

State of New Hampshire

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

APPEAL OF ROBERT PARKER  
Treasury Department  
Docket #91-T-13

September 26, 1991

The New Hampshire Personnel Appeals Board (Bennett and Johnson) met Wednesday, September 11, 1991, to consider the Motion for Reconsideration and Rehearing filed by the Treasury Department in the above-captioned appeal. Having considered that Motion in conjunction with the Board's September 13, 1991 Order reinstating the appellant, the Board voted to deny the Treasury Department's Motion.

The Board voted to affirm its earlier order, finding that it had appropriately applied that evidence which was offered by the parties in determining that the appellant had met his burden of proving that he was not the clearly established aggressor in the altercation which resulted in his discharge from employment. While the Board might have decided differently if the State had offered evidence of a pattern of aggression, no such evidence was offered or suggested by the Treasury Department.

THE PERSONNEL APPEALS BOARD

  
\_\_\_\_\_  
Mark J. Bennett

  
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Robert J. Johnson

cc: Virginia A. Vogel, Director of Personnel  
Georgie Thomas, State Treasurer  
Robert Parker, RFD #1 Box 3756, Green Drive, Northfield, NH 03276

# State of New Hampshire

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## PERSONNEL APPEALS BOARD

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

### APPEAL OF ROBERT PARKER

Docket #91-T-13  
Department of Treasury

September 3, 1991

The New Hampshire Personnel Appeals Board (Bennett, Johnson and Rule) met Wednesday, August 14, 1991, to hear the termination appeal of Robert Parker, a former employee of the Treasury Department. Mr. Parker appeared pro se. State Treasurer, Georgie Thomas, appeared on behalf of the agency. Eric Binette, a current employee of the Department also appeared to offer sworn testimony in support of Mr. Parker's discharge from employment.

Mr. Parker's letter of appeal, dated March 5, 1991, alleged that he had been struck by Eric Binette twice during an altercation with Eric Binette, that he had erroneously been identified as the aggressor in this incident, and that having been so identified, was discharged from employment. He argued that since he had been struck first during the altercation, he should not have been discharged.

The record in this matter consists of Mr. Parker's March 5, 1991 letter of appeal, the Board's March 18, 1991 docketing notice, the Board's July 26, 1991 order of notice, Agency Exhibit 1 (2 photographs of injuries sustained by Mr. Binette in the altercation), Appellant's Exhibit 1 (a hand-drawn diagram of the floor plan in the Treasury Department), and the tape recording of the hearing on the merits. Neither the letters of suspension issued to Parker and Binette, nor the appellant's letter of discharge to which the parties referred during the hearing were offered into evidence.

Inasmuch as neither party submitted proposed findings of fact and rulings of law, the Board found the following:

The incident giving rise to Mr. Parker's discharge from employment was an altercation between Mr. Parker and Mr. Binette which occurred on February 11, 1991, in the offices of the Treasury Department, at approximately 7:30 a.m. before any of the other employees of that Department had arrived for work. Mr. Binette and Mr. Parker admit that they do not like one another. Mr.

Binette was working at the fax machine when Mr. Parker arrived and asked him what he was sending or receiving by fax at that hour of the morning. Mr. Binette told the appellant it was none of his business. The two men exchanged profanities and epithets, and a brief physical altercation ensued. Mr. Binette's injuries were partially documented by photographs taken of him at his home after he had received treatment at an emergency medical facility. Mr. Parker's injuries, as described by him, were undocumented by photographic evidence.

Following the incident, Mr. Binette telephoned the Concord Police Department to press charges against Mr. Parker for assault. Because the altercation occurred in a State office building, the matter was investigated by the State Police. Both gentlemen were subsequently charged with simple assault.

Upon learning of the incident, the Treasury Department took statements from all the employees of the office, including Mr. Binette and Mr. Parker. The Department then notified both gentlemen that they were to be suspended indefinitely pending an investigation to determine which of them had been the aggressor in the incident and subject, therefore, to immediate, mandatory discharge under the provisions of the Rules of the Division of Personnel.

Per 308.03 (a)(1) of the Rules of the Division of Personnel provides for immediate, mandatory discharge, "...in cases such as, but not necessarily limited to, those listed below, provided that the offense in question is clearly established." "Fighting or attempting to injure others (aggressor only)" is one of the listed offenses. [See: Per 308.03(a)(1)d]

There is no dispute that the appellant was engaged in "fighting and attempting to injure others". There was insufficient evidence presented, however, to persuade the Board that it was "clearly established" who had been the aggressor in this altercation. Accordingly, the Board voted to grant Mr. Parker's appeal in part.

Knowing that discharge decisions are not lightly made, the Board is generally reluctant to over-turn such orders of an appointing authority. Additionally, the Board is mindful of the fact that in appeals of a disciplinary nature, the appellant bears the burden of proof. However, in the instant appeal, the Department failed to offer sufficient credible evidence to support a finding that Mr. Parker was the aggressor, a feature of the agency's burden of going forward.

There were no eye witnesses to the incident other than the two employees who were fighting. The Department might have offered credible documentary or testimonial evidence to support a finding that the appellant had exhibited a pattern or aggressive or antagonistic behavior towards Mr. Binette sufficient to find that Mr. Parker was the "aggressor", even if it could not prove that Mr. Parker threw the first punch. Other than Mr. Binette's testimony, however, which was in direct contradiction to that offered by Mr. Parker, no such evidence was offered.

Despite Mr. Parker's insistence that his involvement in the fight was simply self-defense, he did admit that he had used a highly inflammatory epithet in addressing Mr. Binette before the altercation. He also admitted that when he realized that Mr. Binette was injured, he stepped back and asked Mr. Binette if he'd "had enough". Although the appellant characterized this remark as meaning that they should "end this foolishness", the question suggests instead that Mr. Parker knew he had the upper hand in the fight and had an opportunity to remove himself from the scene rather than engage in further physical contact. He did not. While the Board found the entire incident to be outrageous, it specifically found that Mr. Parker's behavior in failing to remove himself from the scene at the first possible opportunity to constituted blatantly unprofessional behavior manifestly departing from the pertinent expected work standard.

Accordingly, on all the facts, the Board voted to order Mr. Parker reinstated to his position of Computer Operator I, subject to a six month suspension without pay, benefits, or accrual of leave. Further, the Board voted to put the parties on notice that any further instance of fighting between them may be deemed cause for immediate dismissal.

THE PERSONNEL APPEALS BOARD



Mark J. Bennett



Robert J. Johnson



Lisa A. Rule

cc: Robert Parker  
Georgie Thomas, State Treasurer  
Virginia A. Vogel, Director of Personnel