

# State of New Hampshire



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

September 27, 1989

**TO:** Michael K. Brown, Staff Attorney  
New Hampshire Department of Corrections

Michael C. Reynolds, General Counsel  
State Employees' Association

Virginia A. Vogel  
Director of Personnel

Attorney General's Office  
**ATTN:** David S. Peck, Esq.  
Assistant Attorney General

**RE:** PERSONNEL APPEALS BOARD ORDER  
Appeal of Marc Nichols (Docket #89-T-5)

Attached is a copy of the Personnel Appeals Board's decision and order in the above noted appeal. The order itself is dated September 20, 1989, with the notation on the first and last pages that the date of issue is September 27, 1989.

FOR THE PERSONNEL APPEALS BOARD

A handwritten signature in cursive script that reads "Mary Ann Steele".

MARY ANN STEELE  
Executive Secretary

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# State of New Hampshire



DATE OF ISSUE: 9/27/89

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THE STATE OF NEW HAMPSHIRE

DEPARTMENT OF PERSONNEL

PERSONNEL APPEALS BOARD

Appeal of Marc Nichols

89-T-5

I. General and Procedural Background

Marc Nichols was employed by the Department of Corrections (DOC) as a full time permanent Corrections Officer I. His employment was terminated by letter dated January 25, 1989, effective that day, for allegedly failing to obey a lawful order of a superior. See, Per-A 308.03 (2) (b).

Mr. Nichols timely appealed this action to the Board by letter of February 3, 1989. Per-A 308.04. The appeal was duly entered and a hearing was scheduled for April 3, 1989. A request for special scheduling was granted in order to afford four hours for the presentation of the appeal as requested by the appellant. Per-A 204.03. Subsequently, a corrected notice of hearing was issued setting the hearing date in this matter for April 5, 1989.

Upon further review of the original hearing request, the Board voted to postpone the hearing in order to resolve certain discovery requests made by the appellant. A pre-hearing conference was scheduled for April 26, 1989, for this purpose. Per-A 202.05. Due to the length of a prior hearing on that date, no pre-hearing conference occurred; however, the parties' representatives, who were present, agreed to exchange necessary information and were advised to expect the hearing to be scheduled in July or August.

The hearing was finally scheduled for August 9, 1989 at 12:30 p.m. The Department of Corrections contacted the Board regarding a continuance due to the vacations of some of its personnel. This request was denied prior to the scheduled hearing and not raised at the hearing, which proceeded as scheduled.

## II. Appearances and the Record

Throughout the proceedings, the appellant has been represented by SEA General Counsel, Michael C. Reynolds, Esquire. The Department of Corrections was represented by Staff Attorney Michael Brown in all pre-hearing matters, and at the hearing by Ms. Viola Lunderville, of the Department of Corrections.

The record in this appeal consists of all materials, correspondence and/or pleadings received by the Department of Personnel and contained in the case file pertinent to this appeal, the tape recorded record of the proceedings at the

hearing of August 9, 1989, and one exhibit - Appellant's A, duly admitted without objection at the hearing, which is a four page statement given by Mr. Nichols to DOC investigative personnel.

III. The Hearing and Factual Findings of the Board

All testimony offered was given under oath. The parties' representatives were afforded every opportunity to present and argue their cases. The rules of evidence were generally followed. Irregularities, objections or motions are noted herein whenever necessary to explain the Board's conduct of the hearing or its rulings.

Opening statements were presented by the parties' representatives. Rumors were circulatory at the Adult Correctional Facility (the Prison) that the DOC Investigations Unit was "bugging" the work areas of DOC officers. Mr. Nichols was allegedly overheard saying that he had observed such a bugging device in the officers' briefing room. When he was asked about this, he refused to disclose the names of the officers involved in the conversation and was terminated for this insubordination.

The appellant contends that he was never willfully insubordinate, that he did not refuse to disclose any names he knew, that the alleged rumors are largely irrelevant to the case at hand, and that the allegations relating to Mr. Nichols' termination must be connected to a meeting on or about November

8, 1988, occurrences at which are claimed to be the basis for the termination.

The DOC first called Lucy Bilodeau in support of its position. Ms. Bilodeau is a Correctional Officer who was on duty on November 6, 1988 and who worked two shifts on that day. She was in the dining room between the two shifts with Mr. Nichols, whom she knew. Mr. Nichols said he had seen a microphone hanging in the officers' dining room. She was subsequently called to the Investigation Unit and provided this information about the conversation she had with Mr. Nichols.

Ms. Bilodeau indicated on cross examination that she had heard nothing about microphones or bugging devices prior to this incident, but that she did hear rumors thereafter. She indicated that Correctional Officer Gagnon, and perhaps others, were present for the conversation she related. She does not know them all as she works primarily on the second shift.

Major George Ash testified that he was aware of rumors that the Investigations Unit was bugging work areas of prison employees. He was concerned that this could create an environment which could facilitate manipulation of DOC personnel by the inmates.

Major Ash was present at an interview of Mr. Nichols by Gerald Mills, the Chief Investigator of the DOC's (internal) Investigations Unit. The Major recalls Nichols saying: "I'm not going to give up their names," in response to Mills' questions

about the identity of Nichols' interlocutors. Ash, Nichols' superior, ordered Nichols to do so. Nichols declined. Nichols did not claim that he could not recall the names or that he did not know the identity of the officers. Major Ash ordered Nichols to answer twice, but he did not, despite what the Major testified was a duty to do so.

Major Ash was a career Marine who is now a career correctional officer. He states that he would not issue an order that he believed a subordinate could not carry out. In the context of this case, he feels insubordination is a terminable offense when it consists of behavior by word or deed which is disrespectful of a superior's order.

Cross examination testimony suggested that Major Ash was not present at all of Nichols' interview with Mills. He does not recall exactly when he arrived and does not know what Nichols said before he arrived.

Referring to Appellant's Exhibit A, Page 4, and Mr. Nichols' Statement that: "I would be wary to second guess names," the testimony indicates that this was elicited after the Major talked to Nichols, and after Nichols was taken to talk to Warden Cunningham for up to one hour regarding the situation. The Major does not recall if he went to the Warden's office with Nichols. Nichols continued to work after the November 8, 1988 interview with Mills until January 25, 1989. He was not considered a security risk. His job duties were unchanged. Major Ash

recommended to the Warden that Nichols be terminated on November 8, 1988, but was without personal authority to effect the termination himself.

The Major does not know why the Warden waited until the end of January to effect the termination. Major Ash indicated that he had seen Mr. Nichols at the state inauguration in January. He was unaware that Nichols had allegedly been complaining about the situation at the DOC. According to the Major, there were no "bugging devices" installed in the prison, but there may have been microphones present in various places as part of a built-in communications system.

In response to questions from the Board (Chairman McNicholas), Major Ash indicated that he didn't know whether or not Nichols had indeed found any microphones. The purpose of the investigation was to find the source of the rumors that bugging devices were installed in officers' work areas. Ash says that the microphones are part of a two-way ADT intercom system with overhead microphones, that the system did not function well, and that there were no microphones in the briefing room, where the officers congregate.

The appellant testified in his own behalf. He has received average or better evaluations since coming to the DOC in October of 1987. He worked for ten years for the New York State DOC. He is now working for First Security Systems in Lowell, Massachusetts, but corrections is his chosen career. He was

called in from home for the November 8, 1988 interview with Mills. Investigators Holland and Barrett were also there, and Ms. Bilodeau was leaving as he arrived. Major Ash went into the interview with him, to his recollection. Nichols states that he told the investigators that he didn't remember the names of his interlocutors and didn't want to "second guess" their names. He says Appellant's Exhibit A is a summary of the interview.

Nichols relates that he had heard rumors about a microphone in the briefing room from a source he didn't recall, and that he told Major Ash that it would be wrong to speculate about the identity of the source.

After the interview had progressed for a time, Roy Holland and Gerald Mills took Nichols to the Warden's office. The Warden told him to tell the names to the investigators within ten minutes or be terminated. Nichols told the Warden he didn't know the names, and he was returned to the investigations room to complete the interview. When the interview was completed, he was advised that the investigation would be ongoing and that he was not terminated, as yet. The last three questions on Appellant's Exhibit A were completed after the meeting with Warden Cunningham. Nichols says he would have given up the names if he had remembered them.

Nichols says that he spoke to Major Ash about receiving overtime for his attendance at the investigative interview of November 8, 1988, and finally did receive it after a call to the

State Employee's Association, which interceded on his behalf. Nichols reports that Ash told him he would get a letter of warning out of the incident. Nichols says he would have appealed such a warning. He also says that his corporal told him that termination would be unlikely to occur right around the holidays, and that Ms. Bilodeau was actually sitting several tables away during the conversation of November 6, 1988. He contends that he wasn't sure with whom he was speaking during the relevant conversation on November 6, 1988.

Turning to Appellant's Exhibit A (Page 33, Nichols says he reported the microphone he discovered to Corporal Cook who told him that the report of the microphone would be turned over to the Investigations Unit. Mr. Nichols relates that he thought that the Major's order was direct and he felt his answer violated it in some way at the time of the incident.

At the close of the evidence, Board Chairman McNicholas indicated that he represents Mrs. Dennis Ammerman in an unrelated action involving Dennis Ammerman who was referred to in the testimony as the second person to whom Nichols reported the discovery of a microphone. Neither party objects to Mr. McNicholas' involvement in the instant appeal.

Lastly, the Board gave some consideration to Appellant's Exhibit A, which summarizes Mr. Nichols' discovery of two microphones, a portion of the investigation and conveys a sense of the circumstances of this termination.

III. Rulings, Order and Comments of the Board

On all the evidence in this case, the Board is inclined to believe that Correctional Officer Marc Nichols is as likely the source of the rumors being investigated by the DOC Investigation Unit, due to his "discovery" of certain microphones, as he is a propagator of the rumors in question. The focus of the investigation was the propagation of rumors, and it appears, not so much the truth or falsity of underlying facts, or the development of a means of putting these rumors to bed.

In an institutional setting the potentially injurious affects of unfounded rumors can be envisioned by the Board, as can be a wider range of management solutions thereto than investigations of the type presenting itself here. We leave those considerations to appropriate management personnel of the DOC, but note that the situation out of which this appeal arises need be understood in order to resolve the appeal fairly.

Similarly, the Board is inclined to feel that Mr. Nichols remembered the names so fervently sought by the investigators and would not give them up. Mr. Nichols was thus, in some sense, insubordinate to his superiors and did disobey an order communicated to him by Major Ash.

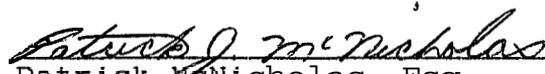
The appellant argues through counsel that the DOC has treated the case as a mandatory discharge case where optional discharge is in fact the pertinent standard remedy. There is some appeal to this argument. However, the DOC cites the

Department of Personnel's optional discharge rule in the January 25, 1989 letter of termination, and we treat the case accordingly. Per-A 308.03 (2)(b).

We are further persuaded on all the evidence that the appellant has met his burden, and that discharge is not the option warranted under the facts elucidated here. Accordingly, the Board orders that the appellant be reinstated to his former position with the Department of Corrections as of the date hereof. He is awarded all benefits and back pay he may have lost, less wages and benefits accrued from other employment in which he has engaged in the meantime, and less an additional two weeks of pay at the rate pertinent to the time of his discharge, on account of a two-week suspension which we order instead of the discharge as, in our view, that course of disciplinary action would have been appropriate in light of the particular facts of this case.

10 September 1989

THE PERSONNEL APPEALS BOARD

  
Patrick McNicholas, Esq.  
Chairman of the Board

  
Mark J. Bennett, Esq.  
Sitting as Chair for the  
Hearing

DATE OF ISSUE: 9/27/89

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Robert Johnson, Member