

State of New Hampshire



PERSONNEL APPEALS BOARD

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

APPEAL OF JAMES ROY

DOCKET #99-D-7

Response to State's Motion for Reconsideration

June 8, 1999

The New Hampshire Personnel Appeals Board (Bennett, Wood and Barry) heard the appeal of this matter on January 13, 1999. At the hearing, the Appellant argued that the State had not followed the notice and time provisions of the CBA in its investigation and therefore the case should be dismissed. The State argued that any such procedural error on its part should not eliminate the State's authority to discipline an employee for failure to meet the work standard.

The Board, after considering the arguments made by both parties, decided to treat Appellant's request as a motion for directed judgment, similar to a motion for a directed verdict. The Board then orally granted Appellant's motion.

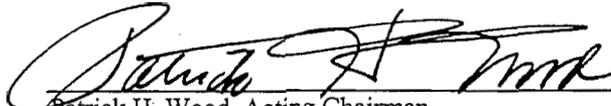
On January 29, 1999, prior to the Board's issuance of a written decision on this matter, the State filed a Motion for Reconsideration and Rehearing. The Appellant responded to the State's Motion by letter dated February 8, 1999.

On February 24, 1999, the Board issued its written decision and by further order stated that it would allow both parties an additional 30 days to file additional Motions for Rehearing or Reconsideration. Neither party has filed any additional motions.

The Board has reviewed the State's Motion for Reconsideration and Rehearing and the Appellant's Response. The Board believes that the issues presented by this Motion and Response were fully reviewed and discussed in the Board's decision of February 24, 1999. The Motion and Response do not put forth any legal arguments or facts not considered by the Board.

Accordingly, the Motion for Reconsideration and Rehearing is DENIED.

THE PERSONNEL APPEALS BOARD



Patrick H. Wood, Acting Chairman



James J. Barry, Commissioner

cc: Virginia A. Lamberton, Director of Personnel, 25 Capitol St., Concord, NH 03301
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DEPARTMENT OF CORRECTIONS

February 24, 1999

The New Hampshire Personnel Appeals Board (Bennett, Wood and Barry) met on Wednesday, January 13, 1999, under the authority of RSA 21-I:58, to hear the appeal of James Roy, an employee of the Department of Corrections. Cpl. Roy, who was represented at the hearing by SEA Field Representative Stephen McCormack, was appealing a March 18, 1998, letter of warning, issued to Cpl. Roy on March 26, 1998, for failure to meet the work standard. 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, notices and orders issued by the Board, the audio tape recording of the hearing on the merits, and documents admitted into evidence as follows:

Appellant's Exhibits

1. Letter of warning issued to Cpl. Roy, dated March 18, 1998
2. April 3, 1998, appeal to Warden Cunningham
3. May 4, 1998, appeal to Commissioner Risley
4. May 12, 1998, memorandum from Commissioner Risley to Warden Cunningham regarding appeal of Corporal Roy
5. July 17, 1998, letter from Commissioner Risley to Cpl. Tab Colby

6. July 22, 1998, appeal to Personnel Director Virginia Lamberton
7. August 3, 1998, letter from Virginia Lamberton to Stephen McCormack
8. Department of Corrections Policy and Procedure Directive 5.39
9. Department of Corrections Policy and Procedure Directive 5.91
10. Collective Bargaining Agreement ,
11. Department of Corrections Policy and Procedure Directive 5.81
12. List of Department of Corrections Personnel authorized to use Oleoresin Capsicum Spray
13. NH Police Standards and Training Council "Force continuum"
14. NH Department of Corrections Investigators Unit Reporting Form, January 23, 1998
15. Notification of Investigation and Letter to Extend from Investigator William Wilson
16. January 8, 1999, memo from John Vinson to Stephen McCormack with attached copy of a letter dated May 8, 1998, from Warden Cunningham to Commissioner Risley

On March 26, 1998, Cpl. James Roy received a written warning, dated March 18, 1998, in which the Department of Corrections alleged that on November 6, 1997, Corporal Roy, acting in his capacity as the officer in charge at the Special Housing Unit, failed to use proper procedures in the use of force during the restraint of an inmate. Specifically, the Department charged Cpl. Roy with violation of Departmental Policy and Procedure Directives 5.91, paragraphs III and IV B. 1, and 5.39, paragraph III D.

The undisputed facts are as follows:

1. On the evening of November 6, 1997, Cpl. Roy was working in the prison's Special Housing Unit (SHU) as the Officer In Charge.
2. In the course of his duties, Cpl. Roy was directed by a superior officer to restrain a disruptive inmate who had been transferred that evening from R&D (Reception and Diagnostic Unit) to SHU after verbally threatening an officer and refusing to obey an officer's orders, and after attempting to injure himself and others.
3. In the course of that restraint, the inmate was placed in a restraining stretcher. Cpl. Roy was aware at the time that the only available restraint stretcher was not fully functional, but he

determined that restraint was necessary in order to keep the inmate from injuring himself or staff.

4. The inmate repeatedly attempted to flip the stretcher and bang his head against the metal frame. Cpl. Roy sprayed the inmate with OC spray (Oleoresin Capsicum) after the inmate refused to stop flipping the stretcher, banging his head on the stretcher frame, spitting at officers, and attempting to bite an officer. Although not specifically directed to use OC while the inmate was restrained, the use of OC in controlling the inmate had been anticipated and earlier authorized by his shift commander.
5. Departmental Policies require incidents involving force to be video-taped. However, the video-tape unit in SHU had been sent out for repairs and was not available for use. Video equipment borrowed from other units must be requested by an officer at or above the rank of lieutenant.
6. Following the incident, Cpl. Roy notified Health Services and his shift commander of the incident, documenting the use of the restraining stretcher and the OC spray.
7. Cpl. Roy was notified by memo dated December 2, 1997, that an investigation had been opened to determine if he "...used unnecessary force by using cap stun..." on the inmate.
8. By memo dated January 19, 1998, Investigator William Wilson advised Commissioner Risley that it was the 45th day of the investigation, and he needed additional time in order to complete his report. He indicated that he expected the report to be completed by the close of business on Friday, January 26, 1998.
9. The conclusions offered in Investigator Wilson's report, dated January 23, 1998, are summarized as follows:
 - 1) Cpl. Roy violated PPD 5.39 in that he was not directed to use the OC on the inmate, although the use of OC had been authorized by Capt. Cassavaugh if necessary to get the inmate into the stretcher restraint. The inmate's continued course of conduct in attempting to escape the restraint and injure himself and staff, warranted the use of OC.
 - 2) Cpl. Roy violated PPD 5.81 in that he knew the stretcher itself was not in compliance with policy because several straps were missing, but use of the restraint was less

harmful than the alternative of allowing the inmate to continue banging his head against the wall.

- 3) Cpl. Roy did not video tape the incident because the SHU camera was out for repair, and either Lt. Haney or Capt. Cassavaugh should have borrowed a camera from another unit in order to ensure that the incident was properly recorded.
- 4) All DOC staff certified to use OC spray should receive refresher training.
- 5) Except in the case of an emergency, staff directing the use of OC (i.e., Platoon Commanders) should directly supervise its use.

10. On March 26, 1998, the Department issued a written warning to Cpl. Roy, dated March 18, 1998, for failure to meet the work standard.

Mr. McCormack argued that there would have been no basis for the allegations of improper use of restraint or failure to properly document the incident if the proper equipment, including the restraining stretcher and video-camera, had been available and/or in working repair. He also argued that Cpl. Roy should not have been disciplined for use of OC spray when its use had been authorized already by his commanding officer. He noted that none of the appellant's supervisors had been disciplined for their failure to meet the work standard, and he argued that it was unfair for the department to hold the appellant to a higher standard. He also argued that the Department's investigation of the incident violated Article 27.22.b. of the Collective Bargaining Agreement, and that the department should not be permitted to take disciplinary action in face of its own procedural violations. Mr. McCormack argued that under the provisions of Per 103.02 (b) of the Rules of the Division of Personnel, "In the case of terms and conditions of employment which are negotiated, the provisions of the Collective Bargaining Agreement shall control." He argued that because the Agreement controls in this instance, and because the employer failed to abide by the terms and conditions of the Agreement, the Board had the authority to make a finding that such violation warranted reversal of the warning.

Mr. Vinson argued that the investigation itself is not disciplinary in nature. He admitted that notice of the investigation and reporting of the results were not in full compliance with Article

27.22.b of the Department of Corrections Sub-Unit Agreement. However, he argued, a procedural error should not result in the discipline being reversed. He argued that the investigation had revealed the appellant's failure to meet the work standard, and the department acted appropriately in issuing a written warning. Mr. Vinson also argued that the Board did not have authority to reverse the discipline solely on the basis of an alleged violation of the Agreement. He argued that Article 27.22.b. was proposed by the Association, and that the provision contained no penalty clause that would prohibit the department from taking disciplinary action as a result of an untimely investigation or report. He argued that the only relief available to the appellant for the alleged contractual violation was through the grievance procedure in the Agreement itself.

Per 103.02 (b) of the Personnel Rules states:

"In the case of terms and conditions of employment which are negotiated, the provisions of the Collective Bargaining Agreement shall control."

Article 27.22. f the 1997-1999 Bargaining Agreement states in pertinent part:

"Investigation of Employees: Any unit employee against whom a complaint is made from any source shall be afforded, as a minimum, the following rights: ...

- b. In every case when the employer determines an investigation of the facts or circumstances behind the complaint is to be undertaken, the employee shall be so notified in writing in seven (7) working days. Notification shall include the reason(s) and or cause(s) for the investigation and the anticipated date of completion of the investigation.
- c. All investigations shall be completed and the final report thereof shall be filed with the Commissioner within forty-five (45) work days. This deadline may only be extended by the Commissioner and then only for exceptional reasons. Notice of any extension shall be in writing to the employee before the expiration of the 45-day period, and shall include all of the reasons for the extension and its duration."

After receiving the evidence and hearing the parties' arguments and offers of proof, the Board voted to treat the appellant's request for removal of the warning as a motion for a directed judgment. The Board then voted unanimously to grant that motion. In so doing, the Board found the following:

1. Under the Rules of the Division of Personnel, the Board is required to give full effect to the Collective Bargaining Agreement, and the relevant portion of that Agreement is clear on its face.
2. Article 27.22.b. requires the State to notify an employee within seven working days when investigation of a complaint is to be undertaken. The incident occurred on November 6, 1997. The State did not provide notice of the investigation until December 2, 1997, fifteen working days later (excluding holidays).
3. Article 27.22.b. requires the State to notify the employee of the "reason(s) and or cause(s) for the investigation and the anticipated date of completion of the investigation." The State notified the appellant that he was to be investigated for use of OC spray. He was not advised that the investigation would include his use of the restraint stretcher or failure to video-tape the incident.
4. Article 27.22.c. states, "All investigations shall be completed and the final report thereof shall be filed with the Commissioner's office within 45 work days. This deadline may only be extended by the Commissioner and then only for exceptional reasons. Notice of any extension shall be in writing to the employee, before the expiration of the 45 day period and shall include all of the reasons for the extension and its duration."
5. In his May 8, 1998, memorandum to Commissioner Risley, Warden Cunningham wrote:

"This is the first investigation under the new sub-unit agreement and it is true that Cpl. Roy was not notified within seven working days. Mr. Garry discussed this with SEA Steward Tab Colby and they agreed that an error had been made and we would work to fix these errors in the future. The investigators requested an extension from you of the 45 work day agreement. You signed off of this on the 45th day. It is uncertain when, if ever, Cpl. Roy received written notice of your approved extension. In any

event, these are administrative rules that we need to follow and we will. They do not, however, in any way mitigate Cpl. Roy's negligence in the performance of his duties."¹

6. There is no evidence that the employee was notified that an extension had been requested, that the Commissioner had approved such a request, or that there were any exceptional reasons to grant such an extension.

The State has argued that the agency's failure to comply with the terms and conditions of the Collective Bargaining Agreement with respect to the conduct of its investigation should not preclude its use of the information obtained during the investigation for disciplinary purposes. While there is some merit to that argument, an equally compelling argument is offered by the appellant. Specifically, the appellant argued that if he were to miss a filing deadline in perfecting his appeal, the State would be entitled to ask that the appeal, whether or not it had any merit, be dismissed on purely procedural grounds. The Board believes that the principles of fairness in administration of both the rules and the contract require adherence to their provisions by both parties. Having demonstrated that the State failed to carry out its contractual obligations to provide appropriate and timely notice to the appellant of its investigation, a right secured for the appellant by the plain language of Article 27.22. of the Collective Bargaining Agreement, a finding in the appellant's favor is warranted.

¹ The appellant received notification of the investigation by memorandum dated December 2, 1997. Allowing 45 work days in which to complete the investigation, the Department should have completed its investigation and filed its report of same with the Commissioner on or before February 5, 1997. It appears, however, that both the State and the appellant believed that the investigation was to have been completed within 45 days of the incident under investigation. Although that interpretation appears to be inconsistent with the plain language of the contract in this instance, the Board defers to the parties' agreement with respect to its interpretation.

Accordingly, the Board voted to grant the motion for a directed judgment.

THE PERSONNEL APPEALS BOARD



Mark J. Bennett, Chairman



Patrick H. Wood, Commissioner



James J. Barry, Commissioner

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DEPARTMENT OF CORRECTIONS

Response to State's Motion for Reconsideration and Rehearing and

Appellant's Objection

February 24, 1999

The New Hampshire Personnel Appeals Board (Bennett, Wood and Barry) met on Wednesday, January 13, 1999, under the authority of RSA 21-I:58, to hear the appeal of James Roy, an employee of the Department of Corrections. At the conclusion of the hearing, the Board informed the parties that it had voted to treat the Appellant's request for immediate removal of the warning as a Motion for Directed Judgment, and notified the parties orally that it had voted to grant that motion.

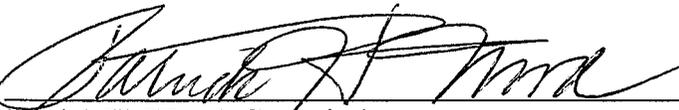
On January 29, 1999, the Board received the State's Motion for Reconsideration and Rehearing. The Board received Appellant's Objection to that Motion on February 9, 1999.

The Board voted to hold both the Motion and Objection in abeyance pending the parties' receipt of a written notice of decision. Upon receipt of that order, either party aggrieved of the decision may, within 30 days, file a Motion for Reconsideration or Rehearing. The submissions received to date will be treated as timely filed. Either party may choose to supplement or amend those arguments within thirty days by written notice to the Board.

THE PERSONNEL APPEALS BOARD



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