

# State of New Hampshire



## PERSONNEL APPEALS BOARD

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Appeal of Bruce Vanlandingham, Docket #2013-D-006

New Hampshire Department of Transportation

May 22, 2013

The New Hampshire Personnel Appeals Board (Wood, Johnson and Casey) met in public session on Wednesday, May 8, 2013, under the authority of RSA 21-I:58 and Chapters Per-A 100-200 of the NH Code of Administrative Rules, to hear the appeal of Bruce Vanlandingham, an Auto Body Repair Technician working for the New Hampshire Department of Transportation. Mr. Vanlandingham, who was represented at the hearing by SEA Grievance Representative Charles McMahon, was appealing an August 27, 2012 letter of warning issued to him for "failure to follow the directives of your supervisor." Attorney Brian Buonamano appeared on behalf of the Department of Transportation.

The appeal was heard on offers of proof by the representatives of the parties. Neither party objected to the format of the hearing, and neither party objected to the participation of any member of the Board scheduled to hear the appeal.

In addition to documents admitted into the record without objection, the record of the hearing in this matter includes notices and orders issued by the Board, the digital audio recording of the hearing on the merits of the appeal, a nine-page written "offer of proof" submitted by Mr. McMahon at the hearing, the January 29, 2013 notice of appeal, with attachments including:

- August 27, 2012 letter of warning
- September 10, 2012 Step I Appeal
- November 9, 2012 Step III Appeal
- December 28, 2012 Step IV Appeal (without attachments as listed in the document)
- January 15, 2013 email from Karen Hutchins to Charles McMahon
- Unsigned, undated statement from Bruce Vanlandingham

- August 8, 2012 Handwritten notes of Jim Lamora
- Unsigned, undated statement from Martin Wilson
- 5 photocopies of pictures showing truck parts masked for painting
- June 14, 2011 letter from Bruce Vanlandingham to Commissioner Campbell regarding paint shop techniques
- Process and time estimate for prepping and painting trucks created by Mr. Vanlandingham
- June 20, 2011 Statement of Bruce Vanlandingham
- October 4, 2011 letter from Fran DeCinto titled "Follow-up to Complaint"
- Unsigned, undated summary produced by Mr. Vanlandingham regarding a meeting held in the shop following a complaint being filed
- September 25, 2012 Step I Appeal Response from William Dusavitch
- October 1, 2012 Step II Appeal
- October 25, 2012 Step II Appeal Response from William Janelle
- December 14, 2012 Step III Appeal Response from David J. Brillhart

Appellant's exhibits

1. August 27, 2012 letter of warning with hand-numbering of paragraphs in the left margin
2. Color copy of a photograph showing the area between the I-beams on a truck dump body

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

1. As an Auto Body Repair Technician assigned to the Paint Shop at the Department of Transportation, the Appellant's duties include prepping and painting vehicles and equipment belonging to the department. The Appellant has seven years of experience working for the Department of Transportation and approximately twenty years of similar experience in the private sector.
2. On August 8, 2012, the Appellant was scheduled to paint the first of a number of trucks being delivered to Mechanical Services. Before leaving on vacation the previous Friday, Jeff Amrol, the Appellant's supervisor had told the Appellant that he would be expected to paint the dump body on the new truck orange, and the truck frame black. Traditionally, the area on the underside of the dump body between the I-beams near the scissors lift also would have been painted black.

3. On August 8, 2012, after painting most of the dump body on the new truck orange, the Appellant cleaned out his spray equipment and went into the office to get some water and pick up a work order. Martin Wilson, the acting supervisor, was in the office and the Appellant told Mr. Wilson that his plan was to mask off the I-beams and to paint the frame and the area between the I-beams black the following day.
4. Mr. Wilson told the Appellant that he was not going to paint that area black, but needed to paint the entire dump body orange as Mr. Amrol had instructed. The Appellant said that he did not believe Mr. Amrol meant to include the middle section between the beams. Mr. Wilson replied, "All means all."
5. The Appellant asked Mr. Wilson if they could make an exception. Mr. Wilson said, "No." After further discussion about how to paint the scissor lift, the Appellant returned to the paint booth to look at the area that would need to be masked prior to painting. He felt it would be more labor intensive than painting as he had suggested, and returned to the office to ask Mr. Wilson exactly how he wanted the work done.
6. Mr. Wilson came out of the office, showed the Appellant what he wanted done, then returned to the office. The Appellant went back to the office to ask again if an exception could be made in this instance, suggesting that they could take the matter up with Jim Lamora. Mr. Wilson again told him no, saying "now you're just arguing with me."
7. The Appellant put away his tools and returned to the office telling Mr. Wilson that he had not been feeling well and that he was going home to take care of his sore throat. The Appellant submitted a request for sick leave, then left work for the day. The Appellant's request for sick leave was later approved.
8. The Appellant returned to work approximately an hour late the following day and was approached by Mr. Lamora who said he had heard the Appellant wanted to speak with him. Mr. Lamora, Mr. Wilson and the Appellant then met, and the Appellant explained that he had not gone home sick to avoid painting the truck, but that he had been dealing with a sore throat all week. The Appellant visited his doctor Friday of that week and was prescribed antibiotics.
9. The Appellant also told Mr. Lamora that the original instructions about how to paint the truck were unclear, and he believed that his own method would be more efficient and more cost effective. Mr. Lamora explained that the decision about how to paint the trucks had been made months earlier, and he told the Appellant that that decision would stand.

10. The Appellant apologized to Mr. Wilson indicating that he did not mean to appear argumentative the previous day. He then he went to the paint shop and did the work as directed.
11. Because it took two days instead of one to finish applying the orange paint, and because the newly applied paint needed to dry before it could be masked in preparation for painting the frame, the work took three days to complete; the department had hoped to be able to complete painting in two days. Other vehicles painted using the revised process also required three days to complete.

### Position of the Parties

Attorney Buonamano argued that the Appellant knew full well that he was expected to paint the entire dump body orange, but that he disagreed with that process and planned to paint the truck his own way. Attorney Buonamano argued that when Mr. Wilson told the Appellant that he was to perform the work as Mr. Amrol had directed, the Appellant continued to disagree and tried to convince Mr. Wilson to make an exception. When Mr. Wilson did not relent, he argued, the Appellant showed up a minute later saying that he had to leave because he had a sore throat.

Attorney Buonamano argued that although the sick leave slip was approved, the context in which the leave was requested and granted was critical to understanding the Department's decision to take formal disciplinary action. Attorney Buonamano argued that although the request for sick leave was approved, the Department did not believe that the request was credible and signed the leave slip simply as a way to avoid a confrontation.

Attorney Buonamano argued that the decision about how to paint the trucks had been made long before the interaction between Mr. Wilson and the Appellant, and the decision was not something the department was interested in debating with the Appellant. Attorney Buonamano agreed that eventually the work was completed as directed, but asked the Board to find that if an employee refuses to perform work until some later time, it still constitutes a refusal. Mr. Buonamano argued that the Appellant clearly had no intention of following the directions that were given to him, noting that even before speaking with Mr. Wilson about how the truck was to be painted, the Appellant had already cleaned up "the pot," a task that takes about twenty minutes to complete.

Attorney Buonamano argued that the department has the right to give directions and expect them to be followed, and that when an employee disagrees with those directions, argues with a supervisor about carrying out those directions, and leaves in the middle of the afternoon claiming that he is ill before completing the job as assigned, the employee has failed to follow the directives of a supervisor and is obstructing the will of the department. That conduct, he argued, justified the issuance of a written warning, which is the least severe form of discipline recognized by the Personnel Rules.

Mr. McMahan argued that the department could not discipline the Appellant for refusal to follow a directive of a supervisor when the department admitted that the Appellant had, in fact, completed the task as directed. Mr. McMahan argued that the original instructions about how to paint the truck were vague, and the Appellant reasonably believed that Mr. Amrol simply meant that all visible parts of the truck were to be painted orange, with the rest being painted black. Mr. McMahan argued that when the Appellant questioned the process, he was trying to ensure that it was done as efficiently and cost-effectively as possible, particularly since orange paint was two or three times more costly than black paint.

Mr. McMahan argued that the Appellant was legitimately ill when he submitted his sick leave slip, noting that the Appellant had seen a doctor Friday of that week. He also argued that if the department doubted the legitimacy of the Appellant's request for leave, they did not have to approve his request or they could have asked him to get proof of his need for leave.

Mr. McMahan argued that when the Appellant met with Mr. Wilson and Mr. Lamora on Thursday, August 90, 2012, Mr. Lamora said that the decision had been made months earlier to change the way the painting was to be accomplished. The Appellant asked why they did not involve the people who were actually doing the painting before making that decision. Mr. McMahan said that the Appellant, Mr. Wilson and Mr. Lamora ultimately came to an understanding. Mr. McMahan said that Mr. Wilson later apologized to the Appellant after he realized that the original instructions were vague, and the Appellant apologized to Mr. Wilson, telling him that it was not his intention to be argumentative.

Mr. McMahon argued that the Board should give little weight to the department's claim that the Appellant wasted money by delaying completion of the painting by a day; he argued that trucks always take three days to paint. Mr. McMahon also argued that the Board should not give any weight to the Department's claim that it suspected misuse of sick leave, or that they gave the Appellant sufficient notice that his use of sick leave was a basis in part for the warning simply because they mentioned the Appellant's sore throat in the text of the warning. Mr. McMahon argued that the written warning was issued for refusal to follow the directives of a supervisor, and absent evidence of that offense, the warning needed to be removed from the Appellant's file.

### Decision and Order

In accordance with the provisions of 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."

The warning issued to the Appellant on August 24, 2012, alleged that he refused to follow the directives of a supervisor. However, in a September 25, 2012 Step I appeal response to Mr. McMahon, Administrator William Dusavitch wrote, "In the end, the truck was painted in the manner that was directed, but in the process, negating the results of the trial and Mr. Vanlandingham's own intent to accomplish this task in a more cost effective and efficient manner."

None of the evidence reviewed by the Board suggests that anyone ever told the Appellant that the agency saw his work painting the first truck as a trial to evaluate the new painting process. While the agency was under no obligation to do so, if the agency actually did intend to assess the new process based on the work performed by the Appellant, they would have been well advised to share that information with him. The fact that a decision apparently had not yet

been made about how to paint the scissor lift could easily suggest to the Appellant that the agency's "plan" was not final and that the Appellant could exercise some discretion or suggest a different method for completing the painting as long as the exposed, exterior of the dump body was orange and the frame was black.

While there is no question that the Appellant planned to use black paint on the area between the I-beams on the underside of the truck, in the end, he painted the truck the way the department expected it to be painted. The Appellant's supervisors were obviously annoyed by his continuing insistence that there was a better, more cost-effective way to do the job, but as Mr. Dusavitch wrote, "In the end, the truck was painted in the manner that was directed." As a result, the Board found that a written warning for refusal to follow the directives of a supervisor was unwarranted in light of the facts in evidence.

The Appellant's supervisors were also reasonably suspicious of the Appellant's request for sick leave when that request was made within minutes of the supervisor's refusal to change the way the painting was to be accomplished. However, if the supervisor believed that the Appellant was not actually ill on the afternoon of August 8, 2012, and believed that he was requesting sick leave in order to avoid performing the work as directed, the Appellant could have been required to furnish a certificate from an attending physician or licensed health care practitioner indicating that, in the practitioner's opinion, the Appellant was ill and unable to attend to his duties. [Per 1002.07] The Department imposed no such requirement and signed the request for leave.

In accordance with the provisions of RSA 21-I:58, "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." Had the evidence shown that the Appellant was uncooperative or disrespectful, or that the Appellant took sick leave to avoid doing the work he was instructed to perform, the Board could have been persuaded to modify the warning. In this case, however, the Board does not believe that a disagreement about how best to complete an assignment, or the Appellant's use of approved sick leave following such a disagreement, would warrant anything more than counseling.

For all the reasons set forth above, the Board voted unanimously to GRANT the appeal and order the written warning removed from Mr. Vanlandingham's personnel file.

THE NEW HAMPSHIRE PERSONNEL APPEALS BOARD

  
Patrick Wood, Chairman

  
Robert Johnson, Commissioner

  
Joseph Casey, Commissioner

cc: Karen Hutchins, Director, Division of Personnel  
Charles McMahon, SEA Grievance Representative  
Brian Buonamano, Attorney, Department of Justice, Transportation Bureau