

# State of New Hampshire



## **PERSONNEL APPEALS BOARD**

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Appeal of Tracie Bettez

Docket #2007-T-019

Department of Corrections

October 29, 2009

The New Hampshire Personnel Appeals Board (Bonafide, Johnson and Casey) met in public session on Wednesday April 8, 2009, and Wednesday, May 6, 2009, under the authority of RSA 21-l:58 and Chapters Per-A 100-200 of the to hear the appeal of Tracie Bettez, a former Corrections Officer who was dismissed from her position, effective February 22, 2007, for allegedly disobeying a written order, regulation or directive, making a false official statement, and obstructing investigative activity in violation of the NH Department of Corrections Policy and Procedure Directive PPD 2.16. The appellant was represented at the hearing by SEA General Counsel Michael Reynolds. Attorney John Vinson appeared on behalf of the Department of Corrections.

The appeal has a lengthy procedural history. Ms. Bettez was dismissed from her position at the Department of Corrections on February 22, 2007. Her appeal was filed on March 6, 2007, and the Board scheduled the matter for a prehearing conference on July 25, 2007. At that meeting, the parties indicated that it would be in both parties' best interests to schedule the prehearing for a later date, and the Board agreed to reschedule the prehearing for September 7, 2007.

At the September 7, 2007, prehearing conference, the parties represented that they were engaged in extensive prehearing discovery and actively involved in discussions of a possible settlement. They asked the Board to schedule a further prehearing conference, and agreed to meet again with the Board on December 19, 2007.

On December 12, 2007, the appellant filed an Assented-to Motion to Continue. In that Motion, Attorney Reynolds stated, "The parties understand that should the appellant prevail, the Board has discretion to

award retroactive pay as it deems just and may consider the continuances in this matter." The Board granted the Motion, and the parties agreed to meet with the Board on April 8, 2008.

On March 10, 2008, the appellant filed another assented-to request to continue the prehearing until April 30, 2008, with the same condition offered, that the parties understood that Board could take any of the prior requests to postpone the matter into consideration in the event that the appellant prevailed and the Board considered retroactive compensation. The Board again granted the request.

The Board met with the parties on April 30, 2008, to determine the scope of the hearing and establish a schedule for future prehearing and hearing activities associated with the appeal. Attorney Reynolds argued that the appellant had a number of witnesses who could demonstrate some animosity at the Department of Corrections toward the appellant. He indicated that while most would have no direct evidence, they could describe the work environment and work relationships that colored both the investigation into the appellant's alleged misconduct and the Commissioner's ultimate decision to dismiss the appellant. Attorney Vinson argued that the scope of the hearing was far more narrow, and should remain focused on whether or not Commissioner Wrenn had sufficient information to believe that the appellant had lied during an official investigation, and whether the Personnel Rules permitted him to dismiss the appellant on that basis. The parties were directed to file any status reports by July 1, 2008, and to submit by that date any motions that they wished the Board to consider. The parties then agreed to appear for a final prehearing conference on July 16, 2008, and to present their evidence on the merits of the appeal at a hearing scheduled for July 23, 2008.

By letter dated July 9, 2008, the Department of Corrections filed an Assented-to Motion to Continue the July 23, 2008, hearing because the Corrections Commissioner had been directed to appear at a budget meeting with the Governor and would be unable to attend the hearing. The Board agreed to grant that request, but directed the representatives of the parties to appear as scheduled on July 16, 2008, in order to select another date to hear the appeal. On July 16, 2008, the parties met and agreed to the scope of the hearing, set a final prehearing phone conference for September 19, 2008, and established a hearing date of September 24, 2008.

At the September 19, 2008, telephone prehearing conference conducted by a quorum of the Board (Wood and Bonafide) the parties again discussed the scope of the hearing and the number of witnesses who would be permitted to testify at the hearing on the merits of the appeal. The Board ultimately determined that there were only two witnesses with direct evidence about the incidents under investigation about which

Commissioner Wrenn believed the appellant had lied. The Board concluded that the appeal turned on the credibility of two witnesses, Ms. Bettez and Ms. Marshall, and decided that it would hear only their testimony. The Board advised the parties that if after hearing their testimony the Board believed that it had insufficient evidence to reach a fair conclusion, it would then determine what other testimony or evidence to receive in order to decide the appeal.

On September 23, 2008, the Department of Corrections' representative contacted the Board to inform the Board that the State's key witness was ill and would be hospitalized, and would therefore be unable to appear as scheduled on September 24, 2008. The Board granted the State's Assented-To Motion to postpone the hearing.

Throughout the ensuing months, the Board worked with the parties to select a date when both parties would be available for hearing, and ultimately agreed with the parties that the matter could be scheduled for a hearing on the merits of the appeal on January 21, 2009.

On January 20, 2009, the Board received from the State another Assented-To Motion to Continue based on the continuing unavailability of the State's witness due to medical reasons. The Board granted that Motion, based on the unavailability of the State's witness, and rescheduled the matter for hearing on April 8, 2009, the first available hearing date that both parties and their witnesses could appear.

On April 3, 2009, the Personnel Appeals Board received Appellant's e-mail request for the Board to issue an order requiring the Department of Corrections and/or Linda Marshall to release Linda Marshall's personnel file to SEA General Counsel Michael Reynolds and/or his staff in preparation for the hearing. Attorney John Vinson's objection to that request was submitted by email shortly thereafter. The Board denied that motion, finding, in part, that RSA 91-A:5, IV specifically exempts personnel records from disclosure under the Right to Know Law, and that neither the Board nor the Department of Corrections had any authority to release Ms. Marshall's personnel records without her express consent.

The parties appeared as scheduled on April 8, 2009, and May 6, 2009, for the hearing on the merits of the appeal.

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

### State Exhibits (Appellee Exhibits)

1. Tina Thurber Green Card for 2006
2. Officer Marshall Phone Record – August 2006
3. Officer Marshall Phone Record – September 2006
4. Department of Corrections Phone Log for August 2006 from 2 Shea Farm Phones
5. Police Standards and Training Council Incident Report for September 2006 concerning Ms. Bettez
6. Resident Outside Activity Log August 26-27, 2006
7. DOC Employment Application for Tracie Bettez

### Appellant Exhibits (SEA Exhibits)

1. Letters of reference and performance documents from Ms. Bettez's personnel record
2. Interview with CO Tracie Bettez by Commissioner Wrenn
3. Interview with CO Linda Marshall RE: Tracie Bettez Investigation by Commissioner Wrenn
4. 2006 Department of Corrections report of hours worked for Tracie Bettez
5. 2006 Department of Corrections report of hours worked for Linda Marshall
6. Relevant CBA Section in Effect During Times Pertinent to Docket #2007-T-019
7. DOC Incident Reports (137 pages)
8. February 22, 2007 Letter of Termination (with attachments) issued to Ms. Bettez
9. Shea Farm staffing report for August 9, 2006 to September 15, 2006

### Joint Exhibits

- A. Linda Marshall's cell phone record, August 18, 2006 – September 7, 2006 with voice mail record
- B. DOC Phone Records 7131106 – 10131-06
- C. Investigative Report dated January 11, 2007
- D. Transcript of Tracie Bettez's Unemployment Compensation Hearing, July 17 and August 14, 2007
- E. Deposition of Tracie Bettez conducted July 30, 2008
- F. Transcript – Interview of William Wrenn conducted by Attorney Michael Reynolds, July 7, 2008
- G. Transcript – Interview of Linda Marshall conducted by Attorney Michael Reynolds, July 1, 2008
- H. Transcript – Interview of Cheryl Smith (formerly Morand) conducted by Attorney Michael Reynolds, July 9, 2008
- I. Transcript - Interview of Tina Thurber conducted by Attorney Michael Reynolds, July 9, 2008
- J. Transcript - Interview of Christine Cook conducted by Attorney Michael Reynolds, July 9, 2008
- K. Transcript - Interview of Linda Marshall conducted by NH DOC Investigator Mark Wefers, November 16, 2006
- L. Letter of Warning issued to Officer Linda Marshall, March 6, 2007
- M. Transcript – Interview of Tina Thurber conducted by NH DOC Investigator Mark Wefers, November 15, 2006

The following persons gave sworn testimony:

Tracie Bettez (appellant)  
Linda Marshall, Corrections Officer

At the conclusion of the hearing on the merits of the appeal, Attorney Vinson informed the Board that he intended to make several offers of proof and would be calling a number of rebuttal witnesses. Attorney

Reynolds objected, arguing that the Board had decided during the final prehearing conference on September 19, 2008, that the Board would limit the testimony of witnesses, allowing the parties to call only those two witnesses with direct knowledge of the underlying incident. Attorney Vinson argued that the State needed to call other witnesses in order to challenge Ms. Bettez's credibility, arguing that the appellant had raised new allegations after the fact about Ms. Marshall and other DOC staff in order to impeach their credibility and suggest a motive for Ms. Marshall to lie. The Board declined the State's offers of proof, but agreed to hold the record of the hearing open to allow the State to file its written request to offer additional testimony, and to allow the appellant an opportunity to respond.

#### Post-hearing Motions and Objections

On May 18, 2009, the Board received the State's Motion to Allow the Testimony of Rebuttal Witnesses.

Nine additional exhibits were attached as follows:

1. Affidavit of Keri Denis dated April 13, 2009
2. Signed Statement of CO Deborah Steele dated April 29, 2009
3. Signed Statement of CO Linda Marshall dated May 5, 2009
4. Signed Statement of Unit Manager Christine Cook dated May 5, 2009
5. Affidavit of Mark Wefers dated April 30, 2009
6. Affidavit of Tina Thurber dated April 20, 2009
7. Affidavit of Richard Grenier dated April 27, 2009
8. Signed Statement of Brian Baxter dated May 5, 2009
9. Affidavit of William Wrenn dated May 18, 2009

On May 28, 2009, Attorney Reynolds filed the appellant's Objection to State's Motion to Allow Testimony of Rebuttal Witnesses and Contingent Motion of Tracie Bettez. On June 8, 2009, Attorney Vinson filed with the Board the State's Motion for Leave to File a Response to Appellant's Objection to State's Motion to Allow the Testimony of Rebuttal Witnesses and Contingent Motion of Tracie Bettez. On June 19, 2009, Attorney Reynolds filed the appellant's Response of Tracie Bettez to NHDOC's June 8, 2009, Motion.

In his Motion to Allow the Testimony of Rebuttal Witnesses, Attorney Vinson argued that the Board's own rules require the Board to allow live witness testimony when the credibility of a witness is material to the outcome of an appeal. He also argued that the Board could only limit the number of witnesses when "required to avoid irrelevant, immaterial or unduly repetitious evidence." [Per-A 207.02(d)]. Attorney Vinson argued that the testimony of rebuttal witnesses was necessary in order for the State to address allegations

raised by the appellant at the hearing regarding Ms. Marshall's potential bias toward the appellant, and to refute allegations raised by the appellant in the hearing on the merits of the appeal regarding why Ms. Marshall would perjure herself before the Board or at other proceedings.

In his Objection to the State's Motion, Attorney Reynolds argued that after hearing Ms. Marshall's testimony, the State was attempting to rehabilitate Ms. Marshall into a credible witness and overcome testimony he characterized as contradictory and disingenuous in some cases, and outright fabrication in others. Attorney Reynolds also argued that the State had no credible evidence to corroborate Ms. Marshall's claim about the Alco-sensor incident or the alleged activity on Ms. Bettez's behalf to obstruct the investigation, and that the State's Motion "aggressively ignores the State's additional burden to prove its 'operative facts' by a preponderance of the evidence." [Objection, p. 2]

At both the final prehearing conference on September 19, 2008, and before taking testimony on the second day of the hearing on the merits of the appeal, the Board reiterated its position that it would hear the testimony of Tracie Bettez and Linda Marshall. If the Board determined that it was unable to reach a decision after hearing their testimony, reviewing the documentary evidence offered by the parties, and considering the arguments offered by the parties, the Board would then decide whether or not to call additional witnesses. At the hearing on the merits of the appeal, the Board did permit live witness testimony in order to test the credibility of the only two witnesses with direct knowledge of the facts as alleged by the State in its February 22, 2007, notice of dismissal. The Board also admitted into the record of the hearing nine transcripts including seven witness interviews, the appellant's deposition, and the transcript of the appellant's Employment Compensation hearing at which the appellant, Ms. Marshall, Commissioner Wrenn and CO Mark Jordan all testified. As such, the Board found that it had sufficient evidence upon which to decide the appeal. Therefore, after reviewing the Motions, Objections and Responses identified above,<sup>1</sup> the Board voted to DENY the State's Motion to Allow Testimony of Rebuttal Witnesses.

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<sup>1</sup> Although the Board noted receipt of nine additional exhibits from the State, the content of those exhibits were not considered by the Board, either in reaching its decision on the original Motion, or in its ultimate decision on the merits of the appeal.

## Narrative Summary

The grounds for dismissal outlined in the letter of dismissal issued to Ms. Bettez on February 2, 2007, stated:

"In accordance with the NH Division of Personnel Code of Administrative Rules Per 1002.08 (a)(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, this is a letter of dismissal from employment with the New Hampshire Department of Corrections." Specifically, the Department alleged that Ms. Bettez was properly notified on September 1, 2006, of a confidential investigation into a number of allegations of misconduct. According to the notice of dismissal issued to the appellant by Commissioner Wrenn:

"The investigator questioned you about your use of the Alco-sensor and the other allegations. You denied that you had used the Alco-sensor on yourself and you denied that you made any statements that the readings were high. Also you denied that you allowed inmates to perform inmate counts, allowed inmates to assign smoke walks for other inmates and you denied having inmates check in visitors to the halfway house.

"After the investigation was completed, I met with you on January 31, 2007, to review the findings. At that time I asked you questions regarding the allegation that you used the Alco-sensor on yourself and the alleged statements you made to the officer who was witness to your actions. You again denied using the equipment on yourself and you provided no further explanation as to why these allegations would have been made by the other officer who reported witnessing your actions.

"Also, during the course of the investigation, it was reported that you had contacted the other officer alerting her to the investigation. When I met with you I asked whether you had informed anyone about the fact you were under investigation you stated, 'Never.' However, the same officer reported that you did contact her at her home and told her to expect a call, alerting her to the investigation. Again, when I inquired as to why that officer would make these allegations, you provided no reason as to why a fellow officer would make a report claiming that these events occurred. During that meeting I also provided you opportunity to give your side of the story or to ask any questions. You declined."

"Due to the fact that there was a witness who reported that these events did in fact occur, I have come to the conclusion that you have made false statements, failed to follow a directive and obstructed investigative activity by not cooperating fully during the course of an investigation, violating Policy and Procedure Director [sic] PPD 2.16 Section V.4 and 10 and 22."

#### Review of the Department of Corrections Investigation Report and Related Documents

1. On August 6, 2006, Corrections Officer Tina Thurber prepared a report for Unit Manager Christine Cook regarding a meeting between herself, Inmate Cindy Castle and Officer Bettez. Officer Thurber wrote that, "...during briefing today it was passed on that CO Bettez should watch her back due to Ms. Castle wanting to have her fired.... She [Castle] did not admit to wanting to have her [Bettez] fired but she did state she wanted to speak to someone with rank about the situation. CO Nolin and Honeman stated that she [Castle] approached them [Nolin and Honeman] in the morning about wanting to have her [Bettez] fired. This was passed to us during briefing." (SEA Exhibit 7, p. 115)
2. On August 12, 2006, Officer Bettez submitted an incident report to Sgt. Desmond indicating that an inmate returning to Shea Farm from an outing informed Officer Bettez that the inmate had spoken with two other inmates and with Unit Manager Cheryl Morand in Ms. Morand's office, on August 10, 2006, and that Unit Manager Morand told the inmates that Officer Bettez was being transferred out of Shea Farm. Ms. Bettez was then working at Shea Farm in a permanent position and was not aware of anything relating to a transfer. (Joint Exhibit C, page 61)
3. According to Investigator Wefers' report, "Officer Bettez believes the complaint against her that she had been 'hung over' might have originated with Inmate Cindy R. Castle or one of Castle's associates. Officer Bettez thinks I/M Castle might have filed the complaint, or caused it to be filed, in retaliation for a major disciplinary report Bettez filed against Castle for stealing from the State. (The [disciplinary] report was eventually overturned.)" (Joint Exhibit C, pp. 4-5)
4. Although Investigator Wefers was aware of Ms. Bettez's concerns about being "set up" by inmates, he never interviewed Inmate Castle to determine whether or not she might have been the source of the allegations, or whether she might have persuaded other inmates to fabricate claims about Officer Bettez. There was no evidence of an investigation of any kind into the report by Ms. Bettez on August 12, 2006, in spite of the fact that potentially career-ending allegations were made against the appellant by inmates less than three weeks later. There also is no evidence that Investigator Wefers ever questioned Ms. Morand about the August 12, 2006, incident report filed by Officer Bettez in which Ms. Bettez reported that inmates claimed that Ms. Morand told them that Officer Bettez would be

transferring out of Shea Farm. In his testimony at the Department of Employment Security hearing on August 14, 2007, Mr. Wefers described that information as not being pertinent to his investigation. (Joint Exhibit D, Day 2, page 12)

#### The alleged Alco-sensor incident

5. On or about August 31, 2006, Unit Manager Cheryl Morand submitted an Incident Report to her supervisor, Joanne Fortier, stating, "On 8/29/06, this writer learned that Inmate Rebecca Drown had information about misconduct by Officer Bettez on Sunday August 20, 2006." According to the report, Inmate Drown claimed that when Officer Bettez arrived for work on Sunday, August 20, 2006, Officer Bettez "told some inmates that she was 'hung-over,'" that she later allowed inmates to sign other inmates out for "smoke walk," that she had an inmate do "count" for her, and that she allowed an inmate to sign visitors in to the facility. (Joint Exhibit C, p. 36)
6. In Ms. Morand's hand-written report, which is dated August 29, 2006, in one place and August 31, 2006, in another, the date that the alleged misconduct was reported to have occurred has been altered to read "Sunday, August 20, 2006," instead of "Saturday, August 26, 2006." Ms. Morand did not indicate in the report how she "learned" about the information that Inmate Drown allegedly had, nor did she explain why the date in her hand-written report has been changed from Saturday, August 26, to Sunday, August 20, 2006. (Joint Exhibit C, p. 36)
7. Inmate Drown's written statement, attached to Morand's report and submitted in response to Unit Manager Morand's request, makes no reference to Officer Bettez being "hung-over," nor does it say that Inmate Drown observed inmates signing in visitors. According to Inmate Drown's statement, "Today on 8-29-06 I was called into Cheryl's office with Cheryl [Morand] and Mrs. Fortier, they asked if anything unusual was going on, on Saturday 8-26-06." (Joint Exhibit C, p. 39)
8. In response to questioning by Unit Manager Morand, Inmate Bridgette Patch also provided a written statement alleging that on August 26, 2006, Officer Bettez had Inmate Candi Serounian "doing count for her." (Joint Exhibit C, p. 28) Inmate Patch also claimed that although she had not witnessed it personally, she overheard an unidentified visitor asking why inmates would be checking visitors in to the facility. (Joint Exhibit C, p. 29)
9. Ms. Morand's second written report, dated September 1, 2006, contained further allegations from Inmate Drown, and statements from inmates alleging that other inmates were allowed into the officer's station unsupervised, that inmates were going through the files, and that inmates were passing out cigarettes. An attached statement from Inmate Kelly Crawford claimed that she had witnessed the alleged misconduct "on a Saturday in the middle of August while [Bettez] was the only officer working."

- (Joint Exhibit C, p. 44) Inmate Kathy Halvorsen's written statement, also attached to the Morand report, describes the same alleged offenses taking place on August 20, 2006. The date on that document has also been changed from August 26, 2006, to August 20, 2006. (Joint Exhibit C, pp. 44 and 45)
10. According to his report, Investigator Wefers conducted a five-minute interview with Unit Manager Cheryl Morand on October 10, 2006, describing her as the "complaining witness." Investigator Mark Wefers wrote, "I referred Ms. Morand to her Incident Report dated August 31, 2006... Responding to my questions, Ms. Morand stated that when Inmate Rebecca Joann Drown told her 'that Officer Bettez told some inmates she was "hung over," Drown did not identify, and Morand did not ask Drown to identify, the inmates to whom Bettez made the alleged statement." (Joint Exhibit C, p. 9)
  11. There was insufficient evidence to support any of the allegations made by various inmate witnesses against Officer Bettez regarding "smoke walks," inmate counts, or inmates signing-in visitors, nor was there evidence to corroborate inmate allegations that Officer Bettez was, or said she was, hung over.
  12. Corrections Officer Tina Thurber identified August 27, 2006, as the date that Officer Marshall told her that Officer Bettez had arrived at work that morning saying she was hung-over, Officer Thurber was certain of the date, explaining that it was part of her conversation with Officer Marshall about Officer Bettez complaining about Officer Marshall missing inmate counts when Officer Bettez had missed a count herself on first shift that day. According to Officer Thurber, Officer Marshall was angry. (Joint Exhibit C, p. 54)
  13. Officer Marshall testified that she worked alone on third shift the day that Officer Bettez "blew numbers." However, after being shown the Shea Farm log for August 27, 2006, which clearly shows Officer Mousseau working third shift with Officer Marshall, (Joint Exhibit C, p. 56), Officer Marshall changed her testimony and claimed to remember that Officer Mousseau left early that morning.
  14. While Officer Mousseau may or may not have been present at briefing between the two shifts, and may or may not have had an opportunity to observe Officer Bettez, she was never interviewed as part of the department's investigation.

The alleged warning phone call from Officer Bettez to Officer Marshall regarding the investigation

15. In her November 16, 2006, investigative interview with Investigator Wefers, Officer Marshall said that she received a call on her home phone from Officer Bettez warning her about the investigation. According to Officer Marshall, "She had called my home to let me know that she was probably going to be under investigation. She wanted to give me a heads up.... [Officer Bettez] .., said she couldn't get into it. I mean she's not going to incriminate herself, I'm sure, and start talking to me about crap, so I said, 'Okay, well I guess I'll see you at work,' and that was the end of the conversation and I told my

husband and he just shook his head and, because he's a Sergeant... I'm trying to ask him, you know, he says, 'Just go in, tell them what you know and it's done.'" (Exhibit K, p. 15 – NHDOC Interview of Linda Marshall)

16. Officer Marshall testified that the only call she ever received from Ms. Bettez occurred before September 1, 2006, when Ms. Bettez called on Officer Marshall's home phone to warn her of the impending investigation. Officer Marshall was unable to identify the date on which the phone call allegedly was made, Investigator Wefers did not request any telephone records to determine whether or not such a call was made, Investigator Wefers testified at the NH Employment Security hearing, Ms. Bettez would not have known that she was under investigation until she received formal notice of the investigation from Unit Manager Cook on September 1, 2006. (Joint Exhibit D, Day 2, page 12)
17. Ms. Bettez testified that the only call she ever made to Ms. Marshall was on the morning of August 20, 2006, when she informed Ms. Marshall that Marshall had taken one of only two sets of keys from the facility with her when she left her shift. Calls from State facilities appear on caller ID as either "Restricted" or "Unavailable," and there is a record of an "unavailable" call to Ms. Marshall's cell phone on the morning of August 20, 2006, when Ms. Bettez claims to have called Ms. Marshall about the missing keys. (Joint Exhibit A) There is also a notation in the shift report log for August 20, 2006, that states, "CO Marshall brought home key set #1, will bring back for third shift this evening." (Joint C, p. 65)
18. Investigator Wefers did not request, obtain or review Officer Marshall's telephone bills in order to determine whether or not the alleged call occurred, Investigator Wefers also did not interview Ms. Marshall's husband, a Sergeant working for the Department of Corrections, to find out if Officer Marshall's husband recalled a conversation with his wife concerning an impending investigation.

#### Commissioner Wrenn's Meetings with Corrections Officer Bettez and Corrections Officer Marshall

19. On January 31, 2007, Commissioner Wrenn met with Officer Bettez, John Sanfilippo, and CO Mark Jordan, and questioned Officer Bettez about allegations concerning "the events of a day shift you worked at Shea Farm on or about August 27, 2006." According to his notes, Commissioner Wrenn asked Officer Bettez a series of questions including, "Is there any reason that CO Marshall would lie about the issues involved in this matter to get you in trouble?" Officer Bettez replied, "Well, she has already lied once." Commissioner Wrenn followed up by asking, "What did she lie about?" Officer Bettez replied, "The lies she told about what happened." When asked for her "side of the story," Officer Bettez declined to answer. (SEA Exhibit 2)

20. On February 12, 2007, Commissioner Wrenn and Human Resources Administrator Lisa Currier met with Corrections Officer Linda Marshall and questioned her about her allegation that Officer Bettez reported for duty and said she was "hung over," and that Officer Bettez used an Alco-sensor on herself and stated that she "blew numbers." The report of the interview states, in part:

"Originally CO Marshall stated she was not forthcoming. She did not want to get someone else in trouble.

"When Inspector Mark Wefers told her about the consequences of lying, she told the truth of what happened.

"CO Bettez called CO Marshall a couple of days latter to tell CO Marshall she would be getting a phone call about what the inmates said." (SEA Exhibit 3)

21. When questioned by Officer Bettez at her Unemployment Compensation hearing on August 14, 2007, Commissioner Wrenn stated, "...All I had to go on [in deciding whether or not to take disciplinary action against Officer Bettez] was the [Wefers investigative] report that I read and having you [Officer Bettez] come before me, if you had answered the questions to my satisfaction that where I believed that you were being truthful, that was certainly my hope at that point in time, then we probably wouldn't be sitting here right now." (Joint Exhibit D – day 2, p. 48)

22. Commissioner Wrenn described Officer Bettez's conduct at the January 31, 2007, meeting as "arrogant" and not appropriate for the circumstances. Commissioner Wrenn described Officer Marshall's statements to him in their February 12, 2007, meeting as "very emotional" and he recalled Officer Marshall saying that, "...when Mark Wefers told her something to the extent or the strict policy on lying and that and the conversations that she had had with her husband, she knew she had to do, according to her, the right thing and bring these things forward. Weighing out her statements to me, her demeanor to me and weighing out yours, the fact that I gave you an opportunity to tell me what happened and you chose not to, in your words, that all went into my consideration that the weight of my decision was that CO Marshall was the truthful one and you were not." (Joint Exhibit D, day 2, p. 51)

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Having carefully reviewed the evidence submitted by the parties, and having weighed the credibility of the witnesses, the Board found that neither the investigation conducted by Investigator Wefers nor Officer Marshall's testimony was sufficiently complete, reliable or credible to support the conclusion that Ms. Bettez engaged in the misconduct as alleged or that she engaged in any activity to obstruct an official investigation. However, by refusing to provide complete answers to Commissioner Wrenn's questions during two separate meetings with him, and by refusing to provide her "side of the story" when asked, Ms. Bettez effectively

prevented Commissioner Wrenn from having sufficient information to reach the same conclusions, or sufficient reason to cause Commissioner Wrenn to ask the investigator to interview relevant witnesses or look more closely at the circumstances surrounding the original allegations. Ms. Bettez failed to tell Commissioner Wrenn that she believed she may have been set up by inmates, or that Unit Manager Morand had allegedly told inmates weeks before the alleged incident that Officer Bettez was being transferred out of Shea Farm. She failed to point out any of those things in the investigative report that she believed to be inconsistent or inaccurate. She refused to discuss why she thought Officer Marshall might lie, saying only that, "She did before." According to Commissioner Wrenn, when he met with Officer Bettez, she was curt, uncooperative and disrespectful. Under those circumstances, it is unrealistic to believe that Commissioner Wrenn would have felt compelled to conduct his own in-depth review to challenge his investigator's findings, and Officer Bettez gave him no reason to do so. As such, the Board must conclude that Commissioner Wrenn made the only decision he felt he could make given the facts as he understood them.

Per 1002.08 (d) states:

"No appointing authority shall dismiss a classified employee under this section until the appointing authority:

- (1) Offers to meet with the employee to discuss whatever evidence which the appointing authority believes supports the decision to dismiss the employee;
- (2) Offers to provide the employee with an opportunity to refute the evidence presented by the appointing authority provided, however:
  - a. An employee's failure to respond to a request for a meeting with the appointing authority shall not bar the appointing authority from dismissing an employee pursuant to this part; and
  - b. An employee's refusal to meet with the appointing authority shall not bar the appointing authority from dismissing an employee pursuant to this part; and
- (3) Documents in writing the nature and extent of the offense."

Commissioner Wrenn complied with the requirements of Per 1002.08 (d) and gave Officer Bettez an opportunity to refute the evidence presented by Investigator Wefers and give her side of the story before making his decision to dismiss her. Officer Bettez simply refused to cooperate. By comparison, Officer Marshall's behavior was described by Commissioner Wrenn as "emotional," and she gave what Commissioner Wrenn considered a plausible explanation for telling Officer Thurber about Officer Bettez,

then allegedly lying about it to the investigator in the first instance, saying that she did not want to be ostracized by her co-workers if they found that she had reported misconduct by a fellow officer. Ultimately, Officer Marshall told the Commissioner she just wanted to come to work and do her job, and felt that she needed to "do the right thing." As such, it is not surprising that Commissioner Wrenn found Officer Marshall to be more credible than Officer Bettez at that time.

The obligations created by Per 1002.08 (d) of the NH Code of Administrative Rules (Rules of the Division of Personnel) apply to both the agency and the employee. The agency is obliged to produce the evidence supporting termination from employment in order to allow the employee an opportunity to refute that evidence. If the employee knows that the evidence is insufficient or the reasoning for dismissal is flawed, the employee has an obligation to inform the employer so that errors in the decision-making process can be corrected before the termination occurs. Although Officer Bettez might have been unable to identify or articulate reasons that Officer Marshall might have lied about her, Officer Bettez certainly had theories about the source of the original allegations and the quality of the investigation, and could have brought those concerns to the Commissioner's attention. The fact that Ms. Bettez failed to do so should not now obligate the employer to reverse its decision and compensate her for the resulting lost wages.

RSA 21-I:58, I provides the following:

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."

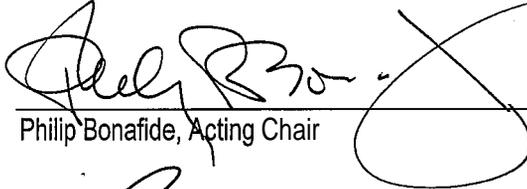
Having carefully reviewed the evidence and argument presented, the Board found that the decision to dismiss Ms. Bettez was not taken by the appointing authority for any reason related to politics, religion, age, sex, race, color, ethnic background, marital status, or disabling condition, or on account of the person's sexual orientation, nor was taken in violation of a statute or of rules adopted by the director. Rather, it was a decision based on the information available to Commissioner Wrenn at the time, even though that information was at best incomplete and unreliable. As such, the Board found that Ms. Bettez was not entitled to reinstatement without loss of seniority, status or pay.

However, in light of the evidence presented, the Board also found that Ms. Bettez's dismissal was not just in light of the facts in evidence. Employees have a right to expect a reasonable degree of consistency in the level of discipline applied for similar infractions. Commissioner Wrenn chose to dismiss the appellant for lying. In Officer Marshall's case, although she admitted that she lied to the investigator during the course of an official investigation, she only received a written warning. (Exhibit L.) Accordingly, the Board found that Ms. Bettez should have been entitled to similar treatment and should have received some form of discipline short of her outright dismissal.

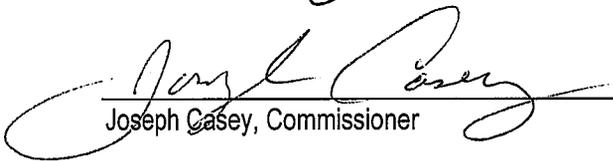
Therefore, for all the reasons set forth above, the Board directs the Department of Corrections to reinstate the appellant to her position of Corrections Officer, and to make such reinstatement within 30 days of the date of this order. The Department may choose the position, shift and facility to which the appellant will be assigned. The appellant's period of separation from service shall be treated as a leave without pay, and the appellant shall not be entitled to compensation for any period between the date of dismissal on February 12, 2007, and June 8, 2009, when the appellant's Response of Tracie Bettez to NHDOC's June 8, 2009, Motion was received by the Board.

The Appeal of Tracie Bettez is therefore GRANTED IN PART and DENIED IN PART as set forth in the order above.

THE NH PERSONNEL APPEALS BOARD

  
Philip Bonafide, Acting Chair

  
Robert Johnson, Commissioner

  
Joseph Casey, Commissioner

- cc: Karen Hutchins, Director of Personnel, 25 Capitol St., Concord, NH 03301  
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