

# State of New Hampshire



**PERSONNEL APPEALS BOARD**  
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## ***APPEAL OF BRUCE BROFMAN***

***Docket #2007-T-001***

***Department of Health and Human Services***

December 5, 2007

The New Hampshire Personnel Appeals Board (Wood, Johnson and Casey) met in public session on July 11, September 5, and November 14, 2007, to hear the appeal of Bruce Brofman, a former employee of the Department of Health and Human Services. Mr. Brofman, who was represented at the hearing by SEA General Counsel Michael Reynolds, was appealing his July 6, 2006 termination from employment from his position as a Child Protective Service Worker IV. The State alleged that Mr. Brofman engaged in conduct that created an intimidating, hostile and offensive working environment for clients, colleagues and providers in and outside the workplace in violation of [former] Per 1001.08 (a)(19). Attorney Lynne S. Mitchell appeared on behalf of the Department of Health and Human Services.

After the original prehearing conference, the State submitted a Motion to Close Hearing to Public, arguing that the State intended to offer case records into evidence regarding recipients of DCYF services, as well as the testimony of some current and former DCYF service recipients who had been subpoenaed to testify. In its motion, the State indicated that DHHS was not legally permitted to release that information except in the case of fatality or near fatality of a child, pursuant to a court order, or if the recipient of services voluntarily assents to release of personally identifying information, and that an order from the Board closing the hearing would protect the confidentiality of that information.

Although the appellant did not object to closing the hearing, the Board indicated that its hearings are matters of public record, and although it could allow certain parts of documents to be redacted, or witnesses referred to by their initials, the Board would not close the hearing in order to allow DHHS to subpoena witnesses who could not legally be compelled to testify. After some additional discussion, the State's DCYF client witnesses agreed to testify voluntarily, and the State withdrew its motion to close the hearing to the public.

The record of the hearing in this matter consists of pleadings submitted by the parties, notices and orders issued by the Board, the audiotape recording of the hearing on the merits of the appeal, thirty-one "Stipulated Facts," and documents admitted into evidence as follows:

State's Exhibits (as identified in State's "List of DHHS Exhibits"):

1. Dismissal Documents
  - A. May 6, 2006 letter to Bruce Brofman from Lorraine Bartlett
  - B. Intent to Dismiss Meeting with Bruce Brofman – Transcripts June 1, 2006
  - C. July 6, 2006 Dismissal Letter to Bruce Brofman from Lorraine Bartlett
2. Evaluations I
  - A. Evaluation of Bruce Brofman, June 1, 1979
  - B. Performance Summary of Bruce Brofman, February 10, 1993
  - C. Performance Summary of Bruce Brofman, July 31, 2001
3. Evaluations II and Change Forms
  - A. DHHS Human Resource Form 170 – Personnel Action Transfer Form – 9/25/02
  - B. Performance Summary of Bruce Brofman, November 14, 2003
  - C. Performance Summary of Bruce Brofman, December 27, 2004
  - D. Performance Summary of Bruce Brofman, August 4, 2005
  - E. Workplan Expectations, August 4, 2005
  - F. DHHS Human Resources Change Form, Involuntary Termination, 7/13/06
4. NH Policies on Sexual Harassment

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- A. New Hampshire State Policy on Sexual Harassment, Memo, Judd Gregg 7/28/92
- B. NH/DHHS Civil Rights Policy and Complaint Procedures, 8/93
- C. State of New Hampshire DHHS/Sexual Harassment in the Workplace, 9/28/93
- D. DCYF Policy Manual, Code of Ethical Conduct
5. Attendance of Civil Rights/Sexual Harassment Programs
  - A. Awareness Acknowledgment Form, 03/19/90
  - B. Acknowledgment of Sexual Harassment Awareness Training, 1/11/94
  - C. Security in the Work Environment Policy Relating to Threats, 11/2/95
  - D. Sexual Harassment and Drug-Free Workplace Refresher Training, 9/23/97
  - E. Sanctions, 4/07/05
  - F. Sexual Harassment Policy Awareness Form, 8/03/05
6. Professional Behavior in the 'Workplace'
  - A. Curriculum (partial)
  - B. Booklet (partial)
7. Bridges Assignment (Bruce Brofman assigned case #103539, 7/19/05-12/06/05 – B/B/R)
8. FamilystrengthNotes (Lori Foster)
  - A. Email from Lori Foster to Lorraine Bartlett, 2/21/06
  - B. Familystrength contact notes
9. DCYF Contact notes (Bruce Brofinan contact notes of T.B., 10/4/05, 9:35 a.m.)
10. Russell Landry email to Lorraine Bartlett, 3/8/06 (Foster parent Denise Palmer email to Jill Stephenson 12/19/04, 8:53 p.m.)
11. Correspondence
  - A. 11/7/05 letter from Marci Morris to Bruce Brofman
  - B. 2/16/06 email from Lorraine Bartlett to Maggie Bishop and Karen Hutchins
  - C. 2/16/06 chronology from Lorraine Bartlett (attachment to email)
  - D. 2/16/06 email from Lorraine Bartlett to Lori Foster
  - E. 2/17/06 email from Joanne Legare to Lorraine Bartlett and Russell Landry
  - F. 2/21/06 email from Lorraine Bartlett to Joanne Legare and Russell Landry
  - G. 3/8/06 letter from Lorraine Bartlett to Bruce Brofman
  - H. 3/17/06 letter from Lorraine Bartlett to Bruce Brofman

- I. 3/27/06 letter from Lorraine Bartlett to Bruce Brofman
  - J. 4/07/03 letter from Lorraine Bartlett to Bruce Brofman
  - K. 4/14/06 letter from Lorraine Bartlett to Bruce Brofman
  - L. 4/28/06 email from Marcie Morris to Lorraine Bartlett
  - M. 5/2/06 letter from Lorraine Bartlett to Bruce Brofman
  - N. 5/17/06 letter from Lorraine Bartlett to Bruce Brofman
  - O. 5/24/06 letter from Lorraine Bartlett to Bruce Brofman
  - P. 10/06/05 Red Sox Concord Monitor publication
  - Q. 1997 TV Guide – Notes of Joanne Legare
12. Ombudsman
- A. May 12,2006 letter from Charles Weatherill to Bruce Brofman
  - B. April 13,2006 letter from Charles Weatherill to T.B
  - C. April 13,2006 letter from Charles Weatherill to Bruce Brofman
  - D. April 13,2006 Memo and Ombudsman's Report from Charles Weatherill to Maggie Bishop, DCYF Director
  - E. Ombudsman's Supporting Documentation
13. SIU Report
- A. Christine Kelly (SIU) interviews 4/20/06
  - B. Marcie Morris (SIU) Interviews 4/20/06
  - C. Investigative Interview of Bruce Brofman, May 5,2006
  - D. SIU Report, May 2,2006
14. Bruce Brofman Answers and Correspondence
- A. Answers to May 5,2006 Investigatory Meeting
  - B. Specific Responses to Ombudsman's Report and Intent to Dismiss Letter
  - C. October 28,2005 Letter from Bruce Brofman to Marcie Morris
15. Addendum to DHHS Exhibits
- A. August 1,2007 Letter from Susan Watson Re: Home Visitor for Family Partnership Program
  - B. Affidavit of Joanne Legare
  - C. Resume of Joanne Legare
  - D. Affidavit of Debra Foss

- E. Nurse Training Documentation of Debra Foss
- F. Affidavit of Russell Landry
- G. Transcript of Deposition of Susanne Moberly

Appellant's Exhibits

- A. Affidavit of Christine Zoulias
- B. Affidavit of Bernard Buzzell
- C. Affidavit of Alan J. Tardif
- D. Affidavit of Holly Thoms
- E. Affidavit of Gail Degoosh
- F. Affidavit of Edwin Mellett and Debra Mellett
- G. Affidavit of Corinne Cascadden
- H. Criminal Record from Berlin District Court for T.B.
- I. Letters of Reference/Character References for Bruce Brofman
- J. Internet print-out (1 page) for Red Sox game, October 4, 2005

The following persons called as witnesses for the State gave sworn testimony:

- Lori Foster
- T.B. (DCYF client)
- C.B. (sister of T.B.)
- Kenneth Wagner
- Lorraine Bartlett
- Debra Foss
- Joanne Legare

At the conclusion of the State's presentation, Mr. Reynolds made an oral motion for summary judgment, arguing that the appellant was entitled to reinstatement as a matter of law. Mr. Reynolds argued that the appointing authority admitted that she failed to provide Mr. Brofman with the names of co-workers and professional colleagues, or a summary of their statements against him, prior to making the decision to dismiss Mr. Brofman from his employment. He also argued that in presenting its case to the Board,

the State failed to offer sufficient evidence to support its allegation that Mr. Brofman engaged in sexually harassing behavior with a DCYF client.

The State objected to the Motion, arguing that before dismissing Mr. Brofman, the agency apprised him of all the allegations, and gave him an opportunity to refute those allegations. Ms. Mitchell argued that Ms. Bartlett shared the content of the Ombudsman's investigative report with the appellant, although he was not given a copy of the supporting documentation or recommendations. Ms. Mitchell also argued that the letter of termination listed the names of co-workers, professional colleagues and others who were interviewed during the "special investigation" who believed that Mr. Brofman's behavior was sexually inappropriate.

#### Decision and Order

The letter of termination alleges that the appellant violated the Department of Health and Human Services Civil Rights Policy by engaging in behavior toward clients, colleagues and providers that was sexual in nature, thus creating an intimidating, hostile and offensive working environment. The letter also refers to information obtained from a number of individuals during the course of the agency's investigation, although the record is clear that the agency had already reached the decision to dismiss the appellant before the agency provided him the names of all the witnesses or the details that those witnesses provided during the agency's investigation, and before the appellant had an opportunity to refute all the evidence.

Although the agency provided that information in the letter of dismissal, those same disclosures were not made during the pre-disciplinary process and the appellant was not afforded a meaningful opportunity to refute the evidence upon which the agency relied in reaching its decision to dismiss the appellant. Therefore, the Motion for Summary

Judgment is granted with respect to that portion of the letter of dismissal as it relates to complaints from persons other than "T.B."<sup>1</sup>

With regard to the remainder of the allegations as they relate to T.B., although the Board did not hear Mr. Brofman's testimony, it did hear all of the State's witnesses including T.B., T.B.'s sister, Mr. Brofman's co-workers, caseworkers providing contracted services to support T.B. and her family, and Mr. Brofman's supervisor and administrator. The Board could either grant the summary judgment based on what the Board had already heard, or they could deny the Motion and require Mr. Brofman to testify. The Board voted unanimously to grant summary judgment in the appellant's favor based on a reasonable belief that T.B.'s testimony was not credible.

According to the witnesses' testimony, T.B. waited until January 19, 2006, during an "in-home family counseling session" with a contract worker from FamilyStrength before making any formal complaint concerning Mr. Brofman's alleged misconduct during the October 5, 2005 trip to Plymouth. T.B.'s next official report of sexually inappropriate behavior on Mr. Brofman's part was made about a month later, on February 16, 2006, two days after Mr. Brofman had made an approved, unannounced visit to T.B.'s home to address several issues of non-compliance with her family care plan, including T.B.'s failure to attend a scheduled IEP meeting at her child's school. There also were suspicions that T.B. had lied about the nature and extent of a relationship with a male friend, who workers in the district office considered a safety risk for T.B. and her children.

There is substantial testimony, even from T.B.'s own sister, that T.B. is not a credible witness as a general rule. Although T.B.'s sister, her caseworkers and investigators from the Ombudsman's office believed she was truthful in this instance, there was no other credible evidence to substantiate the statements made by T.B. about her interactions with Mr. Brofman. Although T.B. had moments of credibility, in this kind of a case with such

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<sup>1</sup>To the extent possible, the Board tried to use the witness' first and last initials to identify the DCYF client who made the original complaint of harassment.

a serious allegation, there has to be greater evidence to support discipline at the level of dismissal. Absent reliable evidence of sexual harassment, there is no legal ground for termination that the Board can find based on the evidence as presented by the state. Accordingly, the motion for summary judgment is granted with regard to the first part of the dismissal allegations as well.

The appellant's motion is also supported by the fact that throughout the 27 years and 10 months of Mr. Brofman's employment, there doesn't appear to be any such complaint raised in any manner, or concerns sufficient to cause any of the appellant's co-workers, supervisors or administrators to even attend to that issue. Ms. Legare's own testimony indicates she and the appellant discussed the policy as to why a male employee should not be transporting a female client without at least another witness present. Those concerns, even as the appellant raised them, are clear. The Department, not the appellant, made the decision to allow Mr. Brofman to transport T.B. by himself, and did so based on what Ms. Legare described as Mr. Brofman's "rapport" with T.B. If T.B.'s statements are accurate and if she was truly concerned about the appellant's influence over her life and her children, it is difficult to understand why she waited until January to speak up, and why those concerns were not relayed in some fashion by someone from Familystrength to the State before February, or by any of the other caseworkers who later claimed to have witnessed inappropriate behavior on the appellant's part, but never reported it until questioned by investigators from the Ombudsman's office, or in connection with the special internal investigation. The Board understands the State's obligation to investigate and applauds the State for doing so, but under the circumstances, the Board does not agree that the outcome was appropriate.

The Board noted Attorney Mitchell's objection, and her question concerning how much of the documentary evidence the Board reviewed prior to making its ruling. The Board listened to the testimony and although it did not conduct an exhaustive review of all the documents, the Board did review the relevant portions of the Ombudsman's report that were offered in support of T.B.'s allegation of sexual harassment. The Board found there was insufficient information to substantiate the complaint.

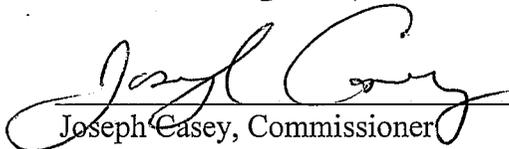
Ms. Legare's efforts as a supervisor are commendable. However, in terms of the other issues that the State raised, if the state has an issue with an employee's conduct or work performance, the State needs to document it. Unless the conduct is so egregious that it warrants an employee's immediate removal from the workplace, the employee also has to have a reasonable opportunity to respond to concerns and correct the problem that are identified. If, as the State asserts, there were concerns dating back to 1997 about Mr. Brofman using sexual innuendos in his communications (DHHS Exhibit 11-Q), the evidence also reflects that none of those concerns were documented or presented to the appellant to give him an opportunity to understand and correct the problem.

**For all the reasons set forth above, the Board voted unanimously to GRANT the Appellant's Motion for Summary Judgment and order the Appellant reinstated under the provisions of RSA 21-I:58, I.**

THE PERSONNEL APPEALS BOARD

  
Patrick Wood, Chairman

  
Robert Johnson, Commissioner

  
Joseph Casey, Commissioner

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