

# State of New Hampshire

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## PERSONNEL APPEALS BOARD

State House Annex  
Concord, New Hampshire 03301  
Telephone (603) 271-3261

APPEAL OF SUSAN M. HERRICK

Docket #93-T-10

Department of Environmental Services

(Termination - Third Letter of Warning)

April 29, 1993

The New Hampshire Personnel Appeals Board (Bennett and Rule) met Wednesday, April 21, 1993, to hear the termination appeal of Susan M. Herrick, a former employee of the Department of Environmental Services. Ms Herrick was discharged from her position of Word Processor Operator I at the Division of Air Resources, Department of Environmental Services, effective November 4, 1992, by issuance of a third letter of warning for uncooperative or disruptive behavior. Ms Herrick was represented at the hearing by SEA Legal Intern Linda E. Chadbourne. The Department was represented by John Roller, Human Resources Administrator and John Dabuliewicz, Assistant Commissioner.

Prior to termination from employment, Ms Herrick worked as the secretarial support person for the Toxics Management Bureau of the Division of Air Resources. Ms Herrick's duties included regular secretarial/word processing assignments for that Bureau as well as serving as the back-up receptionist for the division as a whole. Ms Herrick was discharged from employment following an alleged confrontation with her immediate supervisor, Cammy Pearl, on the afternoon of October 16, 1992.

In preliminary pleadings, the State had requested that the instant appeal be consolidated with an appeal of a second letter of warning which the appellant had received on August 21, 1992. The State argued that consolidating these matters for the purposes of hearing would promote judicial economy and efficiency, and allow the Board to consider Ms Herrick's performance as a whole in its deliberations. The appellant had objected to consolidating the hearings, and at the March 3, 1993 prehearing conference convened by the Board to address those requests, the appellant argued that if Ms Herrick's letter of warning appeal were granted, the termination would be invalidated. The parties agreed that the hearings could be scheduled on the same day, but asked that the matters be treated as two separate and distinct appeals.

In other preliminary matters, the appellant asked that the Board receive into evidence the transcript of an earlier hearing before an Appeals Tribunal at the Department of Employment Security, as well as that Tribunal's decision on her request for unemployment benefits. The Board voted to exclude those proposed exhibits from the record. The Board need not find "employee misconduct"<sup>w</sup> within the meaning of RSA 282-A:32 in order to uphold a termination decision, nor would the Board be bound to uphold a termination decision on the basis of a finding of "employee misconduct" which the Department of Employment Security found to be sufficient to deny unemployment compensation.

The appellant also asked that the witnesses be sequestered. The motion was granted without objection from the State. The witnesses were instructed not to discuss their testimony until after the hearing was closed.

Ms. Herrick, who was discharged from her employment effective November 4, 1992, had worked as a Word Processor Operator I in the Division of Air Resources, Toxics Management Bureau. In addition to her secretarial duties for the bureau, Ms. Herrick also was responsible for acting as the "back up receptionist"<sup>N</sup> for the division. When Ms. Herrick was discharged from employment, her immediate supervisor was Cammy Pearl, the agency's Administrative Secretary/Supervisor.

On the afternoon of October 16, 1992, at approximately 3:30 pm, Richard Andrews, Administrator of the Toxics Management Bureau, was completing a federal grant package which needed to be sent out by Federal Express before the end of the work day. To complete the package, he needed five sets of documents photocopied. When he did not find Ms. Herrick at her desk, he gave the work to Cammy Pearl and asked her to have Ms. Herrick do the copying. Ms. Pearl did not find Ms. Herrick at her desk and did not see her in the Toxics Management Bureau. She left the work on Ms. Herrick's desk with instructions on a "sticky note"<sup>v</sup> to make 5 sets of copies as soon as possible.

At approximately 3:45 pm, Ms. Pearl went to Ms. Herrick's desk and asked for the photocopying. Ms. Herrick testified she was on the telephone with Walter Carlson about "Chapter"<sup>u</sup> business when Ms. Pearl came and asked for the copies. Ms. Herrick testified that she responded "What copies?", at which point Ms. Pearl reached into the appellant's "in" basket, lifted up a folder, retrieved the work and threw it on her desk. Ms. Herrick testified Ms. Pearl never asked her to make the copies, and instead just picked up the work and walked off. Ms. Herrick finished getting ready to go home and left the office. She testified the alleged confrontation with Ms. Pearl never occurred.

Ms. Pearl's version of events is substantially different from the appellant's. Ms. Pearl testified that when she went back to Ms. Herrick's desk to retrieve the copying she had requested, the work was still in the middle of Ms. Herrick's desk, and that the satchel or bag Ms. Herrick carried was sitting on top of it. Ms. Pearl testified that when she asked for the copying, Ms. Herrick said it wasn't done and that she wasn't going to do it. Ms. Pearl said she told the appellant there was still time before the end of the day for the task to be completed, and asked Ms. Herrick to do the copying. She said Ms. Herrick refused the job twice more. Ms. Pearl testified that she then picked up the work and left to copy it herself, at which point Ms. Herrick followed her from the reception area and began yelling at her. She said Ms. Herrick said, "Who do you think you are, anyway?" to which Ms. Pearl replied, "Your supervisor, that's who!" She said Ms. Herrick then walked out of the office.

Deborah Mayo, the full-time receptionist, testified she was at her desk on the afternoon of October 16th when Ms. Pearl came to Ms. Herrick's desk to check on some high priority photocopying. She said Ms. Pearl asked for the copying, which Ms. Herrick refused to do. She testified that Ms. Pearl asked three times for the appellant to do the copying, and each time Ms. Herrick responded, "No, I will not do it."

James Meyer, Supervisor of Special Projects in the Toxics Management Bureau, said he was returning to his own office from the reception area when the alleged incident took place. He said he was about ten feet away from Ms. Herrick and Ms. Pearl. He testified he saw the two women just outside of the director's office, and that Ms. Herrick was yelling at Ms. Pearl. He testified that she asked, in a loud, excited fashion, "Who do you think you are?"

Both Ms. Pearl and Dennis Lunderville, Director of the Division of Air Resources, testified that Ms. Herrick was asked to meet with them in Mr. Lunderville's office on Monday, October 19, 1992, to discuss the incident. They testified Ms. Herrick refused to even acknowledge the incident and walked out of the office.

Ms. Herrick denied that the incident ever took place, denied she was ever asked to attend a meeting with Ms. Pearl and Mr. Lunderville, and said she did not see Mr. Meyer in the reception area on the afternoon in question. On cross-examination, she testified that Ms. Pearl and Mr. Lunderville were lying about both the incident and the meeting.

Ms. Herrick testified that she was usually caught in the middle between the director and the staff, and that he would give her one set of instructions, then change his mind and either neglect to tell her, or tell the remainder of

the staff something else. She said the staff were biased against her for a variety of reasons. She suggested that Peg Carroll, another member of the staff, was jealous of her because Ms. Herrick and not Ms. Carroll had been asked to fill in as the Director's secretary when Ms. Sabbia, his former secretary had transferred. She said that when she was physically relocated from her own bureau to the reception area, Ms. Mayo was angry that she had to share the office space. She testified that many of the problems among the clerical staff had arisen because Terri Sabbia had not been a strong supervisor and she believed Ms. Pearl had been hired specifically to deal with clerical staff so the director would not have to. Ms. Herrick testified she had applied for the supervisory position but had not been selected.

In its closing, the State argued that Ms. Herrick had been uncooperative, disruptive and defiant, as evidenced by the testimony of its witnesses. Mr. Dabuliewicz said that the only way the Board could find on the appellant's behalf would be to determine that all the State's witnesses had lied and only Ms. Herrick had told the truth. He asked the Board to find that the incident cited in the final letter of warning was indicative of a pattern of conduct which warranted Ms. Herrick's termination under the provisions of the Rules of the Division of Personnel.

Ms. Chadbourne asked the Board to find that Ms. Herrick had not been afforded due process, arguing that the instances of alleged uncooperative or disruptive behavior related by the State's witnesses had not been brought to Ms. Herrick's attention through performance evaluations or warnings. She argued that the state had failed to prove its allegations and that the appellant should be reinstated with full back-pay and benefits.

The instant appeal turns on the issue of credibility. Ms. Herrick was unable to sustain the burden of proof by claiming that all the witnesses were either lying or had an incomplete understanding of the circumstances about which they had testified. Ms. Herrick attempted to persuade the Board that Ms. Mayo, Ms. Pearl, and Mr. Lunderville had motives ranging from jealousy to job security which would cause them to lie about her. However, she failed to offer any credible reason why Mr. Meyer would have testified falsely about seeing her in the hall with Ms. Pearl on the afternoon of October 16, 1992, and about hearing her yell at Ms. Pearl, "Who do you think you are?".

The Board granted the Appointing Authority's requests for findings of fact and rulings of law. The Board found that Ms. Herrick had conducted herself in an uncooperative, disruptive manner on the afternoon of October 16, 1992. The Board further found that Ms. Herrick's refusal to discuss the incident with Mr. Lunderville and Ms. Pearl further supported the State's contention that Ms. Herrick was uncooperative or disruptive, that it had warned her on two prior occasions that failure to take corrective action by dealing with her

co-workers and members of the public in a courteous and cooperative fashion would result in additional discipline, up to and including her termination from employment. The Board found that the appointing authority was under no obligation to suspend or demote Ms. Herrick in lieu of dismissal.

The Board found that by refusing to complete a work assignment given to her by her supervisor, disobeying a direct order of a supervisor, Ms. Herrick could have been dismissed from her employment under the optional dismissal provisions of Per 1001.08(b). Therefore, the Board did not, consider it unreasonable for the agency to dismiss Ms. Herrick under the provisions of Per 1001.08(e)(1): "An appointing authority shall be authorized to dismiss an employee pursuant to Per 1001.03 by issuance of a third written warning for the same offense within a period of 2 years."

The Board voted to uphold the letter of warning, thereby upholding the decision to discharge her from employment by issuance of a third letter of warning for the same offense within a two year period of time. Ms. Herrick's appeal is denied.

THE PERSONNEL APPEALS BOARD



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Mark J. Bennett, Acting Chairman

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Lisa A. Rule, Commissioner

cc: Virginia A. Lamberton, Director of Personnel  
Linda Chadbourne, SEA Legal Intern  
John Roller, Human Resources Administrator, Dept. of Environmental Services  
John Dabuliewicz, Assistant Commissioner, Environmental Services

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**Department of Environmental Services**

**September 7, 1993**

On May 13, 1993, the Personnel Appeals Board received the appellant's May 12, 1993 Motion for Reconsideration of the Board's April 29, 1993 decision denying her appeal of termination from employment at the Department of Environmental Services. On May 20, 1993, the Board received the State's Objection to that Motion. Having reviewed both the Motion and Objection in conjunction with the Board's order in this matter, the Board found that the appellant failed to raise arguments to support the requested reconsideration which were not already raised by the appellant during the hearing on the merits and duly considered by the Board in deciding to deny that appeal. Accordingly, the Board voted unanimously to deny the Motion for Reconsideration and to affirm its decision upholding Ms. Herrick's discharge from employment.

THE PERSONNEL APPEALS BOARD

A handwritten signature in cursive script, appearing to read "Mark J. Bennett".

Mark J. Bennett, Acting Chairman

A handwritten signature in cursive script, appearing to read "L.A. Rule".

Lisa A. Rule, Commissioner

cc: Virginia A. Lamberton, Director of Personnel  
Linda E. Chadbourne, Legal Intern, State Employees' Association  
John Roller, Human Resources Administrator, Environmental Services