

# State of New Hampshire



## PERSONNEL APPEALS BOARD

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### *Appeal of Mark Wefers*

### *Department of Corrections*

### *Docket # 01-D-10*

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 of the N.H. C.A.R. (Rules of the Personnel Appeals Board), to hear the appeal of Mark Wefers, an employee of the Department of Corrections. Mr. Wefers, who was represented at the hearing by SEA Field Representative Brad Asbury, was appealing a March 27, 2001, written warning issued to him for allegedly failing to meet the work standard. Corrections Counsel John Vinson and Commissioner Phil Stanley appeared on behalf of the Department of Corrections.

Without objection, the appeal was heard by the Board on oral argument and 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 of the appeal, and documents admitted into evidence as follows:

#### Appellant's Exhibits

(Identified in Appellant's September 5, 2001 letter to the Board as follows)

1. PAB Decision in the Appeal of James Roy, Docket #99-D-7
2. Statement of Mark Wefers
3. Notification of Administrative rights dated September 5, 2000
4. Letter of Suspension dated September 5, 2000
5. Letter to Commissioner Stanley dated September 11, 2000
6. Letter to Thomas Manning dated October 3, 2000

7. Letter concerning extension of investigation dated October 31, 2000
8. Letter to Commissioner Stanley dated March 5, 2001
9. Letter of Warning dated March 27, 2001
10. Response from Appellant to Steve McCormack, SEA Field Representative, dated March 29, 2001
11. Appellant's April 9, 2001 notes of the follow-up meeting with SEA Steward Wayne Brocft, Marlt Wefers, Commissioner Stanley, and Lisa Currier
12. Written response from Commissioner Stanley dated May 1, 2001
13. Appeal of Letter of Warning from Mark Wefers dated May 1, 2001
14. Denial of Appeal from Thomas Manning, Director of Personnel, May 4, 2001

#### State's Exhibits

1. Chronological listing of events
2. November 2, 2000 letter from Commissioner Stanley to Director Manning
3. Excerpts from CBA
4. Letter to Steven McCormack from Marlt Wefers dated March 29, 2001
5. Letter to Mark Wefers from Commissioner Stanley dated October 31, 2000
6. March 27, 2001 Letter of Warning issued to Mark Wefers
7. Letter from Marlt Wefers to Commissioner Stanley dated March 5, 2001

The State also asked the Board to take judicial notice of the Rules of the Division of Personnel.

The appellant argued that none of his conduct rose to the level of an offense warranting the issuance of a written warning. He argued that the investigation upon which the Department had relied in issuing the warning violated Sections 2.1, 27.22B and 27.22C of the Collective Bargaining Agreement, and was therefore invalid. He also argued that in the warning, he had been held accountable for the conduct of his subordinates and for the unfavorable publicity created by Corrections Officers who engaged in an illegal job action in reaction to a legitimate search for contraband. The appellant asked that the warning be withdrawn, that the letter and any information related to the warning be removed from his file, that the Board issue a decision finding that the allegations were "Unfounded," and that Mr. Wefers be returned to his original employment status in Concord, NH.

Mr. Vinson argued that the warning was more than justified in light of the facts, and that the appellant's conduct perhaps would have warranted a more severe form of discipline.

Nevertheless, he argued, the Commissioner had elected to issue a written warning to the appellant as the least severe form of discipline to correct his serious and repeated failures to meet the work standard.

Commissioner Stanley stated that the Department of Corrections did not need five employees investigating the rest of the staff when the Department was responsible for twenty-three hundred to twenty-four hundred inmates, any of whom might become involved in fights, assaults, gang activities, and moving contraband. Commissioner Stanley argued that under the appellant's direction, the Department's Internal Affairs had begun to look too much like the "Commissioner's secret police." He said that in order to change that impression, he decided to redirect the unit's focus by changing the unit's name to Investigations, by restricting the unit's participation in personnel investigations, and by concentrating the unit's efforts on inmate activities and infractions. Commissioner Stanley indicated that his plan "didn't go over well" with Mr. Wefers and his staff, and that "they made it clear to others they weren't happy with that redirection of activities."

The Commissioner stated that he met several times with investigators, advising them that personnel investigations would not be their primary purpose, except where there were actual charges of illegal staff activity. He said that in those meetings, he also addressed concerns that had been raised by the County Attorney's Office about the quality of materials generated by investigations. The Commissioner said that he made it very clear to the appellant that henceforth, evidentiary materials and cases planned for prosecution were to be handled by State Trooper Milce Nolan. The Commissioner said that despite those specific instructions, he later discovered that Mr. Wefers had ignored his orders and had continued to forward cases directly to prosecutors. As a result, the Commissioner stated, he scheduled a meeting on July 20, 2000 with County Attorney Johnson, State Police Officer Nolan, State Police Officer Eastman, Assistant Commissioner Cantor and Investigator Wefers, laying out for everyone how evidentiary materials and cases would be handled.

The Commissioner indicated that he received still another complaint in August 2000, from the County Attorney about materials coming directly from the appellant. He said that before he was able to correct the problem, he had to schedule yet another meeting with the appellant on August 29, 2000, at which time he told the appellant how upset he was with the appellant's performance.

Commissioner Stanley indicated that investigators learned of a threat of contraband being brought into the men's prison in Concord over the Labor Day weekend in September, 2000. Believing that one of the staff might be bringing tobacco into the prison, the Commissioner, the Administrator of Security, the Assistant Commissioner, the Warden, and Investigator Wefers planned to conduct a door search. The Commissioner said that although they had the name of an officer believed to be the one planning to bring in contraband, the group agreed that the search would be made to appear random rather than targeted at any one individual. The Commissioner said everyone involved in planning the search appeared to understand the importance of carrying out the search without obviously singling out the officer they believed was the most likely suspect.

The Commissioner argued that Mr. Wefers and his unit adopted an unreasonably harsh attitude in conducting the search. More importantly, he said, Mr. Wefers completely disregarded recommendations made by State Police Officer Nolan about any possible arrests, failed to communicate appropriately with the shift captains about the search, actually prohibited the shift captains from entering their own office, and allowed one of his subordinates to participate in the search wearing a sidearm. Commissioner Stanley argued that the manner in which Mr. Wefers organized and carried out the search was "overly zealous to the extreme," contributing in large part to the resulting "sick out" by a number of uniformed personnel. Commissioner Stanley argued that it was important to remember that they were not looking for bombs or weapons, they were looking for tobacco. He argued that a relatively routine situation was completely blown out of proportion through poor planning, management and supervision.

The appellant argued that he never tried to thwart the Commissioner's plan for the Investigations Unit; he was simply trying to complete the assignments that were already in progress when Commissioner Stanley was appointed after Commissioner Risley's death. Mr. Wefers argued that when Commissioner Risley had hired him, the Commissioner was unhappy with the way in which the State Police had conducted investigations of staff for alleged violations of the State's sexual harassment policy. He argued that some of those investigations were under way when Commissioner Risley died, and it was those cases to which Commissioner Stanley was referring.

The appellant also stated that he had never received complaints from the County Attorney's Office about any of the work product that he or his unit had transferred to them. In fact, he argued, he had been complimented a number of times in the past for the quality of his work.

The appellant argued that the warning concentrated primarily on events surrounding the search of employees entering the facility in Concord over the Labor Day Weekend in September, 2000, to determine if one of them was bringing contraband into the prison. Mr. Wefers agreed that the search went badly, but argued that he should not be held solely responsible for the problems that occurred. He said that he had expected both Warden Coplan and Administrator Gerry to be present during the search, and if they had been, any of the questions that had arisen on site about how the investigation was to proceed could have been addressed. The appellant argued that it was Trooper Nolan's recommendation to search everyone entering the facility rather than conducting an apparent random search. He stated that he had discussed Trooper Nolan's participation with Administrator Gerry, and Mr. Geny had not objected. He argued that the Warden's late complaints about the presence of a State Police Officer during the search should be weighed in light of that fact.

Mr. Wefers argued that it was unreasonable to hold him accountable for the actions of his immediate subordinates during the search, and it certainly was unreasonable to blame him for the

conduct of approximately thirty officers who called in sick as a form of protest for the search. He argued that the "sick-out" was an illegal job action by the employees that was geared more toward putting some weight behind their bargaining position on wages than it was a reaction to the search itself. The appellant argued that although things might have been handled more efficiently during the search, the events that unfolded should not be considered failure to meet the work standard and should not be deemed sufficient to warrant issuing him a written warning.

Finally, the appellant argued, the investigation authorized by the Department of Corrections and conducted by the Department of Justice, violated both the provisions of the Collective Bargaining Agreement and the Rules of the Division of Personnel. He argued that because the investigation and suspension with pay violated those provisions, the written warning must be vacated and must be removed from his file.

The following facts surrounding the investigation itself are not in dispute. Therefore, on the evidence, argument and offers of proof, the Board made the following findings of fact and rulings of law:

#### Findings of Fact

1. Mr. Wefers was advised in writing on September 5, 2000, that he had been suspended with pay for a period of up to fourteen days pending the results of an investigation into the manner in which he had conducted a search at the prison in Concord the previous day.
2. Written notification of the investigation dated September 5, 2000, advised the appellant that, "On September 4, 2000 while you were in charge of an investigation at the NHSP-Men in Concord, a number of steps were taken that do not appear to be prudent investigative techniques. Due to the actions taken on September 4, 2000, allegations have been made that the investigators only searched uniformed employees and non-uniformed employees and volunteers who entered the prison were not. As a result of these actions, a formal grievance

has been filed and the climate at NHSP-M has been negatively impacted jeopardizing public safety."

3. The possible violation cited in the notice was Dereliction of Duty as defined by PPD 2.16 V 3.
4. The Department of Corrections notified the appellant by letter dated October 31, 2000 that Commissioner Stanley had extended the 45 work day deadline for completion of the investigation period for an additional 20 days, until December 6, 2000.
5. The October 31, 2000 letter also advised the appellant that his leave of absence with pay would be extended until the Department received and reviewed the investigative report.
6. The Department notified Mr. Wefers, by copy of a letter dated November 2, 2000 from Commissioner Stanley to Personnel Director Thomas Manning, that his suspension with pay had been extended indefinitely, pending receipt and review of the completed investigation.
7. On December 1, 2000, although the Department had not yet received the final report of the investigation, the appellant was notified by telephone that he was no longer suspended with pay, and he was directed to report for duty at the Lakes Region Facility in Laconia.
8. The Department of Corrections received the investigator's final report on January 31, 2001.
9. The appellant was permitted to review the final report of the investigation on February 16, 2001.
10. A copy of the investigation report that the appellant had requested on February 16, 2001, was provided to him on February 20, 2001.
11. On February 27, 2001, Commissioner Stanley met with the appellant and his representative in order to allow them to refute the conclusions outlined in the report.
12. On March 27, 2001, during a follow-up meeting, Commissioner Stanley issued a written warning to the appellant for failing to meet the work standards.

## Rulings of Law

- A. "The personnel appeals board shall hear and decide appeals as provided by RSA 21-I:57 and 21-I:58 and appeals of decisions arising out of application of the rules adopted by the director of personnel except those related to [performance evaluations, leaves of absence without pay, and certain classification decisions of the director of personnel]." [RSA 21-I:46, I]
- B. "In the case of terms and conditions of employment which are negotiated, the provisions of the Collective Bargaining Agreement shall control." [Per 103.02 (b)]
- C. "In every case when the Employer determines that an investigation of the facts or circumstances behind the complaint is to be undertaken, the employee shall be so notified in writing within seven (7) work days. Notification shall include the reason(s) and/or cause(s) for the investigation and the anticipated date of completion of the investigation." [CBA Article 27.22 b.]
- D. "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 the reasons for the extension and its duration." [CBA Article 27.22 b.]
- E. "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 Board rejects the appellant's claim that notices issued to him on September 5, 2000 and October 31, 2000, were deficient, or that those notices should support removal of the written warning from his personnel file. The evidence reflects that the appellant was suspended with pay for nearly three months awaiting the outcome of the investigation, that he did not receive a copy of the investigation itself for almost three more months, and that he was not notified of any formal discipline until almost seven months had elapsed from the date the investigation was initiated. Although the Collective Bargaining Agreement provides a mechanism for extending the 45-day deadline for completion of an investigation, such extensions are permitted only for "exceptional reasons." The fact that the Attorney General's investigator was taking longer than expected does not appear to satisfy that criteria.

The language of the agreement does not prohibit investigations by an outside agency, such as the Attorney General's Office, nor does it appear to require the agency to notify the employee that someone outside of the agency will be conducting the investigation. Nevertheless, the agency is obliged to ensure that the investigation is conducted in accordance with the terms of the Collective Bargaining Agreement. That obligation includes providing timely notices to the employee and completing the investigation in accordance with Article 27.22 of the Agreement.

Therefore, despite the Board's belief that the evidence supports the issuance of a written warning, the fact remains that the investigation did not conform to the requirements of the Collective Bargaining Agreement, and the Board is bound by the provisions of Per 102.03 (b) to allow the terms of the Agreement to control. Accordingly, the Board found that because the warning was issued as a result of the investigation, and the notices and timeliness of the investigation were not in accord with the Collective Bargaining Agreement, the warning shall be removed from the

appellant's file, and shall be replaced by a copy of this decision. However, the agency shall not be required to return the appellant to his original work assignment in Concord, nor shall the agency be required to mark the allegations in the investigation as "Unfounded."

THE PERSONNEL APPEALS BOARD

  
Patrick H. Wood, Chairman

  
Lisa A. Rule, Commissioner

  
Anthony B. Urban, Commissioner

cc: Thomas F. Manning, Director of Personnel, 25 Capitol St., Concord, NH 03301  
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