

State of New Hampshire



PERSONNEL APPEALS BOARD

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Appeal of Douglas Gralenski

Docket #2011-D-014

New Hampshire Fish and Game Department

June 28, 2012

The New Hampshire Personnel Appeals Board (Wood, Johnson and Bonafide) met in public session on Wednesday, February 22, 2012, 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 Douglas Gralenski, an employee of the New Hampshire Fish and Game Department. The Appellant, who was represented at the hearing by Attorney Kevin Buck, was appealing his May 11, 2011, five-day disciplinary suspension without pay from his position as a Conservation Officer Lieutenant, for allegedly violating an agency policy, failing to meet work standards and refusing to follow the legitimate directives of a supervisor as outlined in NH Division of Personnel Rules Per 1002.06 (a)(1),(2) and (3). Senior Assistant Attorney General K. Allen Brooks appeared on behalf of the State.

The record of the hearing in this matter consists of pleadings submitted by the parties prior to the appeal, notices and orders issued by the Board, the digital audio recording of the hearing on the merits of the appeal, and documents admitted into evidence, without objection, as follows:

State's Exhibits

1. Letter from N.H. Fish and Game Dept. Director Glenn Normandeau to Lt. Douglas Gralenski dated May 11, 2011, "RE: Notice of Disciplinary Suspension Without Pay"
2. Letter from N.H. Fish and Game Dept. Director Glenn Normandeau to Lt. Douglas Gralenski dated April 28, 2011, "RE: Notice of Disciplinary Suspension Without Pay"
3. Email entitled "RE: Revised memo from FG10" from "Garabedian, Martin" to "Gralenski, Douglas" dated January 12, 2011, 11:38 a.m. plus attachment

4. Email entitled "Dist 1 opposition to WMU A proposal" from "Gralenski, Douglas" to "Garabedian, Martin" dated January 12, 2011, 11:43 a.m., plus attachment
5. Email entitled "WMU A Proposal" from "Gralenski, Douglas" to "Garabedian – Colonel; Jordan – Major" dated January 12, 2011, 2:42 p.m. plus attachment
6. Email entitled "BASM Survey Critique.doc; Wildlife Division and BASM.doc" from "Gralenski, Douglas" to "Garabedian – Colonel; Jordan – Major" dated January 26, 2011, 10:49 a.m. plus attachment
7. Cover memo and attached petition made available to the Coos County Chiefs Meeting held on March 25, 2011, at the Groveton Town Hall
8. Rulemaking notice from Rule Number Fis 301.01 and Fis 301.03
9. New Hampshire Fish and Game Department Law Enforcement Division Search and Rescue Mission Report for incident involving Julie Horgan on March 26, 2011
10. Email entitled "RE: Evaluations" from "Gralenski, Douglas" to "Garabedian, Martin" dated March 20, 2011, 12:03 p.m. plus associated email string and attachments
11. Email entitled "FW: Fisheries Rules Proposals" from Garabedian, Martin" to "Gralenski, Douglas" dated March 24, 2011, 4:42 p.m. and associated email string
12. "Garrity Warning" issued to Lt. Douglas Gralenski
13. Memorandum written by Lt. Douglas Gralenski entitled "March 26, 2011 Harvest Fellowship Game Dinner"
14. Memorandum written by Lt. Douglas Gralenski entitled "Lt. Douglas Gralenski: Chronology of events involving the 3 Point Antler Controversy"

The following persons gave sworn testimony:

Lieutenant Douglas Gralenski

Colonel Martin Garabedian

The Appellant asked the Board to hold open the record of the hearing in order to allow the parties to file briefs on the issue of public employee free speech rights as defined by RSA 94-E:4. The Board agreed to allow the Appellant two weeks in which to file his brief, and two weeks for the State to file its response. Both the Appellant's "Post-Hearing Brief" and the State's "Post-Hearing Memorandum of Law" were received by the Board on March 13, 2012.

In this case, there are few material facts in dispute. Having carefully reviewed the evidence, and having considered the parties' arguments, the Board made the following Findings of Fact and Rulings of Law:

1. Lieutenant Gralenski has worked for the Law Enforcement Division of the New Hampshire Fish and Game Department for nearly 26 years. According to the class specification posted on the State's web site, a Conservation Officer Lieutenant is required, "To perform administrative, supervisory and field work in an assigned geographic area with responsibility for supervising the development and maintenance of good wildlife conditions through the enforcement, investigation and review of fish and game laws and regulations, and contribute to the on-going mission of the agency." The Appellant has spent the last 22 years working in Coos County, and has served as the Lieutenant assigned to District 1 for the past 8 years.
2. On or about January 8, 2011, the Appellant received an email from Steve Weber, Chief of the Wildlife Division, about the results of a survey that the Wildlife Division had conducted the previous fall concerning deer hunting in District 1's Wildlife Management Unit A (WMU-A), and the agency's creation of a proposal to impose a 3-point antler restriction for hunting white tail deer in that area. The Appellant testified that he and all the officers reporting to him were opposed to the restriction.
3. Over the course of the next few months, the Appellant engaged in a number of activities to defeat the proposal before it could be adopted through the legislative rulemaking process. Those steps included, but were not limited to, writing and disseminating internal agency correspondence opposing the restriction; seeking the advice of the Coos Country Attorney with respect to the Fish and Game Commission's legal authority to expend funds in support of a 3-point antler restriction and to adopt the proposed restrictions in a single wildlife management unit; creating and providing a formal presentation at a district meeting for officers and command staff in District 1 regarding the 3-point antler restriction; engaging in informal discussions with licensing agents and sportsmen in the North Country to raise awareness of the proposal; assisting in creating and distributing newsletters, fact sheets and a petition outlining reasons for opposing the restriction; and speaking at a meeting of the Chiefs of Police in Berlin, where the Appellant presented the petition opposing the restriction.
4. On or about March 24, 2011, after learning of the petition being circulated, Colonel Garabedian ordered the Appellant not to circulate the petition or speak to the public to oppose the proposal when the Appellant was in uniform. The following day, March, 25,

2011, the Appellant attended the Coos County Chief's meeting. The Appellant, who was in uniform at the time, addressed the group and informed them that there was a petition available for them to sign stating their opposition to the restriction. The Appellant was fully cognizant of the Colonel's order, but felt that he could ignore that directive because the meeting was not open to "the public." The Appellant also dropped off copies of the petition at local businesses. The Appellant admitted that delivering the petitions while he was in uniform represented a "technical violation" of the Colonel's order; however, he stated that he made, "every effort to shield it from shoppers or employees in the store."

5. On March 24, 2011, Colonel Garabedian forwarded 2011 Fish Rule Proposals to the lieutenants in each district, asking them to submit their comments no later than April 6, 2011. The Appellant's response was, by his own admission, five or six days late.
6. On March 26, 2011, at approximately 4:00 p.m., while the Appellant was still on duty, the Appellant received notice from State Police Troop F that a hiker who had lost the trail near the summit on the Jackson Trail in Crawford Notch was in need of assistance. Lieutenants are responsible for organizing rescue efforts in their own districts and establishing a command post under those circumstances. The Appellant had already made plans to attend a Harvest Fellowship Dinner at a church in Berlin, New Hampshire that evening and had purchased tickets for the dinner. The Appellant, who described himself as being under significant stress from the controversy over the 3-point antler restriction, was looking forward to hearing the guest speaker and talking with his friend Dave Cantor, the pastor at the church who also served as the legislative chairman for the Androscoggin Fish and Game Club. Weather conditions on the mountain were severe that afternoon. The Appellant knew that the hiker was in touch by cell phone with staff from the Highland Center and he knew that they were trying to guide her back to the trail. The Appellant contacted Sgt. Abrams from a nearby district and Conservation Officer Kneeland, asking them to coordinate Fish and Game's response. Sgt. Abrams requested assistance from his own lieutenant, Lt. Bogardus, who was off duty at the time.
7. A search for the missing hiker was undertaken and continued until midnight, at which time the rescue teams were directed to return to base. With winds of 80 mph and the temperature at zero degrees with wind chills of roughly 40 degrees below zero, rescuers were forced to suspend their search until the following morning. The hiker was told to "hunker down" and plan for the search to continue the following morning. The Appellant arrived at the Highland Center at 5:40 a.m. that morning to coordinate the search effort with Lt. Bogardus.

8. Although the Colonel normally would be the person assigned to decide whether or not an officer on days off would be recalled, Colonel Garabedian was unaware of the search in progress until he was contacted by Lt. Bogardus about the possibility of getting a National Guard helicopter to assist in the search. Until receiving that call, Colonel Garabedian was unaware that a hiker was lost and that a rescue mission was under way. The hiker was spotted at 9:45 a.m. that morning by the National Guard helicopter crew and led safely down the trail by two of the searchers. The hiker and all team members returned safely at 12:25 p.m.
9. On March 17, 2011, Colonel Garabedian had emailed the Appellant to ask why District One officer evaluations that had been due at the end of February, had not been submitted. The Appellant responded by email dated March 20, 2011, saying that he had, "A lot of different 'irons' in the fire." On April 1, 2011, Colonel Garabedian again sent a request for the overdue evaluations to be forwarded to him. The Appellant replied, saying that they would be provided no later than April 7, 2011.
10. The Appellant made it known that he planned to attend the April 8, 2011, public hearing in Pittsburg, New Hampshire, regarding the proposed 3-point antler restriction. Although the Appellant was planning to attend the hearing in plain clothes, Colonel Garabedian asked the Appellant to appear in uniform instead and be available to quell any sort of disturbance if the participants became too "rambunctious." Prior to the meeting, Conservation Major Kevin Jordan informed the Appellant and another officer that if there were any questions from the public at the hearing, Major Jordan would be the one to answer them. The Appellant did not speak at that meeting.
11. The Appellant was called to a pre-disciplinary meeting on April 14, 2011, to respond to questions outlined in State's Exhibit 12: "3-Point Antler Restriction Proposal written documents, petitions, presentations, Commissioners packet of material/documents. Failure to meet deadlines related to District One Conservation Officer Evaluations and Fisheries Management Proposals. Failure to respond to search and rescue call for service on March 26, 2011."

For each of the allegations of misconduct or failure to meet work standards, the Board found as follows:

3-Point Antler Restriction proposal written documents, petitions, presentations, Commissioners packet of material/documents

The Appellant's right as an individual to express his opposition to the proposed 3-point antler restriction was protected by RSA 98-E:1 which states, "Notwithstanding any other rule or order to the contrary, a person employed as a public employee in any capacity shall have a full right to publicly discuss and give opinions as an individual on all matters concerning any government entity and its policies. It is the intention of this chapter to balance the rights of expression of the employee with the need of the employer to protect legitimate confidential records, communications, and proceedings." Internal agency correspondence, including memoranda composed by the Appellant expressing opposition to the 3-point antler restriction, would not be deemed confidential records or communications as defined by RSA 98-E:3, which states, "...confidential records and communications shall include communication or records relating to investigations for law enforcement purposes and collective bargaining proceedings."

Ordering the Appellant to appear in uniform at a public hearing, knowing that the Appellant intended to participate in that hearing in plain clothes while he was off duty, would interfere with the Appellant's right to publicly discuss and give his opinion as an individual in a matter concerning the Fish and Game Commission and its policies. Absent evidence that there was a *bona fide* reason for the Appellant to attend the hearing in his official capacity as an employee of the Department of Fish and Game, the Board found that the Colonel's order for the Appellant to attend the public hearing in uniform was intended to limit the Appellant's ability to express his opinion freely without violating the Colonel's direct order.

On the other hand, the Board found that the protection afforded by RSA 98-E:1 would not extend to the Appellant's unauthorized use of paid work time for purposes of publicly opposing the Fish and Game Commission's activities or policies. The Appellant was free to mount a public campaign against the 3-point antler restriction, but must have done so as an individual, on his own time, in order to enjoy the protections of RSA 98-E. The Appellant was under direct orders from Colonel Garabedian not to lobby against the proposal or to circulate the petition opposing the restrictions while the Appellant was in uniform. The Appellant admitted that he understood the order and knew that he was "technically" in violation of that order when he delivered the petition to one or more local businesses, and when he spoke to the Coos County Chiefs. The Board found that the Appellant's violation of a direct order constitutes an offense as

described by Per 1002.06 (a)(3)a, "Refusal to follow the legitimate directives of a supervisor," an offense for which an employee may be suspended without pay.

Failure to meet deadlines related to District One Conservation Officer Evaluations and Fisheries Management Proposals

The record reflects that the Appellant spent significant amounts of time writing memos and proposals, developing a PowerPoint presentation with officers from his district and, at least once, consulting with the Coos County Attorney regarding the authority of the Fish and Game Commission to expend funds to conduct surveys and to propose a 3-point antler restriction in WMU-A. The Appellant also admits that he spent some amount of paid work time delivering petitions to one or more local businesses. The Appellant chose to make opposing the 3-point antler restriction a priority at work, and that commitment certainly appears to have affected the Appellant's ability to fulfill the remainder of his duties in a timely fashion.

The Appellant testified that up until he received his notice of suspension, submitting evaluations in a timely manner, "...was never a priority of the agency. I didn't see that missing a deadline for an evaluation was a major issue," even though there were two reminders from Colonel Garabedian to complete the evaluations and submit them to headquarters. When asked why he failed to respond to the Fisheries proposal on time, the Appellant testified that, "There was the rescue, and I had to go to Maine for the funeral of a Maine Warden." The Appellant described himself as "pretty organized," stating, "As a general rule I meet my deadlines." The Appellant characterized the Department of Fish and Game's inclusion of these allegations in the notice of suspension as makeweight, arguing that late-filed performance evaluations and untimely responses to proposals that did not directly affect his district would not, under other circumstances, have resulted in discipline.

The Board agrees that these failures to meet work standards were not, in and of themselves, a sufficient reason for a disciplinary suspension. However, the fact remains that the Appellant did miss deadlines, and missing deadlines does constitute a failure to meet work standards as described by Per 1002.04 (b)(1) and represents an offense for which an employee may be issued a written warning or, when, "...under the particular circumstances, the appointing authority considers the conduct or offense to warrant the imposition of discipline more severe

than a written warning," an appointing authority may elect to suspend an employee under the provisions of Per 1002.06 (a)(1).

Failure to respond to search and rescue call for service on March 26, 2011

This, in the Board's opinion, is the most egregious of the alleged offenses, and the Board found that this one offense was sufficient, in and of itself, to warrant a five-day disciplinary suspension without pay. The record reflects that the Appellant was on still duty on March 26, 2011, when he received the call for assistance for a hiker lost on Mount Jackson. The Appellant was fully aware of the severe weather conditions on the mountain at the time of the call, and he knew that the hiker was alone and off the trail. The fact that the hiker was in cell phone contact with staff from the Highland Center did not diminish the level of risk. In his own "Investigation/Incident Report," the Appellant wrote, "Recognizing the environmental threats, I contacted the Advanced Search and Rescue Team Leaders, Sgt. Abrams and C.O. Kneeland, advising them of the situation and asking them to respond... Due to logistical issues, I asked that Sgt. Abrams and Lt. Bogardus assume control of the initial rescue effort until I could arrive."

The "logistical issues" that prevented the Appellant from taking control of the rescue effort when the call for assistance was received included dinner at a church in Berlin, an opportunity to hear a guest speaker, and a chance to consult with his friend the pastor who also chaired the legislative committee of the Androscoggin Fish and Game Club.. The Appellant testified that he was, "...stressed from several directions – poor policy, and the feeling about the way my opinions were being quashed. It created a lot of personal stress." The Appellant said that he was, "...leaning on Dave more and more from a religious standpoint." The Appellant testified that officers need "some semblance of normal life," so after he contacted other officers to manage the rescue effort, the Appellant went to the Harvest Fellowship Dinner and remained there until the guest speaker's presentation was complete. He testified that he then returned to his house, got into uniform and went to the Highland Center, where he stayed until the rescue was completed successfully.

The Board understands that every employee needs what the Appellant described as "some semblance of a normal life." Presumably that was what Lt. Bogardus was doing on his scheduled day off when he was called in to manage a rescue that was actually the Appellant's responsibility. The evidence reflects that the rescue effort was fairly extensive, involving twenty

volunteers, a National Guard helicopter and crew, and fourteen Fish and Game Officers who clocked 56.5 work hours and 107.5 overtime hours. Colonel Garabedian testified that he was not even aware of the rescue efforts, or that Lt. Bogardus had been called in from a scheduled day off, until Lt. Bogardus called and asked if it would be possible to request assistance from the National Guard in the search for the missing hiker.

The Board found that by failing to respond while on duty to the search and rescue call, the Appellant committed an offense sufficiently egregious to warrant a five-day suspension without pay under the provisions of Per 1002.06 (a)(1) and (2) for, "(1) Failure to meet work standards or other conduct for which a written warning may be issued pursuant to Per 1002.04, when, under the particular circumstances, the appointing authority considers the conduct or offense to warrant the imposition of discipline more severe than a written warning; and (2) Violation of administrative rules or agency policies."

Decision and Order

For all the reasons set forth above, the Board voted unanimously to DENY the Appeal of Douglas Gralenski and to uphold the agency's decision to suspend him without pay for five working days.

THE NEW HAMPSHIRE PERSONNEL APPEALS BOARD



Patrick Wood, Chair



Philip Bonafide, Vice Chair



Robert Johnson, Commissioner

cc: Karen Hutchins, Director of Personnel
Attorney Kevin Buck, Nolan Perroni and Harrington
K. Allen Brooks, Senior Assistant Attorney General