

State of New Hampshire

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PERSONNEL APPEALS BOARD
State House Annex
Concord, New Hampshire 03301
Telephone (603) 271-3261

APPEAL OF GERALD MILLS
Docket #91-T-7

see
91-T-807
Duplicates

Response to Appellant's Motion for Reconsideration and Rehearing

January 13, 1992

The New Hampshire Personnel Appeals Board (Bennett, Johnson and Rule) met Wednesday, December 4, 1991, to consider the above-captioned Motion filed on behalf of Gerald Mills by his representative, Attorney Shawn J. Sullivan. Appellant's Motion requests that the Board reconsider its September 26, 1991 decision denying Mills' appeal, and order a rehearing on the merits of his appeal. The Board also considered Attorney Michael K. Brown's response and supporting Memorandum of Law, filed October 24, 1991, on behalf of the Department of Corrections.

In support of his Motion for Reconsideration and Rehearing the appellant stated, in part:

- "1. The factual findings as set forth in the September 26, 1991 decision of the Personnel Appeals Board are not substantially disputed.
- "2. However, the Board's conclusion that Mr. Mills voluntarily resigned from the Department of Corrections is unjust, unreasonable and directly contradicts the applicable law on 'voluntary resignations'."

The Board found that the State, in its response, has more accurately addressed the applicable law on voluntary resignations. The appellant offered insufficient evidence of coercion or duress to warrant a finding that the resignation given by Mills was anything but voluntary.

Response to Appellant's Motion for Reconsideration and Rehearing

page 2

The appellant argued that "[a] resignation is voluntary only if it is the product of a rational act", and that "[u]nder the circumstances in this case, a voluntary resignation would not have been rational". Again, this argument is unsupported by the record.

The appellant testified that he had advised the appointing authority that a marijuana plant and drug paraphernalia had been recovered from his home by the Concord Police Department. He sought the personal and professional advice of Nicholas Pishon, who the appellant described as his "friend". The record reflects that Pishon suggested to Mills that "...when an employee is involved in a situation requiring an investigation and the employee knows that he has done something for which he can be neither excused nor exonerated, the best course of action usually would be to resign and protect his record". (See: P.A.B. Decision, Appeal of Gerald Mills, September 26, 1991, page 3)

The evidence supports the Board's finding that the Department had initiated but had never completed a full investigation. Particularly in light of Mills' claim to being the "expert" in investigations, and in consideration of Mills' knowledge that a resignation would effectively terminate any such investigation, the Board continues to find that his resignation was a voluntary, rational act designed to preclude any further investigation by the Department of Corrections.

The fact that Mills successfully passed a drug test offers no conclusive evidence of what other information might have been disclosed through a full investigation of the incident. Similarly, the record contains no evidence of what action might or might not have been taken by the appointing authority as the result of a polygraph examination had a complete investigation been conducted. Mills elected to resign before further investigation of the incident was undertaken.

Clearly, Mills was unhappy with the decision he made and appears to have decided after further reflection that his resignation had been ill-advised. Nonetheless, it was his decision which he based on a deliberate and rational thought process.

APPEAL OF GERALD MILLS

Docket #91-T-7

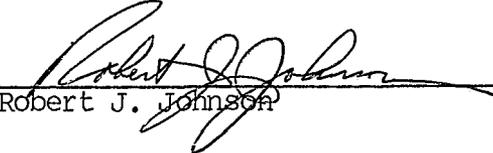
Response to Appellant's Motion for Reconsideration and Rehearing

page 3

In consideration of the foregoing, the Board voted to deny the Motion, and to affirm its decision of September 26, 1991.

THE PERSONNEL APPEALS BOARD


Mark J. Bennett


Robert J. Johnson


Lisa A. Rule

cc: Virginia A. Vogel, Director of Personnel

Michael K. Brown, Staff Attorney, Department of Corrections

Shawn J. Sullivan, Esq., Cook & Molan P.A.
P.O. Box 1464, Concord, NH 03302-1464

State of New Hampshire

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APPEAL OF GERALD MILLS Docket #91-T-7

Department of Corrections

September 26, 1991

The New Hampshire Personnel Appeals Board (Bennett, Johnson and Rule) met Wednesday, August 28, 1991, to hear the appeal of Gerald Mills, a former employee of the Department of Corrections. Mr. Mills was represented at the hearing by Attorney Shawn Sullivan. Staff Attorney Michael K. Brown appeared on behalf of the Department of Corrections,

Mr. Mills alleged that his November 21, 1990 resignation from employment was not a voluntary resignation and, for the purposes of his appeal, should therefore be treated as termination. He requested that the Board order his reinstatement with full back pay.

Mr. Brown, on behalf of the Department of Corrections, argued that the evidence would prove that Mills, facing an investigation into the presence of drug paraphernalia and the manufacture of marijuana in his home, had voluntarily resigned from service.

The appellant moved for sequestration of the witnesses, arguing that each of the witnesses would be testifying to the ~~same~~ series of events and that "justice requires that each of statement be made without the distraction of having heard the prior statements of others." (See: Appellant's Motion to Sequester, undated)

Attorney Brown objected to the Motion, arguing that the Board's hearings are intended to be public hearings, and that by sequestering the witnesses, the Board was essentially allowing the public greater access to the evidence than it was allowing his client(s), the Department of Corrections and its staff. He further argued that in order to conduct an effective cross-examination, he should be allowed to consult with his clients during the hearing for the

purpose of effective direct and cross-examination of the witnesses. The Board voted to grant Appellant's Motion to Sequester, but to allow Warden Cunningham to remain as the representative of the appointing authority.

Neither party submitted requests for findings of fact and rulings of law. Accordingly, the Board found the following:

At the time of Mills' separation from service, he was employed as a Lieutenant at the New Hampshire State Prison. Mr. Mills was originally employed by the Department of Corrections in 1987, as the department's Chief Investigator, and was responsible for initiating and conducting investigations involving both inmates and staff as well as intelligence gathering as required by the Commissioner's office. Mr. Mills' demotion from Chief Investigator to Corrections Lieutenant occurred as a result of a reduction in force, and was not related to the performance of his duties as an investigator.

On the evening of November 16, 1990, officers from the Concord Police Department presented themselves at the Mills residence and executed a search warrant issued for the purposes of determining whether or not illegal drugs were in the possession of Mills' wife. The appellant was at home at the time. In their search of the Mills residence, the police found a small marijuana plant growing on a windowsill in the house. They also retrieved a vial of seeds, roach clips, pipes and cigarette rolling papers from the bedroom Mills shared with his wife. According to Mills' testimony, his wife kept houseplants as a hobby, and had plant cuttings throughout the house. He said he had no interest in them and therefore had never noticed that one of them was a marijuana plant. When the residence was searched, and one of the plants was seized by the police, Mills said he did recognize it as marijuana, but had never noticed it before that moment. He testified that the other items seized, including the seeds and drug paraphernalia, were items he had confiscated from his daughters in the last three or four years and had simply neglected to throw away. Mills' wife was arrested. No charges were brought against Mills himself.

On Saturday morning, December 17, 1990, the appellant telephoned Nicholas Pishon, the Assistant Commissioner of Corrections to discuss the situation with him. During Mills' tenure as the senior Investigator for the Department, Pishon had been his immediate supervisor. He also considered Pishon to be a personal friend, and sought his advice on what steps he did or did not need to take in notifying the Department of the events which had occurred.

Pishon testified that he talked to Mills "like a Dutch uncle". He said he told Mills that he should be familiar with investigations since he'd served in

that capacity for several years. He suggested that Mills should have known that when an employee is involved in a situation requiring an investigation, and the employee knows that he has done something for which he can be neither excused nor exonerated, the best course of action usually would be to resign and protect his record. Pishon described Mills' work performance as "good", but claimed that Mills' "personal life was an unmitigated disaster".

During a preliminary investigation of the marijuana incident, Mills prepared a statement addressing his involvement in the incident. That statement, dated 11/20/90, indicated that Mills was unaware of the presence of the marijuana plant in his household until he saw it in the police officer's hands. He said he was aware of the seeds and drug paraphernalia because he had confiscated them from his children over the past 3 or 4 years, but had simply failed to throw the materials out. His written statement also said:

"Unfortunately, this is only an excuse. I realize from my experience that no matter what reason, I was in possession of these items since they were in my bedroom and I am legally responsible for that. With my experience as a law enforcement officer I am legally guilty of possession of marijuana. I am very embarrassed by this entire situation. I do understand the severity of this situation and if the warden or commissioner feels this is simply to [sic] damaging for me to perform the duties required of me than I am prepared to tender my resignation on request. This statement is true and correct to the best of my knowledge."

Warden Cunningham, Assistant Commissioner Pishon and Commissioner Powell all believed, on the strength of Mills' statement, that he should resign. None of them threatened him with discharge should he refuse to tender his resignation. He was informed, however, that if he did not resign a full investigation would be undertaken to determine if he had committed an offense which warranted discharge. Mills tendered his written resignation before a full investigation had been initiated.

Mills testified that Warden Cunningham had told him the Department would take "final action" if he did not resign, and that he believed that to mean he would be discharged. He said he was "quite fearful about having to go out looking for a job" saying he'd been fired. He also believed that if he did not make his resignation effective immediately, it would give him an opportunity to withdraw it prior to the effective date.

The incident involving the seizure of marijuana and drug paraphernalia from the Mills household occurred on November 16, 1990. Mills' statement was given November 20, 1990. Before giving the statement to Lt. Dugal (Investigations) Mills elected to first give the statement to Warden Cunningham and discuss the matter with him. The Warden told him that if he were not guilty of any offense, he should participate fully in an investigation of the incident and be exonerated. Otherwise, "final action" would be taken.

Apart from urinalysis to which Mills submitted voluntarily, and which tested negative for any drug use, the only investigative activity which occurred was the request that Mills complete a statement detailing the extent of his involvement in the drug charges against his wife. No investigative file was established, no case number was assigned, and no interviews were conducted. Investigator Dugal never saw the police report on the incident until the week before Mills' hearing before the Board.

On all the evidence, the Board found that Mills voluntarily submitted his letter of resignation of November 21, 1990, rather than submit to an investigation. His resignation was accepted that same date. Because he had resigned, the Department did not initiate a full investigation. Any representation of what action the Department would have taken upon a finding that he was, or believed himself to be, in possession of drugs and drug paraphernalia is only speculative, and therefore is not dispositive of this appeal.

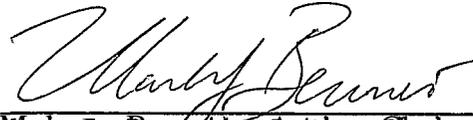
The appellant argued that he had a good work record and had not committed any offense which warranted termination. In reaching its decision in this matter, the Board found it unnecessary to make any finding with regard to any alleged offense. The appeal turns on the question of whether or not Mills' voluntarily resigned from his position. The Department freely admitted to seeking Mills' resignation. That admission alone, however, is insufficient evidence of coercion on the part of the Department of Corrections. Accordingly, the Board found that the written resignation submitted by Mills to the Department of Corrections on November 21, 1990, constituted a voluntary resignation, particularly in light of Mills familiarity with the investigative process and the frequency with which he himself in his capacity of Chief Investigator had requested resignations of other employees in circumstances similar to his own.

After considering all the evidence and testimony, as well as the applicable provisions of rule and law, the Board made the following rulings:

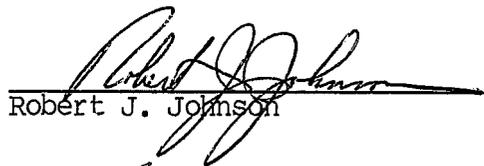
1. The Commissioner of Corrections, or his designee, was acting within his authority in accepting Mills' voluntary resignation.
2. The Department of Corrections violated no rule or law by requesting that Mills resign, since the Department had not threatened Mills with disciplinary action if he failed to comply with the request.
3. The mere fact that Mills was given an opportunity to resign rather than submit to an investigation does not constitute coercion.
4. The fact that Mills requested permission to withdraw his resignation prior to the effective date of such resignation has no bearing upon the Department's prerogative to grant or deny that request.
5. Without proof of coercion, Mills' resignation is not tantamount to a termination and the Board lacks the authority to compel the Department of Corrections to provide him the relief requested.

Accordingly, the Board voted unanimously to deny the appeal.

THE PERSONNEL APPEALS BOARD



Mark J. Bennett, Acting Chairman



Robert J. Johnson



Lisa A. Rule

cc: Virginia A. Vogel, Director of Personnel
Michael K. Brown, Esquire, Department of Corrections
Shawn Sullivan, Esquire, Cook and Molan Professional Association