

State of New Hampshire



PERSONNEL APPEALS BOARD
25 Capitol Street
Concord, New Hampshire 03301
Telephone (603) 271-3261

APPEAL OF DENNIS POTTER

DOCKET #01-D-09

DEPARTMENT OF CORRECTIONS

November 14, 2001

The New Hampshire Personnel Appeals Board (Wood, Rule and Urban) met on Wednesday, September 26, 2001, under the authority of RSA 21-I:58 and Chapters Per-A 100-200 NH CAR (Rules of the Personnel Appeals Board) to hear the appeal of Dennis Potter, an employee of the New Hampshire Department of Corrections. Mr. Potter was appealing his October 23, 2000 demotion from the rank of Corrections Sergeant to Corrections Officer. Attorney John Vinson appeared on behalf of the Department of Corrections. SEA Field Representative Brad Asbury appeared on behalf of the appellant.

The record of the hearing in this matter consists of 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 of the appeal, and documents admitted into evidence as follows:

Appellant's Exhibits

1. DOC Policy and Procedure Directive 2.16 (Rules and Guidance for DOC Employees)
2. Letter of Suspension with Pay dated August 17, 2000
3. August 17, 2000 Statement of Patricia Ann Carlsen
4. Notice of Investigation dated August 18, 2000
5. Response to Letter/Disciplinary Action (submitted by Mr. Potter)
6. Statement of Dennis Potter given to Investigator Mark Wefers on September 1, 2000
7. Garrity Warning, Case No. S-2000-064 Signed by Dennis Potter, Investigator Clayton LeGault and Lieutenant Steven Commeau, dated August 18, 2000
Report of Investigation for the Warden of the Lakes Region Facility (Case No. S-2000-064)

9. Statement(s) of Dennis Potter submitted via mail to Warden Sanfilippo dated October 10, 2000
10. October 23,2000 Letter of Disciplinary Demotion issued to Sgt. Dennis Potter
11. November 3,2000 Letter of Appeal
12. December 20,2000 letter from SEA Field Representative Stephen McCormack to Attorney John Vinson requesting document associated with the Potter investigation
13. February 2,2001 letter from Attorney Vinson to Mr. McCormack forwarding sections of notes from the interview with Sergeant Shaw
14. February 13, 2001 letter from Warden Sanfilippo to SEA Field Representative McCormack affirming the demotion of Dennis Potter from Sergeant to Corrections Officer
15. February 20,2001 letter from SEA Field Representative Stephen McCormack to Commissioner Phil Stanley appealing the demotion
16. March 22,2001 letter from Commissioner Phil Stanley to SEA Field Representative McCormack denying the appeal
17. April 5,2001 letter from SEA Field Representative Stephen McCormack to Personnel Director Thomas Manning appealing the demotion
18. May 5,2001 letter from Personnel Director Thomas Manning to SEA Field Representative Stephen McCormack denying the appeal

State's Exhibits

1. Training bureau course completion certificate dated March 21,1995
2. DOC PPD 2.16
3. Memo dated August 17, 2000 from Patricia Ann Carlson
4. Handwritten statement from Mr. Potter dated October 10,2000
5. Letter dated April 7,2000 from Warden Sanfilippo
6. Report of investigation dated September 18,2000
7. Letter dated October 23,2000 from Warden Sanfilippo
8. Response from the appellant to letter/disciplinary action (undated/unsigned)
9. Statement form dated September 1, 2000
10. DOC yearly performance evaluation for CO Potter due 4/1/01
11. Letter dated March 22,2000 from Commissioner Stanley to SEA Field Representative McCormack

The following persons gave sworn testimony:

Dennis Potter

Warden John Sanfilippo

Sergeant Chris Shaw

Sergeant Art Glynn

Mr. Asbury argued that the allegations against Officer Potter that were used to support his demotion were not factually correct or accurate. To the extent that the complaints were factually correct, he contended, they were taken out of context and therefore made to appear more significant than they actually were. Mr. Asbury argued that demotion was illegal because the allegations listed in support of the demotion exceeded the scope of the formal investigation conducted by the department. Finally, he argued that although some of the appellant's conduct may have been "questionable," none of the offenses warranted a disciplinary demotion from the rank of Sergeant to the rank of Corrections Officer.

The State argued that Mr. Potter violated the Department's core values of integrity, respect, and professionalism through a series of infractions that included:

- ❖ Failing to report or document the fact that a female inmate had hugged him;
- ❖ Remarking to female inmates walking past him in the rain that he was "judging a wet t-shirt contest, and failing to report that two of the inmates had exposed their breasts to him;
- ❖ Failing to report to a superior officer that a Corporal had permitted an inmate to use his personal cell phone to call another inmate at a DOC halfway house, and that the same Corporal had conducted a private meeting with that inmate while she was residing in the halfway house;
- ❖ Making "off-color" comments or jokes to female inmates;
- ❖ Being untruthful during an official investigation; and
- ❖ Violating a direct order to have no contact with DOC personnel, except with Lieutenant Commeau, during the course of the investigation.

Mr. Vinson argued that the appellant was not truthful, failed to show respect for the inmates he supervised, and admitted to a series of infractions including his failure to report inappropriate conduct by inmates and other staff. He argued that the appellant also demonstrated an appalling lack of self-control and a complete lack of professionalism when he lifted up Ms. Carlsen's skirt. Mr. Vinson argued that although the letter of demotion cited offenses that were not included in the report from the Investigations Bureau, there was no prohibition against the agency citing.

improper conduct discovered outside the scope of the investigation as a basis for disciplinary action, particularly when the appellant admitted that conduct directly to the Warden.

Mr. Vinson argued that the appellant's conduct was completely unacceptable at any level in the organization, and that such conduct by a Sergeant was particularly egregious because of the key role that Sergeants play in the department's management structure. He argued that officers are expected to serve as role models and lead by example. He argued that Mr. Potter's characterization of his own misconduct as merely "questionable" demonstrated precisely why Warden Sanfilippo believed it was critical to remove him from the ranks of management by demoting the appellant from Sergeant to Corrections Officer.

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

Findings of Fact

1. In August 2000, Mr. Potter was employed by the Department of Corrections at the Lakes Region Facility as a Corrections Sergeant.
2. Corrections Sergeants are considered part of the prison management team, and they are expected to lead by example.
3. Corrections staff are required to report any conduct by inmates or staff that violates the Department's regulations, and staff may be disciplined for failing to do so.
4. On August 17, 2000, Dennis Potter was suspended with pay from his position while the Department of Corrections conducted an investigation into allegations that the appellant engaged in inappropriate conduct with a female inmate under his supervision.
5. On October 23, 2000, Warden John Sanfilippo demoted the appellant from the rank of Corrections Sergeant to the rank of Corrections Officer.
6. Warden Sanfilippo based his decision to demote the appellant on evidence that had been produced during the course of an internal investigation as well as evidence that the Warden had received directly from Sergeant Potter in the form of oral and written statements.

7. In January or February 2000, while Mr. Potter was making his rounds, Inmate Kim Taylor hugged him. He "thought nothing of it" and decided that lie didn't need to report it.
8. Mr. Potter had information concerning a fellow officer's breach of security regulations when that officer allowed an inmate to use his personal cell phone in order to call another inmate who had left the Lakes Region Facility and was in residence at a DOC halfway house.
9. Mr. Potter violated departmental policies and procedures by repeatedly failing to report conduct by inmates and staff that violated the department's regulations.
10. During the summer of 2000, a small group of female inmates were walking in the rain past Mr. Potter and they asked him what he was doing. Mr. Potter replied, "I'm here for the wet t-shirt contest."
11. Mr. Potter told a co-worker, Sgt. Shaw, that two of the inmates from that group had exposed their breasts to him.
12. During the investigation, Mr. Potter claimed that neither of the inmates had exposed their breasts to him and that he had simply "embellished" the story as part of a "...foolish or jovial conversation between two people."
13. On or about August 15, 2000, without having reason or permission to do so, Mr. Potter touched a female co-worker's clothing, lifting her skirt up several inches.
14. The female employee's written statement (State's Exhibit 3) indicates that she was "shocked" by Mr. Potter's conduct, but reluctant to make any complaint for fear of future confrontations with him.
15. Mr. Potter noted in his own statement (State's Exhibit 4) that the employee seemed "upset" by the incident, something that surprised him because of their friendly relationship.
16. Mr. Potter was instructed not to discuss the investigation with any DOC staff during his suspension, although he was informed that if he had questions, he could contact Lt. Commeau.
17. During his suspension, Mr. Potter called Sgt. Chris Sliaw at his home, and although he ostensibly called Sgt. Sliaw to congratulate him on the birth of his son, Mr. Potter did engage in discussion about the investigation and he asked Sgt. Shaw to call him if he heard anything.

18. The conduct to which Mr. Potter has admitted constitutes a serious and continuing failure to meet the work standard.

Rulings of Law

A. “ An appointing authority shall be authorized to demote an employee under any of the following circumstances:

- (1) In lieu of termination;
- (2) Pending the outcome of an investigation of alleged criminal wrongdoing which is in conflict with the assigned duties of the employee's position; or
- (3) For offenses including, but not limited to:
 - a. Failure to meet any work standard.. .” [Per 1001.07 (a)]

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.” [Per-A 207.12(b)]

Decision and Order

The appellant testified that uniformed Corrections personnel are expected at all times to model appropriate behavior for the inmates and to provide leadership by example for fellow officers and subordinates. He also acknowledged that officers are expected to demonstrate the agency's core values of respect, integrity and professionalism. Nevertheless, the appellant argued that while he may have demonstrated poor judgment, demotion was too severe a penalty for any of the infractions cited in the investigation or in the letter of demotion. The Board does not agree.

The appellant's conduct demonstrated an almost callous disrespect for the department's core values and for its rules and regulations governing the conduct of inmates and staff. He completely discounted the seriousness of the "wet T-shirt" remark. He expressed surprise at the fact that Ms. Carlsen was offended when he lifted up her skirt. Mr. Potter also downplayed the significance of his remarks about female inmates exposing their breasts to him. If his original report about the inmates was true, he had an obligation under the department's policies and procedures to make a formal incident report. If that report was not true, as he now claims, Mr. Potter showed remarkable disregard for the inmates' rights by knowingly making false statements about their behavior.

The appellant's explanation of events surrounding the investigation is equally troubling. The evidence reflects that the appellant was instructed not to discuss the investigation with anyone other than Lieutenant Commeau. Mr. Potter insists that the telephone call to Sgt. Shaw was strictly personal, and that it was Sgt. Shaw who brought up the question of the appellant's suspension and the investigation. He argued that even if they did discuss the investigation, he was not under any actual orders, since Investigator Wefers was not his supervisor.

Warden Sanfilippo testified that he was present when Investigator Wefers instructed the appellant not to discuss the investigation with anyone else. The Board is hard-pressed to believe that Mr. Potter did not consider himself to be under direct verbal orders when those orders were given in the Warden's presence. Simply put, the Board found that Mr. Potter fully understood what was expected of him during the investigation as well as the authority under which those expectations had been established; nevertheless, he chose to conduct himself in a manner contrary to those expectations.

On all the evidence, the Board found that the appellant repeatedly failed to meet the work standard, and was therefore subject to demotion under the provisions of Per 1001.07 of the Rules of the Division of Personnel. The appellant failed to persuade the Board that his demotion was unlawful, that it violated the Rules of the Division of Personnel, that it was unwarranted by the

alleged conduct or failure to meet the work standard in light of the facts in evidence; or that it was unjust in light of the facts in evidence. Therefore, the Board voted unanimously to DENY Mr. Potter's appeal.

THE NEW HAMPSHIRE PERSONNEL APPEALS BOARD


Patrick H. Wood, Chairman


Lisa A. Rule, Commissioner


Anthony B. Urban, Commissioner

cc: Thomas F. Manning, Director of Personnel, 25 Capitol Street, Concord, NH 03301
John Vinson, Corrections Counsel, 105 Pleasant St., Concord, NH 03302-1806
Brad Asbury, SEA Field Representative, PO Box 3303, 105 North State St., Concord,
NH 03302-3303