

State of New Hampshire



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

APPEAL OF RICHARD INMAN
Docket #93 -T-2A
Department of Corrections

August 8, 1994

The New Hampshire Personnel Appeals Board (McNicholas, Bennett and Rule) met Wednesday, April 13, 1994, to hear argument on the Appellant's November 29, 1993 Petition for Declaratory Ruling, Clarification and Hearing relative to the appellant's claim for appropriate back-pay and benefits after his termination from employment, appeal and eventual reinstatement.

The appellant argued, in part, that the Department of Corrections' calculation of Mr. Inman's reinstatement award was contrary to the intent of RSA 21-I:58 and the Rules of the Division of Personnel. Specifically, the appellant argued that the Personnel Appeals Board had the authority to decide that all or part of his earnings from alternative employment during the period of termination could be excluded from the salary set-off. The appellant also argued that "accumulated leave", "one-time State cash payment", "Blue Cross/Blue Shield premium", and "covered medical expenses" are separate entitlements which must be calculated and paid separately, and should not be deducted from retroactive salary. The appellant asked the Board to rule that the Department of Corrections' reimbursement to him should not have been reduced by any earnings he had since 8/17/92. At the hearing, the appellant said he was uncertain what the correct amount of compensation should be, as it would be impossible to provide an exact figure without hiring an accountant. Therefore he suggested that the Board also order the Department of Corrections to lay out in detail how it had arrived at its figures so that the appellant could either agree or disagree, and could then negotiate a payment he found acceptable.

RSA 21-I:58 establishes the conditions under which reinstatement shall be made when the Board finds that the employee was terminated in violation of a statute or rules adopted by the Director of Personnel:

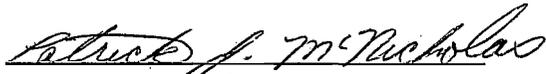
"...The employee shall be reinstated without loss of pay, provided that the sum shall be equal to the salary loss suffered during the period of denied compensation less any amount of compensation earned or benefits received from any other source during the period. ..." (Emphasis added)

The statute refers to "compensation earned and benefits received". In order to comply with the provisions of RSA 21-I:58, as well as the order of the Board, the Department of Corrections considered all compensation earned and benefits received by the appellant in determining a

possible award of retroactive compensation upon restatement. Therefore, the Board found that the Department of Corrections attempted to apply the conditions imposed by RSA 21-I:58 in calculating what compensation, if any, the appellant was entitled to receive.

The appellant has failed to state with specificity what he believes would have been a more appropriate calculation of possible compensation. Accordingly, the Board voted to deny his appeal, finding that he failed to sustain his burden.

THE PERSONNEL APPEALS BOARD


Patrick J. McNicholas, Chairman


Mark J. Bennett, Commissioner


Lisa A. Rule, Commissioner

cc: Virginia A. Lamberton, Director of Personnel
Michael Reynolds, SEA General Counsel
John Vinson, Staff Counsel, Department of Corrections

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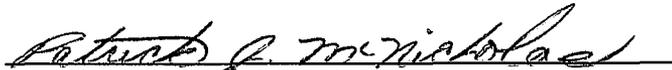
Response to State's Motion for Reconsideration and Appellant's Objection and Contingent Motion

June 23, 1993

On May 17, 1993, the Personnel Appeals Board received a Motion for Reconsideration dated May 14, 1993, from Attorney John Vinson on behalf of the Department of Corrections. In that Motion, Attorney Vinson asked the Board to reverse its May 5, 1993 decision which ordered the reinstatement of the appellant Richard Inman to his position of Correctional Officer. On May 20, 1993, the Board received SEA General Counsel Michael Reynolds' Objection and Contingent Motion for Reconsideration.

Having reviewed the Motion, Objection, and Contingent Motion in conjunction with its own decision in this matter, the Board found that the State failed to offer evidence or argument which had not already been offered in connection with the hearing, and which the Board had not already considered in deciding to reinstate Mr. Inman. Accordingly, the Board voted unanimously to deny the State's motion and to affirm its order reinstating Mr. Inman under the conditions set forth in the Board's May 5, 1993 order for reinstatement.

THE PERSONNEL APPEALS BOARD


Patrick J. McNicholas, Chairman


Mark J. Bennett, Commissioner


Robert J. Johnson, Commissioner

cc: Virginia A. Lamberton, Director of Personnel
Michael C. Reynolds, SEA General Counsel
John E. Vinson, Staff Attorney, Department of Corrections
Ronald L. Powell, Commissioner, Department of Corrections

State of New Hampshire

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APPEAL OF RICHARD INMAN
Department of Corrections
Docket #93-T-2a

May 5, 1993

The New Hampshire Personnel Appeals Board (McNicholas, Bennett and Johnson) met Wednesday, January 27, 1993, to hear the appeal of Richard Inman, a former employee of the Department of Corrections. Mr Inman was discharged effective July 31, 1992, for alleged violation of departmental policy and procedure directives by becoming unduly familiar and remaining personally involved with a "person under departmental control", a former inmate of the New Hampshire State Prison for Women. The State claimed that in addition to the aforementioned alleged infractions, the appellant violated a direct order and committed willful insubordination by refusing to discontinue his relationship with the former inmate, or, in the alternative, by not seeking and receiving permission from the Commissioner of Corrections to maintain his relationship with the former inmate.

Mr Inman was represented at the hearing by SEA General Counsel Michael Reynolds. Attorney John Vinson appeared on behalf of the Department of Corrections. In addition to the evidence which the Board received on the day of the hearing, the Board allowed the parties to submit written closing arguments which it considered in reaching its decision in this matter.

On the charges listed in the July 31, 1992 letter of termination issued to Mr Inman, the Board made the following findings of fact and rulings of law:

Charge #1: "Had knowledge of a violation of a rule and failed to report it to your superiors. You were working as the control room officer on July 21, 1992 and knew Sarah Kelleher was in confinement. You were living with her prior to arrest and return to New Hampshire on July 20, 1992 and did not inform your supervisor of this fact, knowing it was a rule violation. This is contrary to paragraph IV R of the Rules and Guidance for Departmental Employees (P/PD 6.2.16) and is grounds for dismissal pursuant to PER 1001.08 (a)(3).

None of the "rules" cited by the Department in the July 31, 1992 letter of termination require an employee to notify the department when he or she has a personal relationship with an individual should that individual become incarcerated. Similarly, there was no "rule" cited requiring employees to obtain approval from the Commissioner of Corrections to engage in a relationship with a former inmate, an individual with a criminal record, or an individual on bail.

The policy which Mr Inman allegedly violated prohibits employees from becoming "unduly familiar" with persons "under departmental control". There is no dispute that between May, 1992, and July 21, 1992, the appellant and Ms Kelleher were living together. To argue that the appellant and Ms Kelleher "became" familiar during the several hours she was incarcerated would be absurd. Inasmuch as the State specifically represented that it had not discharged Mr Inman for events prior to July 21, 1992, the Board found that Mr Inman could not be disciplined for "becoming unduly familiar" with Ms Kelleher during her brief period of incarceration July 20, 1992 and July 21, 1992.

Similarly, the evidence will not support a finding that Mr Inman should be discharged for failing to disclose that he was living with Ms Kelleher. Such disclosure is not required by the Department's own Rules and Guidance for Departmental Employees, and therefore can not be considered a "policy" which in itself warns of immediate termination pursuant to Per 1001.08(a) of the Rules of the Division of Personnel. Although the Board appreciates the security risks inherent in fraternization between officers and inmates, probationers or parolees, Ms Kelleher was not a probationer or parolee when she was released on bail May 6, 1992, or July 21, 1992. The Department's regulations make no provisions for disciplining employees who fail to disclose the nature of their relationship with individuals whom the Department considers to be a security risk. Finally, even if there was evidence to support a finding that the appellant did become unduly familiar with a person "under departmental control", Paragraph IV of the Rules and Guidance for Department Employees does not contain a warning that violation will result in immediate dismissal as required by Per 1001.08(a) of the Rules of the Division of Personnel.

Charge #2: Continued to have contact with Sarah Kelleher after being ordered by [the Superintendent] not to do so after July 21, 1992, while she was under Departmental control. Your failure to obey a lawful order by your superior is contrary to paragraph IV E and is also grounds for dismissal pursuant to Per 1001.08(a)(3) and constitutes willful insubordination contrary to Per 1001.08(b)(7).

The second charge supports discharge only if the Board accepts that M~~S~~ Kelleher continued to be under departmental control after her July 21, 1992 bail hearing and release from prison, and that the appellant violated a direct and lawful order of a superior by refusing to discontinue his relationship with her. The State argued that because the Court imposed conditions on M~~S~~ Kelleher's release from prison on July 21, 1992, she should be considered to be "under departmental control". The State emphasized the fact that M~~S~~ Kelleher was to report to the Manchester Probation/Parole Office for random drug and alcohol testing. The State argued that if M~~S~~ Kelleher violated the conditions of bail, the case technician logging in her visits could report the violation and ask the court to revoke her bail and return her to custody.

In spite of the State's assertions, the Board is not persuaded M~~S~~ Kelleher's release on bail, with or without conditions, constitutes departmental control. Black's Law Dictionary defines the relevant terms as follows:

Bail

"To procure release of one charged with an offense by insuring his future attendance in court and compelling him to remain within jurisdiction of court,"

Parole

"Release from jail, prison or other confinement after actually serving part of sentence. ... Conditional release from imprisonment which entitles parolee to serve remainder of his term outside confines of an institution, if he satisfactorily complies with all terms and conditions provided in parole order. (Emphasis added)

"'Parolee' gains his conditional freedom as a result of exercise of discretion by parole board which may grant parole when it is of opinion there is reasonable probability that prisoner will live and remain at liberty without violating laws."

Probation

"Sentence imposed for commission of crime whereby a convicted criminal offender is released into the community under the supervision of a probation officer in lieu of incarceration."

When Ms. Kelleher was originally released from the Women's Prison in May, 1992, she was not placed on probation or parole. Her sentence was amended as follows:

"The parties agree as follows: That the remainder of the defendant's minimum sentence be suspended, not to be brought forward after 1 year and that the defendant's maximum sentence be deferred for one year. One month prior to the expiration of the deferred period the defendant will be required to petition the court to show good cause why the deferred sentence should not be imposed. The suspended and deferred sentences are conditional upon the defendant's successful completion of the Dismiss [sic] House Program in Worcester, Mass. The State is in agreement based on the recommendation of the Warden." (See May 6, 1992 NOTICE OF AMENDMENT TO SENTENCE, State's Exhibit #2)

Her release was not subject to supervision as in the definition of probation, nor did the court consider any of her time outside the confines of the institution "time served" as in the definition of parole. Contrary to the State's assertions, none of the State's exhibits clearly support a finding that Ms. Kelleher was "under departmental control" except during the period of time she was actually incarcerated. In fact, the State's own closing arguments could support a finding that the Department of Corrections had virtually no control over Ms. Kelleher when she was originally released from the State Prison:

"Sarah Kelleher testified at some length about her leaving the institution on May 6 or 7, 1992. Although the State Prison for Women asked Dismas House to pick Ms. Kelleher up, Ms. Kelleher decided that she did not want to go to Dismas House that day. ..." (See State's Closing Argument, page 2)

The record reflects that after Ms. Kelleher refused to be transported directly to Dismas House, Ms. Cantor initiated steps to have her returned to the custody of the State Prison to serve the balance of her sentence. State's Exhibit 1 contains a copy of an Ex-Parte Request for Capias, dated July 9, 1992. The request stated that Ms. Cantor had contacted the County Attorney's office and had informed Counsel for the State that a portion of Ms. Kelleher's sentence "...was recently suspended on the condition that the defendant take up residence at Dismiss [sic] House, a drug treatment program in Massachusetts...".

Simply put, the Notice of Amendment to Sentence contains no such provision. The State failed to explain why Ms Cantor became involved in Ms Kelleher's case after she had been released from the Women's Prison. In fact, it would appear that if Ms Cantor had not taken such a personal interest in Ms Kelleher's case, Ms Kelleher might have had no further contact with the Department of Corrections or the Hillsborough County Superior Court until she was required "...to petition the court to show good cause why the deferred sentence should not be imposed." (State's Exhibit #2) Rather than supporting its claim that Ms Kelleher was under "departmental control", the State's actions more readily support a finding that it was attempting to use whatever means it had available to regain control.

Charge #3: Had a duty to support all policies of the Department as outlined in 6.2.16 when off duty. As noted above, you failed your duty which is a violation of Paragraph IV P-20 of the Rules and Guidance for Departmental Employees and is grounds for dismissal pursuant to Per 1001.08(a)(3).

As set forth above, the Board did not find that Mr Inman's refusal to cease having contact with Ms Kelleher constituted an offense warranting immediate dismissal without prior warning. What the Department claimed to be a failure to perform his duties, the Board would consider an act of poor judgment.

Charge 114: Did not have written permission from the Commissioner to maintain off-duty contact with persons under Departmental control which is in violation of paragraph IV P-1 of Rules and Guidance for Departmental Employees (P/PD 6.2.16) and is grounds for dismissal pursuant to Per 1001.08(a)(3)."

Again, inasmuch as the Board did not find Ms Kelleher to have been a person under departmental control, the Board did not consider Mr Inman's failure to secure written permission from the Commissioner for continued off-duty contact with her to be grounds for immediate dismissal.

Shortly after Ms Kelleher's release from prison in May, 1992, she and the appellant met at the Mall of New Hampshire in Manchester, and Ms Kelleher told the appellant she had been released without probation or parole. They began dating, and later that month, Mr Inman asked Ms Kelleher to move in with him at his residence in Goffstown. They were still living together in July, 1992, when the State sought to have Ms Kelleher returned to the Women's Prison in Goffstown.

Almost immediately after his arrival at the Women's Prison on the morning of July 21, 1992, the appellant was summoned to Superintendent Cantor's office. Ms Cantor told him she had heard rumors about him and a former inmate, Sarah Kelleher, being seen together in a park. Mr Inman said he was not in a park with Ms Kelleher. He offered no additional information and Ms Cantor asked no further questions. Mr Inman was excused to report to his duty post in the control room, where he found Ms Kelleher's name on the inmate roster. Upon learning that she was incarcerated, he made no effort to advise his immediate supervisor or the Superintendent of his relationship with Ms Kelleher. While stationed in the control room, the appellant was responsible for operating the security doors, including operation of same when Ms Kelleher was escorted from the facility for a bail hearing.

After completing his scheduled work assignment in the control room, the appellant was stationed in the dining area, where he was working when Ms Cantor again summoned him to her office. Ms Cantor asked the appellant if he was involved with Ms Kelleher and he said he and Ms Kelleher were living together. Ms Cantor told him he would be immediately transferred to Concord, where he should report the following morning, Wednesday, July 22, for first shift. Instead of reporting in, he called in sick. The following two days were his scheduled days off.

On July 24, 1992, Ms Cantor called the appellant to a "pre-determination" meeting with Lt. Westgate and herself. Patricia Fortin attended as recording secretary. Ms Cantor briefly summarized the events of July 21st, then asked a series of questions concerning Mr Inman's relationship with Ms Kelleher. She also asked Mr Inman whether or not he knew there had been a capias issued for Ms Kelleher's arrest. Ms Inman denied having any knowledge of the capias. He said he knew living with an ex-inmate was not illegal, although he knew the Department of Corrections would consider it an offense. He apologized to Ms Cantor for "letting her down", but refused to discontinue his relationship with Ms Kelleher.

Ms Cantor advised the appellant during her meeting with him that she had concerns about his ability to continue serving as a Corrections Officer because of his relationship with Ms Kelleher. She said Ms Kelleher still had friends in the prison for whom she might request favors from Mr Inman. Further, she said if Ms Kelleher were to violate the terms of her release or commit a crime, she might be returned to the facility as an inmate. Mr Inman insisted his relationship with Ms Kelleher would have no effect on his work, and suggested Ms Cantor had no authority to restrict his off-duty conduct. Ms Cantor concluded the meeting by telling the appellant that he was to be suspended with pay beginning the afternoon of the meeting. He was notified of termination one week later, effective July 31, 1992.

In spite of the statement in his closing arguments about a suspected relationship between Mr. Inman and Ms. Kelleher while Ms. Kelleher was incarcerated, Attorney Vinson said that Mr. Inman was not disciplined or discharged for conduct prior to July 21, 1992. Attorney Vinson also argued that at all relevant times, Ms. Kelleher was a person "under departmental control", and that absent specific written authorization from the Commissioner of Corrections, the appellant's relationship with Ms. Kelleher violated the Rules and Guidance for Department Employees. In his written arguments, Attorney Vinson stated:

"It is clear that Mr. Inman was a good employee. The problem we have in this case is insubordination and the lack of forthrightness on the part of Mr. Inman. He violated a direct order. He did not try to get an accommodation from the Commissioner as did [another former employee]. (State's Closing Arguments, page 7, section 5.)

"...He acknowledged that an individual has to give up certain rights when their friend or relative is in the Prison ... Whether or not Mr. Inman or Ms. Kelleher believed she was subject to Departmental control is not the issue nor is it relevant that Mr. Inman disagreed with the Department of Corrections and Edda Cantor's determination that she was under Departmental control. The fact is that the appointing authority said that she was under Departmental control. This fact had to be accepted by Mr. Inman or he could have appealed that determination to the Commissioner. ... (State's Closing Arguments, page 9)

Per 1001.08(a)(3) of the Rules of the Division of Personnel provides for immediate dismissal without prior warning for **"violation of a posted or published agency policy, the text of which clearly states that the violation will result in immediate dismissal"**. Paragraph IV of the Department's rules of conduct states, "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 published policy does not clearly state that a violation will result in immediate dismissal, and none of the alleged offenses could have been considered grounds for immediate dismissal under the provisions of Per 1001.08(a)(3) of the Rules of the Division of Personnel.

Of the offenses listed, the only ones which could have warranted immediate dismissal were refusal to obey a direct order of a superior and willful insubordination. Inasmuch as the Department failed to offer persuasive evidence supporting its position that Ms. Kelleher was "under departmental control", its claim that Mr. Inman violated a direct and lawful order of a superior by refusing to discontinue his contact with her is unsupported by the evidence.

The Board is fully aware of the security issues raised by fraternization between inmates and correctional officers, and neither party should construe the Board's decision in this matter as prohibiting the Department from taking action against an employee who jeopardizes that security. In this instance, however, the department has predicated disciplinary action upon little more than its assertion that Ms Kelleher was under departmental control after the fact of the relationship between Inman and Kelleher:

"Whether or not Mr Inman or Ms Kelleher believed she was subject to Departmental control is not the issue nor is it relevant that Mr Inman disagreed with the Department of Corrections and Edda Cantor's determination that [Ms Kelleher] was under departmental control. The fact is that the appointing authority said that she was under departmental control. This fact had to be accepted by Mr Inman or he could have appealed that determination to the Commissioner. . . ." (See: State's Closing Arguments, page 9)

The State's argument on this point illustrates the department's view of its authority to interpret its own regulations to fit the facts of a given situation. Corrections' policies and procedures do not prohibit employees of the department from having contact with individuals with criminal records. The Department's policies do not specifically require employees to disclose any personal knowledge they may have of an individual in the custody of the department. The Department's policies prohibit employees from becoming unduly familiar with persons under departmental control. The Board did not find Ms Kelleher to have been under the control of the Department of Corrections. Accordingly, the Board voted unanimously to grant Mr Inman's appeal in part.

Clearly Mr Inman believed that his relationship with Ms Kelleher represented a problem and probably constituted a breach of departmental policy. Rather than discussing that matter with his supervisor, the Superintendent or the Commissioner, he attempted to conceal the facts of that relationship from the Department, even though he believed it constituted a substantial breach of policy.

Mr Inman knew he was responsible for supporting all policies and procedures of the Department and knew he was responsible for reporting any alleged infractions of departmental rules, either by inmates or staff. He believed he was violating departmental policy and intended to continue conducting himself in that fashion without even consulting a superior, either to explain that Ms Kelleher should not be considered a person under departmental control, or to request that he be transferred to a position where any possible conflict would be eliminated.

Absent a finding that Ms Kelleher was "under departmental control", and that Mr Inman's conduct in living with her without departmental approval constituted an offense warranting immediate discharge, the termination must be deemed invalid. On the morning of July 21, 1992, before Ms Cantor had questioned Mr Inman about his relationship with Ms Kelleher, Peter Flood of the Sheriff's Department had already informed her that Kelleher and the appellant were living together. The Superintendent would have been reasonably sure of that fact when Mr Inman first reported to work that morning. Ms Cantor testified under oath that at 6:00 or 6:30 that morning, before she met with the appellant, she assumed he knew Ms Kelleher had been arrested and was incarcerated at the Goffstown facility.

If Ms Cantor had such grave concerns about Mr Inman's relationship with Ms Kelleher and the possible ramifications for security at the facility, she did little or nothing to elicit any meaningful information from Mr Inman about his familiarity with Ms Kelleher. She also allowed him to report for duty in the control room to operate all the facility's security doors without confronting him with the additional information she had received from the Sheriff's office.

Mr Inman exhibited poor professional judgment in failing to admit to the extent of his relationship with Ms Kelleher when originally questioned about her. His error was compounded when he failed to report his relationship with her after discovering her name on the inmate roster for the facility. However, the Department's handling of the matter was equally unacceptable.

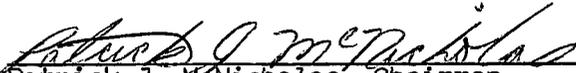
It is conceivable that Ms Cantor intentionally put the appellant in a "test" situation, exerting her authority and forcing the appellant to choose between his job and his personal life, even when she knew full well she could have advised him Ms Kelleher was in the facility and that she had a substantial amount of information about the relationship between the two. Ms Cantor also apparently had every opportunity to eliminate the possible security risk by asking that the appellant be transferred to another facility within the Department. Instead, she elected to have the appellant discharged.

When questioned on this subject, Ms Cantor said that in the event of riot, officers from every facility within the system could be called to work at Goffstown. Although the Board accepts that such a situation could arise, its likelihood is not great enough to warrant terminating rather than transferring a concededly superior employee.

On the evidence, the Board found that the appellant's failure to communicate with departmental supervisory personnel, lack of cooperation, willful misrepresentation through omission of relevant information concerning his

relationship with a person reported to be under departmental control, coupled with his lack of judgment in failing to clarify Ms Kelleher's status before endangering his employment, warrant a 4 week suspension without pay or benefits under the provisions of Per 1001.05 (b)(1). The appellant shall be reinstated to a position similar to that from which he was discharged, although the Department may exercise its authority to transfer him to any other facility within the system if it continues to believe that he represents a security risk at the Goffstown facility.

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