State of New Hampshire

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

Appeal of George Elms

Docket #97-T-11

Department of Transportation

February 11, 1998

The New Hampshire Personnel Appeals Board (Bennett, Johnson and Barry) met on Wednesday, September 24, 1997, under the authority of RSA 21-I:58, to hear the appeal of George Elms, a former employee of the Department of Transportation. Mr. Elms, who was represented at the hearing by SEA General Counsel Michael Reynolds, was appealing his termination from employment as a Toll Attendant, effective January 24, 1997, for repeated violations of a posted or published agency policy [Per 1001.08 (b)(3)] and for willful insubordination [Per 1001.08 (b)(7). Karen Levchuk, Senior Assistant Attorney General, appeared on behalf of the agency.

On March 5, 1997, the Board had convened a prehearing conference, setting the matter for a hearing on the merits on April 2, 1997. On March 21, 1997, the State filed an Assented To Motion to Continue, advising the Board that at the time of the prehearing, neither party was aware that the appellant had been scheduled for a March 27, 1997, criminal hearing on a charge of stalling arising out of the same series of events that had led to the termination. In its Motion, the State also asserted that its principal witness, Linda Haverman, had also filed a claim alleging that she had become ill as a result of the alleged harassment and that she was receiving medical treatment that might affect her ability to testify at the scheduled April 2, 1997, hearing before this Board. The Board granted the Motion to Continue.

A second prehearing conference was convened on July 30, 1997, and, with the agreement of the parties, the matter was subsequently scheduled for a hearing on the merits on September 24, 1997.[1]

[1] The hearing was delayed until the parties could reach agreement on how to present Ms. Haverman's testimony and allow Mr. Elms to be present at the hearing without forcing Mr. Elms to violate the restraining order obtained by Ms. Haverman against him, to which he had submitted voluntarily. Once agreement between the parties was reached, the matter was scheduled for hearing.

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

Appellant's Exhibits

A. September 6, 1994, letter of commendation from Peter Carlson to George Elms congratulating him on ten years of service
B. George Elms' 1994,1995 and 1996 Performance Summaries

State's Exhibits

1. Note card from George Elms to Linda Haverman addressed "Linda Dearest," received 7/15/96
2. Packet containing temporary rose tattoo left at the workplace for Ms. Haverman by Mr. Elms
3. Apology note from George Elms to Linda Haverman, received 7/25/96
4. August 23rd note from George Elms to Linda Haverman
5. October 17,1996, letter from George Elms to Linda Haverman
6. Small orange "pumpkin" card from George Elms to Linda Haverman, received 10/31/96
7. Note from George Elms to Linda Haverman received 11/13/96
8. Copies of Toll Plaza keys in small manila envelope addressed to "Linda Dearest"
9. Letter from George Elms to Linda Haverman, received 12/31/96
10. July 25, 1996, letter from Peter Carlson to Mr. Elms concerning a complaint of sexual harassment
11. Copy of DOT Policy 5.51 entitled "Employee Harassment"
12. August 1, 1996, certification signed by George Elms for receipt of Policy on Sexual Harassment
13. November 6, 1996, letter from Assistant Commissioner Carol Murray to Personnel Director Virginia Lamberton requesting investigation of a complaint by Ms. Haverman that she was being sexually harassed
14. November 8, 1996, letter from Virginia Lamberton to Carol Murray assigning Pat Gagne and Fran Buczynski to investigate the sexual harassment complaint
15. November 18, 1996, letter (with attachments) from Peter Carlson to George Elms regarding the sexual harassment investigation process
16. January 30, 1997, memo from Peter Carlson to Fran Buczynski concerning George Elms
17. January 24, 1997, letter of termination from Assistant Commissioner Murray to George Elms
18. November 13, 1992, certification of receipt of Policy on Sexual Harassment signed by George Elms

19. Sexual Harassment Complaint Summary Report concerning the investigation of a complaint by Linda Haverman that she had been sexually harassed by George Elms

The following persons gave sworn testimony:

Linda Havennan, DOT Toll Supervisor

Patrick W. Morris, Assistant Administrator, Bureau of Turnpikes

Carol Murray, Assistant Commissioner, Department of Transportation

George Elms, Appellant

Neither party submitted proposed findings of fact or rulings of law. Both parties were permitted to file written closing arguments within ten days of the close of evidence.

There are few factual disputes concerning the events leading up to Mr. Elms' termination.

Narrative Summary of Ms. Haverman's Testimony

On the evening of June 12, 1996, the appellant told his supervisor, Linda Haverman, that he had had a dream about her. Mr. Elms had earlier mentioned one of his dreams in which a motorist had shot a toll attendant, and Ms. Haverman asked what this most recent dream had been about. Although Mr. Elms said the dream was a little racy, Ms. Havennan repeated her inquiry. Rather than answering her, the appellant kissed Ms. Haverman, saying, "That's my dream." Ms. Haverman was shocked and backed away. She knew that Mr. Elms was scheduled to go on vacation that evening, and that she would be on vacation when he returned from his leave. She said something about seeing him after vacation and he replied that no, he would see her that night. When she replied that she would not see him and would be home in bed with the doors locked, he told her he knew where she lived and knew how to get in through locked doors.

Ms. Havennan returned from her vacation on July 15th, and when she looked in the drawer at the toll plaza where supervisory memos and time sheets were kept, she discovered a note decorated with a picture of a rose addressed to "Linda Dearest." The note said, "A Rose for A Rose! Welcome back! G." [State's 1] Initially, Ms. Havennan thought the card was just a thoughtful gesture in recognition of the fact that a friend of hers had died on July 4th. However, upon further reflection, she found the note disturbing remembering that Mr. Elms had earlier asked her for her middle name. Ms. Haverman, whose middle name is Rose, had refused to answer, telling the appellant that her middle name was none of his business. When Ms.

Haverman saw Mr. Elms on July 17th, she brought up the subject of the note, asking how Mr. Elms had gotten her middle name. After refusing to answer, he eventually said, "I have my ways." During that same shift, the appellant said he'd come over after his shift and install her air conditioner for her. She declined the offer, but he persisted. Finally, he said, "You're scared of me, aren't you." When she said she wasn't, he repeated the question. She replied, "Am I supposed to be?" Mr. Elms insisted that he'd come to her home after her shift. When she told him no, he said he'd call her. He did call at 11:00 p.m. and Ms. Haverman let her answering machine pick up. The appellant left the message, "I'm available, it's getting hot, it's eleven o'clock."

At work the following day, Mr. Elms said that he'd called her the night before. He repeated his offer to install her air conditioner, and when she declined, he asked her what she'd tale out of her house if it was on fire. Before Ms. Haverman left at the end of her shift, Mr. Elms again said he'd be coming to her house when he left work. When she said he would not, he told her that if he wasn't welcome at her house, he would meet her at the Backroom Restaurant for a drink. Ms. Haverman said she would not meet him, and did not. Before reporting for work the following day, Ms. Haverman called Al Almasy, Toll Manager, to discuss the problem she was having with Mr. Elms.

On July 19th when she arrived at work, Ms. Haverman checked the desk drawer at the Toll Plaza and found a package of rose tattoos. [State's 2]. She drove to the turnpike plaza at Exit 12 to find a State Trooper, and ended up speaking with Cpl. Richard D'Auria. She also spoke with Forrest Weatherbee, her direct supervisor. Ultimately, a meeting was held on July 22nd between Ms. Haverman, Cpl. D'Auria, Forrest Weatherbee and Patrick Morris, Assistant Administrator of Turnpikes. During that meeting, Cpl. D'Auria said he believed Mr. Elms should be transferred to put some distance between him and Ms. Haverman, but both Mr. Morris and Mr. Weatherbee said that would be difficult.

On July 25, 1997, Ms. Haverman received another note from Mr. Elms [State's 3] in which the appellant apologized for, "all the aggravation and embarrassment I've caused." He wrote, "Please forgive me," and signed the note, "With the Utmost Respect, G (No hard feelings)."

Mr. Elms wrote again to Ms. Haverman on August 23rd, reporting activities at the toll plaza. He signed the note, "Fondly, G." [State's 4] On or about October 3rd, Mr. Elms admitted to Ms. Haverman that he'd called her house but had left no message. He said he had just wanted to hear her voice., then said, "Oh, I shouldn't have said that." In another letter dated October 17, 1996, Mr. Elms discussed his disagreement

with certain maintenance practices at the plaza. He closed by saying, "Now that I've finished shooting my big mouth off, may I take this opportunity to wish you an enjoyable and pleasant weekend! Fondly, G." [State's 5]

In late October, Mr. Elms had placed cash bags near Ms. Haverman's water bottle at the toll plaza. When he realized she had discarded the bottle, he purchased a replacement. He handed it to her as she was leaving work on October 31st, saying, "Trick or treat." Attached to the bottle was a small gift card in the shape of a pumpkin on which the appellant had typed, "I tossed a bag in the air, Now I'd wish'd I'd used more care. G." [State's 6] Approximately two weeks later, Mr. Elms left another note addressed to "Linda" saying, "Hello, Stranger! I'm afraid the black chair needs repair... I'll try to have it back, when I see you on Thursday. G." [State's 7]

On November 4, 1996, Frank Pasternak replaced Forrest Weatherbee as Ms. Haverman's direct supervisor. Ms. Haverman spoke to him about the number of telephone calls she had been receiving where the caller would hang up without identifying himself. She also said she was becoming more fearful.

On November 20th, Mr. Elms was reassinged to work at another toll plaza. On his last evening at the Exit 11 tolls, Mr. Elms returned keys to the facility in a small manila envelope marked "Linda Dearest." [State's 8] Mr. Elms had been issued one key to the facility. The envelope contained three keys.

After November 20th, Ms. Haverman had no further contact from Mr. Elms until late December when a friend called to say Mr. Elms had left Ms. Haverman a letter. [State's 9] The letter was addressed to "Dear Friend" and was signed, "Au Revoir and Arriverderci, G." Mr. Elms wrote that as he was writing "this final note" to her, "a lump comes to my throat, and tears to my eyes." He said he had always tried to conduct himself as a gentleman in both the workplace and his private life and that it hurt him to realize that Ms. Haverman believed that conduct was harassing. He wrote that he had thought they could be " Platonic friends," whom he described as having "almost a spiritual relationship." Writing that his "heart is free of malice, or hard feelings," he wrote:

> "They are not long
> The days of wine and roses.
>
> Out of a misty dream
> Our path emerges for a while.

Then closes within a dream."

Narrative Summary of George Elms' Testimony

The appellant began working full-time for the Department of Transportation in September, 1984, as a Toll Attendant I. In 1991, he was promoted to Toll Attendant II, and reported to Linda Haverman, the Toll Plaza Supervisor. Mr. Elms enjoyed a good working relationship with Ms. Haverman, and received a series of excellent performance evaluations completed by Ms. Haverman. [Appellant's B] Prior to June, 1996, Mr. Elms had received no formal discipline, nor had he been counseled for performance problems of any kind.

Throughout his acquaintance with Ms. Haverman, the appellant believed that the two were friends. Ms. Haverman did not restrict their relationship to a professional level, having confided in him from time to time about such matters as the break-up with her boyfriend or the illness of a friend. Mr. Elms discussed with her the death of his daughter.

In the Spring of 1996, Mr. Elms told Ms. Haverman about a dream he'd had in which he'd been shot and killed in the course of a hold-up at the toll plaza. He asked her if she'd, "lower the flag at half-staff' for him. In June, 1996, Mr. Elms was describing to Ms. Haverman a dream he'd had involving her. He said, "Every time we're alone together, you turn on the light. You're afraid of me." He then hugged and kissed her. Mr. Elms didn't think he was doing anything wrong, since Ms. Haverman had told him that whenever former Commissioner Stickney had come to visit at the toll plaza, he'd always given Ms. Haverman a hug and a kiss. He said it was just "one kiss and one hug," both of which he had meant simply as friendly gestures.

Mr. Elms gave Ms. Haverman the "rose" note card and rose tattoos in an attempt to cheer her up, because he knew she'd been going through a difficult time personally. The fact that her middle name is Rose was merely coincidental.

Mr. Elms knew that every summer, Ms. Haverman suffered from allergies. He thought that having her air conditioner installed would help, and knowing how difficult it could be for her to do it, he offered his assistance. Although he told her that he knew where she lived, he didn't. When Ms. Haverman said she'd be home in bed with the doors locked, he said that he knew how to get through locked doors, but meant nothing by it, and never would have gone to her house uninvited. When Ms. Haverman said she didn't want

him coming to her house to install the air conditioner, he said he'd call, thinking that she might change her mind. He didn't want her to suffer through the 95° heat.

Mr. Elms also recalled seeing pictures of Ms. Haverman's apartment. When he asked what she'd take out in the case of a fire, he was simply making conversation with her.

Near the end of July, Mr. Elms invited Ms. Haverman to meet him at the Backroom for a drink. He knew that she'd just broken up with a boyfriend she'd been seeing for seven or eight years, and he thought she might need a friend to talk to. He meant nothing by it, and was "flabbergasted" when he learned that an investigation had started into claims that he had sexually harassed Ms. Haverman. If Ms. Haverman had told him that she felt threatened or believed that she was being harassed, he would have stopped immediately.

Mr. Elms knew that Ms. Haverman was "a little germ conscious" and disliked it whenever anything was left near her water bottle. On one occasion, he'd put a cash bag from the tolls near her water bottle, and she became very upset, asking who'd put the bag there. In an effort to smooth things over, he bought'her another bottle of water and left a little note with it as an apology.

When he was transferred from the Exit 11 tolls, Mr. Elms returned his keys. Although he'd been issued a single key, he'd had copies made and wanted to be sure to return all of them.

Mr. Elms realized that he'd made some mistakes, particularly by kissing Ms. Haverrnan and asking her out for a drink. He also knew he probably shouldn't have told her he'd just wanted to hear the sound of her voice when he'd called her house. Mr. Elms recalled that at the end of his first meeting with staff from the Attorney General's Office, he was instructed not to call Ms. Haverman, write her personal notes or stop by her house. He was also told not to use the word "fondly" in his communications. However, he did not recall ever being told not to contact her.

When Mr. Elms received the letter from Mr. Morris about keeping his contacts with Ms. Haverman on a professional level, he took the admonitions very seriously. He didn't believe that any of his contact with her after that date could be considered harassing. Mr. Elms said that following his transfer, he had a meeting with Peter Carlson on December 17, 1996. He said that he knew he was in deep trouble. Mr. Elms said that if anyone had ever told him not to contact Ms. Haverman at all, he would have complied.

Findings of Fact

1. At all relevant times, George Elms was employed as a Toll Attendant II by the New Hampshire Department of Transportation.
2. At all relevant times, Linda Haverman was employed as a Toll Supervisor by the New Hampshire Department of Transportation, and was Mr. Elms' immediate supervisor.
3. Department of Transportation employees are subject to the Rules of the Division of Personnel as well as Department of Transportation Policy and Procedure Directives.
4. On November 13, 1992, and again on August 1, 1996, Mr. Elms signed statements acknowledging that he had read the State of New Hampshire Policy 5.51 (a), Policy on Sexual Harassment.
5. On or about July 19, 1996, Linda Haverman, DOT Toll Supervisor, reported to Al Almasy, Toll Manager, that she believed she was being harassed by one of her subordinates, George Elms.
6. In support of that complaint, Ms. Haverman described conduct by Mr. Elms including his having hugged and kissed her, and his leaving her a note addressed to "Linda Dearest."
7. On the evening of July 19, 1996, Ms. Haverman found in the mail drawer a package of rose temporary tattoos from Mr. Elms.
8. Ms. Haverman's July 19, 1996, complaint was not reported to the department's EEOC coordinator or to the Director of the Division of Personnel, as required by the State's Policy on Sexual Harassment.
9. On July 22, 1996, Appellant George Elms met with Assistant Turnpikes Administrator Patrick Morris and Forrest Weatherbee, Supervisor of Toll Operations, to discuss a sexual harassment complaint lodged against Mr. Elms by Ms. Haverman. During that meeting, Mr. Elms admitted that he had made telephone calls to Ms. Haverman's home, and that he had asked her out socially, but insisted that he had no intention of upsetting her.
10. On July 25, 1996, Peter Carlson, then Administrator of Turnpikes, issued a follow-up letter to Mr. Elms, summarizing the July 22, 1996, meeting. That letter advised Mr. Elms that he was to cease trying to engage Ms. Haverman in a social relationship and would maintain his conduct with her in a strictly professional manner.
11. The July 25th letter advised Mr. Elms that he was to follow the guidance contained in DOT Policy/Procedure 5.51, and refrain from 'conduct that creates an intimidating, hostile or offensive work environment. He was also advised that in accordance with the procedure, any employee found to have harassed another employee would be subject to appropriate disciplinary action up to and including discharge from employment pursuant to Per 1001.

12. Mr. Morris, who conducted the July 22nd meeting and issued the July 25th letter to Mr. Elms, understood it to be the practice in the Turnpikes Bureau to resolve its complaints internally rather than involving the department or other State agencies.
13. After receiving the July 25, 1996, letter from Mr. Carlson, Mr. Elms wrote a note to Ms. Haverman asking her to forgive him for the aggravation and embarrassment he'd cause. He signed the note, "With the utmost respect, G." Mr. Elms also wrote notes to Ms. Haverman on August 23, 1996, and October 17, 1996, to report work-related issues. Both were signed "Fondly, G."
14. On October 31, 1996, Mr. Elms gave Ms. Haverman a poem on a small pumpkin note card attached to a bottle of water to replace one she had thrown away after finding that Mr. Elms had left a cash bag near it.
15. On or about November 2, 1996, Ms. Haverman made a complaint to the Supervisor of Toll Operations that she was being sexually harassed. That complaint was transmitted to the EEOC Coordinator at the Department of Transportation on or about November 4, 1996..
16. On November 6, 1996, Assistant Commissioner of Transportation Carol Murray notified the State Director of Personnel of the complaint, and asked that an investigation be completed as quickly as possible. The Director responded by letter dated November 8, 1996, stating that she had designated investigators to review the complaint and report their findings to her within 30 days.
17. By letter dated November 18, 1996, Mr. Elms was advised of his transfer to the Bedford Toll, effective November 21, 1996, pending the outcome of the investigation.
18. On November 20, 1996, Ms. Haverman received an envelope addressed to "Linda Dearest" containing three copies of the key to the toll plaza office. Only one key had been issued to the appellant.
19. On December 31, 1996, Mr. Elms received permission to return to Exit 11 to pick up some personal belongings. Mr. Elms admitted that while he was there, he left a letter for Ms. Haverman.
20. Ms. Haverman considered the note to be very threatening.
21. Upon completion of 'the investigation, Mr. Elms met with Turnpikes Administrator Peter Carlson to review the Summary Report regarding the sexual harassment complaint. After reading the summary and signing a Confidentiality Statement, Mr. Elms was asked to respond to a series of questions about his conduct. Mr. Elms was also advised that he was being placed on suspension pending the final disposition of the investigation.
22. By letter dated January 24, 1997, signed by Assistant Commissioner Murray, Mr. Elms was informed of his immediate termination.
23. Assistant Commissioner Murray did not meet directly with Mr. Elms prior to issuing the letter of termination.

Rulings of Law

A. The State of New Hampshire Policy On Sexual Harassment defines sexual harassment, in part, as "an unwelcome sexual advance, a request for a sexual favor, or other verbal or physical conduct of a sexual nature" when such conduct "has the purpose or effect of [or] creating an intimidating, hostile or offensive working environment."

B. Department of Transportation Policy 5.51 (b) states, "Any employee found to have harassed another employee will be subject to appropriate disciplinary action up to and including discharge pursuant to Per 1001."

C. Per 1001.08(b) of the Rules of the Division of Personnel states, "In cases such as but not necessarily limited to, the following, the seriousness of the offense 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 warranted."

D. The offenses listed in Per 1001.08 (b) include, "(3) Violation of a posted or published agency policy, the text of which clearly states that violation of same may result in immediate dismissal," and, "(7) Willful insubordination."

E. Per 1001.08 (f) states, "No appointing authority shall dismiss a classified employee under this rule until the appointing authority: (1) Meets with the employee to discuss whatever evidence the appointing authority believes supports the decision to dismiss the employee prior to issuing the notice of dismissal; (2) Provides the employee with an opportunity at the meeting to refute the evidence presented by the appointing authority..."

F. Per 101.07 defines "Appointing Authority" as meaning, "The officer, director, board, commission, or person designated in writing having the power to make appointments in the state classified service in a particular agency."

Discussion

In his closing, the appellant attempts to shift the blame for the events leading up to his termination to the Department for failing to take appropriate action when Ms. Haverman's original complaint was made, and to Ms. Haverrnan herself, asserting that she was "no shrinking violet." He argued that Ms. Haverman had cultivated a "close and in some ways quite personal" relationship by confiding in the appellant about her personal life, that she encouraged a personal relationship by her "effusive praise" of Mr. Elms' work

performance, and that she could have found less "subtle" ways of discouraging Mr. Elms' attentions if she found them so repugnant. The appellant also asks the Board to find that any perceived "threat" was a direct result of Mr. Almasy's characterization of the appellant as a "nerdy, computer whiz killer" when Ms. Haverman's first complaint was lodged.

Those arguments are simply not persuasive. Mr. Elms was clearly placed on notice as early as July 25, 1996, that his communications with Ms. Haverman had been inappropriate and unprofessional, and that she considered his attentions to be sexual in nature. Mr. Elms dismisses his subsequent contacts with Ms. Haverman as attempts to apologize and make her understand that he harbored no malice and had no hard feelings. However, immediately after receiving the July 25th letter concerning Ms. Haverman's original complaint, Mr. Elms wrote to her apologizing for the "aggravation and embarrassment" he'd caused. Although Mr. Elms insists he hadn't intended for his attentions to cause such distress, the fact remains that they did, and he acknowledged that they did.

Even after having been apprised of the fact that Ms. Haverman considered the appellant's conduct harassing, the appellant persisted. He telephoned her at her home, and when confronted about the call, responded, "I just wanted to hear your voice." Within less than a month after receiving Peter Carlson's letter about the complaint, Mr. Elms had written another letter to Ms. Haverman, signing it "Fondly, G." Mr. Elms admits that he had never signed any other business correspondence with any other supervisor or co-worker, male or female, with the term "Fondly." That closing was repeated in a communication dated October 17, 1996. Despite the appellant's repeated assertions that his conduct was not meant to be offensive, harassing or threatening, the facts in evidence reflect that Ms. Haverman felt threatened by Mr. Elms, and he knew it.

In the letter notifying Mr. Elms of his transfer pending the outcome of the investigation, he was advised that any person engaging in "retaliation of any kind, including threats or perceived threats" against any person involved in the investigation would be subject to disciplinary action. Disregarding that caution, Mr. Elms delivered keys to Ms. Haverman's office, addressing the envelope containing those keys, to "Linda Dearest." Mr. Elms admits that he had been issued a single l e y to the toll plaza office, and that he had made extra copies for himself. In light of Mr. Elms' earlier representation to Ms. Haverrnan that he could get through locked doors, the appearance of extra keys could easily have been perceived by Ms. Haverman as a threat. When questioned about his state of mind when he dropped off the keys, Mr. Elms admitted under oath that he was very upset that night and that he lost his temper. He stated, "I admit it, I made a mistake on that one."

The appellant also argues that, "The State has attempted to minimize the lack of any previous letter of warning," and that the Personnel rules, "...strictly mandate that if prior behavior is to be factored into a termination, that prior behavior should be in a letter of warning...." Again, that argument is unpersuasive in light of the plain language of the Per 1001.08(b)(3), the State's Policy on Sexual Harassment, and DOT Policy 5.1. The appointing authority was under no obligation to issue a formal warning prior to dismissal under Per 1001.08. The fact that the counseling letter contains much of the same cautionary language as that contained in a letter of warning simply illustrates the fact that the Department had advised Mr. Elms that failure to cease conduct which was considered harassment could result in his termination under Per 1001.08 (b), a provision that authorizes termination without pior warning when the offense is sufficiently serious to warrant such action.

The appellant argued that the termination was legally invalid because Carol Murray, the appointing authority, did not meet with the appellant to discuss the evidence supporting his dismissal. He further argued that the appellant was not given all the evidence supporting his termination. That argument is not persuasive. Peter Carlson, acting as the appointing authority, met with Mr. Elms on January 17, 1997, to review the summary report of the sexual harassment investigation. The appellant was given an opportunity to dispute the report's findings. Mr. Carlson's report of that meeting was forwarded to the Department, then to Carol Murray, who subsequently assumed Mr. Carlson's responsibilities in this regard after Mr. Carlson had been removed from his position after his arrest on unrelated charges. The appointing authority was under no obligation to conduct a second meeting with the appellant simply because of a change of command. Ms. Murray issued the letter of dismissal on January 24, 1997.

Finally, some of the appellant's arguments with respect to the charge of willful insubordination are well founded. They will be discussed below in the Board's decision.

Decision and Order

The evidence does not support the agency's claim that after the formal harassment investigation was initiated, the appellant was under clear orders to have no further contact with Ms. Haverman. Although the appellant admitted that he knew he was not supposed to call her, drive by her house or try to see her, he did not recall being forbidden to have any contact with her. In the absence of any clear evidence that the appellant had been given such a directive or that he understood that writing to her would constitute a

violation of such a directive, the Board found that the appellant's conduct should not be deemed "willful insubordination" under the provisions of Per 1001.08(b)(7). Accordingly, the Board voted to order that charge stricken fi-om the letter of termination.

However, on all the evidence, the Board voted unanimously to deny Mr. Elms' appeal. In so doing, the Board found:

1. That the appellant's conduct constituted sexual harassment within the meaning of DOT Policy 5.1 and the State's Policy on Sexual Harassment;
2. That the appellant had been counseled concerning that conduct and had been given ample opportunity to take corrective action in order to avoid termination for violation of a DOT Policy 5.1 and the State's Policy On Sexual Harassment;
3. That such conduct violated of Per 1001.08(b)(3) of the Rules of the Division of Personnel; and
4. That the Department of Transportation acted within its discretion in dismissing the appellant under the provisions of Per 1001.08(b)(3).

The N.H. Personnel Appeals Board

Mark J. Bennett, Chairman

Robert J. Johnson, Commissioner

James J. Barry, Commissioner

cc: Virginia A. Lamberton, Director of Personnel, 25 Capitol St., Concord, NH 03301
Michael Reynolds, SEA General Counsel, PO Box 3303, Concord, NH 03302-3303
Karen A. Levchuk, Sr. Asst. Attorney General, Dept. of Justice, 33 Capitol St., Concord, NH 03301
Frances Buczynski, HR Administrator, Dept. of Transportation, Hazen Dr., Concord, NH 03301