State of New Hampshire

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PERSONNEL APPEALS BOARD
State House Annex
Concord, New Hampshire 03301
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APPEAL OF GERARD BOULANGER
Docket #91-T-5
Response to Appellant's Motion for Reconsideration and Rehearing
N.H. Youth Development Center

July 18, 1991

The New Hampshire Personnel Appeals Board (McNicholas, Johnson and Rule) met Wednesday, June 12, 1991, to consider the appellant's June 26, 1991 Motion for Reconsideration of the Board's June 6, 1991 Order upholding his discharge from employment. The Board also reviewed the State's July 2, 1991 Objection to Motion for Reconsideration and Rehearing.

In support of his Motion, the appellant argued that the total evidence submitted supported the appellant, claiming that the record reflects the appellant's witnesses believed that if he had been tampering with the clocks, they should have seen it at least once. The State argued that it had presented eyewitness testimony to the clock tampering, while the appellant's witnesses could only testify that they had not personally witnessed the offense. The State further argued that the record reflected that staff people work on different floors of the cottage with little contact throughout the shift. Upon review of the record, as well as the Motion and Objection, the Board voted to affirm its original finding, that the appellant did tamper with the watch clocks.

The appellant also argued that YDC had referred to an "ongoing" investigation of clock tampering, and that no disciplinary action had been taken against those who had admitted to complicity, nor had any disciplinary action been taken against those who worked on those dates where evidence of tampering existed, and the appellant was not on duty. The appellant had already raised this argument in his initial appeal. The Board did not find the absence of other disciplinary action a compelling reason to reinstate the appellant, given the seriousness of the offense.

The appellant reiterated his argument that the Rules of the Division of Personnel require three letters of warning for the same offense before an employee may be discharged. In support of that position, he argued that, "Even if unenumerated offenses can come under Per 300.03 (c)(2), these allegations are not sufficiently connected to ("such as") those enumerated violations."

The Board does not agree. The offense need not be "connected" to those offenses listed as the appellant asserted. The offense need only rise to the level of those offenses listed. Having found that the appellant tampered with the time clocks and demonstrated willful disregard for the safety and well-being of the youth in his charge, the Board found the offense serious enough to warrant immediate discharge without warning. That finding is hereby affirmed.

In consideration of the foregoing, the Board voted unanimously to deny the appellant's Motion, and to affirm its decision of June 6, 1991, upholding his discharge.

THE PERSONNEL APPEALS BOARD

Patrick J. McNicholas, Chairman

Robert J. Johnson

Lisa A. Rule

cc: Virginia A. Vogel, Director of Personnel
Ronald G. Adams, Superintendent, N.H. Youth Development Center
Michael C. Reynolds, General Counsel, State Employees' Association
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APPEAL OF GERARD BOULANGER
Docket #91-T-5

N.H. Youth Development Center

June 6, 1991

The New Hampshire Personnel Appeals Board (McNicholas, Johnson and Rule) met Wednesday, April 24, 1991, to hear the termination appeal of Gerard Boulanger, a former employee of the New Hampshire Youth Development Center. Mr. Boulanger, who was represented at the hearing by SEA General Counsel Michael C. Reynolds, had been discharged from his employment as a Youth Counselor on September 4, 1990, for allegedly tampering with the night watch clocks at Spaulding Cottage, and for sleeping on duty. The Youth Development Center was represented by its Superintendent, Ronald C. Adams.

At the outset of the hearing, the parties made a joint motion that the witnesses be sequestered, and that exhibits to be entered by the parties be entered by stipulation.. The Board granted the motion to sequester, and accepted the exhibits marked as follows:

SEA #1 - List of "Alleged Tamperings" (1 page)
SEA #2 - handwritten time record, Spaulding Cottage 8/20-21/90 (2 pages)
SEA #3 - Time and Pay Record - Gerry Boulanger (6 pages)
SEA #4 - Letters dated 5/22/89, 5/10/89, 11/29/87, 12/1/82 from Boulanger's YDC personnel file
SEA #5 - Performance Evaluations dated 2/2/87, 12/20/85, 10/28/85 from Boulanger's YDC personnel file
SEA #6 - Copy of a daily report - Spaulding Cottage - 8/19/90

YDC #1 - Analysis of Clock Tampering (3 pages)
YDC #2 - 9/4/90 letter of termination, 2/28/90 letter of warning, 2/28/89 letter of warning, 9/12/88 letter of warning from Boulanger's YDC personnel file
YDC #3 - Watch clock graphs (originals only) 90 disks

One of the watch clocks used at YDC was also presented for demonstration later in the hearing.

The State argued that Mr. Boulanger had tampered with the watch clocks in a manner which would make it appear, on casual inspection, that the clocks had been punched at the normal fifteen minute intervals throughout the night shift. The State claimed that Mr. Boulanger had "jimmied" the clocks open, advanced the time graphs by hand, and "punched" the clocks in advance to allow himself and other staff members to avoid making required rounds of the cottage and checking on the residents. Three of the State's witnesses, Brian Russell, Jerry Rothwell and Robert Ouellette, testified that they had either seen Boulanger open one of the watch clocks, pre-punch the watch clock, or have an open clock in his hands.

The appellant alleged that two of the State's witnesses, Brian Russell and Jerry Rothwell, were probationary employees who feared the loss of their jobs through lay-off. He argued that they b t h would be motivated to lie a b u t Boulanger's involvement in the clock tampering in order to protect their own positions if a lay-off did occur. The appellant alleged that another of the State's witnesses, Kenneth Goonan, had access to the watch clocks in his capacity of acting night supervisor, and could have opened the clocks himself to make it appear that Boulanger had jimmied the clocks. He argued that he did not have a good relationship with Gmnan, and that Gmnan could have fabricated evidence to support Boulanger's discharge. The appellant suggested that Mr. Ouellette had been disciplined himself for a variety of infractions, and that his testimony could not be deemed entirely credible as his fear of losing his own job might motivate him to provide information supporting Boulanger's discharge. The appellant insisted that he had never opened the clocks, that he had never had anyone pre-punch the clock for him, and that he was unaware of any tampering with the clocks.

State's Witnesses

Brian Russell testified that he was employed as night staff at YDC as a Youth Counselor I in April, 1990, and worked several times at Spaulding Cottage. He testified that during one of his shifts at Spaulding Cottage, he was in the office at the cottage when the appellant approached him and asked him to come with him. He testified that Boulanger instructed him to hold a piece of paper over one of the residents' windows as a visual shield while Boulanger opened the Qatch clock. He saw the clock open in Boulanger's hands.

Russell testified that after Boulanger opened the clock, he turned his back to him. Although Russell did not actually see the clock being punched, he did hear a series of loud clicking noises like the watch clock was being punched again and again. He indicated that when staff punched the watch clock on their regular rounds, they normally turned the key one to three times. He testified that he heard the key click more than twenty times. Russell, a

probationary employee at the time, admitted that he had not immediately reported the incident to supervisory staff. He wrote to Superintendent Adams about the incident only after Ken Goonan approached him about allegations that someone on staff at Spaulding was tampering with the clocks. He said he was angry about being drawn into the clock tampering incident.

Robert L. Ouellette, testified that he had been employed as a Youth Counselor I at YDC since July, 1982. He stated that he had personally witnessed Gerard Boulanger tampering with the clock on eight or ten different occasions. He stated that after having the clock open, Boulanger would go into the main room or TOG room to lie down. Ouellette admitted that he too had gone to lie down on a couch in the cottage.

When asked why he hadn't reported the clock tampering, Ouellette said that since staff in institutions have to work as teams and have to count on one another, he was afraid that turning in one of his co-workers would result in his being avoided or harassed by the rest of the staff. He also said that he feared he might be "jumped" by one of the students and none of the staff would come to assist him. He also testified that he had seen other staff besides Boulanger sleeping on duty. Mr. Ouellette admitted to knowing of other employees who had "jimmied" the clock and that he had reported those employees to Superintendent Adams only after learning that YDC was conducting an investigation into the possibility of clock tampering. He also admitted that he probably would not have reported any of that information had there not been an investigation.

Jerry Rothwell, a Youth Counselor I at YDC since February, 1990, testified that he'd seen Boulanger with an open watch clock during one shift that they worked together. He testified that Boulanger had told him he didn't have to worry about making any punches during the night shift because the watch clock was "fixed". He stated that he and all the rest of the Counselors on duty slept through the shift and no one checked on the residents. He said he had not actually seen Boulanger opening the clock, but did see Boulanger with an open clock in his hands. Mr. Rothwell said he'd never seen any other staff members tampering with the watch clocks, but that he'd heard rumors about others who were fixing the clocks from his co-worker Brian Russell.

Robert Boisvert, YDC Chief of Operations, demonstrated the operation of watch clocks in use at Spaulding Cottage, and explained how the process of "punching" the clock marks the time graph locked inside. He explained the location of keys inside the cottage used to punch the clocks, and that the time graphs from each clock are used to document that staff have made the required checks on residents in the cottage. He also demonstrated the manner in which a clock could be "jimmied" open, the time graph advanced by hand, and the clock punched with one of the keys to make it appear that the clock had

been punched during rounds at regularly scheduled fifteen minute intervals. Mr. Boisvert further demonstrated how the clock, when opened, marks the time graph, and how analysis of the graphs can document whether or not a clock has been opened during a shift.

Mr. Boisvert testified that in the normal course of operations, a clock would only be opened twice each shift, once to insert the time graph and the second time to open the clock to remove the graph. Mr. Boisvert or his assistant generally wind the clocks, which run for approximately 7 days. He testified that on rare occasion, a clock might stop during a shift, requiring that the supervisor on duty be called in to wind the clock. At those times, however, the supervisor is responsible for initialling the time graph to show that the clock had to be opened during the shift.

Mr. Boisvert testified that as part of the investigation into clock tampering, he had assigned Ken Goonan to analyze the time graphs for evidence of tampering. He noted that there had been no evidence of clock tampering after August of 1990.

Kenneth Goonan, Youth Counselor I, testified that he had been assigned by Mr. Boisvert to analyze a number of time graphs for possible evidence of tampering. He said he had inspected several months worth of time graphs with a magnifying glass and had separated out those with more than the normal number of graph markings. Any graphs with more than two marks, once when the graph was installed and once when it was removed, were considered proof that the clock had been opened without authorization. Mr. Goonan also prepared an analysis of the dates on which it appeared that the clocks had been jimmied, indicating which members of the staff were on duty on those dates.

Norm Larochelle, the Treatment Coordinator at YDC, testified that throughout the institution, there are regular "watches" and that staff make rounds at fifteen minute intervals, checking in on students through the night. In addition to the regular watches, there are also special watches with assigned ratings of A, B, or C. On a C watch, a list is attached to the door of the student's room which staff are required to initial when they check on the student at ten minute intervals throughout the night shift. Staff are required to make a visual check if the student is sleeping, and to also make an auditory check if the student is awake. On a B watch, the student's room is stripped of loose and/or dangerous material, and staff are required to make both a visual and auditory check. During an A watch, a staff member is assigned to stay in the room with the student.

Mr. Larochelle testified that "A" watches are seldom needed, but there may be as many as 7 students on "B" and "C" watches on any given evening in Spaulding Cottage. The remainder of the residents are checked on the routine watch at fifteen minute intervals.

Appellant's Witnesses

Dan Douidi, a former employee of YDC, testified that he had worked night shift with Gerard Boulanger on May 21, May 28, June 4 and July 30, 1990, four of the dates on which the clocks were allegedly jimmied. Mr. Douidi testified that he had never seen Boulanger open a watch clock or tamper with the clocks in any way.

Robert Decker, House Leader at Spaulding, testified that he had never seen Boulanger tampering with any of the watch clocks. He did not generally work nights, however, which were the appellant's regularly scheduled hours. Decker testified that when Boulanger had been held over on over-time into the day shift, he had never had any problems with him or his work.

Mr. Decker also testified that he was not directly involved in the investigation into the clock tampering, and was not present at the meeting at which Mr. Boulanger was notified of his discharge. Mr. Decker testified that in his opinion, anyone who was involved in tampering with the clocks, or who had knowledge of clock tampering and who did not report it, should be considered guilty of tampering with the clocks.

Ronald Greenlow, a Youth Counselor I, testified that he had worked at YDC for approximately 6 years on the night shift. He testified that he had never seen Boulanger tampering with the watch clocks. He admitted to having seen staff in the cottage sleeping on duty for fifteen to thirty minutes at a time, and argued that if it were "their dead time", or if the employee didn't feel well, the employee would be better off catching a quick nap. With regard to the relationship between Boulanger and Goonan, Mr. Greenlow said he believed neither one cared for the other.

The appellant, Gerard Boulanger, testified that he had been employed as a Youth Counselor one from February of 1985 until the time of his discharge on August 4, 1990. He stated that he had never opened or tampered with any of the watch clocks.

Mr. Boulanger characterized his problems with Kenneth Goonan as, "just his little verbal digs". He testified that on November 25, 1989, he had been called in to work Saturday over-time at King Cottage. When Goonan came by the cottage, Boulanger expressed his anger at being assigned to King and being made to work over-time. He said Goonan remarked that after King Cottage there was just "...one more place to go", which he took to mean that he would be discharged.

Mr. Boulanger testified that his problems with supervisory staff stemmed from an earlier warning arising out of his relationship with one of the students, and the issue of supervisory control. He argued that when a problem arose in the cottage, the Youth Counselors would collectively decide what course of action to take and that "Only one person has a hang-up about who's in charge. We're all YC I's". He also stated that he had received no prior warnings for tampering with the watch clocks.

Decision and Order of the Board

On all the evidence and testimony presented, the Board voted unanimously to deny Mr. Boulanger's appeal. In so doing, the Board found that the appellant failed to meet his burden of proof. Neither his testimony nor that of the witnesses called on his behalf support a finding that the agency erred in ordering his discharge from employment. The record supports the conclusion that Mr. Boulanger committed the offenses of tampering with the time clocks, and informing co-workers that there was no need to perform the required watches during the night shift. In light of the critical nature of the night watches at Spaulding Cottage and the appellant's willful disregard for the safety of the students residing at that cottage, his tampering with the watch clocks warranted his immediate discharge.

The appellant's explanation of why Messrs. Rothwell, Russell, Ouellette and Goonan would be inclined to lie about his tampering with the clocks was not persuasive. Rothwell, Russell and Ouellette each admitted that were it not for the investigation, they would not have come forward with any information about the clocks being fixed. In the case of both Rothwell and Russell, the Board finds it hard to believe that the threat of lay-off would motivate them to lie about Boulanger tampering with the clocks. Since both Russell and Rothwell seemed relatively unfamiliar with certain standard procedures in their own agency, the Board finds it highly improbable that they would equate the removal of a permanent employee with improving the likelihood of their own continued employment. Further, given the limited number of occasions on which Messrs. Rothwell and Russell worked with the appellant, the Board considers it highly improbable that the physical evidence of clock tampering would support their testimony if that testimony were untrue.

In support of his claim that 'he had not tampered with the time clocks, the appellant also offered the testimony of Messrs. Douidi, Decker and Greenlow, who each testified that they had never seen Boulanger open or "fix" a watch clock. While their testimony may be entirely true, it does not prove that the offense in question did not occur.

Mr. Decker worked the day shift and only had direct contact with Boulanger when the appellant was carried over from the night shift on over-time. Decker

did not directly supervise the appellant during the night shift when the clock tampering occurred. Watch clocks are not used during the day shift when Decker is on duty. Since Decker is the House Leader, it is highly unlikely that any employee would commit any serious offense in his presence. Therefore, while the Board found Mr. Decker's testimony to be credible, it has little or no bearing on the facts of the appeal.

Mr. Douidi, who is no longer employed by YDC, also testified that he had never seen the appellant "fixing" a watch clock. He also testified, however, that because of the way the staff are positioned in the buildings during the night shift, Youth Counselors normally did not see one another making the required punches, and he would therefore have had no way of knowing whether Boulanger made the required rounds or not. Mr. Douidi also testified that most of his co-workers knew of his desire to become a full-time police officer, and considered him to be something of a "straight arrow". It is therefore reasonable to conclude that the appellant would not have admitted to "fixing" the clocks, nor would he have "jimmied" the clock in Douidi's presence for fear that he would report it to the Superintendent.

Mr. Greenlow testified that he had never seen Boulanger open or tamper with a clock. Again, the Board found that ample opportunity existed, particularly when there were three rather than four Youth Counselors on duty, for one of the staff to tamper with a clock without the other staff on duty being aware of, or witnessing, the tampering. Mr. Greenlow also testified that he saw no harm in employees sleeping on duty during their "dead time". It is therefore unremarkable that Greenlow might have seen staff sleeping on duty without questioning whether or not someone had "fixed" the clock.

The Board found that the State presented sufficient evidence to support its conclusion that Mr. Boulanger committed the offense of tampering with the time clocks, and that such offense warranted his immediate dismissal. Per 308.03 *(2)* of the Rules of the Division of Personnel provides that,

> "In cases such as, but not necessarily limited to the following, the seriousness of the violation may vary. Therefore, in some instances immediate discharge without warning may be warranted, while in other cases one written warning prior to discharge may be indicated. Repetition of any of the following offenses after one written warning has been given makes the discharge of the offender mandatory."

The Board found that the offense in question was of such a serious nature as to warrant the appellant's immediate dismissal without prior warning for the offense of "clock tampering". In his position of Youth Counselor at Spaulding Cottage, the appellant was well aware of the critical nature of his responsibilities for the well-being of the residents of the cottage. By

"fixing" the clock and failing to make the required watches, the appellant demonstrated dangerously poor judgment, jeopardizing the safety of both the students and the staff. The Board found that YDC, after investigating and substantiating the charges that Mr. Boulanger had tampered with the watch clocks, appropriately exercised its discretion in discharging him from his employment as a Youth Counselor under the provisions of Per 308.03 (2). Accordingly, his appeal is denied.

THE PERSONNEL APPEALS BOARD

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cc: Virginia A. Vogel, Director of Personnel
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