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THE SUPREME COURT OF NEW HAMPSHIRE

Personnel Appeals Board
Nos. 2011-016
2011-018

APPEAL OF TIMOTHY ALEXANDER

APPEAL OF NEW HAMPSHIRE DEPARTMENT OF
HEALTH AND HUMAN SERVICES

(New Hampshire Personnel Appeals Board)

Argued: October 19, 2011
Opinion Issued: March 23, 2012

Kristin H. Sheppe and Michael C. Reynolds, of Concord, on the brief, and Mr. Reynolds orally, for Timothy Alexander and William Harris.

Michael A. Delaney, attorney general (Rosemary Wiant, assistant attorney general, on the brief and orally), for the State.

HICKS, J. In these consolidated appeals from a decision of the New Hampshire Personnel Appeals Board (board), Timothy Alexander appeals the board's affirmance of his dismissal from employment with the New Hampshire Department of Health and Human Services (HHS) and the State appeals the board's reinstatement of William Harris to his employment with HHS. We affirm the board's decision as to Alexander but reverse its decision as to Harris.

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The following facts were recited in the board's decision or are supported in the record. The Sununu Youth Services Center (SYSC) is a secure facility that provides detention, treatment and rehabilitation services for serious, chronic and/or violent juvenile offenders. Juveniles committed to SYSC are in the custody of the Commissioner of HHS. SYSC employs youth counselors to staff the facility twenty-four hours a day. Their primary "function is to provide safety and security while supervising and participating in resident activities, monitoring and supervising resident behavior, and monitoring the residents' treatment goals."

According to the use of force policy applicable to SYSC staff, the use of force is authorized only for "[j]ustifiable self-defense"; to protect a third party, property, or a client from self-harm; to prevent a crime or escape; or to prevent "resident disturbances and to maintain order within the SYSC." Staff are to use force only "as a last alternative after all other reasonable efforts to resolve a situation have failed." Accordingly, the policy prescribes a "Use of Force Continuum" that progresses from the presence of the staff member through successive stages of intervention described as verbal, directional, physical, serious physical and deadly force intervention.

On April 5, 2009, Alexander and Harris were involved in the restraint of a resident at SYSC. Alexander was employed at SYSC as a Youth Counselor III and Harris, a full-time probationary employee, was a Youth Counselor I (Trainee). Youth Counselor Casey Creamer was also involved in the incident, which began, according to Creamer, at breakfast that morning. Creamer's incident report indicated that the resident responded rudely when Creamer questioned whether he had permission to sit somewhere other than his assigned table. Creamer informed the resident that he would have to go to his room when they returned to the residential unit. The resident responded disrespectfully under his breath and later refused to go to his room despite repeated instructions from Creamer. The board's decision notes that a "video clip" of the incident "shows the verbal confrontation between Casey Creamer and [the resident] beginning at approximately 07:00:46 a.m." "[A]t 07:00:49 a.m., while speaking to the resident, Mr. Creamer reached out to [the resident] and made the first physical contact. The resident can be seen stepping back and pulling away from Mr. Creamer."

The video . . . [then] shows Mr. Alexander entering the unit at 07:00:58 a.m. . . . By 07:01:01 a.m., three seconds after entering the unit, Mr. Alexander had already closed the distance of approximately 30 feet between the doorway to the unit and the area near the table where Mr. Creamer, Mr. Harris, and [the resident] were standing. A second later, the video shows Mr. Alexander reaching forward and pushing the resident from behind. A second later, the video shows the resident on the floor following

what was described [by Alexander and Creamer] as a “one-arm takedown” [performed] by Casey Creamer.

Following an investigation of the incident, Alexander and Harris were terminated from employment at SYSC. Alexander’s termination letter stated the grounds for dismissal as endangering “the safety of [a] resident . . . by using excessive force, said force constituting Class II Abuse . . . , in that [he] abruptly and without warning, approached [the] resident . . . and forcefully pushed him from behind causing him to fall to the ground.” The letter noted that Alexander’s “actions also violated posted or published agency policies, the text of which warns that violation of same may result in dismissal.” Harris, in turn, was dismissed for: “failure to meet the work standard as a probationary employee” in that he: (1) failed “to immediately report to [his] supervisor, Bureau Chief, or designee, the Class II abuse” of the resident by Alexander; (2) failed to complete a written incident report; and (3) during the investigation of the incident, he “did not conduct [himself] with honesty and [was] not truthful in [his] account of the incident.”

Alexander and Harris appealed their dismissals to the board. The board denied Alexander’s appeal and granted Harris’s appeal in part. These appeals followed.

Our standard of review of the board’s decision as to Alexander, a permanent employee, is governed by RSA 541:13 (2007). Appeal of Morton, 158 N.H. 76, 78 (2008). As the appealing party, Alexander “has the burden of proof to show that the [board’s] decision is clearly unreasonable or unlawful.” Id. We will not vacate or set aside the board’s decision “except for errors of law, unless we are satisfied, by a clear preponderance of the evidence before us, that such order is unjust or unreasonable.” Id. The board’s “findings of fact are deemed prima facie lawful and reasonable.” Appeal of Murdock, 156 N.H. 732, 735 (2008). Its interpretations of statutes and administrative rules, however, are reviewed de novo. Morton, 158 N.H. at 78.

We treat the State’s appeal of the board’s decision as to Harris, a probationary employee, as a petition for a writ of certiorari. Cf. Appeal of Tamm, 124 N.H. 107, 110 (1983) (appeal by probationary employee). “The scope of review on a petition for a writ of certiorari is confined to a determination whether the [board] acted illegally in respect to jurisdiction, authority or observance of the law, thereby arriving at a conclusion which could not be legally or reasonably made.” Id. at 110-11 (quotation omitted).

We will first address Alexander’s appeal. He argues that: (1) the board unlawfully upheld his dismissal on a different factual basis from that stated in his termination letter; (2) the facts found by the board do not warrant termination; (3) he should be reinstated because SYSC failed to comply with

the personnel rules; and (4) he is at least entitled to a new hearing because the board violated several statutes and, along with SYSC, violated his rights to due process.

Alexander first argues that the board erred by upholding his dismissal on a different factual basis from that relied upon by SYSC in his letter of termination. As previously noted, Alexander's termination letter, written by John F. Duffy, Bureau Chief of Residential Services at SYSC, stated that he used excessive force "in that [he] abruptly and without warning, approached [the] resident . . . and forcefully pushed him from behind causing him to fall to the ground." (Emphasis added.) Alexander asserts that the board "did not agree with Duffy's version of the facts" and that the board found "that [he] did not push the resident to the ground." It is not entirely clear whether the board made a finding that the resident was taken down, thereby rejecting the assertion that he fell as a result of Alexander's shove, or whether the board merely recounted witness testimony to that effect. Nevertheless, we will assume, arguendo, that the board made such a finding.

Alexander argues that under the personnel rules, only the appointing authority, not the board, had the power to terminate him. He contends that "[b]y upholding [his] dismissal on alternative grounds, the Board essentially made its own determination about [his] actions and decided to terminate [him]. The Board is not permitted to take that action." The State, citing New Hampshire Administrative Rule, Per-A 207.12(b), counters that the board's review is not limited to the information stated in the termination letter.

Rule 207.12(b) provides:

(b) In disciplinary appeals, including termination, . . . the board shall determine if the appellant proves by a preponderance of the evidence that:

(1) The disciplinary action was unlawful;

(2) The appointing authority violated the rules of the division of personnel by imposing the disciplinary action under appeal;

(3) The disciplinary action was unwarranted by the alleged conduct or failure to meet the work standard in light of the facts in evidence; or

(4) The disciplinary action was unjust in light of the facts in evidence.

(Emphases added). We agree with the State that the board may consider all of the evidence before it. We note, however, that the board’s task, in a review pursuant to Rule 207.12(b)(3), is to determine whether “[t]he disciplinary action was unwarranted by the alleged conduct or failure to meet the work standard.” (Emphases added.)

Alexander’s termination letter alleges that he “endangered the safety of a Sununu Youth Services (SYSC) resident . . . , by using excessive force in pushing him and causing him to fall to the ground.” The letter reiterates four more times that Alexander’s use of force caused the resident to fall. In addition, the letter states that Alexander “also failed to determine, prior to pushing [the resident], whether the two staff members standing beside him needed [his] assistance and failed to attempt to de-escalate the situation prior to using force. Failure to adhere to this policy is also grounds for dismissal.” (Emphasis added.) Thus, the agency cited alternative grounds for Alexander’s dismissal, either of which was alone sufficient.

The board acknowledged the dual grounds for termination, and sustained both. Since the latter ground did not depend upon the finding, allegedly rejected by the board, that Alexander pushed the resident to the ground, we conclude that the board did not independently terminate Alexander on an “alternative theory” not stated in his letter of dismissal.

Alexander next argues that the facts found by the board “do not represent a scenario which would permit termination.” In particular, he challenges the board’s conclusions relating to the use of force continuum. The board stated:

The use of force policy (State’s Exhibit 1) clearly describes the steps staff are required to take, including physical presence, verbal intervention, directional intervention, and physical intervention before the staff person can engage in “serious physical intervention” or “deadly force.” By his own admission, Mr. Alexander did not attempt to use any of the lesser forms of intervention before engaging in what the Board would consider an excessive use of force.

It is important to note that there were two trained staff members on the floor talking face to face with the resident when Mr. Alexander burst into the room, approached the resident from behind and shoved the resident without warning. Mr. Alexander described his actions as “positional movement” of the resident, asserting that it was the next reasonable step when presence and verbal intervention failed. According to the policy, however, the next step in the force continuum is “directional intervention,”

which the policy defines as “a physical cue to follow staff directions. Touching the client and moving with them in an escort position is intended to move them away from the situation and engage the client in defusing questions.” The evidence reflects that Mr. Alexander did not use any physical cue, escort the resident or engage in defusing questions. He simply shoved the resident without warning.

Alexander asserts he saw that “Mr. Creamer had already used a ‘physical cue’ in an unsuccessful attempt to make the resident comply.” He argues:

The Board emphasizes that the appellant did not himself use the lower-level interventions, but it cannot possibly be the case that each staff member must individually perform each step on the continuum. If that were the case, a staff member approaching a clearly impending assault (as the appellant perceived in this case) would be able to resort only to “presence” before even talking to the resident.

We do not share Alexander’s interpretation of the board’s decision. The board noted Alexander’s claim that his actions were an attempt to move the resident away from the conflict and found that claim unsupported by the evidence. “As a fact-finding tribunal, the [board] was at liberty to resolve any conflict in the evidence and to accept or reject such portions of the testimony as it saw fit. The [board’s] findings and conclusions are entitled to great weight and cannot be set aside lightly.” Desmarais v. State Personnel Comm’n, 117 N.H. 582, 586 (1977) (quotation omitted). Having reviewed “the record before us, we cannot say that the [denial] of [Alexander’s] appeal was unjust or unreasonable.” Id. (quotations omitted).

Alexander next argues that pursuant to RSA 21-I:58, I (2000), he is entitled to reinstatement without loss of pay because his termination was in violation of New Hampshire Administrative Rule, Per 1002.08(d), which provides, in pertinent part:

(d) No appointing authority shall dismiss a classified employee under this section until the appointing authority:

(1) Offers to meet with the employee to discuss whatever evidence which the appointing authority believes supports the decision to dismiss the employee;

(2) Offers to provide the employee with an opportunity to refute the evidence presented by the appointing authority

N.H. Admin. Rules, Per 1002.08(d).

Prior to his termination, Alexander received a letter of intention to dismiss, signed by Duffy, requesting a meeting between them “to discuss and view the evidence that supports my belief that you meet the criteria for dismissal from State service as set forth in this letter and to give you the opportunity to refute the evidence.” Alexander argues that this offer did not comply with Rule 1002.08(d) because Duffy was not the appointing authority. Testimony before the board revealed that Director William W. Fenniman, Jr. had final authority with respect to hiring and firing at SYSC and Alexander therefore contends that Fenniman was the appointing authority. Alexander asserts that he “was misled about the identity of the decision-maker and was never given the opportunity to meet with the actual decision-maker – Fenniman, who was the appointing authority.”

The State argues that Alexander failed to preserve this argument because he failed to raise it in his notice of appeal to the board and the board made no finding on the issue. The record reveals that Alexander first raised the issue in his motion for rehearing to the board.

Alexander counters that “[b]efore the hearing, [he] had reason to believe there were violations of the personnel rules, but did not have the particulars regarding Fenniman’s hiring powers and Duffy’s lack of authority.” That information first surfaced, he contends, at the hearing before the board. He asserts that “[o]nce [he] had the additional information, he included this information the next time he had a chance to review his argument – in the Motion for Reconsideration.”

We conclude that, even assuming Alexander had no access to the information about the appointing authority prior to the hearing before the board, the issue is not preserved. The board heard four days of testimony spread out over more than two months. Fenniman’s authority was first discussed on the second day, May 27, 2010. On the third day, June 16, then union chapter president Steven Sage testified that Fenniman consulted him about the Alexander incident, saying “something to the effect of we got this on tape. It’s a horrible thing to see. This guy [Alexander] just wrecked this kid, and he’s going to be out of here, something to that effect.” Sage also testified that when he asked Duffy, at Duffy’s meeting with Alexander, who would make the decision to terminate, he was told it was Duffy’s decision. Sage stated that he had been “instructed and trained as a [union] steward to ask the question. Secondly, if I ask the question, maybe I’ll get where is Director Fenniman. He’s the guy that told me I’m going to – why can’t I refute anything with him? Why am I not seeing him?” Nevertheless, Sage testified that he was certain that Duffy told him the decision was his, and, although Sage was surprised by that

answer, he thought it was “kind of corroborated . . . because [he] never saw Director Fenniman in any of these meetings.”

On the fourth day of testimony, July 28, Alexander confirmed that Duffy stated the decision to terminate was his and testified that if he had known Fenniman was actually the decision-maker, he “would have shown [Fenniman] the video again and explained my version of what took place here this day.”

Despite having elicited this testimony at the hearing, Alexander’s counsel never raised before the board, prior to its September 27, 2010 decision, the argument Alexander now makes in this appeal. Rather, Alexander first made the argument in his motion for reconsideration/rehearing on October 27.

We disagree with Alexander’s assertion here that this was “the next time,” which we interpret to mean the first time, “he had a chance to review his argument.” We acknowledge that the board declined to hear arguments at the close of evidence; however, pursuant to New Hampshire Administrative Rule, Per-A 208.01, Alexander could have moved to add the issue for the board’s consideration prior to its decision. That rule provides:

At any time prior to the issuance of the decision on the merits, the board, on the board’s own motion or on the motion of any party, shall reopen the record of the hearing to receive relevant, material and non-duplicative testimony, evidence or arguments not previously received, if the board determines that such testimony, evidence or arguments are necessary to a full and fair consideration of the issues to be decided.

N.H. Admin. Rules, Per-A 208.01 (emphases added).

By contrast, Rule 208.03 provides, in part:

(a) Pursuant to RSA 541:3, within 30 days after the date of notice of any decision or order of the board, any party to the action or proceeding before the board, or any person directly affected thereby, may apply for rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order.

N.H. Admin. Rules, Per-A 208.03 (emphasis added); see RSA 541:3 (2007). As the State notes, the board “did not make a finding on the issue” of whether Duffy was, or properly acted on behalf of, the appointing authority. Therefore, it was not a proper ground on which to request rehearing. See N.H. Admin. Rules, Per-A 208.03. Accordingly, we do not consider it a “ground . . . set forth” in that motion for purposes of RSA 541:4. RSA 541:4 (2007) (providing

that court will not consider on appeal any grounds for error not set forth in a motion for rehearing to the board). We conclude, therefore, that the issue has not been preserved for our review.

Alexander next argues that “[t]he Board violated [RSA 541-A:31, IV] by denying [him] the opportunity to make a closing argument at the hearing.” The State counters that Alexander failed to preserve this issue by neglecting to make a contemporaneous objection at the hearing. We agree. “The general rule is that a contemporaneous and specific objection is required to preserve an issue for appellate review.” Petition of Guardarramos-Cepeda, 154 N.H. 7, 9 (2006) (addressing preservation of issue before sentence review board). The transcript reveals that Alexander’s counsel inquired about closing arguments at the hearing, to which Chairman Wood responded, “We’re not going to have closing arguments. We appreciate it. Four days [of testimony] is sufficient.” Alexander’s counsel did not object. Accordingly, the issue is not preserved.

Alexander next contends that he is entitled to a new hearing because the board violated RSA 21-I:46, IX (2000) by failing to issue its decision within forty-five days of the date of the hearing. We disagree. As RSA 21-I:46, IX implicates no liberty interest and the record reveals no prejudice to Alexander, “we hold that the statute affords no remedy.” Appeal of Martino, 138 N.H. 612, 616 (1994) (rejecting claim that decision of compensation appeals board should be vacated because it was not issued within statutorily mandated time limit).

We also disagree with Alexander’s contention that “the Board’s decision reflects either unsupported or very unclear fact-finding on material issues, in violation of RSA 541-A:35.” RSA 541-A:35 (2007) requires that “[a] final decision shall include findings of fact and conclusions of law, separately stated.” The board’s fourteen-page decision includes a review of the evidence and separate conclusion sections as to Alexander and Harris. We hold that the decision complies with RSA 541-A:35. To the extent Alexander claims the board’s findings are unsupported by the evidence, his single-sentence argument is either not adequately briefed and therefore waived, Appeal of Town of Nottingham, 153 N.H. 539, 555 (2006), or, to the extent it references a previous argument, is addressed above.

Alexander next contends that he was denied due process under the Fourteenth Amendment to the United States Constitution and Part I, Article 15 of the New Hampshire Constitution. Arguing that he had a property interest in his job, he asserts that he “was entitled to procedural due process in the execution of his termination, by both SYSC and the Board.” The State asserts that Alexander had no property right in state employment and argues that, in any event, “[d]ue process requires notice and an opportunity to be heard, which Alexander received.”

“[W]hile property interests are protected under the Federal, as well as the State, Constitutions, they are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.” Id. at 549 (quotation omitted) (addressing takings claim); see Brown v. Bedford School Board, 122 N.H. 627, 630 (1982). Alexander has the burden of proving he had a property interest in his employment. See Krieg v. Seybold, 481 F.3d 512, 519 (7th Cir. 2007).

“In the context of public employment, we have repeatedly reaffirmed that, as a matter of State law, public employment without more, such as a commission of office, does not rise to the level of a protected property right.” Brown, 122 N.H. at 630. Alexander contends that the collective bargaining agreement (CBA) under which he worked, RSA chapter 273-A, “and the classified system (e.g., RSA 21-I:42-58) . . . provide the ‘more’ that creates a property interest.” He fails to cite a specific provision, however, of either statute, or of the CBA, that creates such an interest. Cf. Intern. Union Local 737 v. Auto Glass Emp. Cr. Union, 72 F.3d 1243, 1250-51 (6th Cir. 1996) (finding no property interest in employment where plaintiffs failed to cite specific provision of contract, or other rule or understanding, that created one). In addition, notwithstanding that Alexander may have been entitled to certain procedural protections and rights of appeal by statute and administrative rule, “a substantive property right cannot exist exclusively by virtue of a procedural right.” Dorr v. County of Butte, 795 F.2d 875, 877 (9th Cir. 1986); see Petition of Gorham School Board, 121 N.H. 878, 881 (1981) (procedural protections of RSA 189:14-a did not create property right in continued employment with school district). Because we conclude that Alexander has failed to meet his burden of showing a protected property interest in his employment with SYSC, we need not further address his constitutional claims, including his claim that the State Constitution affords him greater protection than the Federal Constitution.

We turn now to the State’s appeal of the board’s decision with respect to Harris. The State argues that the board “exceeded both its statutory and regulatory authority” under RSA 21-I:58, I, and New Hampshire Administrative Rule, Per-A 207.12(a), by reinstating Harris to employment with HHS.

The board stated that “[i]n accordance with pertinent provisions of RSA 21-I:58, I, . . . [it] voted unanimously to have Mr. Harris reinstated, but without the benefit of back pay, to his position of Youth Counselor Trainee.” The State contends this was error because RSA 21-I:58, I, applies only to “permanent” employees. We agree.

RSA 21-I:58, I, provides, in relevant part:

Any permanent employee who is affected by any application of the personnel rules . . . may appeal to the [board] within 15 calendar days of the action giving rise to the appeal. . . . If the [board] finds that the action complained of . . . was taken in violation of a statute or of rules adopted by the director, the employee shall be reinstated to the employee's former position or a position of like seniority, status, and pay. . . . In all cases, the [board] may reinstate an employee or otherwise change or modify any order of the appointing authority, or make such other order as it may deem just.

We stated in Appeal of Higgins-Brodersen, 133 N.H. 576 (1990), that “[i]n reviewing RSA 21-I:58, it [was] clear to us that the legislature intended to confer upon State employees a specific right of appeal to the Board based upon permanent status.” Higgins-Brodersen, 133 N.H. at 580.

Harris attempts to distinguish Higgins-Brodersen, noting that it concerned a part-time employee and arguing that “probationary employees should not be equated with part-time employees.” We are not persuaded. Our decision in Higgins-Brodersen clearly differentiated permanent from probationary, as well as part-time, employees. Id. at 580 (noting that “[p]ermanent employees have completed a working-test period and have been recommended for permanent appointment by the proper authority”).

We acknowledge that the last sentence of RSA 21-I:58, I, begins with the seemingly expansive introductory phrase, “[i]n all cases.” Nevertheless, when interpreting statutes, “we do not merely look at isolated words or phrases, but instead we consider the statute as a whole.” Appeal of Kat Paw Acres Trust, 156 N.H. 536, 537 (2007) (quotation omitted). Reading RSA 21-I:58, I, as a whole, we conclude that the discretion conferred by the last sentence was intended to be confined to cases arising under that section – that is, appeals by permanent employees. RSA 21-I:58, I.

Harris argues, however, that the State should be estopped from arguing that RSA 21-I:58, I, does not apply to him because his termination letter informed him that he had the right to appeal under that section. We disagree. “[A] party may not assert equitable estoppel to avoid the application of a statute.” Appeal of Stanton, 147 N.H. 724, 732 (2002) (Dalianis, J., concurring in part and dissenting in part); cf. Thomas v. Town of Hooksett, 153 N.H. 717, 722-23 (2006) (rejecting claim of municipal estoppel because reliance upon a representation contrary to statute was unreasonable). We conclude that the board's reliance upon RSA 21-I:58, I, to reinstate Harris was erroneous because that statute does not confer that authority in the case of a probationary employee.

We now examine the board's actual authority in such cases. New Hampshire Administrative Rule, Per-A 207.12(a) provides:

(a) 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.

N.H. Admin. Rules, Per-A 207.12(a).

Here, the board concluded that "[w]hile [it] did not find the dismissal decision to be arbitrary, illegal, capricious or made in bad faith, [it] believes that the decision to dismiss in this case imposed a more substantial penalty than the appellant's actions warranted." The State argues that the board erred in exceeding the limits on its authority to review dismissals of probationary employees.

Harris counters that the board "essentially found that [he] had not violated the work standard." We disagree. In its denial of the State's motion for rehearing, the board stated:

In its September 27, 2010, decision, the Board concluded after considering . . . all the facts in evidence that the Department's decision to dismiss [Harris] was not arbitrary, illegal, capricious or made in bad faith, as the Department believed that [Harris] failed to meet the work standard as articulated in the Department's policies and procedures. However, the Board found, and continues to find, that those policies and procedures may not be evaluated in a vacuum, but must be weighed in practical terms as they are actually applied and observed in the workplace. Having done so, the Board found that [Harris's] work performance did not represent a failure to meet work standards that would justify his dismissal.

We read this not as a finding that Harris met the work standard, but as an assessment of the degree of his failure to meet it. We reach this conclusion in light of the board's findings that "Harris might have used better judgment with respect to reporting the incident," and "Harris should have been more forthcoming during the investigation, and should not have related as independent recollection those details he actually found in another employee's

. . . [incident] report.” As the State points out, however, under New Hampshire Administrative Rule, Per 1002.02(a), “the discretion to dismiss a probationary employee who fails to meet the work standard” rests with the appointing authority, not the board. “The dismissal of a probationer must not be arbitrary, illegal, capricious or made in bad faith, but the courts will not interfere with a reasonable exercise of discretion by a department head or an administrative official.” Clark v. Manchester, 113 N.H. 270, 275 (1973) (quotation omitted). Similarly, once the board found that the dismissal was not arbitrary, illegal, capricious or made in bad faith, it was not entitled to interfere with HHS’s exercise of discretion in terminating Harris’s employment. Accordingly, we reverse the board’s decision with respect to Harris.

Affirmed in part; reversed in part.

DALIANIS, C.J., and CONBOY and LYNN, JJ., concurred.

State of New Hampshire



PERSONNEL APPEALS BOARD

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Consolidated Appeals of:

Timothy Alexander – Docket #2009-T-020 and William Harris – Docket #2009-T-022

Division of Juvenile Justice Services

Department of Health and Human Services

September 27, 2010

The New Hampshire Personnel Appeals Board (Wood, Bonafide, Johnson and Casey) met in closed session¹, under the authority of RSA 21-I:58 and Chapters Per-A 100-200 of the NH Code of Administrative Rules, on May 19, May 26, June 16, and July 28, 2010, to hear the appeals of Timothy Alexander and William Harris, former employees of the Sununu Youth Services Center. The Appellants, who were represented at the hearing by SEA General Counsel Michael Reynolds, were appealing their termination from employment as Youth Counselors following an incident that occurred on April 5, 2009, involving resident Kurtis B. Their respective appeals are briefly summarized as follows:

Timothy Alexander, a former full-time employee, is appealing his May 21, 2009 termination from employment as a Youth Counselor III. The State alleges that Mr. Alexander violated Per 1002.08 (b)(9), endangering the life, health or safety of another employee or individual served by the agency; and Per 1002.08(b)(7), for violation of a posted or published agency policy or procedure, the text of which warns that violation of same may result in dismissal. The Appellant argues that none of his actions rise to the level of an allowable immediate termination, that management must have had other motivations to terminate his employment, that termination was unjust, and that the termination was procedurally improper.

¹ Although Per-A 205.02 of the Board's rules indicates that hearing are open to the public and the Board's records are available for inspection, RSA 91-A:5, IV, specifically exempts "...confidential, commercial, or financial information..." from disclosure under the Right-To-Know law. In this instance, evidence to be presented at the hearing and entered into the record of the hearing included information from juvenile case records, which are considered confidential and protected from disclosure under the provisions of RSA 170-G:8 A. In order to be permitted to offer that information into evidence, Attorney Gallo obtained a final order from a court of competent jurisdiction that would allow that evidence to be offered and admitted into the record, provided that the Board agreed to close the hearing to the public and seal the record of the hearing to preclude disclosure of confidential juvenile records or records from juvenile case files to any unauthorized third party.

William Harris, a former full-time probationary employee, is appealing his May 28, 2009 termination from employment. The department alleges that the Appellant violated Per 1002.02(a) for failure to meet the work standard as a probationary employee by failing to immediately report to his supervisor, Bureau Chief or designee, the Class II abuse on April 5, 2009 of Sununu Youth Services Center resident Kurtis B. by staff member Timothy Alexander. The Appellant argues that the termination was arbitrary, capricious, illegal and/or made in bad faith. He argues that he was not dishonest or untruthful when he recounted the events that occurred on April 5, 2009. Mr. Harris asserts that he was meeting the DJJS work standard and that the appointing authority has not met the threshold requirement to terminate a probationary employee.

Before the parties began their presentations, Attorney Reynolds asked the Board to note that although the Board's rules state that Appellants have the burden of proof and the State has the burden of production, the State also has the burden of proving the operative facts of its case. Attorney Reynolds argued that the video upon which the State relied in dismissing both Appellants, and which would be offered into evidence, was of extremely poor quality, and must be analyzed in terms of the "jumps" in both time and space. He argued that in Mr. Alexander's letter of termination, Mr. Duffy alleged that Mr. Alexander came up behind the resident and pushed him, causing the youth and another staff member to fall to the ground. Mr. Reynolds argued that when the video is viewed in conjunction with actual eyewitness statements, and explained by the Appellants, the Board must find that Mr. Alexander never pushed the resident, but instead put his hand on the resident to guide him along until another staff member took the resident to the floor with a "one-arm take-down" after the resident raised his hands up to staff, signaling the potential for a physical assault on staff.

The record of the hearing in these matters 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

1. Policy C-003 – Use of Force
2. Policy RS-900 – Abuse and/or Neglect Reporting and Investigation
3. Policy C-002 – Professional Conduct
4. Policy C-A-10 – Incident Tracking and Review
5. Lesson Plan: Report Writing
6. Report Writing Attendance Sheet (Timothy Alexander)

7. Handwritten Incident Report completed by Staff Member Casey Creamer, with attached reports as follows from Bridges: Core Incident Information, Participants, Behavior Incident Information, Nurse Assessment, Restraint Report, Recommendation Report and Witness Report (8 pages total)
8. May 21, 2009 letter from John Duffy to Timothy Alexander Re: Letter to Dismiss
9. April 21, 2009 handwritten "Memorandum for Record" signed by Timothy Alexander waiving union representation
10. Typed summaries compiled from John Duffy's notes of his interviews with the following persons: Timothy Alexander (4/21/09), Casey Creamer (4/24/09), Will Harris (4/23/09)
11. Typed summary compiled from John Duffy's notes of his interview with the resident, Kurtis B. (4/22/09)
12. October 21, 2005 Letter of Warning issued to Timothy Alexander by House Leader George Kalampalikis for failure to meet the work standard regarding the use of force
13. Data Summary titled tblAlexander_Incident_7857
14. May 24, 2009 Notice of Dismissal issued by John Duffy to William Harris
15. Policy RS-1458 – Incident Tracking and Review
16. SYSC Policy Receipt for the revised Professional Conduct Policy (C-002)
17. Video of the interior of SYSC G-0 unit from 6:45 a.m. to 7:10 a.m. on April 5, 2009
18. May 22, 2009 Notice of Intention to Dismiss issued by John Duffy to William Harris

SEA Exhibits (for Appellants)

- A. Performance Evaluations for Timothy Alexander dated April 19, 2004; May 13, 2005; and July 20, 2007
- B. Investigation Summary Report #7857 (5 pages) for resident Kurtis B.
- C. May 12, 2009 Letter of Intention to Dismiss issued by John Duffy to Timothy Alexander
- D. Sketch prepared by Robin Hoyt replicating the diagram of G-unit prepared by Timothy Alexander in his direct testimony on July 28, 2010

The following persons, who were sequestered at the request of the parties, gave sworn testimony:

John Duffy	Casey Creamer
Virgil Bossom	William Harris
Steven Sage	Timothy Alexander
Eric Leitner	

On the fourth and final day of the hearing, the State called Kenneth Goonan as a rebuttal witness and offered into evidence a "meta-data report" (related to State's Exhibit 13) prepared by Mr. Goonan about information in the Bridges computer system. After hearing Mr. Goonan's direct testimony, the Appellants moved to have his testimony and the exhibit excluded, arguing that neither the proposed exhibit nor the testimony should be considered rebuttal, but should have been offered as part of the State's case in chief. After a brief discussion, a majority of the Board voted to exclude the proposed exhibit and to disregard Mr. Goonan's testimony.

Narrative Summary

The Sununu Youth Services Center (SYSC, formerly YDC) is a secure facility designed to provide treatment services for serious, sometimes violent, sometimes chronic juvenile offenders. The facility itself consists of four buildings, with 3 residential units in each building. Residents are assigned to units based on their status as either committed or detained, their risk classification and their treatment requirements. Each unit is designed to house twelve residents.

SYSC residents have multiple treatment needs, and the program has a range of services designed to treat the juveniles and provide appropriate detention, treatment and rehabilitative services. Juveniles are sent to the SYSC by court order, either on a committed or detained status. Youth who are committed are assigned to the care and custody of the Commissioner of Health and Human Services. The detained population includes juveniles with pending court matters including arraignment, adjudication or commitment. Residents may be as young as eleven years old, but on average the residents are usually thirteen or fourteen. Juveniles who are committed may remain committed as youth up to the age of eighteen. Kurtis B, one of the "committed residents," was between the ages of fifteen and sixteen on April 5, 2009, when the incident occurred that later resulted in the Appellants' dismissal.

Since 2004, John Duffy has served as the Chief of Residential Services at the Sununu Youth Services Center. In that capacity, Mr. Duffy is responsible for overall care of up to 140 residents and staff. His responsibilities include ensuring the safety and well-being of staff and residents, security of the facility, monitoring behavioral management activities, making sure the residents are compliant with behavioral expectations, and ensuring that both residents and staff abide by the agency's policies and procedures. Mr. Duffy is responsible for approving the curriculum for staff training and ensuring that Youth Counselors receive training in areas including basic first aid, juvenile justice awareness, courtroom procedures, counseling and management of aggressive behavior. In particular, the training is intended to ensure that Youth Counselors who encounter aggressive behavior are able to de-escalate situations involving the residents in order to gain their cooperation without having to resort to the use of force and defuse the anger before it turns to violence.

On average, the facility employs eighty-one Youth Counselors who are scheduled to provide around-the-clock staffing at the facility. Youth Counselors have a variety of tasks, but their main function is to provide safety and security while supervising and participating in resident activities, monitoring and supervising resident behavior, and monitoring the residents' treatment goals. On April 5, 2009, Mr. Alexander was working as a Youth Counselor III, and had more leadership and clinical responsibilities than Mr. Harris, who was just completing his probationary period as a Youth Counselor I (Trainee). Mr. Alexander would have been involved in more complex interactions with resident groups and families, and was responsible for assisting in running the shift and taking responsibility for operations in the building. Both Appellants received training in the use of force, and the requirement for reporting any incidents involving the use of force.

Under the terms of the agency's Use of Force Policy, actual physical intervention is only permitted in cases of justifiable self-defense, protection of a third party, protection of a client from self-harm, protection of property, prevention of a crime, prevention of escapes, and prevention of resident disturbances and to maintain order within the facility. Employees are expected to use the least amount of force necessary to gain control of a situation. The steps in the force continuum begin with physical presence and move through more intense stages of intervention including verbal intervention, directional intervention, physical intervention, serious physical intervention, and deadly force intervention.

On the morning of April 5, 2009, SYSC Youth Counselors Casey Creamer, Timothy Alexander and William Harris were directly involved in the restraint of resident Kurtis B. Mr. Creamer filed a report of the incident that same day. The information he entered into the Core Incident reporting section of the Bridges System (State's 7) indicated that difficulties with resident Kurtis B began that day at breakfast. According to Mr. Creamer's report, the resident was asked if he had permission to sit at a table other than the one to which he had been assigned. Reportedly, the resident's response was rude and inappropriate, prompting Mr. Creamer to tell the resident that upon return to the unit, the resident would be expected to go to his room and "fill out an FOTP" (Figure Out The Problem). Mr. Creamer reported that the resident "...made a disrespectful comment under his breath," and later refused to go to his room when the residents returned to the unit, insisting that he was going to "do his hygiene first." Mr. Creamer stated that although he told the resident that the resident first needed to cool off, the resident ignored his directives, grabbed his hygiene box and walked over to the sink. Mr. Creamer reported that when he approached the resident and repeated his instructions for the resident to go to his room, the resident replied that he was not going to his room and he wasn't "f---ing listening" to what Mr. Creamer told him. According to the report:

"At this point YCIII Tim Alexander entered G-0 and noticed resident [Kurtis B.] in a combative stance standing face to face with this writer. Tim then placed his hand on resident [Kurtis B.'s]

back and repeated the direction of going to his room. [Kurtis B.] turned in a fast motion at which point this writer went into a one arm take-down and brought resident [Kurtis B.] to the ground. YCIII Alexander assisted this writer in the restraint. Resident [Kurtis B.] resisted momentarily and then complied with staff directions.”

Following the restraint, nursing staff was called to the unit to check the resident. Although the nurse indicated that the resident had a few abrasions on his face, the nurse reported that the resident showed no pain, discomfort or injury as a result of the restraint.

Review of the Evidence:

After hearing four days of testimony, reviewing the documentary evidence and repeatedly viewing the video of the April 5, 2009, incident, the Board concluded that the video and the early reports of what occurred are the most credible and persuasive evidence.

The witnesses described verbal exchanges between Casey Creamer and resident Kurtis B. beginning at breakfast on April 5, 2009. The video clip of the incident giving rise to the appellants' termination depicts events after the residents had returned from breakfast, and shows the verbal confrontation between Casey Creamer and Kurtis B. beginning at approximately 07:00:46 a.m. As shown in the video, at 07:00:49 a.m., while speaking to the resident, Mr. Creamer reached out to Kurtis B. and made the first physical contact. The resident can be seen stepping back and pulling away from Mr. Creamer. While the video has no audio component, the witnesses testified that Mr. Creamer and Kurtis B. were engaged in a verbal exchange that included swearing, name-calling and the resident refusing to go to his room as directed. Although Mr. Creamer and Mr. Alexander both testified that the resident took a “combative stance,” the video does not appear to show the resident taking a fighting stance or making any motions suggestive of an impending strike or assault.

According to Mr. Harris, when the staff and residents came back from breakfast that morning and began “getting settled,” he saw Kurtis and Casey Creamer heading toward the resident's room and talking. He stated that although their voices were not raised, the conversation was loud enough to catch his attention. He testified that Mr. Creamer wanted the resident to go to his room for a time out. Mr. Harris testified that although he believed the situation was under control initially, when the resident continued to refuse Mr. Creamer's directives, Mr. Harris decided he should “get involved.” At 07:00:56 a.m. on the video, approximately 10 seconds after the first obvious exchange between Mr. Creamer and the resident, Mr. Harris can be seen getting up from the table where he had been sitting. By 07:00:59 a.m., Mr. Harris was standing at Mr. Creamer's side, facing the resident. Mr. Harris testified that he had a

good rapport with the resident and thought the situation might be resolved if he spoke to the resident. Mr. Harris testified, "I was talking to him about he needs to comply. You don't want this to escalate any further. By the time I stated all that, then Tim arrived on the scene." Mr. Harris testified that he did not recall if the resident was still interacting with Mr. Creamer when Mr. Alexander arrived. Mr. Harris stated, "Tim just came along and moved him into Casey, and it was a done deal. Casey took the resident down, was on top of him."

Mr. Alexander testified that he first became aware of a problem in G-0 unit when a resident from that unit came into G-1 where he was sitting with Mark Greenwood, another Youth Counselor. According to Mr. Alexander's testimony, "Suddenly the door rips open to G-1 and a kid screams, 'Tim you've got to come downstairs and help Casey; he's having trouble with Kurtis B.'" Mr. Alexander testified that having a resident moving freely from one unit to another without notice or supervision was an immediate cause for alarm. Nevertheless, he was unable to recall the name of that resident, and no evidence was offered to suggest that anyone tried to identify or question that resident about what was occurring.

Mr. Alexander testified that he had a heightened sense of urgency because he knew that night staff would be leaving soon and he was uncertain about when other staff might be there to replace them. He testified that he could see into G-0 through the glass partition and immediately assessed the situation as a threat to staff when he saw Kurtis B. pull away from Mr. Creamer and assume a combative stance. He said that he knew that he had to remove the threat by moving the resident away from Mr. Creamer to take him "out of striking distance." Mr. Alexander said he was not running through the unit, but moving with "a sense of urgency" as he entered G-0. Mr. Alexander testified that he never pushed the resident, but instead put his hand on the resident's back and directed him forward in order to move him past Mr. Creamer and take him out of a combative stance.

When asked if he said anything to Kurtis B. before pushing the resident, Mr. Alexander testified that he did not say anything because calling out to the resident or speaking to the resident before pushing him could have distracted Mr. Creamer and Mr. Harris, leaving both men more vulnerable to attack. According to Mr. Alexander, "[Verbal intervention] had been done. There were two staff already there and we had a situation that had escalated to the point that I saw a physical altercation, or it had escalated so quickly that there wasn't any time for it." Mr. Alexander said he believed that the resident "was going to take a swing at Casey Creamer." He said he believed it then, believed it now, and felt that his assessment of the situation was accurate, as the resident reportedly told Mr. Alexander later that day that if Mr. Alexander had not intervened, the resident would have struck Mr. Creamer.² Mr. Alexander testified that although he originally reported that William Harris was sitting at the table when the incident

² According to Mr. Duffy, the resident denied ever saying that to the appellant.

occurred, the video of the incident shows William Harris standing alongside Mr. Creamer facing the resident. He testified that he was not focused on Mr. Harris but on the resident, because the resident was the source of the threat to staff.

The video of the incident shows Mr. Alexander entering the unit at 07:00:58 a.m. Although Mr. Alexander said that he saw Mr. Harris sitting at a table away from the interaction between the resident and Mr. Creamer, the video shows that Mr. Harris was already standing at Mr. Creamer's side when Mr. Alexander came through the door to the unit. By 07:01:01 a.m., three seconds after entering the unit, Mr. Alexander had already closed the distance of approximately 30 feet between the doorway to the unit and the area near the table where Mr. Creamer, Mr. Harris, and Kurtis B. were standing. A second later, the video shows Mr. Alexander reaching forward and pushing the resident from behind. A second later, the video shows the resident on the floor following what was described as a "one-arm takedown" by Casey Creamer.

According to Mr. Creamer's written report of the incident, "At this point YCIII Tim Alexander entered G-0 and noticed resident [Kurtis B.] in a combative stance standing face to face with this writer. Tim then placed his hand on resident [Kurtis B.'s] back and repeated the direction of going to his room." Mr. Alexander testified that he said nothing and that the resident had no idea he was coming up behind him.

Mr. Harris was never listed as a witness on the Bridges report, despite the fact that he was standing with Mr. Creamer when Mr. Alexander came up from behind and shoved the resident. Mr. Harris testified that in G-0, Kurtis B. was refusing directives. Mr. Harris stated, "At first I was just listening to what was going on, it wasn't escalating." He testified that while he was sitting at the table, he was giving the resident "an opportunity to listen to Creamer." Mr. Harris testified that he stood and approached Mr. Creamer and the resident when the exchange "escalated," the conversation got louder, and the resident's comments became derogatory. Mr. Harris described the resident's posture as "stressful" and "assertive," but said he did not see any evidence of a physical threat to himself or Mr. Creamer. Mr. Harris testified that when Mr. Alexander entered the scene, he did not believe there was any unnecessary roughness, noting that "It happened fast." Mr. Harris testified that in a situation like this, he would defer to Mr. Alexander's judgment, as Mr. Alexander was senior staff and Mr. Harris had been on the job for a little less than a year.

While the parties disagree about what the video shows, one fact is absolutely certain. The actual use of force took place in a matter of seconds. According to Mr. Alexander, as soon as he was called to G-0, he assessed the situation in terms of staffing levels, staff locations, the physical distance between the resident and Mr. Creamer, the angle at which the resident was standing, the way in which the resident was flailing his arms and shifting his weight

from foot to foot like a prizefighter, and the way other residents had gathered in the room. If one accepts that Mr. Alexander could have conducted that sort of detailed threat assessment in the three or four seconds before using physical force, it is difficult to understand how he could have missed the fact that Mr. Harris was not seated at the table, but instead was standing next to Mr. Creamer talking to the resident. Also, despite the poor quality of the video, the Board does not believe it shows the resident flailing his arms or shifting his weight like a fighter.

It appears that Mr. Alexander did precisely what the video shows. He heard there was a problem, rushed through the door, came up behind the resident without any warning and shoved him. It also appears that he did not move the resident "past" Mr. Creamer as Mr. Alexander testified, but directly toward Mr. Creamer. The video does not show the resident raising his hands or arms toward Mr. Creamer or Mr. Alexander as the witnesses described before the resident was taken to the floor and restrained. If he did, however, that would not be surprising, as he had just been hit from behind without any warning.

The Board also noted conflicting descriptions of the incident in the Bridges reports (State's Exhibit 7) and the subsequent report of the resident disciplinary hearing (SEA Exhibit B). Mr. Alexander testified that the resident was in a combative stance and that he posed an imminent threat to staff. Mr. Alexander also testified that the resident later admitted that he would have assaulted Mr. Creamer if Mr. Alexander hadn't intervened. The Board has difficulty understanding why both Mr. Creamer and Mr. Alexander would have omitted that information from their resident disciplinary report, or why the resident would have been charged with a minor violation rather than a major violation if they truly believed that the resident was planning to assault a staff member or posed an immediate and serious threat to staff.

Mr. Leitner testified that he was asked to investigate the resident's "refusal to obey" and "disrespect to staff," but was not charged with investigating any threats to staff. Mr. Leitner testified that he learned of the threat after he had completed his investigation. He made no further report, he testified, believing that Mr. Alexander had done so.

If the use of force and subsequent restraint were actually a response to an imminent threat of assault on a staff member, it seems highly unlikely that such threat would not have been communicated clearly to the investigator, as that would have been a major infraction rather than a minor infraction involving a refusal to follow staff directives. Reference to any possible threat does not appear until the record of the student disciplinary hearing three days after the incident itself. The "mitigating factors" section of the hearing record mentions the resident's combative stance and states that the resident "had to be restrained because of immediate threat to staff" (SEA Exhibit B). Mr. Leitner testified that if a staff person felt he or she had been threatened by a resident, it normally would be reported up the chain of command and investigated as a major violation. The Board can only conclude that there was no imminent

threat, otherwise anyone aware of the alleged threat would have been required to file a Bridges report, as threats are listed among the "reportable incidents."

Having carefully considered the evidence and argument offered by the parties, the Board found as follows:

Timothy Alexander – Docket #2009-T-020

The letter of termination issued to Mr. Alexander on May 21, 2009, states that the appellant was dismissed in accordance with the provisions of Per 1002.08(b)(9) of the Code of Administrative Rules for endangering the life, health or safety of another employee or individual served by the agency, and for violation of Per 1002.08(b)(7), violation of a posted or published agency policy or procedure, the text of which warns that violation of same may result in dismissal. Specifically, Mr. Alexander is alleged to have "endangered the safety of resident Kurtis B. by using excessive force, said force constituting Class Abuse pursuant to DJJS Policy #RS-900III, A(s)(1) in that [he] abruptly and without warning, approached resident Kurtis B. and forcefully pushed him from behind causing him to fall to the ground." The letter further alleges that Mr. Alexander violated agency policies and procedures related to the safe use of physical contacts, professional conduct, reporting of abuse and/or neglect, and timely completion of internal incident tracking reports.

The use of force policy (State's Exhibit 1) clearly describes the steps staff are required to take, including physical presence, verbal intervention, directional intervention, and physical intervention before the staff person can engage in "serious physical intervention" or "deadly force." By his own admission, Mr. Alexander did not attempt to use any of the lesser forms of intervention before engaging in what the Board would consider an excessive use of force.

It is important to note that there were two trained staff members on the floor talking face to face with the resident when Mr. Alexander burst into the room, approached the resident from behind and shoved the resident without warning. Mr. Alexander described his actions as "positional movement" of the resident, asserting that it was the next reasonable step when presence and verbal intervention failed. According to the policy, however, the next step in the force continuum is "directional intervention," which the policy defines as "a physical cue to follow staff directions. Touching the client and moving with them in an escort position is intended to move them away from the situation and engage the client in defusing questions." The evidence reflects that Mr. Alexander did not use any physical cue, escort the resident or engage in defusing questions. He simply shoved the resident without warning.

Mr. Alexander insisted that the only reason he intervened was to eliminate an imminent threat to staff. The evidence reflects, however, that neither Mr. Creamer nor Mr. Harris described the situation as an imminent threat. More

importantly, if an imminent threat existed, Mr. Alexander and Mr. Creamer testified that Mr. Creamer was able, single-handedly, to complete a "one-arm takedown," and that Mr. Alexander only assisted when he realized that the resident was resisting. As such, it is reasonable to believe that Mr. Creamer could have executed an appropriate restraint, if necessary, without Mr. Alexander intervening at all. The fact that Mr. Alexander made forceful and unnecessary contact with the resident before any of the conditions were met that would permit significant physical intervention supports the agency's allegation that Mr. Alexander used excessive force and violated the agency's policies and procedures related to the use of force, safe use of physical contacts and professional conduct.

The offenses described above constitute a violation of Per 1002.08(b) for endangering the life, health or safety of another employee or individual served by the agency, as well as a violation of Per 1002.08(b)(7), violation of a posted or published agency policy or procedure, the text of which warns that violation of same may result in dismissal.

Reviewing the evidence in accordance with the provisions of Per-A 207.12 (b), the Board found that the appellant failed to prove that termination was unlawful; that the appointing authority violated the rules of the division of personnel by imposing the disciplinary action under appeal; that the disciplinary action was unwarranted by the alleged conduct or failure to meet the work standard in light of the facts in evidence; or that the disciplinary action was unjust in light of the facts in evidence.

Therefore, the Board voted unanimously to DENY Mr. Alexander's appeal.

William Harris – Docket #2009-T-022

The letter of termination issued to Mr. Harris on May 28, 2009, states that the appellant was dismissed in accordance with the provisions of Per 1002.02 (a) for failure to meet the work standards as a probationary employee by failing to immediately report to his supervisor, Bureau Chief, or designee, the Class II abuse on April 5, 2009, of Sununu Youth Services Center (SYSC) resident Kurtis B. by staff member Timothy Alexander. The letter also states that the appellant failed to meet the work standard by failing to complete a written Incident Tracking report describing suspected abuse, as well as for failing to be honest and truthful during the investigation of the incident in question.

The evidence reflects that at the time of the incident giving rise to his termination, Mr. Harris was employed as a Youth Counselor Trainee. His immediate supervisor for that shift was Timothy Alexander, a Youth Counselor III. Although Mr. Harris was engaged in conversation with the resident when the physical contact and subsequent restraint occurred, he did not participate in the restraint and had no physical contact with the resident. Mr. Harris testified credibly that because Mr. Alexander was considered senior staff, he deferred to Mr. Alexander's judgment

as to what was or was not appropriate. While it is clear that Mr. Harris might have used better judgment with respect to reporting the incident, Mr. Harris was never even listed as a witness in any of the reports entered into the Bridges system, including the Core Incident Tracking report and report of the restraint. The fact that Mr. Harris did not initiate or contribute to a report is consistent with his previous experience as well. According to his testimony, the one time that Mr. Harris was actually involved in a physical restraint, he was not required to complete a report, nor was he asked to complete a witness statement.

Policy RS-1458 "Incident Tracking and Review" (State Exhibit #15) describes the steps employees are required to take as the result of a reportable incident. Reportable incidents as described in the policy include "...any occurrence that results in injury, property damage, or loss to an employee, resident, or visitor, or that has the immediate potential of a hazardous condition, or any other occurrence that is not consistent with the routine operation of SYSC or the routine care of a particular resident." Examples of reportable incidents include "verbal/written threats by a resident toward staff/peers" and "injuries to residents, staff, or visitors (requires a witness statement).

The "Duty to Notify" section of the Incident Tracking and Review policy states, "The person(s) discovering an incident shall immediately notify their direct supervisor." In this case, Mr. Alexander was the appellant's immediate supervisor and he clearly needed no additional notification. The section titled "Duty to Report" states, "The person primarily involved with or discovering the incident shall complete an Incident Tracking report as soon as possible. This report shall be completed by the end of their work shift. The Incident Tracking report shall be filled out electronically in Bridges...There shall be only one report completed per incident." The persons primarily involved in this incident included Casey Creamer and Timothy Alexander, and Mr. Creamer completed the Core Incident report as required.

Although Mr. Harris was certainly present during the incident and saw what occurred, he was not the person immediately involved. Therefore, it appears that he would be exempt, technically, from the reporting requirement unless he believed that some level of abuse had occurred. As he testified, neither Mr. Creamer nor Mr. Alexander treated the incident as unusual, and Mr. Harris would have deferred to the judgment of more senior, more experienced staff. Also, based on his previous experience, and based on the fact that the resident became compliant and did not suffer any obvious or significant injury, it is unlikely Mr. Harris would have considered it his duty to notify the Bureau Chief or his designee of the incident. Finally, while the policy requires only one report per incident, and requires anyone who witnesses a reportable event to complete a witness statement, the State failed to explain how anyone would know who was responsible for authoring the initial report, or how anyone other than the initial author of the report would know that he or she needed to furnish a statement unless directed to do so by another employee or supervisor.

Mr. Harris was also charged with failing to meet the work standard by being untruthful during the investigation of the incident. In reviewing the video of the incident, it is clear that Mr. Harris had mere seconds in which to observe what Mr. Alexander was doing before Mr. Alexander shoved the resident. It is also reasonable to conclude that Mr. Harris was concentrating on his interaction with the resident, and would have been nearly as surprised as the resident when Mr. Alexander entered the scene and shoved the resident. Under those circumstances, it is not difficult to understand why Mr. Harris might not have a detailed recollection of what occurred, and might have had very little to offer during an investigation of the incident.

The Board agrees that Mr. Harris should have been more forthcoming during the investigation, and should not have related as independent recollection those details he actually found in another employee's Bridges report. However, the Board does not believe that his conduct rises to a level of dishonesty that would warrant his immediate dismissal.

In accordance with the provisions of Per-A 201.12 (a), "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."

While the Board did not find the dismissal decision to be arbitrary, illegal, capricious or made in bad faith, the Board believes that the decision to dismiss in this case imposed a more substantial penalty than the appellant's actions warranted. The evidence reflects that Mr. Harris had been on the job just under a year. During that time, he had been involved in only one other restraint. In that case, he was never required to file a report or complete a witness statement, even though he was directly, personally involved in the restraint itself. While that does not excuse him from following DJJS policies and procedures, it suggests that he was simply doing what he'd done before without any consequence. The incident between Mr. Alexander and Kurtis B. was over in a matter of seconds, giving Mr. Harris very little opportunity to observe or analyze what was happening. Although Mr. Harris indicated during the investigation that he did not believe the use of force was excessive, he should have realized that any use of force should be scrutinized, and that if the person engaging in a use of force was his supervisor, he at least should have sought advice from someone above that supervisor in the chain of command to determine what further steps might be required.

In accordance with pertinent provisions of RSA 21-I:58, I, "...In all cases, the personnel appeals board may reinstate an employee or otherwise change or modify any order of the appointing authority, or make such other order as it may

deem just." Accordingly, the Board voted unanimously to have Mr. Harris reinstated, but without the benefit of back pay, to his position of Youth Counselor Trainee.³ Such reinstatement shall occur within 30 calendar days of the date of this order. Upon his completion of any additional training that the agency considers appropriate, he may be assigned by the agency to any work location, schedule or shift that best meets the agency's staffing needs.

The appeal of William Harris is therefore GRANTED IN PART as set forth above.

THE PERSONNEL APPEALS BOARD

/s/ Patrick H. Wood

Patrick Wood, Chair

/s/ Philip Bonafide

Philip Bonafide, Vice-Chair

/s/ Robert Johnson

Robert Johnson, Commissioner

/s/ Joseph Casey

Joseph Casey, Commissioner

cc: Karen Hutchins, Director of Personnel, 25 Capitol St., Concord, NH 03301
Michael Reynolds, SEA General Counsel, PO Box 3302, Concord, NH 03302-3303
Attorney Jonathan Gallo, Department of Health and Human Services, 129 Pleasant St., Concord, NH 03301
Mark Bussiere, HR Administrator, Department of Health and Human Services, 129 Pleasant St., Concord,
NH 03301

³ RSA 21-I:58 requires the Board to reinstate an employee to the employee's former position or a position of like seniority, status and pay only in those circumstances where the Board finds "that the action complained of was taken by the appointing authority for any reason related to politics, religion, age, sex, race, color, ethnic background, marital status, or disabling condition, or on account of the person's sexual orientation, or was taken in violation of a statute or of rules adopted by the director [of personnel]." Otherwise, the Board may exercise its equitable authority and made such other order as it deems just.

State of New Hampshire



PERSONNEL APPEALS BOARD

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

Board's Decision on Appellee's Motion to Close Hearing and Seal Records

In the Appeals of:

Timothy Alexander (2009-T-020), William Harris (2009-T-022), William Woodson (2010-T-002), and
Kendall Kienia (2010-T-005)

March 2, 2010

On February 2, 2010, Attorney Jonathan Gallo filed with the Board Appellee's Motion to Close Hearing and Seal Records in the appeals of Timothy Alexander, William Harris, William Woodson and Kendall Kienia, former employees of the Sununu Youth Services Center.

As stated in that Motion, the State intends to introduce at hearing records that would identify "certain individuals who are or were at the time of the appellants' employment, juveniles committed to the Department's Sununu Youth Services Center (SYSC). The SYSC is an architecturally secure facility, which houses juveniles either accused of or adjudicated on charges of delinquency (RSA 169-B). This evidence will consist of videos, documents, and witness testimony." After reviewing the Motion, the relevant statutes, and consulting with counsel, the Board found the following:

1. RSA 170-G:8-a, I defines juvenile case records as consisting of all "official records, regardless of the media upon which they are retained, created by the department of health and human services in connection with a report received pursuant to RSA 169-C:29, or cases brought under RSA 169-B, 169-C, 169-D, or 463, or services provided to the child or family without a court order pursuant to RSA 170-G:4, including intake and assessment reports, service or case plans, case logs, termination reports and a list of persons or entities providing reports to the department or services to the child or family."
2. DHHS "case records" are confidential with limited exceptions. RSA 170-G:8-a. If one of the exceptions does not apply, "[a]dditional access to case records and all other records of the

department shall be granted pursuant to the terms of a final order issued by a court of competent jurisdiction." RSA 170-G:8-a, IV.

3. As set forth in RSA 170-G:8-a, V, It is "unlawful for anyone entrusted with the information in case records to disclose the records of information contained in them."

The Board determined that if the evidence DHHS counsel seeks to introduce falls within the definition of "case records" and does not fall within any of the exceptions listed in RSA 170-G:8-a, in the absence of a final order issued by a court of competent jurisdiction, it is unlawful for anyone entrusted with the case records to disclose the records of information contained in the case records. As such, the Board would be unable to receive that evidence without the appropriate court order.

For the reasons set forth above, the Board voted to deny the motion to close the hearing and seal records without prejudice. If DHHS obtains a final order issued by a court of competent jurisdiction which would permit DHHS to offer those records into evidence, DHHS counsel can then refile its motion.

FOR THE PERSONNEL APPEALS BOARD



Patrick Wood, Chair

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169-B:35 Juvenile Case and Court Records. –

I. All case records, as defined in RSA 170-G:8-a, relative to delinquency, shall be confidential and access shall be provided pursuant to RSA 170-G:8-a.

II. Court records of proceedings under this chapter, except for those court records under RSA 169-B:36, II, shall be kept in books and files separate from all other court records. Such records shall be withheld from public inspection but shall be open to inspection by officers of the institution where the minor is committed, juvenile probation and parole officers, a parent, a guardian, a custodian, the minor's attorney, the relevant county, and others entrusted with the corrective treatment of the minor. Additional access to court records may be granted by court order or upon the written consent of the minor. Once a delinquent reaches 21 years of age, all court records and individual institutional records, including police records, shall be closed and placed in an inactive file.

170-G:8-a Record Content; Confidentiality; Rulemaking. –

I. The case records of the department consist of all official records, regardless of the media upon which they are retained, created by the department of health and human services in connection with a report received pursuant to RSA 169-C:29, or cases brought under RSA 169-B, 169-C, 169-D, or 463, or services provided to the child or family without a court order pursuant to RSA 170-G:4, including intake and assessment reports, service or case plans, case logs, termination reports and a list of persons or entities providing reports to the department or services to the child or family. Such records do not include:

(a) Records created as part of an action brought pursuant to RSA 170-B or 170-C.

(b) Records submitted to or maintained by the courts, or records created by third parties, such as psychologists, physicians, and police officers, even if such records are prepared or furnished at the request of the department. Requests for access to court records and records created by third parties may be made directly to the court or to the third party who created the record. Nothing in this section shall restrict or limit access to records filed pursuant to RSA 169-C:12-b.

(c) Reports contained in the central registry of abuse and neglect reports maintained pursuant to RSA 169-C:35.

(d) The name of a person who makes a report of suspected abuse or neglect of a child pursuant to RSA 169-C:29, or any information which would identify the reporter.

II. The case records of the department shall be confidential.

(a) The department shall provide access to the case records to the following persons unless the commissioner or designee determines that the harm to the child named in the case record resulting from the disclosure outweighs the need for the disclosure presented by the person requesting access:

(1) The child named in the case record.

(2) The parent of the child named in the case record, as defined in RSA 169-C:3, XXI.

(3) The guardian or custodian of the child named in the case record.

(4) Another member of the family of the child named in the case record, if disclosure is necessary for the provision of services to the child or other family member.

(5) Employees of the department and legal counsel representing employees of the department for the purpose of carrying out their official functions.

(6) Persons made parties to judicial proceedings in New Hampshire relative to the child or family, whether civil or criminal, including the court with jurisdiction over the proceeding, any

attorney for any party, and any guardian ad litem appointed in the proceeding.

(7) A grand jury, upon its determination that access to such records is necessary in the conduct of its official business.

(8) The relevant county.

(9) Another state's child welfare agency, law enforcement agency, or other government entity that requires the information in order to carry out its responsibility under law to protect children from abuse or neglect.

(b) The department shall disclose information from case records or provide access to case records to the following persons or entities, if such information or access is not harmful to the child and is necessary in order to enable the person or entity requesting information or access to evaluate or provide services, treatment or supervision to the child named in the case record or to the family:

(1) A person or entity requested by the department or ordered by the court to perform an evaluation or assessment on or to create a service plan for the child named in the case record, the child's family, or an individual member of the child's family.

(2) A person or entity requested by the department or ordered by the court to provide services to the child named in the case record or the child's family.

(3) The superintendent of schools for the school district in which the child named in the case record is then, or will, according to the child's case plan, be attending school.

(4) The person or entity with whom the child resides, if that person is not the child's parent, guardian, or custodian.

III. The commissioner shall adopt rules, pursuant to RSA 541-A, governing the procedures regulating access to all of the records of the department. Such rules shall contain provisions relative to:

(a) Access to case records by persons named in paragraph II of this section.

(b) Access to case records by a physician who has examined a child who the physician reasonably suspects may be abused or neglected.

(c) Access to case records by a law enforcement official who reasonably suspects that a child may be abused or neglected, and who is participating with the department in a joint investigation.

(d) Access to case records by a state official who is responsible for the provision of services to children and families, or a legislative official who has been statutorily granted specific responsibility for oversight of enabling or appropriating legislation related to the provision of services to children and families, for the purposes of carrying out their official functions, provided that no information identifying the subject of the record shall be disclosed unless such information is essential to the performance of the official function, and each person identified in the record or the person's authorized representative has authorized such disclosure in writing.

(e) Access to case records by a person conducting a bona fide research or evaluation project, provided that no information identifying the subject of the record shall be disclosed unless such information is essential to the purpose of the research, each person identified in the record or an authorized representative has authorized such disclosure in writing, and the department has granted its approval in writing.

(f) Access to case records by any person making a report of suspected child abuse or neglect pursuant to RSA 169-C:29, provided that such disclosure is limited to information about the status of the report under investigation, or information reasonably required to protect the safety of such person.

(g) Access to all other records of the department which are not case records as defined in

paragraph II.

IV. Additional access to case records and all other records of the department shall be granted pursuant to the terms of a final order issued by a court of competent jurisdiction.

V. It shall be unlawful for any person entrusted with information from case records to disclose such records or information contained in them. Notwithstanding the previous sentence, it shall not be unlawful for a parent or child to disclose case records or the information contained in them to persons providing counsel to the child or family. It shall be unlawful for any person who receives case records or the information contained in them from a parent or a child to disclose such records or information. Any person who knowingly discloses case records or information contained in them in violation of this paragraph shall be guilty of a misdemeanor.

VI. Notwithstanding the foregoing:

(a) Any person who is entitled to access a case record pursuant to this section may share such information with any other person entitled to access pursuant to this section, unless the commissioner or a designee shall specifically prohibit such additional disclosure in order to prevent harm to a child.

(b) Nothing in this section shall be construed to require access to any records in violation of the order of a court of competent jurisdiction.

Source. 1985, 367:10. 1993, 355:8. 1994, 212:2. 1995, 310:143, 175, 181, 183, eff. Nov. 1, 1995. 2009, 47:1, eff. July 21, 2009.

