State of New Hampshire

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

Appeal of Derek Holston – Docket #2010-D-021

Department of Safety, Division of State Police

July 13, 2011

A quorum of the New Hampshire Personnel Appeals Board (Wood and Bonafide) met in public session on Wednesday, March 16, 2011, under the authority of RSA 21-I:58 and Chapters Per-A 100-200 of the NH Code of Administrative Rules (Rules of the Personnel Appeals Board) to hear the appeal of Derek Holston, an employee of the Department of Safety, Division of State Police. Trooper Holston, who was represented at the hearing by Attorney John Krupski, was appealing an eleven day disciplinary suspension without pay for allegedly lying under oath and violating the Division of State Police Rules of Professional Conduct. Attorney Marta Modigliani appeared on behalf of the Division of State Police.

The record of the hearing in this matter consists of pleadings submitted by the parties prior to the hearing on the merits of the appeal, notices and orders issued by the Board, the audiotape of the hearing on the merits of the appeal, and documents entered into evidence as follows:

State's Exhibits

1. September 9, 2008, Investigative Report submitted by Lieutenant David G. Parenteau to Colonel Frederick Booth regarding Investigation PSU-08-025, Trooper Derek Holston
2. Department of Safety Division of State Police, Professional Standards of Conduct
3. November 20, 2008 email message, with attachments, from Arthur Andreasen to David Parenteau regarding GroupWise message property testing
4. April 16, 2010, Memo from Lieutenant Scott Sweet to Colonel Robert Quinn regarding Lt. Sweet's interview with State Police Prosecutor Diane Dubay
5. Class Specification for State Police Trooper I
6. Supplemental Job Description for Trooper Derek Holston

TDD Access: Relay NH 1-800-735-2964

7. PART Per 1002, NH Code of Administrative Rules, re: Discipline
8. May 18, 2010, memo from Colonel Robert Quinn to Trooper Derek Holston re: Notice of Intent to Suspend
9. June 3, 2010, memo from Colonel Robert Quinn to Trooper Derek Holston re: Disciplinary Action - Suspension without Pay
10. February 13, 2004 Memo to All County Attorneys and All Law Enforcement Agencies from former Attorney General Peter W. Heed, re: Identification and Disclosure of *Laurie* Materials[1]

Appellant's Exhibits

1. Annual Performance Evaluation for Derek E. Holston dated March 28, 2010
2. Annual Performance Evaluation for Derek E. Holston dated April 14, 2009
3. Department of Safety/Division of State Police Professional Standards of Conduct dated June 1, 2002
4. Department of Safety/Division of State Police Professional Standards of Conduct dated April 1, 1996

At the Appellant's request, the witnesses were sequestered. The following persons gave sworn testimony:

Captain David Parenteau
Arthur Andreasen
Attorney Diane Dubay
Colonel Robert Quinn
Trooper Derek Holston

At the outset of the hearing, Attorney Krupski made a motion for summary disposition, arguing that even if the Board were to assume as true all of the facts as alleged in State's Exhibit 9, the allegations concern an incident that occurred on March 20, 2008. Attorney Krupski argued that the Division of State Police initiated an investigation into the alleged misconduct and that under

[1] Attorney Krupski objected to introduction of the Heed memo concerning *Laurie Issues*,, arguing that it was unduly prejudicial. After hearing argument on the objection, the Board accepted the exhibit subject to reviewing it for relevancy, its probative value, and the extent to which it could impact the ultimate decision in this case.

the Division's own rules, an investigation must have been completed within twenty-one days. He argued that the letter of suspension issued to Trooper Holston was dated June 3, 2010, more than two years after the investigation was initiated. He argued that there was never a request for, nor notice of, an extension to the investigation. As a result, he argued, the Appellant was entitled to have the discipline overturned, both as a matter of procedure and as an issue of fundamental fairness.

Attorney Modigliani stated that the Department of Safety was unaware of the Appellant's intention to make a motion for summary disposition and asked that the State be allowed an opportunity to respond. She argued that it was well known that investigations are rarely completed within twenty-one days, although the agency attempts to do so. She argued that there is nothing in either the Rules of the Division of Personnel or the State Police Professional Standards of Conduct that would prohibit the agency from taking disciplinary action if an investigation took longer than the twenty-one days allotted in the Professional Standards of Conduct. She argued that the length of time it took in this instance for the Division of State Police to complete its investigation was considered a mitigating factor, and weighed heavily in determining the level of discipline to take, resulting in the agency's decision to suspend the Appellant without pay rather than terminating his employment.

The Board agreed to accept written arguments from the parties addressing the question of whether or not it was reasonable for an agency to take disciplinary action two years after the agency determined that the employee had engaged in conduct that violated the agency's policies and procedures. The parties indicated that the issue could be addressed in briefs and closing arguments, and the Board agreed to hold the record open for that purpose until April 15, 2011. On April 14, 2011, the Board received the Appellant's Assented-to Motion to Extend Deadline for the Filing of Briefs. The Board granted that Motion, holding open the record until April 22, 2011. Both parties submitted briefs by the April 22, 2011, deadline.

The undisputed facts regarding the investigation and the agency's delay in taking disciplinary action are as follows:

1. On or about April 16, 2008, State Police Major Hambrook assigned Lieutenant (now Captain) David Parenteau to investigate allegations that Trooper Derek Holston was

untruthful in his testimony at a March 20, 2008, hearing relative to an Administrative License Suspension hearing that had been scheduled for February 4, 2008. Specifically, Captain Parenteau was directed to investigate "whether or not Trooper Holston was untruthful by testifying under oath on March 20th, at a Show Cause Hearing, that he never received notification of a February 4th hearing, when in fact it appears he did receive notification but had deleted the notification from his email." (State's Exhibit 1)

2. Captain Parenteau conducted an investigation. By memo dated September 9, 2008, Captain Parenteau forwarded his report to State Police Colonel Frederick Booth. Captain Parenteau recommended that the agency sustain a finding that Trooper Holston violated the Professional Standards of Conduct, Chapter 1, Rules and Regulations, Section 1.4.0 Obligations, Sub-Section 1.4.8 Integrity. Captain Parenteau concluded his report, stating that, "Trooper Holston did knowingly give false testimony at the March 20th hearing." (State's Exhibit 1, page 8)
3. On April 1, 2010, Captain Robert L. Quinn was promoted to the rank of Colonel, replacing Colonel Frederick Booth as Director of the Division of State Police. When he assumed office, the Holston investigative file was still open and awaiting disposition.
4. At the Division's request, Lieutenant Scott Sweet from the Professional Standards Unit conducted additional interviews relative to the March 20, 2008, Show Cause Hearing at which the Appellant allegedly gave false testimony. On April 16, 2010, Lieutenant Scott Sweet provided Colonel Quinn an additional report detailing Lieutenant Sweet's interviews with three witnesses: Diane Dubay (interviewed on April 9, 2010), Jeffrey Haus (interviewed on April 9, 2010) and Curtis Duclos (interviewed on April 15, 2010).
5. On May 18, 2010, after reviewing all the documents included in the investigative file, Colonel Quinn issued Trooper Holston a written "notice of intent to suspend" and scheduled a June 2, 2010, pre-disciplinary meeting with Trooper Holston and his union representative to allow Trooper Holston an opportunity to review and refute the evidence supporting the Colonel's decision to suspend the Appellant without pay. [State's Exhibit 8]
6. After meeting with Trooper Holston and reviewing the investigative record, Colonel Quinn concluded that the Appellant had violated the Division's Professional Standards of Conduct. Colonel Quinn notified Trooper Holston, by letter dated June 3, 2010, that he would be suspended without pay for a period of eleven days. In his notice of suspension, Colonel

Quinn wrote, "Given the fact that you now have a potential *Laurie* issue[2], I would have opted to terminate you for this offense. However, I recognize that this disciplinary action comes more than 12 months after the completion of the internal investigation, and further, that the delay was through no fault of your own. Therefore, I am opting to suspend you without pay in lieu of termination." [State's Exhibit 9]

Decision on Appellant's Motion for Summary Disposition

Having carefully considered the parties' arguments and written briefs in light of the undisputed facts set forth above, the Board found that between April, 2008, when the Division of State Police began to investigate allegations that the Appellant had lied under oath, and June, 2010, when discipline was imposed, the Appellant suffered no adverse personnel action. Before he was suspended without pay, he was offered an opportunity to review and refute the evidence supporting the decision to suspend him. Neither the Rules of the Division of Personnel, the State Police Professional Standards of Conduct, nor the Collective Bargaining Agreement prohibit the imposition of discipline if an investigation is not completed within twenty-one days, or if there has been a substantial delay between completion of the investigation and the ultimate decision to impose discipline. Further, as Attorney Modigliani argued in her brief filed on behalf of the State, "...even if the Board were to find that under the facts of the case the delay was 'unreasonable', the remedy cannot be to vacate the discipline and prevent the State from responding to employee misconduct such as the like in this case," as the alleged misconduct involved "...public safety officials who have been found to have breached their fiduciary duties of whom they are entrusted to protect." For those reasons, the Board voted unanimously to DENY the Appellant's Motion for Summary Disposition and to decide the appeal on its merits.

Additional Findings of Fact and Rulings of Law

In consideration of the evidence and argument offered by the parties, the Board made these additional findings of fact and rulings of law as they pertain to the merits of the instant appeal:

---

[2] As a result of a New Hampshire Supreme Court ruling in the matter of *State v. Laurie*, 139 N.H. 325 (1995), prosecutors are obliged to disclose to a criminal defendant evidence favorable to that defendant, including "evidence that is exculpatory and information that could be used to impeach the testimony of a prosecution witness." (Heed memo, State's Exhibit 10, page 120)

7. NH State Police Troopers receive scheduling notices for Administrative License Suspension hearings as attachments to emails sent to the Troopers' email accounts. On January 16, 2008, the Bureau of Hearings sent the Appellant an email, with an attached notice of hearing, directing the Appellant to appear at an Administrative License Suspension (ALS) hearing on February 4, 2008.
8. The Appellant received and opened the January 16, 2008, email on January 17, 2008. Although the email indicated that there was an attached notice of hearing, the Appellant did not, or could not, open the attachment, and he made no further attempt to do so until February 4, 2008, after receiving notice via email from Hearings Examiner Woodman that the ALS case had been dismissed because of the State's failure to appear as scheduled. The Appellant was given ten days in which to request that the case be re-opened by showing good cause for his failure to appear.
9. On February 4, 2008, the Appellant sent an email reply to Hearings Examiner Woodman stating, "Please be advised that I never received a hearing notice for this case. Please reschedule the hearing." Within one minute of sending that email to Hearings Examiner Woodman, the Appellant located the January 16, 2008, email in an archive folder and he deleted it. The Appellant was notified by email that a new hearing had been scheduled for March 3, 2008.
10. The Appellant arrived late for the March 3, 2008, hearing. Although the Appellant called to inform the Hearings Examiner that he would be late, the respondent and his attorney had already been dismissed when the Appellant arrived. However, the Hearings Examiner agreed to reschedule the hearing to March 20, 2008, at which time the Appellant would be allowed to explain why he had failed to appear for the February 4, 2008, hearing as scheduled, and to show good cause why the case should not be dismissed.
11. At the March 20, 2008, hearing conducted by Hearings Examiner Jeffrey Haus, the Appellant indicated that he missed the February 4, 2008, hearing because he never received notice of the hearing. State's Exhibit 1, page 3, includes a partial transcript of the March 20, 2008, hearing, during which the Appellant testified that he "...was never notified for the first hearing, never received a notice. Our notices go out through the e-mail system and is not problem proof. We do have our issues with the e-mail. The first e-mail I got on this was the e-mail that there was a hearing and I wasn't there, so I was notified that I had ten days to respond to that and my response was I was never notified through the e-mail

system of this hearing... of the first hearing, this being the reason I was not here. I sent an e-mail back immediately saying that, again, I was never notified and to reopen the case."

12. The February 4, 2008, notice from Hearings Examiner Woodman was not the first email that the Appellant received about the ALS hearing, as evidenced by the "properties" page that Hearings Examiner Jeffrey Haus produced at the March 20, 2008, Show Cause Hearing. The first email was dated January 16, 2008, and was opened by the Appellant on January 17, 2008.
13. At the March 20, 2008, Show Cause Hearing, the Appellant did not testify that he was unable to open the attachment to the January 16, 2008, email. Instead he testified that the very first email he received concerning the ALS hearing arrived on February 4, 2008, when Hearings Examiner Woodman emailed the Appellant to inform him that the case would be dismissed without a showing of good cause for the State's failure to appear.
14. The Board finds that the Appellant did receive, and did open the January 16, 2008, email on January 17, 2008. The Appellant knew on February 4, 2008, when he deleted the first email from the Hearings Bureau, that an ALS hearing notice had been delivered to him via email on January 16, 2008. When the Appellant testified on March 20, 2008, that he had not received any email regarding the ALS hearing until February 4, 2008, he knew that an earlier email existed, that it was delivered on January 16, 2008, that someone had opened the email, and that he himself had deleted that email on February 4, 2008.
15. Section 1.4.8 of the NH Division of State Police Professional Standards of Conduct states, in part, "No Division Member shall, under any circumstances, make any false official statement or intentional misrepresentation of facts." The Board finds that the Appellant's assertion, under oath, that he never received email notifying him of the February 4, 2008, ALS hearing constitutes an intentional misrepresentation of facts, and therefore violates the Division of State Police Professional Standards of Conduct.
16. In order to meet his burden in this case, under the standards set forth in Per-A 207.12 (b) of the NH Code of Administrative Rules, the Appellant would need to demonstrate 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 Board finds that the Appellant has failed in that regard.

17. There is no law, rule or policy prohibiting the imposition of substantial discipline when a law enforcement officer is found to have made an intentional misrepresentation of facts when testifying under oath. There also is no personnel rule, law or policy that would prohibit the imposition of such discipline if there has been substantial delay between the conclusion of an investigation and the actual date of disciplinary action. Under the facts in evidence, and in light of the Appellant's responsibilities as a law enforcement officer, the Appellant's false official statement represents an offense warranting substantial discipline.
18. The Board found that despite the Appellant's otherwise satisfactory performance as a Trooper, the agency would have been within its authority to dismiss the Appellant from his employment based upon the agency's conclusion that the Appellant provided intentionally incomplete or misleading testimony. As such, the Board found that the decision to suspend the Appellant without pay for a period of eleven days in lieu of termination was just, in light of the facts in evidence.

For all the reasons set forth above, the Board voted unanimously to DENY the Appeal of Trooper Derek Holston, and to uphold the Division of State Police decision to suspend him without pay for a period of eleven days.

THE PERSONNEL APPEALS BOARD

/s/ Patrick H. Wood

Patrick Wood, Chair

/s/ Philip P. Bonafide

Philip Bonafide, Commissioner

cc: Karen Hutchins, Director of Personnel, 25 Capitol St., Concord, NH 03301
Attorney Marta Modigliani, Department of Safety, 33 Hazen Dr., Concord, NH 03305
Attorney John Krupski, Molan Milner & Krupski, PLLC, 100 Hall St., Suite 101, Concord, NH 03301
Elizabeth LaBonte, HR Administrator, Dept. of Safety, 33 Hazen Dr., Concord, NH 03305

State of New Hampshire

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

Appeal of Derek Holston – Docket #2010-D-021

Department of Safety, Division of State Police

Personnel Appeals Board Decision on Appellant's Motion for Rehearing and Appellee's Objection to Appellant's Motion for Rehearing

October 4, 2011

By letter dated August 12, 2011, Attorney John S. Krupski filed a *Motion for Rehearing* in reference to the Board's July 13, 2011, decision in the above-captioned appeal. On August 17, 2011, the Board received Attorney Marta Modigliani's *Assented to Motion to Extend Deadline for Filing Appellee's Objection to Appellant's Motion for Rehearing*. The Board granted the request to extend the deadline for filing, and received *Appellee's Objection* on September 16, 2011.

In accordance with the provisions of Per-A 208.03 (c) of the NH Code of Administrative Rules, a motion for rehearing must "set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable. Per-A 208.03 (f) requires such motion to be granted if the motion demonstrates that the Board's decision was unlawful or unreasonable.

The Appellant summarized his arguments in support of his Motion for Rehearing as follows:

> "The Board's decision is unlawful and unreasonable as the decision ignores that the NH Department of Safety violated its own unilaterally promulgated rules; that the factual findings are contrary to the evidence; and that the Board fails to address the issue of laches." (Motion for Rehearing, page 1)

Having carefully considered the Appellant's Motion and the Appellee's Objection in conjunction with the Board's decision denying the appeal, the Board found that the Appellant failed to demonstrate that the decision was unlawful or unreasonable.

TDD Access: Relay NH 1-800-735-2964

The Appellant offered neither evidence nor argument to persuade the Board that the Division of State Police's Professional Standards of Conduct carry the weight of law, or that the Division's failure to complete an internal investigation within 21 days constituted a violation of law that would require the Board to overturn the Appellant's suspension.

On its web page (www.gencourt.state.nh.us/rules/default.htm), the Office of Legislative Services describes itself as, "...the New Hampshire state government office where all proposed and adopted administrative rules subject to RSA 541-A, the Administrative Procedure Act, must be filed by state executive branch agencies to make the adopted rules[1] effective and therefore have the force of law." (Emphasis added.) The Division of State Police's Professional Standards apply only to members of the Division of State Police, and do not meet the definition of a properly promulgated rule as defined by RSA 541-A. As such, they not have the force of law, nor would any violation of those standards require the Board to reinstate the Appellant under the provisions of RSA 21-I:58.

The Appellant offered neither evidence nor argument to support his assertion that the factual findings in the Board's decision are contrary to the evidence in this case involving his receipt of "email" versus his receipt of "notice" of a hearing. According to the evidence received by the Board, the Appellant testified at the March 20, 2008, show cause hearing that, "...The first e-mail I got on this was the e-mail that there was a hearing and I wasn't there, so I was notified that I had ten days to respond to that and my response was that I was never notified through the e-mail system of this hearing." When the Appellant made that statement, he knew full well that he had received an earlier email from the Hearings Bureau, and that a notice of hearing was

[1] XV. "Rule" means each regulation, standard, form as defined in paragraph VII-a, or other statement of general applicability adopted by an agency to (a) implement, interpret, or make specific a statute enforced or administered by such agency or (b) prescribe or interpret an agency policy, procedure or practice requirement binding on persons outside the agency, whether members of the general public or personnel in other agencies. The term does not include (a) internal memoranda which set policy applicable only to its own employees and which do not affect private rights or change the substance of rules binding upon the public, (b) informational pamphlets, letters, or other explanatory material which refer to a statute or rule without affecting its substance or interpretation, (c) personnel records relating to the hiring, dismissal, promotion, or compensation of any public employee, or the disciplining of such employee, or the investigating of any charges against such employee, or (d) declaratory rulings. The term "rule" shall include rules adopted by the director of personnel, department of administrative services, relative to the state employee personnel system. Notwithstanding the requirements of RSA 21-I:14, the term "rule" shall not include the manual described in RSA 21-I:14, I or the standards for the format, content, and style of agency annual and biennial reports described in RSA 21-I:14, IX, which together comprise the manual commonly known as the administrative services manual of procedures. The manual shall be subject to the approval of governor and council.

attached. The Appellant's assertion that he later "clarified" that statement during his investigatory interview with Captain Parenteau was not persuasive.

Finally, as noted in the State's Objection, the Board did address the issue of laches in its July 13, 2011 decision when it found that the Appellant suffered no adverse personnel action between April, 2008, when the Division of State Police initiated its investigation into the Appellant's conduct, and June, 2010, when discipline was imposed. The Board also found that the State's delay in completing the investigation and imposing discipline did not deprive the Appellant of his substantive or procedural rights. In fact, the Board found that Colonel O'Brien considered the delay a mitigating factor when determining the appropriate level of discipline for the seriousness of the offense, persuading him to suspend the Appellant without pay rather than terminating his employment.

For all the reasons set forth above, and for those outlined in the State's Objection, the Board voted unanimously to DENY the Appellant's Motion for Rehearing, and to affirm its decision denying his appeal.

THE PERSONNEL APPEALS BOARD

Patrick Wood, Chair

Philip Bonafide, Commissioner

cc: Karen Hutchins, Director of Personnel, 25 Capitol St., Concord, NH 03301
Attorney Marta Modigliani, Department of Safety, 33 Hazen Dr., Concord, NH 03305
Attorney John Krupski, Molan Milner & Krupski, PLLC, 100 Hall St., Suite 101, Concord, NH 03301
Elizabeth LaBonte, HR Administrator, Dept. of Safety, 33 Hazen Dr., Concord, NH 03305

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2011-0775, Appeal of Derek Holston, the court on December 21, 2011, issued the following order:

Appeal from administrative agency is declined. See Rule 10(1).

Under Supreme Court Rule 10, the supreme court has discretion to decline an appeal from an administrative agency. No appeal, however, is declined except by unanimous vote of the court with at least three justices participating.

This matter was considered by each justice whose name appears below. If any justice who reviewed this case believed the appeal should have been accepted, this case would have been accepted and scheduled for briefing.

Declined.

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

Eileen Fox,
Clerk

Distribution:
NH Personnel Appeals Board, 2010-D-021
Thomas J. Gleason, Esquire
Attorney General
File