

State of New Hampshire



PERSONNEL APPEALS BOARD
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Appeal of Paul McNeil
Docket #2007-T-021
Department of Transportation
September 27, 2007

The New Hampshire Personnel Appeals Board (Bonafide, Johnson and Casey) met on Wednesday, September 19, 2007, under the authority of RSA 21-I:58 and Chapters Per-A 100-200 of the NH Code of Administrative Rules, to hear the appeal of Paul E. McNeil, a former employee of the NH Department of Transportation. Mr. McNeil, who was represented at the hearing by SEA General Counsel Michael Reynolds, was appealing his March 20, 2007 dismissal from his position as a Highway Maintainer II for allegedly refusing a job assignment by failing to complete the New Options Program for alcohol and substance abuse. Assistant Attorney General Lynmarie Cusack appeared on behalf of the Department of Transportation.

The record of the hearing in this matter consists of pleadings submitted by the parties, notices and orders issued by the Personnel Appeals Board, the audiotape recording of the hearing on the merits of the appeal, and documents admitted into evidence as follows:

State's Exhibits

1. Twenty-eight bates stamped pages including:
 - a. March 20, 2007 Letter of Dismissal issued to Mr. McNeil
 - b. Class Specification for Highway Maintainer II
 - c. Supplemental Job Description for Highway Maintainer II
 - d. June 27, 2006 Letter of Warning issued to Mr. McNeil
 - e. CAIP New Options Program Referral for Paul McNeil

- f. CAIP New Options Program Participant Agreement signed by Mr. McNeil
- g. CAIP New Options Program Consent for Release of Confidential Information signed by Mr. McNeil
- h. July 13,2006 letter to Mr. McNeil from CAIP Re: Class Schedule
- i. July 21,2006 Letter to Mr. McNeil from Mr. Ireland Re: Community Alcohol Information Program
- j. CAIP New Options Program brochure
- k. Request for Training Funds Application for Paul McNeil
- l. September 26,2006 letter to Mi. McNeil Re: Exit Reminder
- m. New Options Program Court Report Program Termination
- n. January 30,2007 letter to Steve Ireland Re: Paul McNeil
- o. February 20,2007 Notice of Pre-Disciplinary Meeting issued to Mr. McNeil
- p. February 8,2007 CAIP letter Re: Paul McNeil
- q. Statement Regarding a Drug Free Workplace signed by Mr. McNeil
- r. New Employee Orientation Check List/Agenda dated 1-18-05 for Paul McNeil
- s. Emergency Contact Information Sheet dated 6/23/05 for Paul McNeil

Appellant's Exhibits

- A. Performance Summary for Paul McNeil dated October 10,2005
- B. Performance Summary for Paul McNeil dated October 13,2006

Witnesses

At the hearing on the merits of the appeal, the following persons gave sworn testimony:

Virginia Stahley- Arenella, former Client Service Coordinator, CAIP
Steven Ireland, Assistant District Engineer, DOT Maintenance District 6
Douglas DePorter, District Engineer, DOT Maintenance District 6
Bonnie McNeil, wife of the Appellant
Robert F. McNeil, brother of the Appellant
Paul E. McNeil, Appellant

Position of the Parties

Attorney Reynolds argued that it was the Department of Transportation's responsibility to ensure that the Appellant understood what corrective action he was required to take in order to avoid additional disciplinary action, particularly after the Department chose to send the Appellant to the eighteen-hour DUI program instead of the twelve-hour New Options Program. Mr. Reynolds described the Appellant as a "meat and potato" kind of person with a history of doing whatever he was instructed to do, and that the Appellant would have attended the exit interview with a Licensed Alcohol and Drug Counselor if he had been properly apprised of that requirement.

Mr. Reynolds argued that the Department could not dismiss the Appellant for refusing a job assignment unless they could first prove that the Appellant understood the assignment and then prove he intentionally refused to do it. Attorney Reynolds argued that the Appellant never received the reminder from the CAIP about scheduling an exit interview, and the agency failed to inform the Appellant that they believed he was lying about not receiving the reminder. Mr. Reynolds argued that even if the Appellant had received a letter from CAIP about scheduling an exit interview with a Licensed Alcohol and Drug Counselor, his failure to do so would not have been a sufficient reason for termination. Attorney Reynolds argued that the employee complied with all the other required corrective action in his letter of warning, that he was willing to attend an exit interview if directed to do so, and should be reinstated.

Assistant Attorney General Cusack argued that the Appellant knew what was expected of him, and that any change in scheduling for the New Options Program was done at the Appellant's request for the Appellant's convenience. She argued that the Department paid for the training, paid the Appellant overtime to attend the training, and paid mileage for him to travel to the training, so the required training constituted a job assignment. Ms. Cusack argued that a change from the twelve-hour to the eighteen-hour program was simply a difference in the number of classroom hours, and that the Appellant would have

been required in either case to complete a one-hour exit interview with a Licensed Alcohol and Drug Counselor.

Ms. Cusack argued that the burden was on the Appellant, not the Department, to ensure that the corrective action detailed in the June 27, 2006 written warning was completed. She argued that the requirement for an exit interview was clearly stated in the written warning, in the brochure attached to the warning and during classroom instruction, and that the Appellant knew of that requirement with or without a written reminder from the organization administering the training. Ms. Cusack argued that the Appellant failed to complete the corrective action outlined in his letter of warning, and was therefore subject to dismissal under the Rules of the Division of Personnel for refusal to accept a job assignment.

Having carefully considered the evidence and argument offered by the parties, the Board made the following findings of fact and rulings of law:

Findings of Fact

1. At all relevant times, Mi. McNeil was employed by the Department of Transportation, Maintenance District 6, as a Highway Maintainer II. As a Highway Maintainer II, and holder of a CDL (Commercial Driver's License), Mr. McNeil was subject to random alcohol and drug testing.
2. On June 27, 2006, Mr. McNeil received a written warning after testing "positive" on a random alcohol screening. Although Mr. McNeil was allowed to continue driving a truck and performing his regular duties at the DOT, he was required to take certain corrective actions in order to avoid additional disciplinary action. The corrective action outlined in the written warning was as follows:
 - a. "Effective immediately, you will report directly to Mr. Rollin Rurnford, Highway Patrol Foreman, or in his absence, Mr. Michael Rogers, Assistant Highway Patrol Foreman, each morning before you start your daily duties. At that time, he will go over a series of questions and

determine your fitness for duty. This corrective action will remain in effect and [be] reviewed in three months."

- b. "You will attend the New Options Program sponsored by the Community Alcohol Information program. You will attend the Level II, 12 hours Prime for Life Education program and then meet with a Licensed Alcohol and Drug Counselor."
3. On June 27,2006, Mr. McNeil signed the New Options Program Referral, which listed the Level II New Options Program requirements as "12 hour Prime for Life Education Program with a LADC screening."
4. Mr. McNeil was scheduled to attend twelve hours of classes on Saturdays and Sundays from 9:00 a.m. to noon on July 8, July 9, July 15 and July 16,2006.
5. On June 30,2006, Mr. McNeil informed Steve Ireland, the Assistant District Engineer, that he could not attend weekend classes because they would conflict with his part-time job with the New Hampshire Liquor Commission.
6. On July 13,2006, Mr. Ireland spoke with Ms. Stahley-Arenella and was able to reschedule Mr. McNeil to attend classes on weeknights instead of weekends, setting his classes for Mondays and Wednesdays, July 26, July 31, August 2, and August 7,2006. Mr. Ireland notified Mr. McNeil's Patrol Foreman of the change, asking that Mr. McNeil contact Mr. Ireland on July 14,2006 around 6:00 a.m. to confirm the new dates.
7. During their discussion on July 14,2006, Mr. Ireland explained that the change from weekends to weeknights would result in six additional hours of classroom instruction. Mr. McNeil again objected to the scheduling, indicating that he worked on Monday and Wednesday nights, and the new dates would still conflict with his part-time position at the Liquor Commission. Mr. McNeil also indicated that it would be too long a day for him, as his regular work was from 6:30 a.m. to 4:00 p.m. He told Mr. Ireland he would prefer the weekend schedule.
8. Mr. Ireland informed Mr. McNeil that the Department would not change the dates again, and that any other scheduling changes would have to be arranged-by Mr. McNeil directly with the program coordinators at CAIP.

9. A summary of the events involved in scheduling and rescheduling the appellant to attend the New Options Program were provided to Mr. McNeil in a letter from Mr. Ireland dated July 21, 2006. In that letter, Mr. Ireland wrote, "I restated that this is a corrective action and you are required to attend and that failure to take corrective action as described above and complete the New Options Program through CAIP shall result in additional disciplinary action, up to and including your discharge from employment."
10. Mr. McNeil did not change the schedule, but instead began attending classes at the New Options Program on July 26, 2006.
11. Mr. McNeil completed the New Options Program intake screening on July 5, 2006, and eighteen hours of classroom instruction between July 26 and August 7, 2006. Mr. McNeil never scheduled or completed an exit interview with a LADC.
12. The New Options Program brochure, which was attached to Mr. McNeil's June 27, 2006 letter of warning, described Level II as follows: "You must successfully complete the full NOP program consisting of an enrollment interview, 12 hours of education, and a screening with a Licensed Alcohol and Drug Counselor (LADC). Upon completion of the LADC screening, NOP will forward to the referral source your completion and any recommendations made by the LADC for you to continue on to aftercare counseling or treatment."
13. As described in its program brochure, "The New Options Program (NOP) is an alcohol and drug awareness program that has the goal of offering [the participant] education and prevention about the use of and abuse of alcohol and drugs so that [the participant] can reduce [his/her] risk of another offense occurring, and can make responsible choices about [his/her] use of these substances. Class sessions are scheduled on weekday evenings or on weekend days; [participants] will complete [their] sessions within two to three weeks, depending on which schedule [they] choose." An increase in class time from twelve weekend hours to eighteen weekday hours of classroom instruction did not alter the type of program, or any of the other program requirements.
14. The State of NH DUI program consists of a one-hour intake interview, eighteen hours of classroom training, and a one-hour exit interview with a Licensed

Alcohol and Drug Counselor. The New Options Program, Level II consists of an intake interview, classroom training, and an exit interview with a Licensed Alcohol and Drug Counselor. Whether participants attend classroom training on weekdays or weekends, successful completion of the program in either case requires participants to complete a one-hour exit interview with a Licensed Alcohol and Drug Counselor.

15. Various documents signed by the appellant, including his June 27, 2006 written warning, his New Options Program Referral, and his Program Participation Agreement, all indicate that the program includes an exit interview with a Licensed Alcohol and Drug Counselor.
16. At the time that Mr. McNeil was enrolled in the New Options Program, participants were allowed six months in which to complete the intake, education and exit screening process. According to program rules, Mr. McNeil would have had until January 5, 2007, to complete the process by scheduling and participating in an exit interview with a LADC.
17. Before receiving notice from the CAIP that Mr. McNeil had been terminated from the New Options Program for failure to complete the exit interview, Assistant District Engineer Ireland and District Engineer DePorter both assumed that Mr. McNeil had carried out all of the corrective action described in the June 27, 2006 written warning, including successful completion of all phases of the New Options Program.
18. By letter dated January 30, 2007, Ms. Stahley-Arenella from the CAIP notified Steven Ireland, Assistant District Engineer, that Mr. McNeil had been terminated from the New Options Program for failure to meet for screening with the LADC.
19. Douglas DePorter, District 6 Engineer, convened a pre-disciplinary meeting with Mr. McNeil on February 23, 2007, to present evidence supporting Mr. DePorter's "decision to take disciplinary action, up to and including Mr. McNeil's dismissal from employment..." as a result of Mr. McNeil's "failure to complete mandatory corrective action for a letter of warning."
20. At the February 23, 2007 meeting, Mr. McNeil told Mr. DePorter and Mr. Ireland that he had never received the reminder from CAIP about scheduling an

exit interview, and if the DOT wanted him to complete the last hour of the program by attending an exit interview, he would. Mr. Ireland and Mr. DePorter both believed that Ms. McNeil had received the reminder about the need to schedule an exit interview with CAIP, as the evidence indicated that he had received other correspondence from the New Options Program at the same address to which the reminder was mail.

21. Mr. McNeil was not dismissed for lying about whether or not he received a reminder by mail from the New Options Program, but for refusal to accept a job assignment as a result of his failure to schedule and attend an exit interview with a Licensed Alcohol and Drug Counselor to complete the New Options Program.

Rulings of Law

- A. The letter of warning issued to Mr. McNeil on June 27, 2006 clearly informed him that failure to complete the corrective action outlined in the warning would result in additional disciplinary action, up to and including termination from employment. The corrective action requirements in the written warning, including the requirement that Mr. McNeil must complete the New Options Program and exit interview, constituted a legitimate job assignment as described by Per 1002.08 (b)(11).
- B. By failing to complete the New Options Program, Mr. McNeil refused a job assignment and was therefore subject to dismissal without prior warning under the provisions of Per 1002.08 (b) (11).
- C. The Department of Transportation complied with the provisions of Per 1002.08 (d) by meeting with Mr. McNeil on February 23, 2007, presenting to him the evidence supporting dismissal, and allowing him an opportunity to refute that evidence before issuing him a written notice of dismissal on March 20, 2007.

Decision and Order

As the evidence reflects, the change in class schedule did not change the nature of the program, or the requirement for the appellant to schedule and participate in an exit interview with a LADC in order to complete the program. The materials provided to Mr. McNeil by the Community Alcohol Information Program and the corrective action outlined in the written warning made that requirement clear. There was no obligation on the part of the CAIP or the DOT to remind the Appellant of those requirements, and it was the Appellant's responsibility to complete the corrective action, with or without a reminder.

The DOT's decision to dismiss the Appellant was lawful and conformed with the Rules of the Division of Personnel. However, while the Board believes that the Appellant was fully aware of the requirement to participate in the exit interview in order to comply with the conditions in the July 27, 2006 written warning, the Board was not persuaded that dismissal was the appropriate level of discipline when considered in light of the facts in evidence.

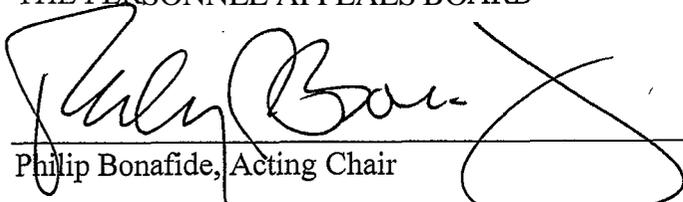
RSA 21-I:58 provides that, "In all cases, the personnel appeals board may reinstate an employee or otherwise change or modify any order of the appointing authority, or make such other order as it may deem just." In this instance, the Appellant provided evidence of an otherwise acceptable work record, and compliance with the corrective action plan outlined in his written warning, up to the point of the exit interview. In consideration of the facts in evidence, the Board voted unanimously to modify the dismissal to a suspension without pay, which shall be effective from the date of termination to the date that the Appellant successfully completes the New Options Program, including an exit interview with a Licensed Alcohol and Drug Counselor.

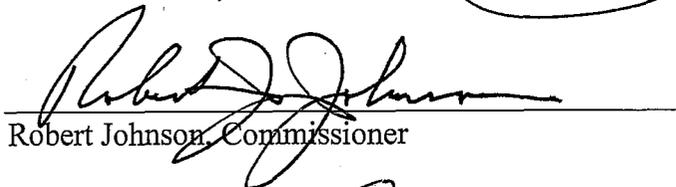
The Appellant shall be required to register for the program within 30 days of the date of this order, and shall not be reinstated until he has provided the Department of Transportation with proof of successful completion. The Appellant shall be responsible ,

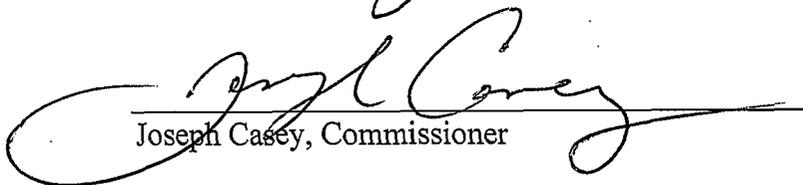
for any and all costs associated with completing the program, and shall not be eligible for compensation or mileage reimbursement associated with completing the program. For the period of suspension, the Appellant shall not be entitled to pay or benefits, including seniority credit or creditable service with the NH Retirement System. The Appellant also shall be responsible for satisfactory completion of any follow-up training or intervention that the LADC recommends. Failure to complete the New Options Program and any follow-up that they may require shall be deemed grounds for immediate termination without further warning.

As set forth above, the Board voted unanimously to modify the dismissal decision, modifying it to an extended suspension without pay. Accordingly, the appeal is GRANTED IN PART.

THE PERSONNEL APPEALS BOARD


Philip Bonafide, Acting Chair


Robert Johnson, Commissioner


Joseph Casey, Commissioner

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