

**THE STATE OF NEW HAMPSHIRE**

**SUPREME COURT**

**In Case No. 2010-0650, Appeal of New Hampshire Department of Corrections, the court on September 28, 2011, issued the following order:**

Having considered the Department of Corrections' memorandum of law on issue of mootness, the court dismisses the appeal as moot.

Appeal dismissed.

Dalianis, C.J., and Duggan, Hicks, Conboy and Lynn, JJ., concurred.

**Eileen Fox,  
Clerk**

Distribution:

NH Personnel Appeals Board; 2010-D-013 (Bettez) and #2010-D-014 (Jordan)  
Lynmarie C. Cusack, Esquire  
Kevin E. Buck, Esquire  
Peter J. Perroni, Esquire  
File

157

THE STATE OF NEW HAMPSHIRE  
SUPREME COURT

DOCKET NO. 2010-0650

APPEAL OF NEW HAMPSHIRE DEPARTMENT OF CORRECTIONS  
(In Re Mark Jordan and Jeffrey Bettez)

**DEPARTMENT OF CORRECTIONS'**  
**MEMORANDUM OF LAW ON ISSUE OF MOOTNESS**

**I. INTRODUCTION**

On June 21, 2011, the Court, after oral argument, ordered that the Department of Corrections file a brief memoranda addressing whether the case is moot because both employees have been returned to pay status. As of oral argument both employees have been provided back pay and benefits pursuant to N.H. Admin Rules Per 1001.02(d).

While both employees have received the full remedy available under the personnel rules, the propriety of the Personnel Appeal Board's ("PAB") erroneous interpretation of the investigatory suspension process and use of its so-called "equitable" powers remains an open question. The PAB may apply its erroneous interpretation to other similar cases, with its decisions effectively evading review, yet the allegedly aggrieved employees receive full relief.

There is currently another consolidated case currently pending before this Court regarding the extent of the PAB's so-called equitable authority. *See Appeal of New Hampshire Health and Human Services (Re: William Harris)*; Supreme Court Docket Nos. 2011-0016 and 2011-0018. The State requests that the Court consider the present case in the context of that consolidated case and take the opportunity to provide guidance in at least one of the pending cases. Only in the event the Court elects to provide published guidance regarding the scope of

the PAB's authority in the *Harris* case should the Court consider dismissing the present appeal as moot.

## II. ARGUMENT

There are no rigid rules requiring dismissal for mootness, and the decision to treat a case as moot lies within the discretion of this Court. *State v. Gagne*, 129 N.H. 93, 98 (1986); *Moody v. Cunningham*, 127 N.H. 550, 553 (1986). "The question of mootness is one of convenience and discretion and is not subject to hard-and-fast rules." *In re Thayer*, 145 N.H. 177, 182 (2000) (quotation omitted). This Court "generally will refuse to review a question that no longer presents a justiceable controversy because issues involved have become academic or dead . . . ." *Id.* (quotation omitted).

In general, this Court will reach the merits of an issue which is otherwise moot where a party has raised "significant constitutional issues" and "there is a public interest which militates in favor of [this Court's] rendering a decision on the merits." *Moody*, 127 N.H. at 553; see also *Gagne*, 129 N.H. at 98. However, the consideration of moot issues should generally be restricted to only those issues that are capable of repetition but likely to evade appellate review. See, e.g., *Asmussen v. Commissioner, N.H. Dept. of Safety*, 145 N.H. 578, 591 (2000) (Court declined to consider moot issue where issue would not evade appellate review); *Concord Orthopaedics Professional Association v. Forbes*, 142 N.H. 440, 442 (1997) (Court reviewed important issue of public policy which was likely to recur but evade appellate review).

Here, the State believes the PAB exceeded its regulatory authority. N.H. Admin. Rule Per 1001.02 provides that an employee will be returned to paid status at the completion of any investigation or criminal charges where no disciplinary action, i.e., termination, is deemed warranted. Thus, this Court would not be in the position of reaching the merits of the PAB's

decision because either a complete remedy is afforded the employee (i.e. return to paid status and recovery of any loss of compensation during the period of suspension) or the employee has alternative appellate rights under the Personnel Rules' disciplinary chapter. *See* N.H. Admin. Rules Per 1002, et. seq.

Absent review, the PAB's erroneous interpretation of its authority as demonstrated in this case, could impact other state agencies considering applying Per 1001.02 to employees, thereby undermining the regulatory framework that is established with the suspension without pay rule. Appointing authorities may be hesitant to utilize an investigatory suspension without pay for an employee who was being investigated by an outside entity for fear the PAB will substitute its judgment for that of the appointing authority. For this reason alone, a ruling would seem appropriate.

There is sound policy behind an appointing authority's use of an investigatory suspension without pay. The "Suspension without pay for purposes of an Investigation" Rule (Per 1001.02) is meant to be used only when an employee is alleged to be involved in criminal wrongdoing and the allegations conflict with the employee's job duties. *See* N.H. Admin Rules Per 1001.02 (a)(1) and (2). The employer should not be left with suspending an employee with pay as the only option. *See* N.H. Admin Rules Per 1001.03. Circumstances, at times, dictate suspensions without pay during the investigatory or pendency of criminal charges. However, if the PAB's interpretation of its authority can effectively escape review in cases where the PAB grants relief to an employee without finding that the State violated the investigatory suspension rule, the rule may become a nullity, as appointing authorities will decline to use it. Employees will be encouraged to challenge its use in every case given the possibility that the PAB will limit the length of the suspension without recourse for the State. The sequence as played out in this case

would reoccur. Thus, while the present case is moot from the Petitioners' perspective, the case could have adverse consequences for the State if guidance is not provided.

In any event, the question of the PAB's equitable authority may be addressed, at least in part, by this Court in the pending consolidated case of *Appeal of New Hampshire Health and Human Services (Re: William Harris)*; Supreme Court Docket Nos. 2011-0016 and 2011-0018 (considering the use of equitable authority in the termination of a probationary employee). If so, dismissal of the present case may not necessarily have the same adverse effect for the State. However, prior to dismissing this case the State respectfully requests the Court consider whether the *Harris* case presents an appropriate vehicle for providing some much needed guidance to the PAB and litigants.

### III. CONCLUSION

For the foregoing reasons the State requests that the Court not immediately dismiss the appeal as moot but rather consider this appeal in the context of the other pending case challenging the PAB's equitable authority and take the opportunity to provide published guidance on the scope of the PAB's authority.

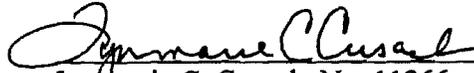
Respectfully submitted,

STATE OF NEW HAMPSHIRE  
DEPARTMENT OF CORRECTIONS

By its attorney,

MICHAEL A. DELANEY  
Attorney General

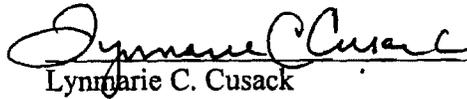
Dated: July 21, 2011



Lynmarie C. Cusack, No. 11266  
Assistant Attorney General  
Civil Bureau  
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33 Capitol Street  
Concord, NH 03301

CERTIFICATION

I certify that <sup>2 copies</sup> ~~a copy~~ of the foregoing was sent this 21<sup>st</sup> day of July 2011, first class postage prepaid, to counsel of record: Peter J. Perroni, Esq. and Kevin Buck, Esq., Nolan Perroni Harrington, LLP, 133 Merrimack St., Lowell, MA 01852.

  
Lynmarie C. Cusack

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# State of New Hampshire



**PERSONNEL APPEALS BOARD**  
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Concord, New Hampshire 03301  
Telephone (603) 271-3261

**Appeals of Jeffrey Bettez and Mark Jordan -- Department of Corrections**  
**Personnel Appeals Board Decision on All Pending Motions Regarding the Board's July 28, 2010 Decision**  
**To Terminate Appellants' Suspensions Without Pay**

September 1, 2010

On August 5, 2010, the New Hampshire Personnel Appeals Board (Wood, Johnson, Bonafide and Case) issued a show-cause order, directing the NH Department of Corrections to show cause why the Board should not issue an order enforcing compliance with the Board's July 28, 2010, decision to terminate the Appellants' suspensions without pay and restore their benefits. In that order, the Board had directed the Department of Corrections to do the following:

1. In the case of Appellant Bettez, his suspension without pay shall be terminated as of 45 days from the date of his original suspension, January 6, 2010. If the State wants to maintain the suspension beyond that date, it shall do so only with pay and benefits.
2. In the case of Appellant Jordan, his suspension without pay shall be terminated as of 45 days from the date of his original suspension, March 11, 2010. If the State wants to maintain the suspension beyond that date, it shall do so only with pay and benefits.
3. The Department of Corrections shall immediately restore the Appellants' benefits. In addition, the agency shall either return these employee to their former positions, secure alternative employment for them somewhere within the Department of Corrections, or convert their suspensions without pay to suspensions with pay until such time that the investigation is completed. At the conclusion of the investigation, if the Appellants are formally charged and arraigned, the Department may request modification of this order. In the alternative, if the Department believes that it has sufficient information to take disciplinary action, the Appellants shall be entitled to all the due process rights outlined in the Rules of the Division of Personnel.

On August 13, 2010, the Board received via email the State's Response to New Hampshire Personnel Appeals Board's Show Cause Order, Motion for Rehearing, and Motion to Stay and Modify Order. The Appellants' Opposition to Motion for Rehearing was received by the Board on August 18, 2010. Additional correspondence from Attorney Peroni was received

on August 19, 2010, requesting that the Board order that certain personal information about Appellant Jordan, which was attached to the Department of Corrections Motion as an exhibit, be completely redacted. On August 25, 2010, Attorney Peronni submitted an additional document from an unrelated matter that he wished the Board to consider as a supplement to the Appellants' Opposition to the DOC's motion for rehearing. He argued that the document would demonstrate that the State's position on the Board's "equitable powers" described in that document is contrary to the position taken by the State in its Motion for Rehearing. The State submitted its response and objection via email on August 26, 2010.

The Appellants' request to have personal information redacted from the record is granted. His request to supplement the Appellants' Opposition to Motion for Rehearing is denied.

With respect to the Board's July 28, 2010, decision, the State misreads the Board's order. Suspension without pay may be appropriate while the suspending agency is conducting **its own** investigation – not some investigation by a third party. In the case of the appeals of Jeffrey Bettez and Mark Jordan, the Department of Corrections, **must** take action under the collective bargaining agreement, which is enforceable by the Personnel Appeals Board under the personnel rules, within the 45 days spelled out in the collective bargaining agreement or put the employee back to work. The Board has made no decision at all on the substance of the underlying facts and is not in a position to do so because none of that material has been presented to the Board except by reference in the post decision filings by the State. If the Department wants the Personnel Appeals Board to review that information, then it needs to take the appropriate disciplinary action against the employee and present that evidence and information to the employee and a hearing can be scheduled.

Accordingly, with regard to the appeal of Mark Jordan, the Motion to Modify is granted as follows:

1. Suspension without pay for investigative purposes is upheld for 45 days from the date of suspension.
2. Suspension without pay based upon the arrest for simple assault is upheld since July 16, 2010.
3. Except as modified herein, the original decision of the Personnel Appeals Board remains unaltered.

With regard to the appeal of Jeffrey Bettez, the Motion for Rehearing is denied and the Motion to Stay and Modify the Order is also denied. The decision of the Personnel Appeals Board in this case resolved the only issue that was before the Board, the propriety of the indefinite suspension without pay pending completion of an investigation by a third party. As indicated above, where there has been no disciplinary action based upon the underlying allegations commenced by the Department of Corrections against Mr. Bettez, an indefinite suspension is improper and deprives Mr. Bettez of his due process rights under the laws of the State of New Hampshire and the personnel rules.

It is clear from the recent pleadings filed by the Department of Corrections that the Department has its own information that would appear to support the commencement of disciplinary action against Mr. Bettez. The Board is instructing the

Department of Corrections that it has a legal obligation to do so in a timely fashion and without waiting for some third party to complete an investigation that may or may not result in criminal proceeding being brought against Mr. Bettez. Mr. Bettez' suspension without pay for investigative purposes must be terminated as of 45 days from the date of that suspension. He should be reinstated with full pay and benefits as of that date.

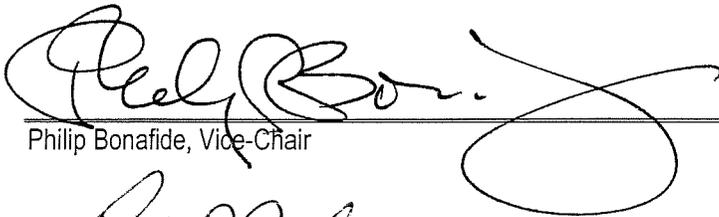
So ordered.

The New Hampshire Personnel Appeals Board



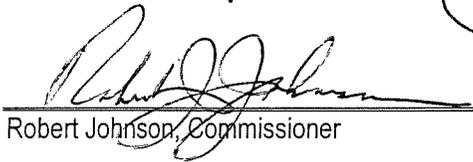
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Patrick Wood, Chair



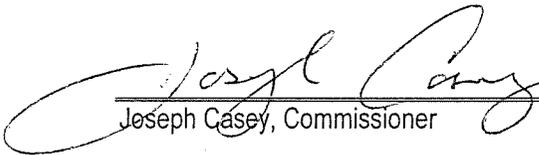
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Philip Bonafide, Vice-Chair



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Robert Johnson, Commissioner



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Joseph Casey, Commissioner

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# State of New Hampshire



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Appeals of Jeffrey Bettez and Mark Jordan -- Department of Corrections  
Personnel Appeals Board Order for the Department of Corrections To Show Cause  
Why the Board Should Not Issue an Order Enforcing Compliance With the Board's July 28, 2010 Decision  
To Terminate Appellants' Suspensions Without Pay  
August 5, 2010

On July 28, 2010, the New Hampshire Personnel Appeals Board (Wood, Johnson, Bonafide and Casey) issued an order in the above-titled appeals, directing the NH Department of Corrections to do the following:

1. In the case of Appellant Bettez, his suspension without pay shall be terminated as of 45 days from the date of his original suspension, January 6, 2010. If the State wants to maintain the suspension beyond that date, it shall do so only with pay and benefits.
2. In the case of Appellant Jordan, his suspension without pay shall be terminated as of 45 days from the date of his original suspension, March 11, 2010. If the State wants to maintain the suspension beyond that date, it shall do so only with pay and benefits.
3. The Department of Corrections shall immediately restore the Appellants' benefits. In addition, the agency shall either return these employee to their former positions, secure alternative employment for them somewhere within the Department of Corrections, or convert their suspensions without pay to suspensions with pay until such time that the investigation is completed. At the conclusion of the investigation, if the Appellants are formally charged and arraigned, the Department may request modification of this order. In the alternative, if the Department believes that it has sufficient information to take disciplinary action, the Appellants shall be entitled to all the due process rights outlined in the Rules of the Division of Personnel.

On August 3, 2010, the Board received Appellants' Motion to Enforce Personnel Appeals Board's Decision on Appellants' Motion to Terminate Suspensions Without Pay. In that Motion, Attorney Perroni stated that, to date, the DOC has not complied with the Board's order, and that both Appellants remain suspended without pay and benefits. He further asserted that neither Appellant has been contacted by the DOC about returning to work. Attorney Perroni also indicated that the Appellants each received letters on July 31, 2010, by overnight mail, indicating that the Department of Corrections

was again extending their suspensions without pay. He asserted that although the letters were dated July 27, 2010, their delivery by overnight mail indicates that they were sent to the Appellants after the date of the Board's order, suggesting that the Department does not intend to comply with the Board's Order. Attorney Perroni argued that pursuant to RSA 541:18, the Board's decision must be implemented and adhered to while any motion for rehearing or appeal is pending, and that only by order of the New Hampshire Supreme Court may the Board's decision be stayed.

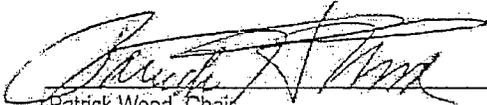
RSA 541:18 Suspension of Order states the following:

No appeal or other proceedings taken from an order of the commission shall suspend the operation of such order; provided, that the supreme court may order a suspension of such order pending the determination of such appeal or other proceeding whenever, in the opinion of the court, justice may require such suspension; but no order of the public utilities commission providing for a reduction of rates, fares, or charges or denying a petition for an increase therein shall be suspended except upon conditions to be imposed by the court providing a means for securing the prompt repayment of all excess rates, fares, and charges over and above the rates, fares, and charges which shall be finally determined to be reasonable and just.

Source, 1913, 145:18. PL 239:18. 1937, 107:31; 133:92. RL 414:20. 1951, 203:16, eff. Sept. 1, 1951.

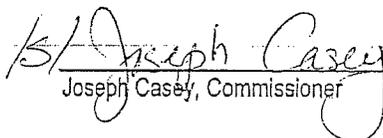
Within ten (10) calendar days of the date of this order, the Department of Corrections shall submit its response, and shall show cause why the Board should not Issue an order enforcing compliance with Its July 28, 2010 Decision to Terminate Appellants' Suspensions Without Pay.

The New Hampshire Personnel Appeals Board

  
Patrick Wood, Chair

 8/4/2010  
Philip Bonafide, Vice-Chair

Robert Johnson, Commissioner

 8/5/10  
Joseph Casey, Commissioner

# State of New Hampshire



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## Appeals of Jeffrey Bettez and Mark Jordan Department of Corrections

### Personnel Appeals Board Decision on Appellants' Motions to Terminate Suspensions Without Pay July 28, 2010

The New Hampshire Personnel Appeals Board (Wood, Johnson, Bonafide and Casey) met in public session on Wednesday, May 26, 2010, under the authority of RSA 21-I:58 and Chapters Per-A 100-200 of the NH Code of Administrative Rules, to hear oral argument on pending motions and objections thereto filed in the appeals of Jeffrey Bettez and Mark Jordan regarding their continuing suspensions without pay for purposes of investigation. Senior Assistant Attorney General Michael Brown and Department of Justice Intern Spencer Culp appeared on behalf of the State. Attorney Peter J. Perroni appeared on behalf of the appellants.

The appeals are briefly summarized as follows:

On January 6, 2010, Commissioner Wrenn suspended Appellant Jeffrey Bettez without pay for purposes of an investigation into allegations that the appellant, a Corrections Officer, had punched an inmate while the inmate was handcuffed. Citing Per 1001.02 of the Rules of the Division of Personnel, Commissioner Wrenn notified the Appellant in writing that the allegations involved possible criminal conduct in direct conflict with the duties and responsibilities of the Appellant's position, thereby necessitating his removal from the workplace. The Appellant has remained suspended without pay since that time, receiving notices at approximately 30 day intervals that the matter remained under investigation and that the Appellant's suspension had been extended in accordance with the provisions of Per 1001.02 of the Rules.

On March 11, 2010, Commissioner Wrenn suspended Appellant Mark Jordan without pay for purposes of an investigation into allegations that the Appellant, a Corrections Officer, had assaulted an employee on the grounds of the New Hampshire State Prison by pushing and punching that employee. Citing Per 1001.02 of the Rules of the Division of Personnel, Commissioner Wrenn notified the appellant in writing that the allegations involved possible

criminal conduct in direct conflict with the duties and responsibilities of the Appellant's position, thereby necessitating his removal from the workplace. The Appellant has remained suspended without pay since that date, receiving notices at approximately 30 day intervals that the matter remained under investigation and that the Appellant's suspension had been extended in accordance with the provisions of Per 1001.02 of the Rules.

On May 7, 2010, Attorney Perroni filed Motions to Terminate Suspension Without Pay in each of the pending appeals, arguing that the suspensions in each case violated the express and implied intent of the Personnel Rules and the applicable Collective Bargaining Agreement. In support of that Motion, Attorney Perroni argued that although the Personnel Rules describe the steps an agency must undertake in order to suspend an employee without pay for purposes of an investigation, Per 101.02(b) of those rules also states, "[i]n the case of terms and conditions of employment that are negotiated, the provisions of the collective bargaining agreements shall control." He argued that the current CBA governing the employment relationship between the Appellants, the State and the DOC establishes the minimum rights of unit employees such as Mr. Bettez and Mr. Jordan, "...against whom a complaint is made from any source..." According to Attorney Perroni, the Appellants have been afforded none of those rights, including timely notice under the provisions of the CBA that an investigation had been undertaken, completion of the investigation within 45 workdays, or, in the alternative, notice describing the "exceptional circumstances" that would require an extension of the investigation beyond the 45 workday limit.

Attorney Perroni stated that the department was attempting to justify the initial suspensions and repeated continuations of the suspensions by characterizing them as ongoing investigations by an outside law enforcement agency involving potentially criminal conduct. He argued that the agency had failed to offer any reasonable explanation why such simple allegations would require months to investigate, or why it would require the Appellants' removal from the workplace for periods well in excess of 30 workdays. He argued that by ignoring the provisions of the Collective Bargaining Agreement, and by construing the language of the Personnel Rules as the State has in this case, the Department would be able to effectuate a constructive termination, cutting off the Appellants' pay and benefits without holding a hearing or giving the Appellants any opportunity to challenge the allegations. Attorney Perroni asked the Board to note that as of the date that the Motions were submitted to the Board, no actual charges had been filed against either of the Appellants.

In his Objection to the Appellants' Motion to Terminate Suspension Without Pay, Senior Assistant Attorney General Michael Brown argued that the State Police Major Crime Unit was conducting investigations into allegations that the Appellants engaged in criminal conduct, and because the allegations were being investigated by the Department of Safety, the Department of Corrections had no control over the manner or speed with which that investigation was conducted. He argued that as long as the investigations were ongoing, the Department of Corrections had the right

to seek approval to extend those suspensions, noting that the agency had received appropriate approvals from the Director of Personnel, and in turn, the Department had given appropriate notice to the Appellants as required by the provisions of Per 1001.02.

Senior Assistant Attorney General Brown also argued that the conduct under investigation did not involve alleged violations of administrative policies or procedures and that the conduct was not being investigated internally. Therefore, he argued, the investigations themselves would not be subject to the limitations outlined in the parties' Collective Bargaining Agreement. If the CBA did apply in this case, he argued, those issues still would be outside the Board's jurisdiction. As such, he argued that the Board must deny the Appellants' Motions.

At the hearing on the pending Motions and Objections, Mr. Culp spoke on behalf of the State, arguing that the Appellants' Motions should be denied. Mr. Culp argued that the Department of Corrections had administered the suspensions in accordance with the provisions of Per 1001.02 (a) by sending letters to the Appellants to advise them of the charges, obtaining approval for the suspensions, and providing notice to the Appellants each and every time their suspensions were extended. Mr. Culp argued that the Board lacked jurisdiction to hear or decide issues arising out of an interpretation or an application of any provision in the Collective Bargaining Agreement, and that even if the Board had such authority, the provisions of the Collective Bargaining Agreement would not apply, as the ongoing investigations were not administrative investigations but criminal investigations being conducted by an outside law enforcement agency. Mr. Culp argued that the Appellants' claims of constructive termination and violation of their due process rights were without merit. He argued that although the Appellants had been suspended, they had not been disciplined, and they were still employed by the Department of Corrections. He noted that if the investigations were to end without any action, the Appellants would be entitled to reinstatement and retroactive compensation, including coverage of their health care expenses.

Mr. Brown reiterated his argument that the Appellants' suspensions were effected under the Administrative Rules of the Division of Personnel rather than the Collective Bargaining Agreement, because the allegations against each Appellant involved possible criminal conduct. He argued that when internal investigations are undertaken, the employer has some ability to direct and control the outcome of an investigation, and the parties can negotiate and agree upon the terms and conditions governing the investigative process. In this instance, the investigations were being conducted by an outside law enforcement agency over which the employer has no control. As such, he argued, the provisions of the CBA would not apply. He argued that even if the provisions of the CBA did apply in either of these cases, the employees would not be entitled to maintain their status as Corrections Officers during the course of the investigation because the nature of the allegations are in direct conflict with their assigned duties and responsibilities. Mr. Brown argued that the Board's authority in this case was strictly limited to determining whether

or not the Department of Corrections complied with the Rules of the Division of Personnel in effecting these suspensions.

The plain language of the CBA does not appear to limit the requirements or protections of the Agreement to administrative complaints. It says instead that when a complaint is made "from any source," the employee shall be afforded certain rights, including the right to maintain his or her current status, assignment and schedule. In the event that an investigation can not be concluded within 45 work days, the employee is also entitled to notice that the investigation has not been completed, and what exceptional circumstances exist that would require additional time for completion of the investigation.

Assuming *arguendo* that investigations by outside law enforcement agencies are not subject to the provisions of the parties' Collective Bargaining Agreement, and setting aside the issue of the Board's jurisdiction to address issues of compliance with the terms and conditions of the CBA as they relate to interpretation and application of the personnel rules, the Board will limit its decision to the appointing authority's decision to suspend the employees without pay under the provisions of Per 1001.02 (a). In so doing, despite the State's position that the Board's authority is limited to determining whether or not the agency complied with the relevant administrative rules, the Board will also apply its equitable authority as set forth in RSA 21-I:58, I, that specifically authorizes the Board to "...reinstate an employee or otherwise change or modify any order of the appointing authority, or make such other order as it may deem just."

The following facts are not in dispute:

1. Jeffrey Bettez was notified on January 6, 2010, that he was being suspended without pay for 30 days for purposes of an investigation into allegations that the appellant had punched an inmate while the inmate was handcuffed. The alleged assault occurred on or about November 29, 2009, and was reported to Corrections officials the following day. Officer Bettez continued to work until January 6, 2010, when he was notified of his suspension.
2. On February 3, March 3, April 2 and April 29, 2010, Officer Bettez was notified in writing that his suspension had been extended for additional periods of 30 days. No explanation was given for the extensions of the suspension, only that the extensions had been approved by the Director of Personnel, and the nature of the allegations necessitated his removal from the workplace.
3. Mark Jordan was notified on March 11, 2010, that he was being suspended without pay for 30 days for purposes of an investigation into allegations that he had assaulted a Department of Corrections employee on the grounds of the New Hampshire State Prison by pushing and punching that employee.

4. On April 2 and April 30, Mr. Jordan was notified in writing that his suspension had been extended for additional periods of 30 days. No explanation was given for the extensions of the suspension, only that the nature of the allegations necessitated his removal from the workplace.
5. Both investigations are reportedly being conducted by the Major Crimes Unit of the Division of State Police.
6. The State did not attempt to reassign or demote either employee into positions elsewhere within the agency.
7. No formal charges had been brought against either employee when the hearing was conducted on May 26, 2010.
8. As a result of their suspensions without pay, neither employee has received compensation, and both employees have been subject to termination of health insurance coverage for themselves and their families.

In accordance with the provisions of Per 1001.02 Suspension Without Pay for Purposes of Investigation.

(a) An appointing authority may, with the approval of the director, suspend an employee without pay for a period of up to 30 calendar days pending the outcome of either criminal charges or an investigation of alleged criminal wrongdoing when:

- (1) The nature of the charges brought or the allegations made conflict with the duties and responsibilities of the employee's position; and
- (2) The charges or allegations warrant the removal of the employee from the worksite.

(b) The appointing authority may request the director's approval to extend the suspension without pay for one or more additional periods not exceeding 30 days each.

(c) The director shall grant an extension requested under (b) above if, at the end of a period of suspension, the appointing authority demonstrates that:

- (1) The conditions set forth in (a) above continue to exist; and
- (2) The investigation has not been completed or the charges are still pending.

(d) If, at the conclusion of the investigation or criminal proceedings, the appointing authority determines that no disciplinary action is warranted, the employee shall be returned to paid status and shall be entitled to any loss of compensation, less the amount of any wages the employee earned during the period of suspension.

Decision and Order

Clearly allegations of assault should never be taken lightly, and circumstances at the time that these allegations first came to light might appear to have warranted removal of these appellants from their positions until an investigation could be undertaken. However, after the first 30 day period that the Personnel Rules allow for an unpaid investigative suspension, knowing that the State Police had not yet concluded their investigation, the Department of Corrections moved to extend the suspension for an additional 30 days. By the time the Department of Corrections sought approval for yet another 30 suspension, the agency decision had deprived these employees of their income and their ability to provide benefits for their dependents and was tantamount to a termination without the benefit of due process. The State failed to offer any reasonable explanation why some other employment could not have been secured for these employees somewhere within the Department of Corrections, even if it meant a temporary demotion to a non-uniformed position and transfer to another facility.

The fact that these Appellants could be entitled to compensation and retroactive restoration of their medical benefits at some future date is not persuasive, and the decision to leave these employees indefinitely suspended without pay because the State Police Major Crimes Unit was unable, for whatever reason, to complete the investigation is simply unjust. Neither of these Appellants has been charged with a crime, and yet they and their families have been subjected to substantial, potentially crippling economic penalties. Individuals actually charged with violent crimes and arraigned in criminal court at least have the opportunity to post bail and return to their lives and their jobs while awaiting trial. Surely these Appellants should be given similar consideration.

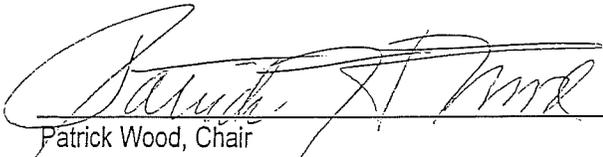
Allowing the State to order indefinite suspensions without pay constitutes termination of employment sufficient to cause these employees to lose their health care benefits. This is wrong. The Personnel Rules require the State to take disciplinary action within a reasonable time in order to provide an employee with the procedural protections set forth in the statutes and rules. The position of the State in these cases has deprived the Appellants of those procedural protections.

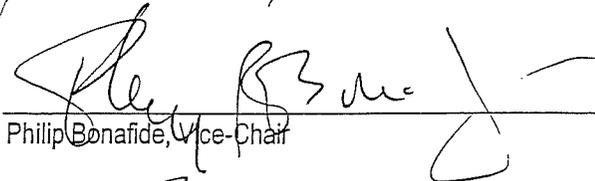
In the case of Appellant Bettez, his suspension without pay shall be terminated as of 45 days from the date of his original suspension, January 6, 2010. If the State wants to maintain the suspension beyond that date, it shall do so only with pay and benefits.

In the case of Appellant Jordan, his suspension without pay shall be terminated as of 45 days from the date of his original suspension, March 11, 2010. If the State wants to maintain the suspension beyond that date, it shall do so only with pay and benefits.

The Department of Corrections shall immediately restore the Appellants' benefits. In addition, the agency shall either return these employee to their former positions, secure alternative employment for them somewhere within the Department of Corrections, or convert their suspensions without pay to suspensions with pay until such time that the investigation is completed. At the conclusion of the investigation, if the Appellants are formally charged and arraigned, the Department may request modification of this order. In the alternative, if the Department believes that it has sufficient information to take disciplinary action, the Appellants shall be entitled to all the due process rights outlined in the Rules of the Division of Personnel.

The New Hampshire Personnel Appeals Board

  
Patrick Wood, Chair

  
Philip Bonafide, Vice-Chair

  
Robert Johnson, Commissioner

  
Joseph Casey, Commissioner

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