

State of New Hampshire



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

Appeal of Stuart P. LaValley

Docket #97-T-13

Department of Safety - Division of Motor Vehicles

March 9, 1998

By letter dated October 30, 1997, SEA General Counsel Michael Reynolds submitted a Motion for Reconsideration/Rehearing of the Board's October 1, 1997, majority decision denying Mr. LaValley's appeal of his termination from employment.

A properly filed motion for reconsideration must set forth fully every ground upon which it is alleged that the decision or order complained of was unlawful or unreasonable, or it must offer additional evidence that was not available at the time of the original hearing. With that standard in mind, the Board responds to the Appellant's motion as follows.

The Board has set forth its factual and legal findings in sufficient detail to apprise the parties of its determinations and permit a meaningful review thereof. It is not required to rule specifically on each of the Appellant's thirty requests, many of which constitute legal argument.

The majority of the Board did not view this as a case of termination of employment for "out-of-work conduct," nor termination for violation of an un-posted policy or *ad hoc* rulemaking on the part of the agency. Loss of the Appellant's driver's license for a minimum of 90 days resulted in his inability to perform up to 75% of his job duties during the period of revocation. The personnel rules cited by the Appellant in

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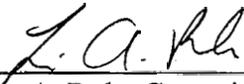
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conjunction with loss of licensure are not supportive of his position. At best, Per 1001.05(b)(3) c permits suspension of an employee, without pay, for up to 20 days, for "failure to maintain" a required license or certification. That provision appears to contemplate a more immediately rectifiable lapse in licensure and not the situation where, as here, the Appellant could not lawfully perform the vast majority of his job functions for at least ninety days.

The Board agrees that the appointing authority could have elected to continue to employ the Appellant in some other capacity, at least during the period of revocation. For the reasons stated in the previous decision, however, it was not compelled by law or rule to do so, nor did its decision constitute an abuse of discretion. The appointing authority gave adequate consideration to the salient facts and circumstances of the case, including the Appellant's long and satisfactory tenure with the agency. The Appellant was adequately advised of the grounds for termination and given an opportunity, with an SEA representative, to address them. No testimony elicited or cross-examination indicated that the termination was based on grounds other than those made known to the Appellant. Nor did testimony that the agency accommodated a licensing offer whose license was suspended or revoked for 90 days in 1987, indicate disparate treatment of the Appellant.

For the foregoing reasons, the undersigned Board members deny the Appellant's Motion for Reconsideration.



Lisa A. Rule, Commissioner



James J. Barry, Commissioner

Dissent

For all the reasons set forth in my earlier dissent, I respectfully disagree with the majority opinion in this case, and would vote to reconsider the Board's decision. I remain of the opinion that the degree of discretion exercised by the appointing authority was not reasonable under the circumstances of this case, and that the resulting decision to terminate the Appellant was, therefore, arguably unlawful.

For that reason I offer this dissent.



Mark J. Bennett, Chairman

cc: Virginia A. Lamberton, Director of Personnel
Sheri J. Kelloway-Martin, Litigation Office, Department of Safety
Michael Reynolds, SEA General Counsel

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Michael Reynolds, General Counsel
State Employees' Association
PO Box 3303
Concord, NH 03302-3303

Atty. Sheri J. Kelloway-Martin
Litigation Office
Dept. of Safety
Hazen Dr.
Concord, NH 03305

re: Appeal of Stuart LaValley

I have enclosed a re-issued copy of the Board's decision on the appellant's Motion for Reconsideration/Rehearing in the above-captioned appeal. Although my records indicate that the decision was forwarded to the parties on February 5, 1998, both parties have advised me that they did not receive that decision. I will adjust the Board's records to reflect the date this decision was reissued.



Mary Ann Steele
Executive Secretary

cc: Virginia Lamberton, Director of Personnel

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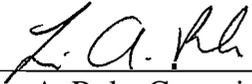
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Lisa A. Rule, Commissioner

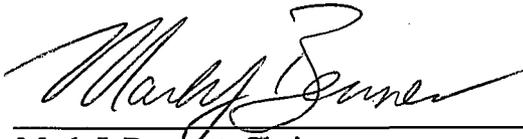


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Department of Safety - Division of Motor Vehicles

October 1, 1997

The New Hampshire Personnel Appeals Board (Bennett, Rule and Barry) met on Wednesday, June 18, 1997, under the authority of RSA 21-I:58, to hear the appeal of Stuart P. LaValley, a former employee of the Department of Safety, Division of Motor Vehicles. Mr. LaValley, who was represented at the hearing by SEA General Counsel Michael Reynolds, was appealing his February 11, 1997, termination from employment as a Licensing Officer following his February 7, 1997, conviction in Concord District Court for driving while intoxicated. Attorney Sheri J. Kelloway-Martin appeared on behalf of the State.

The record in this matter consists of pleadings submitted by both parties, the audio tape recording of the hearing on the merits, and exhibits that were admitted into evidence as follows:

State's Exhibits:

- #1 Licensing Officer class specification
- #2 February 11, 1997, letter from Licensing Supervisor Jeffrey B. Cherrette advising Mr. LaValley of the Department's intention to dismiss the appellant for failure to meet the minimum qualifications for his position
- #3 February 11, 1997, letter to Mr. LaValley, signed by Driving Licensing Supervisor Jeffrey Cherrette, Motor Vehicles Director Virginia Beecher and Safety Commissioner Richard Flynn

- #4 June 13, 1997 Driver Record Report for Stuart LaValley
- #5 Concord District Court Complaint of a Motor Vehicle Violation for driving a vehicle under the influence of an intoxicating liquor.

Appellant's Exhibits:

- A Affidavit of Connie M. Mulcahy
- B Performance Summaries for Stuart LaValley dated 31 Aug 95, 8-15-94, 7-21-93 and 7-15-92
- C Criminal Docket - William H Sweeney, 1st offense DWI

The following persons gave sworn testimony:

Jeffrey Cherrette, Licensing Supervisor

Virginia C. Beecher, Director of the Division of Motor Vehicles

Stuart LaValley

Ms. Kelloway-Martin argued that Mr. LaValley's position as a Licensing Officer for the Division of Motor Vehicles required him to possess a valid driver's license in order to qualify for his position, and that when his license was revoked for a minimum of 90 days, effective February 7, 1997, it made him unable to perform the majority of his duty assignments for the period of revocation. Ms. Kelloway-Martin argued that when the license revocation occurred, the Department as a whole was short handed. She argued that the Department relied upon its ability to assign Licensing Officers to any duty station where they might be needed to cover both expected and unexpected absences. She argued that the loss of Mr. LaValley's license meant that he would have been unable to move between locations as needed during the work day, and that even if he had been able to arrange for transportation, he still would have been unable to perform driver licensing road tests in any location. Ms. Kelloway-Martin argued that Mr. LaValley's job required him to be fully knowledgeable of New Hampshire motor vehicle laws, and that as a long-term employee of the Department of Safety, Mr. LaValley should have known that losing his license could mean losing his job.

Mr. Reynolds argued that the appellant's termination was both illegal and unjust. He argued that Mr. LaValley's performance had always met the work standard, and that the Department could have taken any number of lesser disciplinary actions, or could have permitted the appellant to use either paid or unpaid leave for the period of the license suspension.

At the close of the hearing, the parties submitted Proposed Findings of Fact and Rulings of Law. To the extent that they are consistent with the findings and decision below, they are granted, otherwise, they are denied.

Findings of Fact

1. Mr. LaValley was employed by the Department of Safety as a License Examiner from May 12, 1972, until the date of his termination on February 11, 1997. Throughout that time, his performance on the job was acceptable, and he had never been subject to any prior discipline.
2. The minimum qualifications for the position of Licensing Examiner include the following: Education - graduation from high school, G.E.D. or equivalent; Experience - Three years' experience in motor vehicle maintenance and driving work or its equivalent, preferably with some public contact work; License/Certification - Must possess or be able to obtain a current New Hampshire Class A Commercial Driver's License and Motorcycle License before appointment.
3. Prior to his termination, Mr. LaValley was assigned to the Plymouth sub-station, and regularly worked as one of two Licensing Examiners working from that location.
4. Typically, a Licensing Examiner would conduct up to three CDL examinations in the morning, and in the afternoon would conduct up to fifteen examinations for first-time drivers and re-qualification of drivers over the age of 75.
5. On February 7, 1997, Mr. LaValley was convicted of a violation, first offense, for driving under the influence of alcohol. He was fined \$350, his license was revoked for a period of 90 days, and he was ordered to participate in a State approved impaired driver training program.

6. Mi. LaValley was involved in a single car accident on the evening of his arrest, and his blood alcohol level was determined to be .24.
7. Mi. LaValley had no prior convictions on his driver's record at the time of his arrest and subsequent conviction.
8. On February 11, 1997, Mr. LaValley was informed of his Department's intent to terminate his employment. He met with Arthur Garlow, his bureau administrator, Jeffrey Cherrette, his immediate supervisor, Claude Ouellette, Human Resources Administrator for the Department of Safety, Ms. Kelloway-Martin and the appellant's SEA representative to discuss the possible termination.
9. Following the meeting, Mr. LaValley was notified in writing that he was dismissed from his employment for failure to meet the minimum qualifications for the position of a licensing officer.

DMV Director Virginia Beecher testified that driving under the influence has become a major issue nationwide, and that employees in the Division of Motor Vehicles need to set an example for the general public. She testified that if she were filling a position, she would not even consider applicants who had serious violations such as reckless operation or driving under the influence on their driving records.

Ms. Beecher testified that Mr. LaValley's conviction for the offense of driving while intoxicated not only resulted in his failing to meet the minimum qualifications for his position, but seriously impaired his credibility with the public. She testified that although she and Commissioner Flynn had discussed alternatives to termination such as downgrading or transfer, the offense was sufficiently serious that she believed it warranted immediate termination.

Ms. Beecher testified that at the time Mi. LaValley's license was revoked, the Department had no way of knowing if the license would be restored after 90 days, and that because the Division already had 3 vacancies, the idea of creating a 4th vacancy, even temporarily, was unacceptable. She testified that any arrangement that might be made to accommodate the appellant during the period

of revocation would put an unnecessary and unfair burden on all the other employees in the driver licensing division. She testified that it would have been unfair to the other employees in the Division to allow Mr. LaValley to remain in his job as a Licensing Examiner and do nothing but paperwork. She also indicated that there were no other positions available in the Division for which Mr. LaValley would have qualified if the Department had chosen to take a lesser form of discipline.

The appellant argued that although he was unable to perform road tests during the period of time when his license was under revocation, he still met the minimum qualifications for his position since the specification made no reference to maintaining a valid license, only to an applicant's possession of, or ability to obtain, a license prior to appointment. The Board does not agree. The evidence reflects that up to 75% of a Licensing Officer's time is spent administering road tests. Therefore, during the period of revocation, Mr. LaValley would have been unable to perform approximately 75% of his assigned duties. Furthermore, if Mr. LaValley did not possess, and was not able to obtain, a license to drive, he was not eligible for appointment or continued employment as a Driver Licensing Examiner.

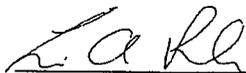
The appellant also argued that he would have been willing to serve out the period of revocation on leave, paid or unpaid, and also would have been willing to accept a suspension or demotion in lieu of dismissal. He argued that the Department should have considered his 25 years of satisfactory service to the Department as a mitigating factor. He also argued that the Department's image would not have been tarnished by returning him to full duty after the period of revocation.

The Board does not agree that the Department was required to make an accommodation for Mr. LaValley under the circumstances of this case. The offense for which Mr. LaValley's license was revoked was of a serious nature, was related to the subject matter of his employment, and resulted in the loss, although temporary, of a necessary qualification for his position. Mr. LaValley was convicted of driving under the influence, with a blood alcohol count of .24, some three times the legal limit. No mitigating circumstances were offered for the conduct resulting in the Appellant's conviction although Mr. LaValley was unquestionably a long term employee. There is no rule or

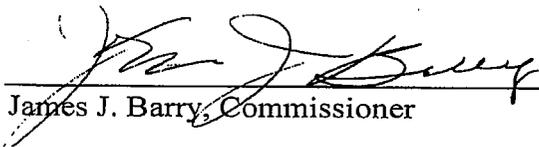
regulation specifically addressing the continued employment of individuals whose convictions preclude them from carrying out their job duties. Nevertheless, the very nature of Mi- LaValley's position makes him responsible for understanding and upholding the State's motor vehicle laws and, by extension, understanding the serious consequences he could suffer if a flagrant violation of those laws results in the loss of qualification for his job.

Based on the evidence presented, the Board finds that the Department acted within its discretion by dismissing Mi- LaValley based upon his conviction and loss of license for driving while intoxicated. The testimony indicates that the agency did take the appellant's length of service into consideration when contemplating the appropriate level of discipline. In light of the nature of both the offense in question and the appellant's job, however, the length of service did not compel the Department to accommodate the Appellant's temporary inability to perform his job functions by imposing a lesser form of discipline. Accordingly, a majority of the Board voted to uphold the Department's action in dismissing Mi- LaValley and deny his appeal.

THE PERSONNEL APPEALS BOARD



Lisa A. Rule, Commissioner



James J. Barry, Commissioner

Dissent of Commissioner Bennett

I must say at the outset that this is, in my mind, an extremely close case. I agree with virtually all of the majority position, and its findings and rulings, including that the agency has, and should have, a high degree of discretion in determining what is indeed a serious offense directly related to the

appellant's service with the Division, and the goals, objectives, appearance and professionalism of that Division.

What I do not agree with is that the exercise of that high degree of discretion was reasonable under the circumstances of this case, to the extent where I consider it arguably unlawful. The reason for this is notice to the affected employee and the concomitant issues of due process it raises at law and under the Personnel Rules and State Personnel system. I do not believe, under the circumstances, Mr. LaValley's conviction, in and of itself, creates a sufficient basis upon which to dismiss him without prior warning or other cognizable notice. Mr. LaValley was not charged with a crime or a misdemeanor. He was convicted of a simple motor vehicle violation, no matter how serious in actuality, or that the offense is very much of the mode, or "politically correct." The State has not seen fit to classify this first offense as a crime, and that fact must be considered in evaluating a 25 year career of one of its, presumably valued, employees.

While Mr. LaValley's conviction for driving while intoxicated clearly flies in the face of the Department of Safety's legitimate crusade against drunk driving, the department offered no posted or published policy applicable to its employees that subjects those employees to immediate termination without prior warning whenever an employee is found guilty of driving while intoxicated, or other serious motor vehicle offenses. I have no qualms that the Department has authority to adopt such a policy under and in accordance with the Personnel Rules, as it should. Had it done so, particularly as a part of its program to combat driving by impaired persons, it would have resolved this problem of notice, balanced its needs with reasonable protections for employees, set a superb example, and managed its affairs effectively and with great professionalism. Under those circumstances I would have voted to affirm the termination.

Per 1001.07 (b) (2) b. provides for the immediate demotion of an employee whose offense "disrupt[s] services provided by the agency." Given the nature of Mr. LaValley's violation, the length of time the appellant's license was likely to be revoked as a result of that violation, the division's staffing constraints, and the adverse publicity the agency might suffer because it had in its

employ a Licensing Officer with a record of driving while intoxicated, the agency had the authority to demote Mr. LaValley under the provisions of that rule. LaValley indicated a willingness to accept this, and/or other punishment, which he deserved. Some of that "punishment" could certainly include enthusiastic participation in the public anti-impaired driver programs of the Division. LaValley's termination deprives the Division of his services in this connection, as the living exemplar of another reason not to drink and drive of a type that hits home more than the unconvincing threat (particularly to the young and the habitually impaired) of becoming a fatality. The loss of status, pay and privilege, tempered with the mercy of continued employment and continued hope on condition of reform and improvement is a strong message that doesn't seem to be conveyed often.

Accordingly, I see another way to salvage what little good there is in this bad situation leading to a very close case, and for that reason I offer this dissent.



Mark J. Bennett, Chairman

cc: Virginia A. Lamberton, Director of Personnel
Sheri J. Kelloway-Martin, Litigation Office, Department of Safety
Michael Reynolds, SEA General Counsel