

State of New Hampshire



PERSONNEL APPEALS BOARD

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

Appeal of Daniel Barry – Docket #2011-T-004

Personnel Appeals Board Decision on Appellant's Motion for Clarification and Enforcement
and
Appeal of Job Assignment

September 5, 2012

By letter dated August 7, 2012, SEA General Counsel Michael Reynolds submitted for the Board's consideration a Motion for Clarification and Enforcement and an Appeal of Job Assignment associated with the Personnel Appeals Board's decision dated May 9, 2012, reinstating Mr. Barry to a position of Youth Counselor III at the Sununu Youth Services Center, and its June 28, 2012, decision denying the State's Motion for Rehearing/Reconsideration and Motion to Stay. The State's objection was received on August 17, 2012.

History of the Appeal

On May 9, 2012, the Personnel Appeals Board issued an order reinstating Mr. Barry to a position of Youth Counselor III. In that order, the Board directed the Department of Health and Human Services to, "...reinstatement him, within 30 days, to a position as a Youth Counselor III, on whatever shift and whichever work location best meets the agency's staffing requirements."

On June 7, 2012, Attorney Lynne Mitchell filed on behalf of the Department of Health and Human Services the Appellee's Motion for Rehearing and Appellee's Motion to Stay. SEA General Counsel Michael Reynolds filed the Appellant's Objections to those Motions on June 13, 2012.

On June 28, 2012, the Board issued its decision denying the Appellee's Motion for Rehearing. In so doing, the Board found that Appellee's Motion to Stay was moot.

In accordance with the provisions of RSA 541:6, "Appeal. – Within thirty days after the application for a rehearing is denied, or, if the application is granted, then within thirty days after the decision on such

rehearing, the applicant may appeal by petition to the supreme court." Neither party appealed the Board's decision to the Supreme Court.

Jurisdiction

The Board's jurisdiction to hear and decide appeals by permanent employees regarding the application of a personnel rule is strictly limited by the provisions of RSA 21-I:46 and RSA 21-I:58, which state, in pertinent part:

21-I:46 Powers and Duties of Board. –

I. The personnel appeals board shall hear and decide appeals as provided by RSA 21-I:57 and 21-I:58 and appeals of decisions arising out of application of the rules adopted by the director of personnel except those related to:

(a) Performance evaluations of classified employees; provided, however, that an employee who is disciplined or has other adverse action taken against him as the result of an evaluation may appeal that action.

(b) The refusal of an appointing authority to grant a leave of absence without pay.

(c) Classification decisions of the director of personnel when the reasons for appeal are based on any of the following:

(1) The personal qualifications of an employee exceed the minimum requirements for the position in question.

(2) The employee has held the position for a long period of time.

(3) Any positions previously held by the employee or any examinations passed by the employee which are not required for the position in question.

(4) The employee has reached the maximum of the assigned salary grade.

(5) The cost of living or related economic factors.

21-I:58 Appeals. –

I. Any permanent employee who is affected by any application of the personnel rules, except for those rules enumerated in RSA 21-I:46, I and the application of rules in classification decisions appealable under RSA 21-I:57, may appeal to the personnel appeals board within 15 calendar days of the action giving rise to the appeal. The appeal shall be heard in accordance with the procedures provided for adjudicative proceedings in RSA 541-A. If the personnel appeals board finds that the action complained of was taken by the appointing authority for any reason related to politics, religion, age, sex, race, color, ethnic background, marital status, or disabling condition, or on account of the person's sexual orientation, or was taken in violation of a statute or of rules adopted by the director, the employee shall be reinstated to the employee's former position or a position of like seniority, status, and pay. The employee shall be reinstated without loss of pay, provided that the sum shall be equal to the salary loss suffered during the period of denied compensation less any amount of compensation earned or benefits received from any other source during the period. "Any other source" shall not include compensation earned from continued casual employment during the period if the employee held the position of casual employment prior to the period, except to the extent that the number of hours worked in such casual employment increases during the period. In all cases, the personnel appeals board may reinstate an employee or otherwise change or modify any order of the appointing authority, or make such other order as it may deem just.

II. Any action or decision taken or made under this section shall be subject to rehearing and appeal as provided in RSA 541.

Personnel Appeals Board Decision on Pending Motion and Appeal

The Department was directed to reinstate the appellant within 30 days of the date of the Board's order to a position of Youth Counselor III on whatever shift, and at whichever location, best suited the agency's needs. The Department also was directed to compensate the Appellant for the period of separation in accordance with the provisions of RSA 21-I:58. That order requires no clarification.

The Board's powers and duties are clearly articulated in the provisions of RSA 21-I:46. While the Board may hear and decide appeals, it has no authority to enforce its decisions. Enforcement is a matter for the civil courts to address. As such, the Appellant's request for enforcement of its order is denied as a matter outside the Board's subject matter jurisdiction.

The Appellant's August 7, 2012 Appeal of Job Assignment is, in essence, a request for the Board to reconsider its decision with respect to the terms and conditions of the Appellant's reinstatement. If the Appellant took exception to the conditions for reinstatement, including that he could be reinstated to a shift and location identified by the agency, he had 30 days from the date of the order in which to file a motion for rehearing, or to file a motion for reconsideration. He did not do so. Therefore, the Board voted to deny the Appeal of Job Assignment, treating it as a late-filed request for reconsideration of the Board's reinstatement order.

THE NEW HAMPSHIRE PERSONNEL APPEALS BOARD

/s/ Patrick Wood

Patrick Wood, Chairman

/s/ Philip Bonafide

Philip Bonafide, Commissioner

/s/ Robert Johnson

Robert Johnson, Commissioner

cc: Karen Hutchins, Director of Personnel
Michael Reynolds, SEA General Counsel
Attorney Lynne Mitchell, Department of Health and Human Services
Mark Bussiere, Human Resources Administrator, Department of Health and Human Services

State of New Hampshire



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Appeal of Daniel Barry – Docket #2011-T-004 Department of Health and Human Services, Division for Juvenile Justice Services Sununu Youth Services Center

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

June 28, 2012

On June 7, 2012, Attorney Lynne Mitchell filed on behalf of the Department of Health and Human Services the Appellee's Motion for Rehearing of the Board's May 9, 2012, decision granting the Appeal of Daniel Barry, and Appellee's Motion to Stay the Board's order reinstating the Appellant. SEA General Counsel filed the Appellant's Objections to those Motions on June 13, 2012.

Per-A 208.03 (b) of the Board's rules provides that a motion for reconsideration and rehearing "...shall set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable" and that "A motion for rehearing in a case subject to appeal under RSA 541 shall be granted if it demonstrates that the board's decision is unlawful, unjust or unreasonable." [Per-A 208.03 (e)]

In the Motion for Rehearing, the State reiterated those arguments offered during the hearing on the merits of Mr. Barry's appeal and fully considered by the Board in reaching its decision. While it is clear that the Appellee disagrees with the Board's analysis of the evidence and the conclusions that it reached in granting Mr. Barry's appeal, that disagreement does not constitute good cause for a rehearing, nor does it demonstrate that the Board's decision was unlawful, unreasonable or unjust.

As the trier of fact, it is the Board's duty to evaluate the evidence, including the testimony of witnesses, and to give that evidence the weight it deserves. In evaluating the evidence in this instance, it was reasonable for the Board to give greater weight to the sworn testimony of eye witnesses, given during the hearing under direct and cross examination, than to summaries produced by investigators of the witnesses' earlier interviews. As attested to by the witnesses, their statements to investigators were not reviewed by the witnesses for accuracy or completeness prior to their inclusion in the investigative reports or their admission into the record of the appeal. Therefore, where there was a conflict between the investigators' summaries and the witnesses' sworn testimony, the Board relied on testimony given during the hearing.

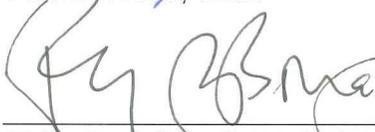
The Board also considered the reasons for dismissal outlined in the letter of termination. If the agency intended to base its dismissal decision on the Appellant's conduct prior to the restraint, it should have included that specifically as grounds for dismissal. It did not.

For the reasons set forth above, and, in a general sense, for the reasons outlined in the Appellant's Objection, the Board voted unanimously to DENY the State's Motion for Rehearing. Having done so, the Board found that the State's Motion to Stay is moot.

THE NEW HAMPSHIRE PERSONNEL APPEALS BOARD



Patrick Wood, Chair



Philip Bonafide, Commissioner



Robert Johnson, Commissioner

cc: Karen Hutchins, Director of Personnel, 25 Capitol St., Concord, NH 03301
Attorney Lynne Mitchell, Department of Health and Human Services, 129 Pleasant St.,
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SEA General Counsel Michael Reynolds, State Employees Association, 207 N. Main St.,
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Appeal of Daniel Barry – Docket #2011-T-004

**Department of Health and Human Services, Division for Juvenile Justice Services
Sununu Youth Services Center**

May 9, 2012

The New Hampshire Personnel Appeals Board (Wood, Bonafide and Johnson¹) met in closed session² on November 30, 2011, December 7, 2011, January 11, 2012, January 18, 2012, and February 8, 2012, to hear the appeal of Daniel Barry, a former employee of the Department of Health and Human Services. Mr. Barry, who was represented at the hearing by SEA General Counsel Michael Reynolds, was appealing his September 9, 2010, termination from employment as a Youth Counselor III for violation of Per 1002.08 (b)(9), endangering the life, health or safety of another employee or individual served by the agency; and Per 1002.08(b)(7), violation of a posted or published agency policy or procedure, the text of which warns that violation of same may result in dismissal. Attorney Lynne Mitchell appeared on behalf of the State.

The record of the hearing in this matter consists of pleadings submitted by the parties, orders and notices issued by the Board, the audio tape recording of the hearing on the merits of the appeal, and documents admitted into evidence as follows:

¹ Commissioner Johnson was not available for some of the testimony during the course of the hearing. The parties did not object to his reviewing the audio recordings and participating in deciding the appeal.

² Although Per-A 205.02 of the Board's rules indicates that hearing are open to the public and the Board's records are available for inspection, RSA 91-A:5, IV, specifically exempts "...confidential, commercial, or financial information..." from disclosure under the Right-To-Know law. In this instance, evidence to be presented at the hearing and entered into the record of the hearing includes information from juvenile case records, which are considered confidential and protected from disclosure under the provisions of RSA 170-G:8 A. As a result, the Board has closed the hearing to the public and will seal the record of the prehearing conference and hearing to preclude disclosure of confidential juvenile records or records from juvenile case files to any unauthorized third party.

State's Exhibits³

1. DVD videos of August 7, 2010 incident
2. Paula Cronin's Incident Report
3. 3A, 3B, 3C, 3D – photos of JL
4. Affidavit of Paula Cronin, RN (with 8 pages of attached handwritten reports)
5. Confidential Internal Affairs Investigation Report
6. William Bovaird's written statement
7. Affidavit of Eric Borrin with attached investigatory notes from his meeting with Daniel Barry
8. Email from William Fenniman, Jr., to Jeffrey Nelson
9. August 23, 2010 Intent to Dismiss letter issued to Daniel Barry
10. John Duffy's notes from the Intent to Dismiss meeting, September 2, 2010
11. Letter of Dismissal issued to Daniel Barry, September 9, 2010
12. SYSC Policy and Procedure Checklist
13. SYSC Policy Receipt and Professional Conduct Policy C-002 (revised)
14. SYSC Policy Receipt and Abuse and Neglect Policy 900
15. SYSC Policy Receipt and Policy Manual Preamble
16. SYSC Policy Receipt and Use of Force Policy C-003
17. SYSC Policy Receipt and Mechanical and/or Physical Restraint Policy RS-1465
18. SYSC Memo Receipt and Training Memo
19. Letter dated May 7, 2009
20. Letter dated October 8, 2007
21. John Duffy Résumé
22. Administrator IV Class Specification
23. Affidavit of Jeffrey Nelson

Appellant's Exhibits

- A. Commendations dated August 13, 1996, through April 15, 2010
- B. Performance Evaluations dated May 19, 2007 and March 21, 2009
- C. June 9, 2009, letter from Lucien Poulette, House Leader – Building G

³ Letters dated May 8, 2009 and October 8, 2007, were initially admitted with restrictions. The Board found that they were unrelated to the decision to dismiss the Appellant, and removed them from the record of this hearing.

- D. Daniel Barry's witness statement re: August 7, 2010, incident
- E. August 7, 2010, Incident Report completed by Gary Smith
- F. August 9, 2010, Use of Force Report completed by Gary Smith
- G. August 13, 2010, Incident Report completed by David Varney
- H. August 14, 2010, Incident Report completed by Robert Tirrell
- I. September 1, 2011, Deposition of William Fenniman – excerpts admitted as follows:
 - P 5, lines 3-5, lines 1—14, 20-21
 - P 13 lines 20-21,
 - P 14 lines 20-23
 - P 15 lines 1-2
 - P 15 13-15 and 19-23
 - P 16 lines 1-4 and lines 15-21
 - P 16 15-21
 - P 19 lines 8-11
 - P 20 lines 9-13
 - P 28 lines 3-11 and lines 15-16
 - P 29 lines 1-7
 - P 31 lines beginning at line 2 through page 32
 - P 35 line 3 and lines 19-21
 - P 38 lines 1-5
 - P 39 lines 16-23
 - P 40 lines 1-6
 - P 43 lines 13-18
 - P 45 lines 15-23
 - P 47 lines 15-23
 - P 48 lines 14-16
 - P 51 lines 4-7
 - P 53 lines 1-6
 - P 54 lines 4-9 and lines 16-18
 - P 56 lines 18-23
 - P 57 lines 17-23
 - P 58 lines 1-7 and lines 19-23
 - P 59 lines 1-2
- J. September 28, 2011, Deposition of James Peace (admitted over State's objection)
- K. November 9, 2011, Affidavit of Anthony Laforge (marked for identification but not admitted)
- L. November 23, 2011, Affidavit of Lucien Poulette (marked for identification but not admitted)

At the request of the parties, the witnesses were sequestered. The following persons gave sworn testimony:

Paula Cronin, RN

William Bovaird, Supervisor III

John Duffy, Administrator

David Varney, Jr., Youth Counselor II

After the Appellant's testimony was concluded, the Board agreed to allow the parties additional time to submit written closing arguments. The parties were instructed to submit those arguments no later than February 17, 2012.

In accordance with the provisions of Per-A 207.11, Requests for Findings of Fact and Rulings of Law.

"(a) By the close of a hearing, either party may submit requests for findings of fact and rulings of law.

"(b) Submission by either party of requests for findings of fact or rulings of law shall not preclude the board from making findings independent of those requests."

In preparing its findings of fact and rulings of law, the Board noted that both parties' closing arguments devoted significant attention to both the Appellant's and the resident's conduct and interactions prior to the actual restraint. Because the Appellant was not dismissed as a result of his conduct prior to the actual restraint, the Board's findings are limited to the Appellant's alleged use of excessive and unreasonable force for the conditions existing when he actually restrained the resident; whether or not the Appellant violated DJJS policies and procedures following the restraint; and whether or not the infractions, if proven, were sufficient to support his termination from employment. Findings of fact related to conduct of individuals involved in the incident prior to the alleged excessive force are included to put Appellant's conduct in context.

The Board has chosen to make its own findings independent of the requests submitted by the parties. Where a material fact is not disputed, the Board has not identified specific testimony or a specific exhibit to support that finding. To the extent that the parties' requests are consistent with the findings of fact, rulings of law, and decision and order below, they are granted; otherwise, they are denied.

Findings of Fact and Rulings of Law

1. Prior to his dismissal on September 9, 2010, the Appellant was working as a Youth Counselor III at the Sununu Youth Services Center (SYSC) in Manchester, New Hampshire. The Appellant had been employed by the State of New Hampshire as a Youth Counselor

since December, 1996. The Appellant had satisfactory performance evaluations, and he was generally well regarded by his supervisor and his peers.

2. The Appellant was working the mid-shift, from 2:00 p.m. to 10:00 p.m., on August 7, 2010, and was assigned to supervise the upper and lower floors housing residential units G200 and G0, at the SYSC. William Bovaird, the Building Supervisor, was the Appellant's immediate supervisor during that shift.
3. Some time after 5:30 p.m. on August 7, 2010, the Appellant responded to a "CODE" called by staff member, Bob Tirrell, on G-200, the upper floor in the unit. Mr. Tirrell reported that one of the residents on G-200 was yelling, banging on his door, and refusing staff directives. Before calling the "code," resident J.L. had been on room restriction. He had been allowed out of his room to use the bathroom, and once he returned to his room, he showed another resident that he had taken the remote control for the television. Mr. Tirrell was working alone on the unit when he called for assistance. When Eric Leitner, another Youth Counselor arrived, Mr. Tirrell opened the resident's door and removed the remote control. Mr. Leitner questioned why the resident was out of his room if he was on restriction. Mr. Tirrell indicated that he did not know why. Mr. Leitner then told the resident, who was occupying a double room by himself, to "pack his stuff because he was leaving the dorm." Mr. Leitner left, and the resident questioned Mr. Tirrell about why he was being made to leave. When Mr. Tirrell responded that he did not know, and refused to respond to continuing questions from the resident, the resident became upset and began banging on the door and refused to quit yelling. Mr. Tirrell then called the response team. (SEA Exhibit H)
4. Although the Appellant was not actually assigned to the response team at that time, he went to assist when the code was called. When Building Supervisor William Bovaird arrived, the Appellant was removing items from the resident's room, including the resident's mattress and personal belongings. Mr. Bovaird did not question why the mattress was being removed, nor did he direct the Appellant to stop removing the resident's personal property. Mr. Bovaird asked the Appellant to assist on the response team as team leader. (Testimony of Daniel Barry and William Bovaird and DHHS Exhibit 6)
5. The resident remained in his room when the Appellant began looking at paperwork that had been removed from the resident's room. Included was a letter or note with gang-related writings. The Appellant told the resident that the letter was inappropriate and that he would not be getting the letter back. The Appellant tore the letter into several pieces and disposed of it in the trash. The resident was infuriated. Mr. Bovaird did not object to the Appellant's

- actions, nor did he remove the Appellant from the response team. (Testimony of William Bovaird and Daniel Barry, and DHHS Exhibit 8)
6. The response team was called to another floor in the unit as a result of a fight that had broken out between two of the other residents. One resident was injured and needed medical attention. Two staff were directed to take the resident to Medical, then to the emergency room. Resident J.L. continued to yell and bang on his door. Because of the commotion, the other residents on that floor remained in lock-down. (Testimony of William Bovaird and DHHS Exhibit 8)
 7. Youth Counselor Gary Smith heard resident J.L. calling the Appellant names and threatening to “bang him out.” Mr. Smith discovered that the resident J.L. had scrawled graffiti and gang signs on three of the four walls in his room with a marker that the resident had taken from the checkroom. Mr. Smith had Mr. Tirrell open the door to the resident’s room so the marker could be removed. The resident continued to act out, and the response team was called again. During that second “code” call, hearing J.L. continuing to bang or kick at his door, Mr. Bovaird became worried that the resident would injure himself. (SEA Exhibit E)
 8. Mr. Bovaird told the Appellant to “go ahead and cuff him up if he needed to.” Mr. Bovaird respected the Appellant’s decision-making and felt that if the resident would not follow directions to stop banging on the door, the resident should be handcuffed and removed from the residential area. (Testimony of William Bovaird)
 9. The Appellant re-entered the resident’s room to place him in handcuffs. The Appellant and Mr. Smith began escorting the resident to Admissions, but they were stopped by Mr. Bovaird, who said he wanted them to keep the resident in the multi-purpose room instead. The resident was then taken to the multi-purpose room and seated in a chair up against a wall. (Testimony of Gary Smith and Daniel Barry, and DHHS Exhibit 1)
 10. Approximately ten minutes after the resident was brought to the multi-purpose room and seated in a chair, the resident stood up. The Appellant returned him to a seated position. (DHHS Exhibit 1)
 11. Approximately fourteen minutes after the resident was brought to the multi-purpose room, Mr. Bovaird provided a security belt so that the resident’s hands, which had been cuffed behind him, could be moved to the front and secured to the belt. (Testimony of William Bovaird, Gary Smith and Daniel Barry, and DHHS Exhibit 1)
 12. The resident threatened to spit at both the Appellant and Mr. Smith. They turned the resident in the chair to face the wall. The resident continued yelling, swearing and

attempting to spit at the Appellant and Mr. Smith. Approximately twenty minutes after being taken to the multi-purpose room, while the resident continued threatening to spit and moved from side-to-side in his chair, the Appellant took the resident to the floor where he was physically restrained by the Appellant and Mr. Smith. The resident kicked and thrashed and threatened to bang his head on the floor. Mr. Smith controlled the resident's legs. The Appellant controlled the resident's upper body and head. Throughout the ensuing restraint, the resident was never prone, but was lying on his left side. (Testimony of Gary Smith and Daniel Barry, and DHHS Exhibit 1)

13. After roughly thirteen minutes, the restraint ended. The resident was returned to a seated position but remained on the floor for another minute or so. At approximately 6:50 p.m., roughly sixteen minutes after the restraint was initiated, Youth Counselor Eric Leitner spoke to the resident, who agreed to comply and "commit to safety." The resident then stood and was escorted to his room. (Testimony of Gary Smith and Daniel Barry, and DHHS Exhibit 1)
14. During the restraint, Nurse Paula Cronin was called to the multi-purpose room to assess resident J.L because the resident had been restrained. Ms. Cronin observed the resident lying on his left side, close to the wall in the multi-purpose room. The resident was uncooperative. In nursing progress notes, Ms. Cronin reported that, "Cuffs were loose. Requested to cooperate or talk to nurse. Denied injury. Was approximately 7:45 p.m. Seen later on unit for assessment 9:30 p.m. Angry c/o various aches + pains. But ambulatory, opening doors and using upper extremities + hands for activities. But refused to demonstrate full ROM [range of motion]. C/o R elbow pain but bending and using. Old abrasion R forearm just distal to elbow. Said happened 8/26/11." The note makes no reference to any injuries that might have been sustained during the restraint, nor is there reference to any red marks or abrasions. (Testimony of Paula Cronin and DHHS Exhibit 4)
15. Ms. Cronin saw the resident on the unit again at approximately 10 o'clock. Ms. Cronin recalled that the resident complained of bilateral hand and left wrist pain as well as soreness behind his right ear, which the resident said occurred when staff had an elbow to his ear during the restraint. The resident also reported to Ms. Cronin that he had been punching the door in his room prior to the restraint. (Testimony of Paula Cronin)
16. Ms. Cronin saw the resident again the following evening, and observed a "superficial abrasion" behind the resident's ear. The resident also complained of soreness behind his ear, pain in his left temple and a sore neck. The resident attributed his discomfort to the restraint that occurred on August 7, 2010. (Testimony of Paula Cronin)

17. None of the staff who witnessed any portion of the restraint of resident J.L. saw evidence of excessive or unreasonable force, abuse, or a violation of the agency's policies regarding use of force and restraints, and none of them saw any evidence of injury as depicted in DHHS Exhibit 3A-D. (Testimony of Gary Smith, David Varney, William Bovaird)
18. None of the individuals who were involved in the restraint, or who witnessed any portion of the restraint contacted DCYF to report that a resident had been abused in any way.
19. There were no photographs taken of the resident's alleged injuries until August 9, 2010, two days after the restraint occurred. (DHHS Exhibit 23)
20. The Appellant did not violate Per 1002.08 (b)(9), "Endangering the life, health or safety of another employee or individual served by the agency," by using excessive and unreasonable force for the conditions existing at the time in physically restraining resident J.L. on August 7, 2010.
21. The Appellant's supervisor, Mr. Bovaird, was fully aware of the resident's history and of his behavior. Mr. Bovaird assigned the Appellant as the team leader for the response team, even after seeing his interaction with the resident following the first "code" that was called. The Appellant's supervisor did not stop him from removing items from the resident's room, and specifically instructed the Appellant to handcuff the resident and remove him from his room if the resident continued to act out and refused to comply with staff directives. The Supervisor also was aware of the restraint and observed at least a portion of it when he brought the security belt to use in moving the resident's handcuffs from the back to the front.
22. The Appellant did not violate Per 1002.08(b)(7) by engaging in violation of a posted or published agency policy or procedure that should have resulted in his dismissal. Although the Appellant himself did not file a report of the restraint, he ensured that such a report was completed and submitted as required.

Decision and Order

Per-A 207.01 (b) of the NH Code of Administrative Rules (Rules of the Personnel Appeals Board), imposes upon the employer the burden of production. In this case, the Division for Juvenile Justice Services is required to produce sufficient evidence to persuade the Board that the underlying facts asserted in the letter of termination are true.

The Board found that the Appellant did not endanger the life, health or safety of resident JL, nor did the Appellant use excessive and unreasonable force for the conditions existing at the time in physically restraining the resident on August 7, 2010.

The Appellant was instructed by his supervisor to place the resident in handcuffs and remove the resident from his room. The evidence reflects that the Appellant took reasonable steps to “de-escalate” the resident, and when the resident continued to resist, he was restrained until such time as the resident was willing to “commit to safety.” None of the witnesses who participated in, or observed, the restraint as it occurred believed that the resident had been abused or had been subjected to excessive or unreasonable force. If they did, they had an obligation to intervene or report such alleged abuse to DCYF. None did.

Although the evidence reflects that the resident was compliant with staff instruction to be calm while he was being handcuffed prior to his removal from his room and ultimately his restraint, the resident’s behavior before and after the time he was initially handcuffed involved yelling, punching and kicking at the door of his room, making threats of violence, threatening self-harm, refusing staff directives and ultimately spitting at staff. Staff presence, verbal intervention and attempts at re-direction had been ineffective. Handcuffing the resident, removing him from his room and ultimately restraining him appeared to be the next, most logical steps in the force continuum for conditions existing at the time.

The record reflects that the resident presented two days after the restraint with some evidence of “injury,” as there was a mark visible on the resident’s head behind his ear. However, no one saw evidence of injury on the day that the restraint occurred, and none was observed by anyone until a day later when Nurse Cronin noted an abrasion. Photographic evidence of an abrasion was not produced until two days after the restraint. While one could assume that the abrasion was the result of the restraint, one could as easily believe that the abrasion was self-inflicted, as the resident reportedly had a history of self-injury.

As the State argued, the Appellant perhaps could have taken another course of action. That, however, would have required him to ignore his supervisor’s instructions to hand-cuff the resident and remove the resident from his room. The unit was understaffed, and there had been several response codes called, including a call involving two residents who had fought, resulting in one resident being injured and taken for treatment to the emergency room.

Although management may now argue that there were no exigent circumstances that warranted either mechanical or physical restraint, supervisory staff required that the resident be removed from the floor, and the Appellant complied. The resident who was restrained had created sufficient commotion and disruption in his residential unit that the other residents were left in lock-down. Once removed, the resident refused to comply with staff directions and tried to spit on staff, an infraction that would have been deemed an assault by the resident. The Appellant acted reasonably in preventing him from doing that.

The State also alleges that the Appellant violated agency policies and procedures regarding reporting after a restraint has occurred. Although the Appellant did not complete such a report himself, a report was filed at his direction.

Having carefully considered all the evidence and argument offered by the parties, the Board found that the disciplinary action was unwarranted by the alleged conduct or failure to meet the work standard in light of the facts in evidence, and that the disciplinary action was unjust in light of the facts in evidence. Accordingly, the Board voted unanimously to GRANT the appeal of Daniel Barry and instruct the agency to reinstate him, within 30 days, to a position as a Youth Counselor III, on whatever shift and whichever work location best meets the agency's staffing requirements.

As set forth in the provisions of RSA 21-I:58, I, "The employee shall be reinstated without loss of pay, provided that the sum shall be equal to the salary loss suffered during the period of denied compensation less any amount of compensation earned or benefits received from any other source during the period. "Any other source" shall not include compensation earned from continued casual employment during the period if the employee held the position of casual employment prior to the period, except to the extent that the number of hours worked in such casual employment increases during the period."

THE NEW HAMPSHIRE PERSONNEL APPEALS BOARD



Patrick Wood, Chair



Philip Bonafide, Commissioner



Robert Johnson, Commissioner

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Appeal of Daniel Barry (Docket #2011-T-004) and George Kalampalikis (Docket #2011-T-008)

Department of Health and Human Services

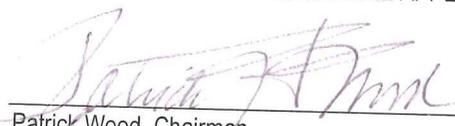
Personnel Appeals Board Decision on Appellee's Motion in Limine and Appellants' Objection Thereto

The Personnel Appeals Board has jurisdiction to hear appeals by permanent employees concerning the application of the New Hampshire Personnel Rules. The Personnel Appeals Board does not have the statutory, or equitable, jurisdiction to hear an appeal of an alleged violation of a collective bargaining agreement.

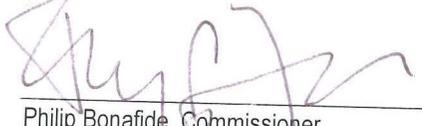
Appellee's motion to preclude argument or exclude evidence with regard to alleged violations of the Collective Bargaining Agreement is granted in accordance with the Board's long-standing and consistent expression of its understanding of the applicable law.

The Personnel Appeals Board will consider arguments and evidence concerning the application of the New Hampshire Personnel Rules. To the extent that such applicability involves a term or condition of employment that has been negotiated, the language of the negotiated agreement will control.

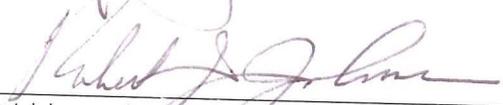
THE NEW HAMPSHIRE PERSONNEL APPEALS BOARD



Patrick Wood, Chairman



Philip Bonafide, Commissioner



Robert Johnson, Commissioner

cc: Karen Hutchins, Director of Personnel
Attorney Jonathan Gallo, Department of Health and Human Services
Michael Reynolds, SEA General Counsel