

# State of New Hampshire

WPPID920



## PERSONNEL APPEALS BOARD

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APPEAL OF THOMAS HURLEY  
Docket #92-T-1  
Department of Corrections  
(N. H. State Women's Prison - Goffstown)

May 12, 1992

The New Hampshire Personnel Appeals Board (McNicholas, Rule and McGinley) met Wednesday, February 12, and Wednesday, March 18, 1992, to hear Thomas Hurley's appeal of termination from employment at the Department of Corrections on June 25, 1991. Mr. Hurley was represented at the hearing by Attorney John Vanacore. Attorney Michael K. Brown appeared on behalf of the Department of Corrections.

Mr. Hurley was dismissed from his position as a Chef at the Women's Prison in Goffstown following an investigation into charges that he was having "improper sexual contact with a female inmate of the New Hampshire State Prison for Women". The Department of Corrections discharged the appellant by letter dated June 24, 1991 for violation of three departmental Policy and Procedure directives:

"PPD 1.2.16 IV J - Making a false statement during an official investigation  
PPD 1.2.16 IV J - Misrepresentation on your Background Investigation Data Sheet  
PPD 1/2/16 IV (P)(1) - Becoming unduly familiar with persons under departmental control"  
(See: State's Exhibit 6)

In preliminary matters, the Board ruled as follows on motions made by the parties:

Appellant's Motion in Limine:

Denied. The Board denied Appellant's Motion to exclude any and all evidence involving polygraphic examination of either the appellant or the inmate in question. As the matter in hearing was not a jury trial, there would be no prejudice. The weight of the evidence, and not its admissibility, would be decided by the Board.

State's Motion to Sequester Inmate Witnesses:  
Appellant's Motion to Sequester All Witnesses:

Motion to sequester all witnesses granted in part. The Board agreed to allow John Kovaks (D.O.C. Investigator) to remain through the hearing as a representative of the appointing authority to assist Attorney Brown.

The letter of discharge stated the following:

"On May 16, 1991 the Investigations Department of the New Hampshire State Prison received information that you were having improper sexual contact with a female inmate at the New Hampshire State Prison for Women. On June 19, 1991 you and the inmate in question were given a polygraph examination and questioned about this activity. The polygraph showed that you were both deceptive in your answers when you denied any wrong doing.

"During this questioning you also stated in the presence of Detective Dave Crawford and Sgt. John Kovaks that you had been arrested in Manchester for Indecent Exposure and that you used illegal drugs other than marijuana. A review of your Background Investigation Data Sheet showed that you failed to disclose this information prior to your hiring." (See: State's Exhibit 6)

The Rules of the Division of Personnel specify the basis upon which an employee may be discharged immediately without prior warning:

Per 308.03 Discipline

(1) Mandatory discharge. Immediate discharge is mandatory without warning in cases such as, but not necessarily limited to, those listed below, provided that the offense in question is clearly established.

- a. Stealing from the state or any employee
- b. Immoral behavior
- c. Violation of a posted or published rule that, in itself, warned of automatic discharge
- d. Fighting or attempting to injure others (aggressor only)
- e. An employee found to be a subversive person under the provisions of RSA 648

(2) Optional discharge. In cases such as, but not necessarily limited to the following, the seriousness of the violation may vary. Therefore, in some instances immediate discharge without warning may be warranted, while in other cases one written warning prior to discharge may be indicated. Repetition of any of the following offenses after one written warning has been given makes the discharge of the offender mandatory.

- a. Willful destruction of state property
- b. Willful insubordination
- c. Refusal to accept job assignments.
- d. Absence for a period of three consecutive working days without notification to his department unless adequate excuse is given.
- e. Willful falsification of claims for annual and/or sick leave.
- f. Inability to perform duty assignments due to being under the influence of drugs or alcohol.

Neither the letter of termination nor the Department of Corrections' Policy Directive specifies which Personnel Rule is applicable for alleged violation of P.P.D. 1.2.16 IV. However, it appears clear that the agency applied the provisions of Per 308.03(1)c - violation of a posted or published rule that in itself warned of automatic discharge.

Department of Corrections Policy and Procedure Directive 1.2.16 IV does not warn of automatic discharge. It states:

"PROCEDURES

"Any employee who violates any provisions outlined below may be subject to disciplinary action and/or dismissal from employment, under\* the Rules of the Department of Personnel." (Emphasis added)

The Department of Corrections has allowed itself broad latitude in determining what discipline, if any, will be taken for violation of the policy. Further, even if the Policy and Procedure Directive had clearly warned of automatic discharge, the Board found that the offense was not clearly established.

The Department of Corrections relied, in large part, upon information obtained through polygraph examinations of Mr. Hurley and Inmate Antoinet Stefan in its decision to discharge Mr. Hurley from employment. Both the appellant and the inmate had volunteered to be polygraphed during the investigation into their alleged misconduct. Neither Mr. Hurley nor Ms. Stefan was represented by counsel during the examination.

Detective David Crawford, an employee of the Division of State Police, conducted the polygraph examination of Thomas Hurley on June 19, 1991, at the Department of Safety in Concord, New Hampshire. Detective James Kelley, Jr., conducted the polygraph examination of Antoinet Stefan on June 6, 1991, at the Department of Safety in Concord, New Hampshire. Both Detective Crawford and Detective Kelley, who appeared as the State's expert witnesses, were trained in polygraphy at the Royal Canadian Mounted Police College in Ottawa, Canada.

Both used the same procedures and techniques in conducting their examinations of the appellant and Ms. Stefan.

Detective Crawford testified that polygraph examinations are 80% accurate. He said he completed his usual pre-examination procedures with Mr. Hurley, although he did not "Mirandize" the appellant because there were no criminal charges involved. He said he had, with Mr. Hurley's assistance, developed a series of "control" questions and three "relevant" questions which would be used during the course of the examination. He said control questions are used in polygraph examination to establish a baseline for measuring a subject's normal physiological reactions when asked questions of a non-threatening nature. The "relevant" questions involve the alleged violation and, in theory, will evoke a measurable physiological reaction if the subject is being deceptive. The subject's reaction to the "relevant" questions is compared with his reaction to the control questions to determine if the subject is being truthful or deceptive.

Detective Crawford testified he had concluded after completing the first of three polygrams that Thomas Hurley had been deceptive in responding to the "relevant questions" about his relationship with Antoinet Stefan. Those questions were:

"This year, 1991, did you kiss Toni Stefan?"

This year 1991, was it you who kissed Toni Stefan?"

This year 1991, were you the one who kissed Toni Stefan?"

[States Exhibit 1]

On cross-examination, Detective Crawford was asked to explain why there was a distinct "flattening" in the subject's GSR (galvanic skin response) to the relevant questions between the first and the third polygram. Detective Crawford said the subject's reaction to the relevant questions would be strongest the first time they were asked, and that as the test progressed and the subject heard the relevant questions repeated, they would evoke less and less of a physical reaction.

Detective Kelley, the State's second expert witness, conducted the polygraph examination of Ms. Antoinet Stefan on June 6, 1991. He testified that before he began the polygraph examination of Ms. Stefan, he told her he knew two other inmates at the prison had reported seeing her and Thomas Hurley "kissing and grabbing crotch". He said since Ms. Stefan was facing possible disciplinary action as a result of the investigation, the heightened "fight or flight" reaction would "enhance the test and make it easier". He testified the first polygram was inconclusive, with the subject testing unresponsive on one parameter, deceptive on the second, and truthful on the third. On the second polygram he said Ms. Stefan tested deceptive on two parameters and truthful on the third. In the last polygram, Kelley testified the subject tested deceptive on all parameters.

Detective Kelley testified it was normal for the physical reaction to the

relevant questions to increase as the questions were repeated. He concluded that Ms. Stefan's responses overall to the relevant questions were deceptive. The relevant questions were as follows:

"This year did you kiss Tom Hurley?  
This year were you the one who kissed Tom Hurley?  
This year was it you who kissed Tom Hurley?"  
[State's Exhibit #2]

Although the State's two expert witnesses received the same training from the same law enforcement agency and used the same methods and procedures in testing the two subjects, they gave very different explanations of the changes in a subject's reactions to the relevant questions between the first and the last polygram. The Board found the polygraphic evidence in this case was not sufficiently reliable to have formed the basis of the decision to discharge Mr. Hurley.

In further support of its charges that Mr. Hurley had become "unduly familiar" with Ms. Stefan and had made a false statement during an official investigation, the State offered the testimony of Allison Tavano and Cindy Gray. Both Ms. Tavano and Ms. Gray were personally familiar with Antoinet Stefan and had worked with her in the kitchen at the Women's Prison.

Ms. Tavano testified she was assigned to work in the kitchen at the Prison and that her job sometimes required her to pick up materials from the storage area behind the kitchen where canned and dried foods were stored. She said she entered the storage area one day and saw Ms. Stefan and Mr. Hurley kissing. She said she had an unobstructed view of them but did not see if their bodies were touching or if they were holding each other. She said she left immediately and had not discussed the incident with anyone prior to being interviewed by Investigator John Kovaks during the subsequent investigation. Ms. Tavano testified she had no actual recollection of what time of day the incident occurred, but she recalled working until the end of her shift, which was at 6:00 p.m. However, on further inquiry, she said she left the kitchen right after the incident, sometime around 2:00 p.m. or 3:00 p.m.

Ms. Tavano testified she was not involved in writing the note discovered by Hurley which said "Tom, your [sic] such a babe", that the note was written by Inmates Tracy Elliot and Diane Sulloway, and that after it had been written she added the words "Love, Toni" to the note. According to Investigator John Kovaks' testimony, however, Ms. Tavano had reported during the Hurley/Stefan investigation that the note was written by an inmate named Trotty, not Elliot and Sulloway.

Given the repeated contradictions in Ms. Tavano's testimony, the Board considered her an unreliable witness and gave very little weight to her representation of events. She contradicted her own report of the time of day

the kissing incident allegedly occurred. She changed her testimony concerning events which took place immediately after she had seen Hurley and Stefan in the storage room. Her testimony contradicted her own report about the note found by Hurley which said "Tom your [sic] such a babe". Moreover, she admitted signing Ms. Stefan's name to the note.

Ms. Gray, currently a half-way house resident, testified she had seen Hurley and Stefan in the storage room one afternoon and believed they might have been kissing because of the way they "jumped away" from each other when she entered the room. She said she had gone to the storage area to get sugar and when she pushed the door open, she observed Ms. Stefan and Mr. Hurley standing close to one another. She said, "It was like, startled. Jump away. I didn't know how to explain it". She said she had not actually seen any physical contact between the appellant and Ms. Stefan.

Even though Ms. Gray's testimony was credible, she did not actually witness anything which should have resulted in disciplinary action against the appellant. Ms. Gray's assessment of what the appellant and Ms. Stefan might have been doing is insufficient to clearly establish the appellant committed an offense for which he might have been subject to immediate dismissal.

Antoinet Stefan, who appeared as the appellant's witness, testified she had started working in the kitchen at the prison in December, 1990. She said her roommate Debbie Baka told her in late May or early June, 1991, that there were rumors Stefan and Hurley "were fooling around". Initially she ignored the rumors, she said, but as they continued to circulate she discussed them with the appellant and his supervisor Bill Simonds as well as reporting the substance of the rumors to Lt. Westgate from Investigations. According to Ms. Stefan's testimony, she was prepared to quit working in the kitchen if it created a problem, but Lt. Westgate told her she had nothing to worry about if there was no truth to the rumors.

Ms. Stefan said she later learned that a formal investigation had been initiated. She was called for an interview with Investigator John Kovaks and said she saw the note to Hurley for the first time. She said she told Kovaks she had nothing to do with writing the note and was furious someone would "set her up". She said she requested a polygraph examination to prove she was telling the truth. She testified she was later told by other inmates that Allison Tavano was responsible for starting the rumors about Hurley and Stefan.

Prior to the investigation, she had been scheduled to enter the Shock Incarceration Unit on July 1, 1991, and would have been eligible for a reduced sentence. As a result of the investigation, Ms. Stefan was disciplined by the Department of Corrections, including being moved from "dormside" to D-tier, the maximum security unit of the Women's Prison. She lost 75 days "good time", received 80 hours extra duty and received reduced pay for the work she was performing.

Ms. Stefan testified she'd spoken with the Superintendent of the Women's Prison the day before the hearing and was informed that regardless of the outcome of the hearing, her own discipline would stand. Ms. Stefan testified she had nothing to gain by appearing at the hearing other than to have the State recognize that she had been falsely accused and that the "other girls" were lying. When asked if she feared any repercussions as a result of her testimony, she said she hoped there would be none but that she could not be certain what might come of it.

On all the evidence, the Board found the Department of Corrections failed to "clearly establish" that the appellant had become unduly familiar with an inmate of the prison, or that the appellant had made a false statement during an official investigation of that charge. Therefore, the Board found these charges insufficient to warrant his discharge from employment without prior warning.

The final offense cited in the letter of termination was violation of "PPD 1.2.16 IV J - Misrepresentation on your Background Investigation Data Sheet". The evidence of the alleged misrepresentation was obtained in the course of Mr. Hurley's polygraph examination on June 19, 1991. Detective Crawford testified Hurley, who was 25 years old at the time of the polygraph examination, admitted to experimenting with marijuana, cocaine and speed in his late teens and early twenties. He also testified Mr. Hurley had described his "largest mistake" as an incident in Manchester where he was charged with indecent exposure. The Board found the appellant had answered the questions on the Background Investigation Data Sheet truthfully. He admitted to having "used" marijuana, as well as being arrested for an open container violation. The evidence did not support a finding that the appellant "used" other illegal drugs, or that the appellant's failure to explain the indecent exposure incident constituted willful misrepresentation.

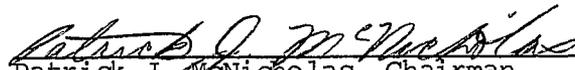
Generally, the Board has found willful misrepresentation of information on an application for employment an offense which would warrant disciplinary action up to and including discharge from employment. However, the Board would be reluctant to uphold a discharge on the basis of discoveries made during the course of a polygraph examination when the subject was not advised of the possible consequences of making admissions beyond the scope of the investigation. In this instance, the appellant made admissions concerning conduct which occurred outside of the work place prior to his employment with the Department of Corrections. Those admissions were made at the urging of the polygrapher who warned him that failure to make full disclosure could adversely affect the results of the polygraph examination, and without any prior warning that information beyond the scope of the polygraph examination might be used as a basis for his dismissal.

Therefore, on all the evidence, the Board found Mr. Hurley was improperly dismissed from his employment as a Chef II. The Board voted unanimously to order him reinstated. The appellant shall be entitled to back pay and

benefits from the date of his dismissal to the date of reinstatement, except that such award shall not include payment for the period of October 30, 1991 to February 12, 1991, as ordered by the Board during the October 30, 1991 prehearing conference. The award of back pay shall be further reduced by the amount of compensation earned or benefits received from any other source during the period of termination pursuant to RSA 21-I:58 I.

Mr. Hurley's appeal is granted.

THE PERSONNEL APPEALS BOARD

  
Patrick J. McNicholas, Chairman

  
Lisa A. Rule

  
Karen S. McGinley

cc: Virginia Vogel, Director of Personnel  
Michael K. Brown, Attorney, Department of Corrections  
Michael C. Reynolds, SEA General Counsel  
John Vanacore, Esq.