

# State of New Hampshire



## PERSONNEL APPEALS BOARD

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### *APPEAL OF SCOTT FRYE*

*Docket #2005-T-007*

*Department of Safety/Division of State Police*

*June 2, 2006*

The New Hampshire Personnel Appeals Board (Bonafide, Johnson and Reagan), met on June 8, September 7, and September 14, 2005, under the authority of RSA 21-I:58, to hear the appeal of Scott Frye, a former employee of the Department of Safety. Mr. Frye was appealing his November 22, 2004, termination from employment as Communications Technician for violation of the department's Professional Standards of Conduct, Chapter 1 – Rules and Regulations and Section 1.5.0 Performance Expectations. SEA General Counsel Michael Reynolds appeared on Mr. Frye's behalf. Attorney Marta Modigliani appeared on behalf of the Department of Safety.

#### **Procedural Issues:**

At a mandatory prehearing conference convened by the Board on April 27, 2005, Attorney Modigliani argued that the scope of the hearing would be too broad if the Board did not require the Appellant to specify the basis for his claim that the termination was retaliatory. The Appellant volunteered to provide a Statement of More Specific Facts, outlining the basis for that claim. On May 17, 2005, the Appellant submitted his More Specific Statement Regarding Retaliation. Subsequently, on May 25, 2005, at a second prehearing conference, the State filed a Motion to Strike, asking the Board to strike attachments numbers 1.2, 5-7 and 9, and III in that More Specific Statement. The Appellant's response to that Motion was filed on May 31, 2005.

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On June 8, 2005, the first day of the hearing on the merits of the appeal, the Board voted unanimously to deny the State's Motion to Strike, agreeing to allow the various objected-to exhibits into evidence for whatever weight the Board deemed appropriate.

### **Hearing; on the Merits**

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's Exhibits**

- A. November 19, 2004, Notice of Intent to Dismiss
- B. November 22, 2004, Notice of Dismissal
- C. November 19, 2004, Internal Investigation
- D. Job Description and Supplemental Job Description
- E. October 27, 2004, Performance Evaluation and Supporting Documentation
- F. November 17, 2004, E-mail from Dan Cross to Thomas Bardwell
- G. July 6, 2004, E-mail from Scott Frye Regarding Climbing
- H. July 6, 2004, E-mail from Charles Bardwell Regarding Climbing
- I. July 6, 2004, E-mail from Randy Kimball Regarding Climbing
- J. Instruction Sheet for Confirming/Changing IP Addresses for P54
- K. June 11, 2004, E-mail from Jim Kowalik to Craig Wiggin
- L. October 19, 2004, Minutes of Joint Loss Management Committee of October 14, 2004
- M. October 25, 2004, E-mail from Claude Ouelette to Jim Kowalik
- N. October 22, 2004, Response Memo from Jim Kowalik to Claude Ouellette
- O. November 5, 2004, Memo from Jim Kowalik to Mark Liebl
- P. November 16, 2004, E-mail from Jim Kowalik to Claude Ouellette
- Q. April 21, 2005, Professional Standards of Conduct – Performance Evaluations
- R. September 15, 2004, Memo from Tom Bardwell to Scott Frye
- S. May 15, 2005, letter from James Martel to Colonel Booth
- T. September 8, 2004, Message from Charles Bardwell to Scott Frye
- U. Internet Use Policy signed by the Appellant on July 12, 2004
- V. Fax copy of a letter dated December 18, 2004, from Scott Frye, addressed "To Whom it May Concern"

Appellant's Exhibits

1. Letter from Scott Frye to Eric Wilking regarding events of October 26,2004
2. July 6, 2004, 1-page memo from Charles Bardwell to Tom Bardwell (Frye "Doc.A")
3. July 6, 2004, 1-page memo from Jim Kowalik to Radio shop (Frye "Doc. B")
4. July 6,2004, 1-page memo from Jim Kowalik to Charles Bardwell (Frye "Doc. C")
5. July 27,2004, 1-page memo from Jim Kowalik to Charles Bardwell and Randall Kimball (Frye "Doc. D")
6. July 27, 2004, 2-page memo from Jim Kowalik to Col Frederick Booth ("Frye Doc. E-2")
7. July 30,2004, 1-page memo from Radio Shop to Jim Kowalik ("Frye Doc. E )
8. July 30,2004, 1-page memo from Jim Kowalik to Radio Shop ("Frye Doc. F")
9. July 30, 2004, 2-page memo from Steve Benson to Scott Frye ("Frye Doc. H )
10. October 29,2004, E-mail from Steve Benson to Scott Frye, etc. ("Frye Doc. J")
11. November 2,2004, memo from Debbie Rule to Scot Frye ("Frye Doc. K )
12. A Guide for Developing a Written Safety Program (13 pages) marked "II"
13. August 7,2004, memo from Charles Bardwell to Jim Kowalik (5 pages) marked "III"

Witnesses:

The following persons gave sworn testimony:

Colonel Frederick Booth	Randall Kimball	Charles Bardwell
Lieutenant Mark Myrdek	Daniel Cross	James Martell
Lieutenant Mark Liebl	Richard Delanoi	Scott G. Frye, Appellant
James Kowalik	Thomas Bardwell	
	Catherine Bardwell	

The parties jointly submitted stipulations as follows:

1. On August 25,2003, Mr. Frye submitted a 4-page job application to the NH Department of Safety (DOS) for a Communications Technician position.
2. On December 12,2003, Mr. Frye was hired by DOS as a Communications Technician, Labor Grade 19, Step 3, in the NH State Police Communications Maintenance area.
3. Mr. Frye attended a tower climbing and safety class on June 7-8,2004, at State expense.
4. Mr. Frye was certified as a safe tower climber by ComTrain LLC after completing the tower climbing and safety class.
5. On October 26,2004, Mr. Benson sent an e-mail to Mr. Frye indicating the safety concerns were being addressed by Charles Bardwell and Major Wiggin.
6. Mr. Frye called in sick for October 22,2004.
7. Mr. Frye received training on the IP configuration for Project 54 from Dwight Mitchell, Microwave Technician.
8. Mr. Frye received one written evaluation dated October 27,2004.
9. No documented evaluation other than the one dated October 27, 2004, exists for Mr. Frye.
10. A notice of Intent to Dismiss was issued to Mr. Frye on November 19,2004.
11. Mr. Frye's termination referred primarily to the written evaluation dated October 27,2004.
12. Mr. Frye's dismissal was effected by a written letter of termination provided to him on November 22,2004.

### **Position of the Parties**

Attorney Modigliani argued that the Appellant was a probationary employee who failed to meet the work standard by performing at substandard levels, despite appropriate training and regular and frequent consultation between him and his supervisors. Specifically, she alleged that the Appellant did not perform satisfactorily in the areas of

job knowledge, quality of work, quantity of work, planning, and written communication/record keeping. Attorney Modigliani argued that the Appellant sometimes demonstrated confrontational and insubordinate behavior, as well as "a deliberate and on-going disregard for work standards, rules and policy guidance." She said the evidence would prove that the Appellant failed to demonstrate teamwork, initiative or effective decision-making. As such, she argued, the Department of Safety had no viable alternative but to dismiss the Appellant prior to completion of his probationary period for failing to meet work standards.

Attorney Reynolds argued that the Appellant's managers, Thomas Bardwell and James Kowalik, were angry with him for having raised safety issues with State Police Communications management personnel and with the Department's Joint Loss Safety Committee concerning the way in which Communications Technicians were trained and equipped. He argued that Thomas Bardwell was equally angry with the Appellant for being so friendly with Charles Bardwell, the manager's estranged brother, who also worked as a technician in the bureau. Attorney Reynolds argued that to the extent there was a work standard, the Appellant was meeting it. He argued that the allegations in the letter of termination were inaccurate, that the appointing authority failed to provide sufficient resources and training, that the motivation for termination was personal and retaliatory, and that the appointing authority's investigation was not done in good faith. As a result, he argued, the Department of Safety violated the Appellant's rights under the principles of due process, the CBA, and the personnel rules.

After considering all the evidence and arguments offered by the parties, the Board made the following findings of fact and rulings of law:

**s of Fact:**

1. At all relevant times, the Appellant was an initial probationary employee subject to immediate dismissal without prior warning for any failure to meet the work standard.
2. On-the-job training that the Appellant received at the Department of Safety was similar to that received by other Communications Technicians, and was generally provided by their peers in the department.
3. Following preliminary orientation in the shop that lasted about two weeks, the Appellant began working "on the road," interacting most frequently with Charles Bardwell and James Martel. Initial reports from Charles Bardwell indicated that the Appellant's performance was satisfactory. Later observations of the Appellant's work by Thomas Bardwell were less favorable, and Thomas Bardwell found the appellant's work product, both in terms of quantity and quality of work, to be substantially below expectations.
4. Randy Kimball, one of the Appellant's co-workers who started work in the shop the same day as the Appellant, testified that the Appellant seemed okay at first but later proved himself to be "slow" and "lackadaisical" with a "very negative, anti-management attitude." He indicated that the Appellant seemed "extremely bitter" toward the end of his probationary period.
5. Daniel Cross, another Communications Technician, indicated that he could see the Appellant's attitude changing over time and knew that whenever he was assigned to work with the Appellant, someone had to "push" the Appellant to get anything done. After an assignment working with the Appellant and Randall Kimball on Belknap Mountain, Mr. Cross approached Thomas Bardwell to complain about the Appellant's lack of initiative. He later discovered that Mr. Kimball had gone to Mr. Bardwell as well to complain about the Appellant's performance.
6. As late as November 17, 2004, the Appellant was still making mistakes entering the IP addresses, unit names and usernames into SPOTS (the State Police Online Telecommunications System).
7. The Appellant used sick leave almost as quickly as he accrued it and gave insufficient notice to his supervisors when requesting other forms of leave.

8. When the Appellant took sick leave in October, 2004, and was questioned about it after having been observed that day at his house outside in his yard working on his personal vehicle, he defended himself by saying that he hadn't gone to work because he was overtired and recovering from a lengthy drive the night before. He said he should have been given personal time and was simply checking fluid levels in his vehicle before making that drive again the next night. He told his supervisor that he believed he was entitled to take sick leave for those reasons and did not believe he had to be incapacitated in order to use his sick leave.
9. When instructed to bring in notes from a health care provider to document his need for sick leave, the Appellant complained of harassment and became quite angry, telling his supervisor Thomas Bardwell that "this is bulls - - t." When the Appellant told his union steward that Mr. Bardwell was being unreasonable, the steward advised the Appellant that the employer had the right to request certification when the use of sick leave was questionable.
10. The Appellant was assigned a truck to use in performing work in the field, and was responsible for ensuring that the vehicle was maintained properly. The truck was owned by the State and maintained at State expense, and the Appellant could have no reasonable expectation of privacy with respect to the vehicle.
11. The Appellant failed to keep complete or accurate maintenance records for his State-assigned vehicle. On at least one occasion, when the Appellant was assigned to a project with his supervisor and the Appellant was unable to locate the parts that he should have had with him in the vehicle, his supervisor looked through the truck for the parts. The Appellant complained that it was a violation of his privacy. The Appellant made a similar complaint when his supervisor looked through the vehicle for maintenance records.
12. Thomas Bardwell believed that the Appellant possessed the education and experience to be successful as a Communications Technician, although he had significant concerns about the Appellant's attitude and work ethic. Toward the end of October, Mr. Bardwell asked the Department's Personnel Office whether or not he could extend the Appellant's probationary period. When he was advised it would not be

possible, Mr. Bardwell decided dismissal was the appropriate course of action, and made that recommendation to his supervisor, James Kowalik.

13. By memo dated November 5, 2004, Supervisor James Kowalik advised Lt. Mark Liebl that he had reviewed the performance evaluation completed by Thomas Bardwell for the Appellant. He said he concurred with Mr. Bardwell's assessment and his recommendation to dismiss the Appellant before the end of the Appellant's initial probationary period.
14. Overall, the Appellant's work and workplace behavior failed to satisfy the accountabilities listed in the Appellant's Supplemental Job Description and failed to meet the work standards established by the agency.
15. Prior to November 19, 2004, when he met with the Appellant to review the Appellant's performance evaluation, Thomas Bardwell believed it was his own brother Charles who had approached the Department's Joint Loss Management Committee about safety issues for employees assigned to climb towers. He was not aware that the Appellant had already complained to Steve Benson, a member of the Joint Loss Management Committee, about the safety of the climbing gear.
16. When Mr. Bardwell met with the Appellant on November 19, 2004 to review the Appellant's performance evaluation, the Appellant complained that he should have received a higher rating in the area of safety, saying that it was he, not Charles Bardwell or James Martel, who had raised the issue of tower safety.

**Rulings of Law:**

- A. Per 102.42 of the NH Code of Administrative Rules defines "Probationary period" as "a period of full-time work during which a full-time employee is required to demonstrate satisfactory performance of the duties and responsibilities of the employee's position as listed on the supplemental job description for the position."
- B. Per 601.07 (b) of the NH Code of Administrative Rules provides that each new hire, rehire, promotion and transfer is subject to a 12-month probationary period.

- C. According to Per 601.07 (a) of the NH Code of Administrative Rules, "The probationary period shall be considered an integral part of the process of appointment for full-time employees and shall provide the appointing authority with the opportunity to: (1) Observe the new employee's work; (2) Train and aid the new employee in adjustment to the position; and (3) Remove an employee if the employee's work performance fails to meet required work standards."
- D. At all relevant times, the Appellant was an initial probationary appointee subject to termination under the provisions of Per 1001.02 of the NH Code of Administrative Rules which states, in pertinent part: "(a) At any time during the initial probationary period an appointing authority may dismiss an employee who fails to meet the work standard provided the dismissal is not: (1) Arbitrary; (2) Illegal; (3) Capricious; or (4) Made in bad faith."
- E. While Per 801.07(a) requires an appointing authority to "evaluate the performance of any probationary employee at least one month prior to the expiration of the probationary period," it does not preclude the appointing authority from dismissing a probationary appointee whether or not an evaluation has been completed.
- F. Per 801.07 (b) states, "If an appointing authority dismisses a probationary employee, the appointing authority shall do so in accordance with Per 1001.02."
- G. Per 1001.02(b) establishes the conditions that must be met in order to protect the employee's due process rights before the termination can be effected. The Department of Safety met those conditions when Colonel Booth met with the Appellant on November 22, 2004, reviewed the Appellant's performance evaluation, discussed the reasons supporting the Appellant's termination, and allowed the Appellant to refute the evidence supporting his termination.
- H. According to Per-A 207.12 (a) of the NH Code of Administrative Rules, "In probationary termination appeals, the board shall determine if the appellant proves by a preponderance of the evidence that the termination was arbitrary, illegal, capricious or made in bad faith. Allegations that the appellant does not know the reason(s) for the dismissal, or evidence that the appointing authority took no formal disciplinary action to correct the employee's unsatisfactory

performance or failure to meet the work standard prior to dismissing the employee, shall not be deemed sufficient to warrant the appellant's reinstatement."

**Decision and Order:**

The evidence reflects that the Appellant failed to meet work standards during his initial probationary period and was therefore subject to dismissal, with or without prior warning, at any time during his initial 12 months of employment.

Although the Appellant argued that his termination was effected in retaliation for his having raised safety concerns, the evidence reflects that a co-worker who raised the same safety issues as the Appellant at the same time during his own probationary period remained employed by the Department of Safety. There are others in the department as well who have not or will not climb and work on the towers who continue to work for the Department.

The evidence also reflects that while the Appellant's supervisors believed the Appellant's performance was marginal at best, there were discussions between Thomas Bardwell and James Kowalik about the possibility of extending the Appellant's probationary period. When they realized there was no mechanism for extending the Appellant's probation, they made their recommendation for dismissal.

The recommendation to dismiss was forwarded to Lieutenant Liebl and then to Colonel Booth, based upon the Appellant's overall failure to meet expectations in his performance evaluation, his unsatisfactory history of attendance and leave, and his apparent disrespect for supervisory personnel. After the Appellant met with Colonel Booth, arguing the various points in his performance evaluation and telling the Colonel that "Motivation is management's problem," Colonel Booth made the decision to terminate the Appellant's employment.

On all the evidence and argument offered by the parties, the Board found that the Appellant failed to provide evidence to support his claim that his termination was arbitrary, illegal, or capricious. He also failed to provide evidence to support his claim that the termination was retaliatory or that it was motivated in whole or in part by bad faith on the part of management. Accordingly, the Board voted unanimously to DENY the appeal and UPHOLD the Department of Safety's decision to dismiss Scott Frye from his employment prior to completion of his probationary period.

THE NH PERSONNEL APPEALS BOARD

/s/

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Philip P. Bonafide, Chairman

/s/

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Robert J. Johnson, Commissioner

/s/

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John Reagan, Commissioner

cc: Karen A. Levchuk, Director of Personnel  
Attorney Michael C. Reynolds  
Attorney Marta A. Modigliani

# State of New Hampshire



## PERSONNEL APPEALS BOARD

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### *APPEAL OF SCOTT FRYE*

*Docket #2005-T-007*

*Department of Safety/Division of State Police*

*Decision on Appellant's Motion for Reconsideration and Rehearing  
and Division's Objection to Appellant's Motion for Reconsideration and Rehearing*

April 23, 2007

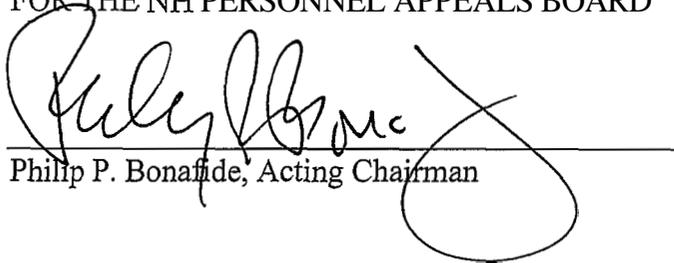
On June 30, 2006, the NH Personnel Appeals Board received Appellant's Motion for Reconsideration/Rehearing of the Board's June 2, 2006 decision denying Appellant's appeal of his dismissal from employment from the Department of Safety/Division of State Police prior to the conclusion of his initial probationary period. The Board received the State's Objection to that Motion on July 12, 2006.

In accordance with Per-A 208.03 (b) of the NH Code of Administrative Rules (Rules of the Personnel Appeals Board), a motion for reconsideration must "...set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable." In reviewing the Motion, the Board found that the arguments raised by the Appellant in support of his request for reconsideration are essentially the same arguments that he raised in pleadings submitted prior to the hearing as well and in arguments offered during the hearing on the merits of the appeal. Having reviewed those arguments, as well as the arguments raised by the State in its Objection, the Board found that the Appellant has not shown good cause why the Board should now reconsider its decision and reverse or modify its June 2, 2006 decision denying Mr. Frye's appeal.

In accordance with Per-A 207.12 (b) of the NH Code of Administrative Rules, in order to prevail in his appeal to this Board, the Appellant needed to prove by a preponderance of the evidence that his termination was arbitrary, illegal, capricious, or made in bad faith. In deciding the appeal, the Board gave all of the evidence and arguments the weight that they deserved in relation to the record as a whole. The fact that the Appellant disagrees with the conclusions that the Board reached on the basis of that evidence and does not provide good cause to reconsider or rehear the appeal.

Therefore, in accordance with Per-A 208.03(e), and for the reasons set forth in the Division's Objection, the Board voted unanimously to DENY the Appellant's Motion for Reconsideration/Rehearing, and to AFFIRM its decision DENYING THE APPEAL of Scott Frye.

FOR THE NH PERSONNEL APPEALS BOARD



Philip P. Bonafide, Acting Chairman

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