

# State of New Hampshire



**PERSONNEL APPEALS BOARD**  
25 Capitol Street  
Concord, New Hampshire 03301  
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## *Appeal of Charles Murphy*

*Docket #2007-D-009*

*Department of Transportation*

*November 15, 2007*

The New Hampshire Personnel Appeals Board (Bonafide, Johnson and Casey) met in public session on Wednesday, September 12, 2007, under the authority of RSA 21-I:58 and Chapters Per-A 100-200 to hear the appeal of Charles Murphy, an employee of the Department of Transportation. Mr. Murphy, who was represented at the hearing by SEA Grievance Representative Nick McGinty, was appealing a second suspension without pay pending the outcome of a criminal investigation. Lynmarie Cusack, Assistant Attorney General, appeared on behalf of the DOT.

Ms. Cusack asked the Board to note that the personnel appeal in this instance is limited to the second suspension, as the first notice of suspension was not appealed in a timely manner. Mr. McGinty argued that the appeal naturally involves the original suspension, as the facts DOT relied upon in extending the suspension are the same as those underlying the original decision so suspend Mr. Murphy without pay. The Board found that to the extent the first suspension was relevant, the parties could discuss it; however, no direct appeal of the original suspension would be permitted, as there was no timely appeal of that decision.

The Board heard the appeal on offers of proof by the representatives of the parties. The record of the hearing in this matter consists of pleadings submitted by the parties, notices

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and orders issued by the Board, the audiotape recording of the hearing on the merits of the appeal, and documents admitted into evidence as follows:

Appellant's Exhibits

A: Packet of documents including sub-exhibits as follows:

- A. June 14,2007 Letter of Extension of Suspension
- B. May 16,2007 Letter of suspension
- C. Federal Motor Carrier Safety Administration 49 CFR 382 Controlled Substances and Alcohol Use and Testing
- D. July 19,2007 Letter of Suspension
- E. August 15,2007 Letter of Suspension
- F. September 10,2007 Letter of Pre-Disciplinary Meeting
- G. June 21,2007 Denial of Benefits letter
- H. DesMarais v. New Hampshire Personnel Commission, 117 NH 582
- I. Peabody v. State Personnel Commission 109 NH 152
- J. RSA 21-I:58

The appellant also submitted "Appellant's Statement of Proof" dated September 4,2007

State's Exhibits

- 1. Notice of Suspension
- 2. Notice of Indictment for Possession of a Narcotic Drug, Class B Felony (Cocaine)
- 3. Notice of Indictment as Accomplice to Sale of a Narcotic Drug, Special Felony (Cocaine)
- 4. Concord Monitor article, May 16,2007, re: arrest of Charles Murphy on possession of cocaine and criminal liability for sale of cocaine

Position of the parties:

Mr. McGinty argued that under the provisions of Per 1001.02 (a), the appointing authority is not required to suspend an employee without pay when the employee is facing criminal charges. Instead, Mr. McGinty argued, the DOT could have asked for approval for a suspension with pay, or it could have allowed the employee to use his own paid leave. Mr. McGinty argued that when the appellant was arrested, he was off-duty. He also argued that in spite of the appellant's offer to submit to drug testing, the agency never tested him. As a result, Mr. McGinty argued, the State could not prove that the appellant's Commercial Driver's License was in jeopardy, nor could the State justify removing the appellant from his employment pending the outcome of the criminal proceedings.

Mr. McGinty argued that by suspending the employee without pay for a period in excess of 30 days, the State cut off the appellant's source of income and access to benefits, effectively denying him a way to pay for his defense or address the stress-related medical issues that the appellant was facing. He also argued that by factoring into its decision the appellant's positive test to a drug test some five years ago, the State unreasonably relied on past behavior to predict current conduct.

Mr. McGinty argued that although the State may not have the burden of proof beyond a reasonable doubt when taking administrative action based on the appellant's arrest, the State could not even meet the burden of proving that the appellant's indictment created a conflict with his duties, or that pending criminal charges required his removal from the workplace.

Ms. Cusack argued as a Highway Maintainer III, the appellant is required to possess a Commercial Driver's License, and is expected to drive State vehicles, perform maintenance on state highways, and be available twenty-four hours a day for emergency services. Ms. Cusack said that the DOT originally suspended the appellant following his arrest on charges of possessing narcotic drugs and transporting an individual to a drug

buy. Following review by a grand jury, two separate felony charges were brought in Superior Court. Ms. Cusack asked the Board to note that indictments such as this are based on a finding of probable cause. She argued that while Mr. McGinty has suggested that the Board should consider the appellant innocent until proven guilty, the State does not need proof beyond a reasonable doubt before taking administrative action. In this case, she argued, a grand jury has already determined that it is more likely than not that Mr. Murphy did those things for which he has been indicted. Ms. Cusack argued that since the appellant has been charged with possession of cocaine, as well as being an accomplice to the sale of cocaine, the Department of Transportation has an obligation to protect the public trust, which it did by suspending him without pay pending the outcome of the criminal case.

Ms. Cusack argued that under the Board's rules, the appellant has to prove by a preponderance of the evidence that the DOT's action was unlawful, that it violated the rules, or that it was unwarranted by the alleged conduct. She argued that State would dispute the appellant's representation that he was willing to take a drug test, noting that the State was under no obligation to conduct such a test.

Ms. Cusack argued that Mr. Murphy was waiting to go to trial, and was entitled to a speedy trial. The fact that he's suffering mental distress, she argued, is not the State's issue, but an issue for the appellant to address.

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

## Findings of Fact

1. By letter dated May 16,2007, the Department of Transportation notified Charles Murphy, an employee of the Department of Transportation, that he was to be suspended without pay pending the results of a criminal investigation into his "arrest for possession of a controlled/narcotic drug and criminal liability for conduct of another."
2. Under the provisions of RSA 21-I:58 and the Rules of the Personnel Appeals Board, Mr. Murphy had fifteen calendar days from the date of suspension in which to initiate an appeal. No such appeal was filed.
3. By letter dated June 14,2007, the Department of Transportation notified Mr. Murphy that his suspension had been extended through July 14,2007.
4. By letter dated June 28,2007, Nicholas McGinty, Mr. Murphy's SEA Grievance Representative, requested a hearing to appeal the extension of Mr. Murphy's suspension.
5. By letter dated July 19,2007 and August 15,2007, the Department of Transportation provided notice of additional extensions of the appellant's suspension without pay.
6. By letter dated September 10,2007, Mr. Murphy was requested to attend a pre-disciplinary meeting on September 13,2007 to determine what disciplinary action the Department might take. In that letter, Mr. Murphy was advised that they would be discussing his arraignment in the Merrimack County Superior Court on two felony charges.
7. At the time of hearing, the appellant was awaiting trial in Merrimack County Superior Court on two counts: Possession of a Narcotic Drug, a Class B Felony, and Accomplice to Sale of a Narcotic Drug, a Special Felony.

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Rulings of Law

- A. Per 1001.01 of the Rules of the Division of Personnel allows an appointing authority, with the approval of the Director of Personnel, to suspend an employee with pay when there are "allegations of misconduct related to the employee's duties and responsibilities and require an internal investigation... and... the nature of the allegations warrant the removal of the employee from the work site." The Department of Transportation did not conduct an internal investigation, as the charges against the appellant involved criminal activity rather than misconduct related to the employees duties and responsibilities.
- B. Per 1001.02 of the Rules of the Division of Personnel allows an appointing authority, with the approval of the Director of Personnel, to suspend an employee without pay "...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."
- C. Federal regulations and State policy require the DOT to maintain a Drug-Free Workplace. Although the charges against the appellant involve off-duty conduct, the pending felony charges concerning possession and sale of narcotic drugs warrant the appellant's removal from the workplace pending resolution of those charges, as Per 1002.08(b)(23) would provide grounds for dismissal should it be determined that the appellant violated, "...a law related to an employee's job duties or conviction of any criminal offense relating to the employee's job duties..."
- D. In accordance with Per 1001.03 (c) At the conclusion of an investigation, the appointing authority shall provide the employee who has been suspended with written, notice indicating what action, if any, will be taken."
- ( )

Decision and Order

The Board found that the appellant's arrest on felony drug charges warranted his removal from the workplace, and his suspension without pay pending the outcome of criminal proceedings. Although the Board recognizes the financial hardship imposed by such suspension, the Board also recognizes the Department's obligation to protect the public, as well as its obligations to consider whether or not suspension without pay would have been appropriate given the seriousness of the pending charges. In this case, the Board found that the Department of Transportation acted appropriately in suspending the appellant without pay. For those reasons, the Board voted unanimously to DENY Mr. Murphy's appeal.

THE PERSONNEL APPEALS BOARD

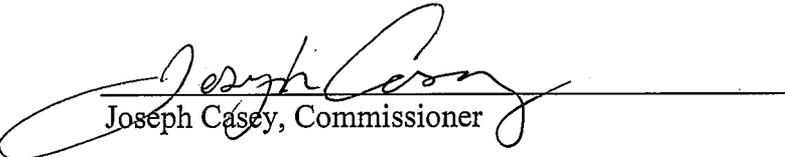
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Philip Bonafide, Acting Chair



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Robert Johnson, Commissioner



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Joseph Casey, Commissioner

cc: Karen Hutchins, Director of Personnel.  
Michael Reynolds, SEA General Counsel  
Lynmarie Cusack, Assistant Attorney General, Transportation Bureau