

State of New Hampshire



PERSONNEL APPEALS BOARD

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Concord, New Hampshire 03301

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APPEAL OF CHARLES W. ELLIS

Department of Corrections

Docket #95-T-6

April 26, 1995

The New Hampshire Personnel Appeals Board (McNicholas, Johnson and Rule) met Wednesday, January 4, 1995, to hear the appeal of Charles Ellis, a former probationary employee of the New Hampshire Department of Corrections. Mr. Ellis, who appeared pro se, was appealing what he alleged to have been his "constructive termination" from employment on July 22, 1994, when the Department accepted his resignation from his position as a Correctional Officer. Mr. Ellis alleged that the resignation was given under extreme duress, and that the Department acted in bad faith.

Mr. Ellis testified that on the afternoon of July 15, 1994, he learned that the Concord Police had a warrant for his arrest on the misdemeanor charge of sexual assault arising out of an incident in February, 1994. On the advice of counsel, Mr. Ellis surrendered himself to the Concord Police Department, where he was taken into custody. On the advice of counsel, Mr. Ellis invoked the right to counsel. He was released that evening on \$500 cash bail.

Nicholas K. Holmes, the appellant's attorney, was not available to meet with Mr. Ellis on the night of the arrest, nor was he available the following week because he was out of State on vacation. During his absence, he suggested that Mr. Ellis should not discuss the matter with anyone until he and Mr. Holmes could meet. Mr. Ellis testified that he believed Mr. Holmes' advice extended to discussing the arrest with the Department of Corrections.

Mr. Ellis testified that he knew he was responsible for reporting his arrest to his employer, but that the regulations were silent on the issue of when such reports had to be made. He also testified that he decided to "hold off" reporting his arrest to the Department of Corrections because of the reaction he expected from Viola Lunderville, then head of security. He was concerned that she might order him to discuss the details of his arrest, contrary to the instructions he had received from his attorney. Mr. Ellis testified that he was aware of similar situations with other officers at the prison, and believed he should delay speaking with Ms. Lunderville until he had been able to discuss his arrest with his attorney.

Mr. Ellis testified that he was ordered to report to a meeting at the Department of Corrections on July 21, 1994, and that he was questioned about his arrest. That morning, the Concord Monitor had published an article about the incident which stated, "The charge is a Class A misdemeanor punishable by up to a year in jail and a maximum fine of \$1,000. If convicted¹,

¹In October, 1994, criminal charges against Mr. Ellis were dismissed when the complainant refused to honor a subpoena to appear in court.

Ellis will lose his job as a guard at the state prison, said Nick Pishon, assistant commissioner of corrections." The article stated that prison guards are required to notify prison officials if arrested, and that Mr. Pishon, the Assistant Commissioner, knew nothing more about the arrest than what he had been told by a reporter.

The appellant testified that when he was called in for the first meeting after his department learned of his arrest, he was ordered to divulge all the information he had about the arrest. He testified that Ms. Luqderville was upset when he refused to disclose any information beyond the fact that he had been arrested and had given all his notes to his attorney.

Mr. Ellis testified that he had every intention of reporting the arrest after he had an opportunity to speak with his attorney, but had not been able to do so prior to his meeting at the prison on July 21, 1994. At the conclusion of that meeting, Mr. Ellis was placed on suspension without pay pending the outcome of the investigation.

Mr. Ellis testified that Sgt. Beltrami called him at home on the evening of July 21, 1994, and ordered him to report to the Department the following day. He testified that on his way to the meeting, he bought a copy of the July 22, 1994 Concord Monitor and read that he was being fired that day. That article stated, in pertinent part, "The state prison guard arrested last week and charged with sexual assault will be fired today for not reporting his arrest to prison officials, said John Gilford, corrections spokesman."

Mr. Ellis testified that when he arrived at the prison, the Warden handed him an assignment paper which said he was being fired. He testified that he became angry, asking how he could be discharged when there were no specific charges concerning his work. He also asked for permission to make a phone call, and was allowed to do so before the meeting ended.

Mr. Ellis testified that he called Employment Security to get some information about unemployment benefits, and whether it would be better for him to resign or be fired. He said that the counselor with whom he spoke informed him that it would be to his advantage to resign instead of being discharged for misconduct, as he would receive better benefits. Mr. Ellis asked Warden Cunningham if he could resign instead of being discharged. The Warden agreed to accept a resignation.

After considering the testimony and evidence offered by the parties in this case, the Board voted unanimously to deny Mr. Ellis' appeal. Mr. Ellis failed to persuade the Board that his resignation was anything other than voluntary. Upon learning that he was to be discharged from his employment, Mr. Ellis began exploring his options. Mr. Ellis was allowed to call the Department of Employment Security to discuss unemployment benefits. After deciding that it would be more prudent financially to resign instead of being discharged, Mr. Ellis asked if he could be allowed to submit a resignation. He was then allowed to resign. The Board has no doubt that Mr. Ellis' situation was stressful, and that the choices he had to make were difficult ones. Nonetheless, they were choices made after weighing the alternatives, not choices made through coercion or improper or unlawful threat.

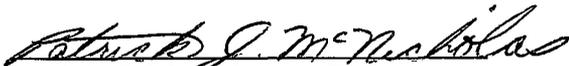
Mr. Ellis also failed to persuade the Board that the Department of Corrections acted in bad faith by allowing him to resign. Mr. Ellis was fully aware of his responsibility for notifying his supervisor of his arrest. He chose not to do so. When the Department of Corrections decided to terminate the appellant's employment for having failed to report his arrest on

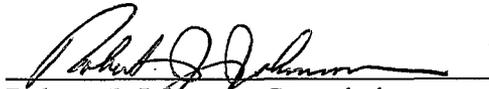
Appeal of Charles Ellis
Docket #95-T-6

charges of sexual assault, it believed Mr. Ellis had committed an offense for which he could be discharged without prior warning, and was prepared to discharge him for that offense. Mr. Ellis, who was familiar with the regulations, asked if he could resign in lieu of discharge in the hopes of securing a higher level of unemployment benefits. The Department of Corrections granted that request, and the Board does not consider it a decision in bad faith under these circumstances.

Therefore, on the testimony and evidence offered by the parties, the Board unanimously voted to deny Mr. Ellis' appeal, finding that he voluntarily resigned from his position of Correctional Officer.

THE PERSONNEL APPEALS BOARD


Patrick J. McNicholas, Chairman


Robert J. Johnson, Commissioner


Lisa A. Rule, Commissioner

cc: Virginia A. Lamberton, Director of Personnel
Mr. Charles Ellis
Mr. John Vinson, Esq., Department of Corrections