the County. Mr. Brown directed the appellant to meet on an individual basis with those persons who were most upset and to convey his apologies in person.
17. Mr. Brown stated in his deposition (p.54) that after receiving and reviewing Mr. Osborn's report to the committee, he believed that, "...the bulk of the substance of what [the appellant] was attempting to say was worthy to be said, the way he said it was, I think, needlessly inflammatory, in essence called into question the operation of the court, the county house of corrections, every entity of the county attorney office and so on. The other thing that struck me too was that the report looked like it was coming from Barry."
18. On or about April 7, 1997, Mr. Brown met with all the probation and parole personnel within an hour of the Dover District Office to look for volunteers for a transfer into Mr. Osborn's position so that Mr. Osborn could be removed from an otherwise volatile political situation. None of the other officers were willing to volunteer for, or to accept, such a transfer.
19. Mr. Brown also learned of a request from then Assistant Attorney General Michael Ramsdell, and the appellant's failure to respond to that request, for information about a complaint concerning alleged improper conduct by Strafford County Attorney Lincoln Soldati.
20. On May 12, 1997, Mr. Osborn received a "letter of optional dismissal" under the provisions of former Per 1001.08 (b) of the Rules of the Division of Personnel for, "...failure to meet the work standard and for violations of the Department of Corrections Policy and Procedure Directives."
21. The warning alleged that because of Mr. Osborn's conduct, "A diminished working relationship with the Strafford County Commissioners and County Administrator [had] developed."
22. Despite the claim of a diminished working relationship with officials from Strafford County, there is no indication of diminished or ineffective performance by the appellant in his role as the Chief Probation/Parole Officer for the county to which he was assigned.

23. The warning alleged that Mr. Osborn's, "...release to a media reporter of a document intended for release to the Strafford County Jail Advisory Committee prior to the committee members receiving the document [had] damaged [his] credibility with County and Criminal Justice Officials."
24. The June 30, 1997 letter from Lincoln Soldati to Mr. Osborn which allegedly demonstrates the damage done to the appellant's credibility indicates that Attorney Soldati would not accept the appellant's apology because it was identical to those sent to other members of the committee and was not, in Attorney Soldati's opinion, "heartfelt or well intentioned."
25. Attorney Soldati wrote, "It is not your opinion [of the reasons for jail overcrowding] but your use of false, fraudulent, and misleading facts, that I find offensive and unprofessional. Even the title of the document was intended to mislead the reader into believing it was the product or conclusion of the committee."
26. It is unclear from Attorney Soldati's remarks what information in the appellant's report to the committee he considered to be false, fraudulent or misleading.
27. The other allegations in the letter of warning involve alleged rumor-mongering, making false reports, and failing to provide information critical to an Attorney General's investigation.
28. The subjects of the alleged rumors, false reports and investigation by the Attorney General's Office were directly related to alleged conduct by County Attorney Soldati and County Administrator Bower.
29. Mr. Osborn was an outspoken opponent of County Commissioners' plans to expand the existing correctional facility before first studying alternatives to sentencing and incarceration.
30. The warning charged that "When confronted by County Administrator Bower [the appellant] was less than forthcoming with regard to the release of the [jail overcrowding report] and the circumstances of its release."
31. The warning alleged that Mr. Osborn failed to follow directives to, "...take certain remedial steps, such as meeting individually with County Officials, in an attempt to minimize or reverse some of the damage done to [Mr. Osborn's] and the Department's credibility."
32. The warning alleged that Mr. Osborn, "...provided information to Attorney Paul McEachern about alleged improper conduct by County Attorney Lincoln Soldati and County

Administrator Bower without having first-hand information and involving [himself] in a matter [he] had no official reason to be involved in," and that he failed to make a timely response to inquiries by the Attorney General's Office about those allegations.

33. The warning charged Mr. Osborn with violation of Corrections PPD 2.16 III (professional conduct), PPD 2.16 IV C (dereliction of duty for failure to follow the directives of a superior), PPD 2.16 IV J (making false or misleading official statements), PPD 2.16 IV P 22 (failure to refer media inquiries to the Commissioner's Office), PPD 2.16 IV S (failure to report knowledge of a matter under investigation).
34. Mr. Osborn's attempts to apologize to Strafford County officials were rebuffed repeatedly.
35. The appellant complied with all the corrective actions outlined in the written warning.
36. The appellant had attempted to implement the "damage control" measures as directed by Mr. Brown prior to the date the written warning was issued.

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 employees unsatisfactory work performance..." [former Per 1001.03 (a)]
- B. "In some cases such as, but not necessarily limited to, the following, the seriousness of the offense may vary. Therefore, in some instances immediate discharge without warning may be warranted while in other cases one written warning prior to discharge may be warranted." [former Per 1001.08 (b)]
- C. Included in the list of offenses under former Per 1001.08 (b) is "Violation of a posted or published agency policy, the text of which clearly states that violation of same may result in immediate dismissal." [former Per 1001.08 (b)(3)]
- D. "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]

- E. Notwithstanding any other rule or order to the contrary, a person employed by the state in any capacity shall have a full right to publicly discuss and give opinions as an individual on all matters concerning the state and its policies. It is the intention of this chapter to balance the rights of expression of the employee with the need of the state to protect legitimate confidential records, communications and proceedings.

Decision and Order

Mr. Osborn was asked by Strafford County Officials to serve on a committee to study overcrowding at the County House of Corrections. The advisory committee consisted of 20 members including State legislators, Superior and District Court judges, representatives of the media, jail officials, county staff, and the general public, including a representative of the local press. Although the chairman of the committee contacted the Department of Corrections to obtain approval for the appellant to participate, he did not simply invite the Department of Corrections to provide a representative for the committee. The invitation was extended directly to the appellant as an individual knowledgeable in the field of corrections, and the department's approval was simply for excused time from work, since the agency established no parameters or restrictions upon the appellant's participation.

When the committee was formed, the county correctional facility was housing more maximum security inmates and more medium security inmates than they had cell space to accommodate. At the same time, they were renting out to other agencies minimum security space and obtaining annual revenue of approximating \$375,000 in boarding fees. Mr. Osborn believed that the county should explore alternatives to incarceration rather than constructing new cell space. At the committee's second meeting, a representative expressed concern that the committee needed to explore those alternatives. Mr. Osborn was asked to complete a report for discussion at the March 14, 1997 meeting.

Several days before the committee meeting, while speaking with a member of the Union Leader staff on another matter, the appellant shared an advance copy of his report with the press, which then was carried in the March 13, 1997 edition of the Manchester Union Leader, one day before the committee was scheduled to meet. There was a follow-up 'article in Foster's Daily Democrat the following day which the appellant alleges was prepared from the Union Leader account. Mr. Osborn's release of his report to the press prior to its submission to the committee was closely followed by violent reactions from some committee members and County officials who alleged that the report contained many misrepresentations, although they failed to specify which facts had purportedly been misrepresented.

Although it clearly represented an error in judgment on the appellant's part to release the document to the press prior to its presentation to the committee, the press could have obtained it a few days later simply by attending the meeting, or it would have been available to the press under the provisions of the Right to Know Law, as committees of this nature are generally required to publicize the dates and times of their meetings as well as the content of their agenda for discussion.

Upon receipt of complaints from Strafford County Commissioners and Administrative staff, the Department of Corrections reacted immediately to implement a program of damage control, and in this connection considered the outright discharge of the employee and/or his transfer from Strafford County. While neither of these actions materialized, the Department nevertheless imposed stringent restrictions upon the appellant requiring revision of the draft document, a series of written and in-person apologies to committee members and County staff, as well as constant reports within the appellant's own department to prove that "damage control measures" were in progress.

The appellant is charged with making statements "perceived as misleading by those who are interested in [the] content [of the report]." The optional dismissal letter quotes agency policy,

'Media inquiries will be referred to the Commissioner's Office," which obligates personnel to have all news releases approved by the Commissioner or his designee prior to issuance.

The appellant's report and committee recommendations was not a press release, but rather his observations for alternate programs to avoid costly construction of new jail facilities. The appellant was not acting as a representative of the Department of Corrections, but rather that of a private citizen engaged in a community activity. As such, he has every right to exercise his First Amendment right, and the rights conferred by RSA 98-E, to speak freely and conscientiously on matters which to him seem appropriate and beneficial to the committee's deliberations.

The appellant has 22 years of service to his agency, and his annual performance evaluations for the last decade indicate a high caliber individual who was extremely successful in the discharge of his duties to the agency and to the public. It is regrettable that his failure to provide his recommendations to the committee prior to their release to the press should impair an outstanding work record.

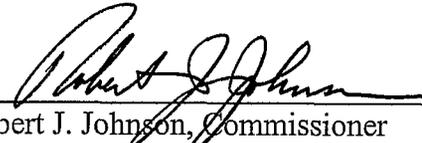
The letter of optional dismissal also references two situations where the appellant provided information regarding potentially improper conduct by other individuals. Some of the information was obtained from his professional colleagues, while in another instance, it was obtained by one of his supervisees in the agency. He referred the information to higher authorities where investigations were carried out with no official legal action. This Board believes that when a public employee obtains information about a possible crime, he has an obligation to refer such information to a higher authority for whatever action that higher authority may deem proper and advisable.

On all the evidence, argument and offers of proof, the Board voted unanimously to GRANT Mr. Osborn's appeal. The letter of optional discharge which in effect is a letter of warning is hereby rescinded and ordered removed from his personnel file.

THE PERSONNEL APPEALS BOARD



Lisa A. Rule, Acting Chair



Robert J. Johnson, Commissioner



James J. Barry, Commissioner

cc: Thomas Manning, Director of Personnel
Attorney Jack McGee
Attorney John Vinson