State of New Hampshire

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

APPEAL OF FAYE **MEMOLO**
Division of Public Health Services - Bureau of Emergency Medical Services
Response to Appellant's Motion for Reconsideration
Docket **#93 -T-36**

December **9, 1993**

By letter dated November 17, 1993, SEA Legal Intern Linda Chadbourne submitted a Motion for Reconsideration of the Board's October 28, 1993 decision denying Ms. Memolo's appeal of her termination from employment prior to the completion of her probationary period from her position of EMS Training Coordinator. In support of that Motion, Ms. Chadbourne argued that the Board's decision goes against the weight of the evidence, and that the Board conceded in its decision that if Ms. Memolo had been a permanent rather than a probationary employee when the incident occurred, she would only have received a letter of warning for uncooperative and disruptive behavior, and failing to meet the work standard. She further argued that the Board improperly upheld the decision to terminate Ms. Memolo's employment by relying on the potential consequences of her behavior rather than the actual consequences.

In spite of the appellant's assertion that "...thousands of incidents occur daily in the realm of public employment which, "could have' resulted in more dire consequences, but did not..." the simple fact remains that Ms. Memolo's conduct constituted a failure to meet the work standard, and that the employer acted within its discretion in discharging her from her probationary employment on those grounds. The fact that there were no complaints from the general public about the incident does not alter the fact that Ms. Memolo acted in a disruptive, uncooperative, unprofessional manner, that she engaged in an altercation which had escalated to the point that another of the EMS employees had to intervene physically, and that such behavior constitutes a failure to meet the work standard.

The Board voted to deny the instant motion and to affirm its October 28, 1993 decision denying Ms. Memolo's appeal.

THE NEW HAMPSHIRE PERSONNEL APPEALS BOARD

Patrick J. McNicholas, chairman

Lisa A. Rule, Commissioner

TDD Access: Relay NH **1-800-735-2964**

cc: Virginia A. Lamberton, Director of Personnel
Linda Chadbourne, SEA Legal Intern
Sandra Platt, Administrator, Health and Human Services

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Division of Public Health Services - Bureau of Emergency Medical Services

Docket #93 -T-36

October 28, 1993

The New Hampshire Personnel Appeals Board (McNicholas and Rule), met Tuesday, August 24, 1993, to hear the termination appeal of Faye Memolo, a former probationary employee of the Department of Health and Human Services, Division of Public Health Services, Bureau of Emergency Medical Services. Ms. Memolo was represented at the hearing by SEA Legal Intern Linda Chadbourne. Sandra Platt, Human Resources Administrator, appeared on behalf of the agency.

Ms. Memolo was discharged from her Training Coordinator position effective May 20, 1993, as a result of her alleged participation in a verbal and physical altercation during a seminar the employer was sponsoring at Dartmouth Medical School. Ms. Memolo's notice of termination also alleged she had conducted herself in an unprofessional manner, damaging the credibility of the Division of Public Health Services, and her own credibility with the public and other staff in the Bureau of Emergency Medical Services. The notice of termination, dated May 20, 1993, signed by Marcia Houck, Chief of the Bureau of Emergency Medical Services, cited Per 1001.02, Dismissal During Initial Probationary Period, as the authority under which the termination was effected.

Ms. Memolo, through her representative, argued in her June 1, 1993 notice of appeal that the termination was arbitrary, illegal, capricious and/or made in bad faith. Specifically, she argued that she was "the recipient of, not a participant in, an altercation begun by an attendee of the May 3, 1993 seminar in Hanover." Ms. Memolo argued that in the absence of express or implied guidelines for handling situations of that nature, she had acted reasonably and appropriately, and further that she was "working on a voluntary basis at the time the alleged incident occurred." Ms. Memolo claimed that the incident actually was a result of her attempts to keep another participant in the seminar from driving while intoxicated.

The Department of Health and Human Services had filed a Motion to Dismiss on July 12, 1993, arguing that Ms. Memolo was a probationary employee at the time of her termination, that the Department had not acted arbitrarily, illegally, capriciously or in bad faith, and that the termination was for good cause attributable to the employee's own actions. The Board denied that motion, finding that there were material facts in dispute concerning the alleged altercation

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between Ms. Memolo and her co-workers and the effect such altercation had on Ms. Memolo's continuing ability to function effectively in her capacity as a Training Coordinator for the Division of Public Health Services. Accordingly, the Board voted to hear the appeal on the merits.

On the evidence, the Board made the following findings of fact:

On May 3,1993, the Bureau of Emergency Medical Services (Division of Public Health Services) hosted a seminar at the Dartmouth Medical School in Hanover, New Hampshire. Ms. Memolo was one of several trainers assigned to organize and manage the seminar. Ms. Memolo invited two of her co-workers, Diane Lynch and Heather Neil, and loaned her truck to Ms. Neil to transport herself and Ms. Lynch to Hanover. The two women arrived late to the seminar, and were confronted by Ms. Memolo in the lobby of the Vail Building just before the program intermission. Ms. Memolo demanded to know where the two women had been, why they were late "and why they hadn't called to tell her they would not arrive on time. She became upset when she smelled alcohol on Ms. Neil's breath, and suspected Ms. Neil might have been drinking while driving the appellant's truck.

Ms. Neil and Ms. Lynch went back out to the parking lot where they were again confronted again by Ms. Memolo. At that point, Ms. Neil still had the keys to Ms. Memolo's vehicle. She made a remark to the appellant about "If you didn't want us here, you shouldn't have asked us." She then shook the keys at Ms. Memolo and told her that she and Ms. Lynch were leaving. Ms. Memolo became upset, followed her toward the door and reached for Ms. Neil's arm to grab the keys. There is some dispute about whether Ms. Memolo "put her hand on Heather's arm" or grabbed her. In any case, Ms. Neil swung around and pushed Ms. Memolo. Liza Burrill, another of the Bureau staff involved with the seminar, intervened by stepping between the two women. Ms. Burrill offered to take both Ms. Neil and Ms. Lynch home. Ms. Memolo did not go back to the seminar then, but walked around taking time to regain her composure.

Ms. Memolo was upset that Ms. Neil had been drinking while she had the appellant's vehicle, and explained to Liza Burrill, one of the other Training Coordinators, that she didn't want Ms. Neil or Ms. Lynch driving her truck. No evidence was presented to suggest that Ms. Neil was intoxicated or impaired in any fashion. Although it would be reasonable for Ms. Memolo to object to anyone driving her vehicle under the influence of alcohol, there is insufficient evidence to support a finding that Ms. Memolo's actions were motivated by her desire to protect Ms. Neil and Ms. Lynch, as her appeal letter suggests.

Liza Burrill, EMS Training Coordinator I, testified that she had known both Ms. Neil and Ms. Memolo since 1989, when Ms. Memolo was a volunteer involved with the Bureau. She testified the two women were known for having "short bursts" of heated, verbal exchanges. In terms of the actual incident giving rise to this termination, Ms. Burrill characterized both Ms. Neil's and Ms. Memolo's behavior as unprofessional, and told Ms. Memolo she was "out of line". When the incident escalated to the point of physical contact between Ms. Neil and Ms. Memolo, Ms. Burrill had to physically intervene, stepping between the two women, to keep the incident from getting any further out of hand.

Ms. Burrill was sufficiently disturbed by the events that she reported the incident to her supervisor, Mr. Hettinger, an Administrator in the Bureau of Emergency Medical Services. Mr. Hettinger referred the issue to his supervisor, Marcia Houck, who then directed him to "look into" the matter. Mr. Hettinger set up an interview with the appellant to discuss the incident. He testified that he did not ask any specific, investigative questions, asking only that the appellant "give her side of the story". Mr. Hettinger testified that during the interview, Ms.

Memolo said that when she confronted Ms. Lynch and Ms. Neil in the parking lot, she "really laid into them". That characterization is supported by Liza Burrill's testimony that the women were known for their verbal outbursts. Mr. Hettinger said he believed the behavior of both women directly involved in the confrontation was inappropriate, and that he had told the appellant she should not have allowed personal problems to spill over into the workplace. He admitted that he had probably told the appellant "not to lose any sleep" over the incident, but noted that he was not really involved in the decision-making process which lead to Ms. Memolo's termination, and that he had no authority to determine what level of discipline might have been appropriate.

Ms. Chadbourne argued on the appellant's behalf that the testimony of the witnesses and the evidence must be weighed in the light most favorable to the appellant, and that the Board should find that the alleged "altercation" was nothing more than a disagreement. She argued that there were no complaints received from the public and no evidence that any of the individuals attending the seminar had actually overheard the incident. She argued that the agency's reputation would be harmed by terminating Ms. Memolo's employment, not by allowing her to remain on staff as an EMS Training Coordinator. Ms. Chadbourne argued that Ms. Memolo had not engaged in any physical violence, and that her behavior did not rise to the level of an offense warranting termination from employment. Ms. Chadbourne also argued that Ms. Memolo's performance over-all was meeting the work standard for EMS Training Coordinators.

Ms. Platt, on behalf of the Division of Public Health Services, argued that the appointing authority properly exercised its discretion by discharging Ms. Memolo's employment prior to completion of her probationary period after determining the appellant was unable to meet the work standard. Ms. Platt argued that the appellant acted inappropriately and unprofessionally, failing to demonstrate an ability to maintain good working relationships with the other employees of the Bureau of Emergency Medical Services. She argued that the agency's reputation and credibility could have been damaged by Ms. Memolo's behavior, and that although the outcome might have been different had the incident occurred in the office, the altercation took place in a public setting and could have been overheard by either the general public or the guest speaker. Ms. Platt asked the Board to find that the agency acted appropriately in terminating Ms. Memolo's employment, and that the termination was not arbitrary, capricious, illegal, or made in bad faith.

STANDARD OF REVIEW

At all relevant times, Ms. Memolo was a probationary employee of the Division of Public Health Services in the position of EMS Training Coordinator, subject to the provisions of Per 1001.02 of the Rules of the Division of Personnel. Per 1001.02 (a) governing the dismissal of employees during their initial probationary period states:

> At any time during the initial probationary period an appointing authority may dismiss an employee who fails to meet the work standard provided the dismissal is not: (1) arbitrary; (2) illegal; **(3)** capricious; or (4) made in bad faith.

Even when the evidence is viewed in the light most favorable to the appellant, the appellant can not sustain her burden of proving that the termination was arbitrary, illegal, capricious, or made in bad faith. Given the facts of the incident, if Ms. Memolo had been a permanent rather than an initial probationary employee, she could have received a letter of warning as provided in Per 1001.03(a) (1) and (6) for her conduct at the May 5, 1992 seminar for failing to meet the work standard and exhibiting uncooperative or disruptive behavior. Ms. Memolo's

behavior described by Ms. Burrill was "out of line". Training Coordinators need to maintain a calm, pleasant, business-like demeanor, and that both Faye Memolo and Heather Neil failed to conduct themselves in an appropriate, professional manner. Ms. Memolo repeatedly confronted Ms. Lynch and Ms. Neil, even after Ms. Burrill and Ms. Hunt had both attempted to intervene. The exchange was not terminated until the conflict became physical and Ms. Burrill interceded physically.

Although the appellant has argued that her behavior was only a response to more inappropriate behavior on Ms. Neil's part, the Board still found that Ms. Memolo acted in an uncooperative and disruptive manner, and failed to meet the work standard for a probationary EMS Training Coordinator. Accordingly, the Board voted to deny Ms. Memolo's appeal.

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