

State of New Hampshire



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

Appeal of Randall Patrick

Docket #00-T-16

Department of Corrections

October 27, 2000

The New Hampshire Personnel Appeals Board (Wood, Rule and Jolmson) met on Wednesday, July 12, 2000 and August 16, 2000 to hear the appeal of Randall Patrick, a former employee of the Department of Corrections. Mr. Patrick, who was represented at the hearing by SEA General Counsel Michael Reynolds, was appealing his termination from employment as a Corrections Officer, effective April 20, 2000, on charges that he violated the State's Sexual Harassment Policy and Corrections Policy and Procedure Directives 2.39 and 2.16 III.F. Attorney John Vinson appeared on behalf of the Department of Corrections.

The record of the hearing in this matter consists of pleadings submitted by the parties prior to the hearing, the audio tape recording of the hearing on the merits, notices and orders issued by the Board, and documents admitted into evidence as follows:

State's Exhibits:

1. Mi. Patrick's yearly performance evaluation dated 8/2/99
2. Mr. Patrick's yearly performance evaluation dated 8/3/98
3. Mr. Patrick's yearly performance evaluation dated 8/11/97
4. Mr. Patrick's yearly performance evaluation dated 9/13/95
5. Two written statements dated 2/9/96 given by Mr. Patrick to DOC Investigations (7 pages)"
6. Letter from Warden Cunningham to Mi. Patrick dated 2/2/96*
7. Letter from Warden Cunningham to Mr. Patrick dated 2/23/96*

8. Letter from Warden Cunningham to Randall Patrick dated 8/6/96
9. Statement of counseling 7/8/99 from Dominick Tarallo (WITHDRAWN)
10. Mr. Patrick's acknowledgment and receipt of harassment policy
11. Letter to Mr. Patrick from Warden Cunningham, dated 4/20/00
12. DOC PPD 2.39 Sexual Harassment dated 8/1/99
13. NH DOC PPD 2.16 Rules and Guidance, dated 8/15/98
14. Statement form dated 4/15/2000 from Aileen Jacques
15. Statement form dated 4/16/2000 from Officers Patrick, Robinson and Sullivan

*Admitted for purposes of showing that Mr. Patrick was given a specific written explanation of the possibility of termination in the event of a subsequent harassment offense.

Mr. Reynolds made a motion to have the witnesses sequestered. That motion was granted and the witnesses were instructed not to discuss their testimony with anyone until the case had been concluded and a final decision issued. The following persons gave sworn testimony:

Former Warden Michael J. Cunningham
Randall N. Patrick
Gerald Haney
Aileen Jacques
Jonathan Topham
Roy Tripp
Stephen Sullivan
Daniel Turgeon

Summary of Events Leading Up to Termination

On the morning of April 15, 2000, Corrections Officers Patrick, Jacques, Johnson, Tripp and Sullivan were assigned to work in the kitchen at the State Prison. As the senior officer on duty, Officer Patrick was designated as the Officer In Charge. Officer Jacques was the "floater" on the

shift and remarked to her fellow officers it meant she didn't have to do anything. Officer Patrick said it meant she was filling in for any missing staff, and that she was to work the floor and control room and would "share keys" with him. Ms. Jacques refused his order and followed Officers Johnson and Tripp "upstairs." Officer Patrick threatened to write her up for disobeying orders. She responded that she would take it up with the sergeant the following day. Later in the shift, the unit received notice that assistance might be needed in other work units. Officer Patrick called the shift commander and told him that the kitchen was fully staffed, and that Officer Jacques was available for duty in another work area if necessary.

Sgt. Johnson ordered Officers Patrick and Jacques to complete written statements describing the incident, and told the two officers to stay away from one another. Sgt. Johnson also met with Officer Jacques and Officer Patrick on April 16, 2000 to discuss the incident.

During her meeting with Sgt. Johnson, Ms. Jacques complained of the way she had been treated by the staff, and complained that whenever she reported problems to the Corporal or to the Sergeant, they ignored her and told her it was "no big deal." When Sgt. Robinson said that it was important for all of the officers to act professionally, Ms. Jacques remarked that it wasn't very professional when Officer Patrick patted or slapped her on the buttocks "every time he came into the bubble" during her first few weeks assigned to the kitchen. Although Ms. Jacques later said in her written statement that she did not want to make an official complaint about Officer Patrick's conduct, Sgt. Robinson reported the information to Captain Beltrani who later relayed the substance of Ms. Jacques' remarks to his superiors.

On the morning of April 20, 2000, Officer Patrick was called to the Warden's office and was advised that he was being suspended with pay pending the outcome of an investigation. He received a copy of Ms. Jacques' statement containing allegations about his conduct. He stated to the Warden something to the effect of, "This is bogus; she's just using her silver bullet." On the advice of Daniel Turgeon, another Corrections employee who accompanied the appellant to the meeting, Officer Patrick made no other specific response to the allegations, expecting that he

would have the opportunity to respond during the investigation. The appellant was escorted out of the facility and left for home.

Approximately an hour and a half later, Officer Patrick received a call at his home to return to the prison to meet with Warden Cunningham. Warden Cunningham informed Officer Patrick that his investigation into Officer Patrick's alleged misconduct was concluded and that he found Ms. Jacques' report to be credible. He noted that Officer Patrick had been suspended some years earlier on a charge of sexual harassment, and that he had been warned that any further incident(s) would result in his tennination. Warden Cunningham informed Officer Patrick that his employment was terminated immediately, and that a written notice of tennination would be mailed to him.

Having considered the evidence and arguments, the Board made the following findings of fact and rulings of law:

1. Warden Cunningham disciplined Officer Patrick in 1996 for sexual harassment, and made the appellant aware that any other incident of such harassment would result in his termination from employment.
2. Warden Cunningham did not recall how he learned of the Jacques complaint. However, once it had come to his attention that Ms. Jacques had reported being "patted" several times by Officer Patrick, he met with Iier to discuss the alleged behavior.
3. It was not so much the details of Ms. Jacques' report, but her emotional state and general demeanor that persuaded Warden Cunningham that her report was credible.
4. Warden Cunningham was not surprised that it had taken more than a year for Ms. Jacques to report Officer Patrick's behavior since, in his opinion, females working in the prison are often fearful of retaliation or of being ostracized by fellow officers.
5. Warden Cunningham did not conduct an interview with Officer Patrick prior to his decision to terminate Officer Patrick's employment.

6. Warden Cunningham considered the alleged conduct to be similar to that for which Officer Patrick had been disciplined in 1996, and he determined that it was more likely than not that Officer Patrick had committed the alleged offense.
7. Warden Cunningham did not question any of the officers' co-workers, nor did he recall reading Officer Patrick's statement prior to making his decision to terminate the appellant.
8. Warden Cunningham gave no weight to Officer Patrick's statement that Ms. Jacques was "using her silver bullet," making a complaint in order to avoid discipline for her own misconduct.
9. Warden Cunningham considered Officer Patrick's remark about Ms. Jacques to be typical of a "predator" trying to blame the victim.
10. Officer Patrick worked as a Corrections Officer for approximately nine and a half years, and considered his performance during that time to be average.
11. Officer Patrick was suspended without pay in 1996 for violation of the State's Sexual Harassment Policy. He did not appeal the suspension and understood that a future charge of sexual harassment could result in his termination from employment.
12. Officer Patrick's understanding of what constituted sexual harassment has changed considerably over the past few years.
13. Officer Patrick believes that sexual harassment is described as any unwanted or unwelcome behavior of a sexual nature.
14. A few weeks after Ms. Jacques started working in the prison kitchen, while she and Officer Patrick were working in the Control Room reviewing work procedures, Officer Patrick began teasing Ms. Jacques about some mistakes that she made.
15. Ms. Jacques hit Officer Patrick in the arm, and he hit her back, striking her on the hip or buttocks.
16. Officer Patrick hit Officer Jacques harder than he had intended, and he believed he might have bruised her.
17. Officer Patrick did not believe that he engaged in sexual harassment by slapping Ms. Jacques on the buttocks, because it occurred in the course of horseplay that she had initiated by first hitting him.

18. Officer Jacques never indicated that any of Officer Patrick's conduct was offensive to her, and she never took steps to avoid Officer Patrick while they were working together.
19. Ms. Jacques initiated and participated in a number of conversations with Officer Patrick and others about her sex life.
20. In or around January, 2000, while having coffee with two fellow officers at Friendly's Restaurant, Ms. Jacques remarked that Officer Patrick had "slapped her on the butt."
21. Lt. Haney, one of the officers having coffee with Ms. Jacques, recalled the remark but made no report of it as he considered it a one-time event that Ms. Jacques had not characterized as any kind of harassment, nor suggest by her behavior that she felt she had been harassed.
22. Officer Jacques did confide in Lt. Haney from time to time about difficulties in the work place, but she did not suggest that she was being harassed.
23. Lt. Haney never observed any problems between Officer Jacques and Officer Patrick, nor did he ever witness Ms. Jacques avoiding Officer Patrick.
24. There was no further mention of the slapping incident until after Officer Patrick had threatened to write her up for refusing to obey an order.
25. Officer Patrick was serving as the OIC on the morning of April 15, 2000, and ordered Ms. Jacques to take keys and a radio to work "the floor."
26. Officer Jacques refused his directive and followed two of the other officers upstairs to another part of the unit.
27. Officer Patrick threatened to write her up, and Officer Jacques said they'd take it up with the Sergeant.
28. The following day, Officer Patrick met with his Sergeant and was told to write a statement summarizing the incident. The Sergeant told him not to talk to Ms. Jacques.
29. Ms. Jacques also met with her Sergeant and completed a written statement summarizing the events of April 15, 2000. Ms. Jacques included in her statement, and mentioned in her discussion with the Sergeant, that Officer Patrick had hit her on the buttocks.
30. Officer Patrick was unaware of Ms. Jacques' charges until April 20, 2000, when he was summoned to the Warden's Office.

31. Ms. Jacques has worked for the Department of Corrections as a Corrections Officer for approximately six years, and has been acquainted with the appellant throughout her employment.
32. Ms. Jacques admits to behavior with Officer Patrick and others that she would describe as "highly sexual," including: discussing with Officer Patrick and other officers her own sexual relations and activities; making a cookie in the shape of a penis and giving it to a fellow officer as a going away present; giving another officer a pacifier in the shape of a penis; and sending a pair of panties to another officer as a "last joke."
33. Ms. Jacques and Officer Patrick had a good working relationship, although she complained that he sometimes left the floor unattended, and engaged in what she considered to be dangerous horseplay with the inmates.
34. On April 15, 2000, while Ms. Jacques was assigned as "floater" in the kitchen, she became angry with Officer Patrick, who was functioning as the Officer in Charge, when he told her to take floor keys and a radio rather than following Officers Johnson and Tripp "upstairs."
35. Ms. Jacques also was angry when she learned that Officer Patrick had offered her as the "floater" to take an assignment in another unit if necessary.
36. When Ms. Jacques met with Sergeant Johnson on April 16, 2000, the Sergeant told her to act like a professional and she responded, "Do you think it's professional for Randy to slap me on the butt?"
37. Ms. Jacques did not intend to file a formal complaint of sexual harassment.
38. Mr. Topham, a former employee of the Department of Corrections, had a personal relationship with Ms. Jacques while both were employed by the Department of Corrections.
39. While Mr. Topham and Ms. Jacques were living together, Ms. Jacques made threats of physical violence against Mr. Topham's ex-wife.
40. Roy Tripp, another officer assigned to the kitchen, observed the interaction between Officer Patrick and Ms. Jacques on the morning of April 15, 2000, and he believed that Ms. Jacques had refused to follow a direct order.
41. Officer Tripp likes Officer Patrick, but believes that Officer Patrick is not always mature or professional in his conduct around inmates or fellow officers. Because of that, he would not characterize Officer Patrick as a "good officer."

42. Officer Tripp believes Ms. Jacques is a good officer, but he also believes that she places herself at risk by not being sufficiently careful around the prisoners.
43. According to Officer Tripp, everyone "fools around" in the Itichen.
44. Officer Sullivan observed the incident between Officers Patrick and Jacques on the morning of April 15,2000, and characterized Ms. Jacques' behavior as refusal of a direct order.
45. After Officer Patrick's termination, Ms. Jacques accused Officer Sullivan of discriminating against her and she charged Officer Sullivan with harassment.
46. Ms. Jacques told Officer Sullivan that if Sgt. Robinson didn't watch his step, "he'd be next." Shortly thereafter, Ms. Jacques filed harassment charges against him as well.
47. Ms. Jacques admits that she engaged in sexually explicit conversations with Officer Patrick and others, and that she had said "you can't sexually harass the willing."

Standard of Review

"(a) Dismissal shall be considered the most severe form of discipline. An appointing authority shall be authorized to take the most severe form of discipline by immediately dismissing an employee without warning for offenses such as but not necessarily limited to... (19) Sexual harassment" [Rules of the Division of Personnel, Per 1001.08 Dismissal].

Rulings of Law

- A. "The policy of the NH Department of Corrections is to prevent sexual harassment in the work place. Acts that constitute sexual harassment include, but are not limited to, unwelcome sexual advances, suggestions or requests for sexual favors and other verbal or physical conduct of a sexual nature when: A. Submission to such conduct is either explicitly or implicitly a term or condition of an individual's employment..." [DOC PPD 2.39 III, A].
- B. "The following definition of sexual harassment is intended to describe the conduct prohibited by this policy: Sexual Harassment: an unwelcome sexual advance, a request

for a sexual favor, or other verbal or physical conduct of a sexual nature constitutes sexual harassment when (1) submission to such conduct is made either explicitly or (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual or (3) such conduct has the purpose or effect of or creating an intimidating, hostile or offensive work environment... Other sexually harassing conduct, whether committed by supervisory or non-supervisory personnel, is also prohibited. Such conduct includes, but is not limited to: repeated verbal abuse of a sexual nature; repeated offensive sexual flirtation; graphic verbal comments about an individual's body; sexually degrading words to describe an individual; repeated brushing, touching, patting, or pinching an individual's body; sexually explicit gestures; the display in the workplace of sexually suggestive, sexually demeaning, or pornographic objects, pictures, posters or cartoons; inquiring or commenting about sexual conduct or sexual orientation or preferences; or verbal abuse consistently targeted at only one sex, even if the content of the abuse is not sexual" [State's Policy on Sexual Harassment, part II].

- C. "Complaints of sexual harassment or of retaliation for making such complaints shall be accepted, either in writing or verbally, by the Director of the Division of Personnel. Complaints may also be accepted by a supervisor, who shall then refer the complaint to the Director. In either case, the Director of Personnel shall then assign a human resources representative from the complainant's agency or from the Division of Personnel as investigator of the complaint..." [State's Policy on Sexual Harassment, part III, A].
- D. "All complaints shall be investigated expeditiously by the investigator. All interested persons shall be afforded an opportunity to submit information relevant to the complaint" [State's Policy on Sexual Harassment].
- E. "Investigations shall be completed and a written report issued within thirty (30) days of receipt of the complaint. The investigator's report shall be disclosed to the complainant. If the investigator makes a determination that the complaint was proven by a

preponderance of the evidence, the investigator shall disclose the report to the agency head along with a recommendation for corrective and/or disciplinary action. The recommendation shall be based on the severity of the offense which shall be determined according to the totality of the circumstances. The intensity, frequency, and duration of the prohibited conduct shall be considered by the investigator. Other factors may include the extent to which the misconduct, however minor, may serve to isolate, limit, intimidate or otherwise increase the difficulties of job performance or atmosphere in the workplace for the complainant" [State's Policy on Sexual Harassment, part III, B].

Decision and Order

Having carefully considered the evidence and argument offered by the parties, and in light of the above findings of fact and rulings of law, the Board voted unanimously to GRANT the Appeal of Randall N. Patrick, ordering him reinstated to his position as a Corrections Officer.

Although Warden Cunningham characterized Officer Patrick as a predator and Ms. Jacques as a victim, the fact remains that Ms. Jacques frequently engaged in extremely explicit discussions of a sexual nature with Officer Patrick about her sex life and her sexual preferences. She admitted that she made and brought to work cookies in the shape of a penis, which she apparently distributed to her fellow officers during a shift briefing. She admitted that she gave a male officer a pacifier in the shape of a penis. She also admitted that she sent another male officer a pair of panties. Although the slapping incident with Officer Patrick was inappropriate and might have been annoying, there is nothing whatsoever to suggest that it constituted "physical conduct of a sexual nature when (1) submission to such conduct is made either explicitly or (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual or (3) such conduct has the purpose or effect of or creating an intimidating, hostile or offensive working environment..." as described by the State's Policy on Sexual Harassment. Nor was there credible evidence that there were repeated incidents of inappropriate touching.

There is ample evidence of immature and unprofessional behavior on the appellant's part. However, the evidence does not support the charge that the appellant sexually harassed Ms. Jacques, nor does it support a finding that the appellant violated Department of Corrections PPD 2.39 III,A, or the State's Policy on Sexual Harassment.

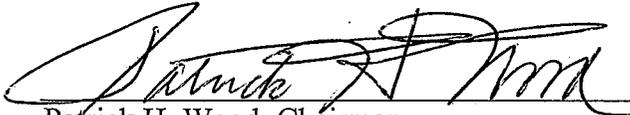
Despite its reliance on the State's and the department's sexual harassment policies as a basis for Officer Patrick's termination from employment, the Department of Corrections effected that termination without conducting any meaningful investigation of the facts surrounding the alleged misconduct. According to the State's policy, allegations of sexual harassment are to be referred to the Director of Personnel who, in turn, assigns a human resources representative from the Division of Personnel or from the complainant's agency to investigate the complaint. During the course of the investigation, all interested persons are to be afforded an opportunity to submit information relevant to the complaint. Based upon the information gathered during the course of the investigation, the investigator then submits a report and, when appropriate, a recommendation for corrective and/or disciplinary action, taking into consideration the severity of the offense in light of all the circumstances surrounding the alleged conduct, as well as the intensity, frequency, and duration of any prohibited conduct.

In this case, there was no investigation and no opportunity for Mr. Patrick to make investigators aware of all the circumstances, including Ms. Jacques' conduct, surrounding the alleged offense. In fact, Warden Cunningham admits that he made the decision to terminate Officer Patrick's employment without even reading the appellant's statement. Simply put, the evidence presented by the parties at the hearing does not support the State's allegation that Officer Patrick violated the State's or the Department's policies on Sexual Harassment. Accordingly, Officer Patrick's termination under the provisions of Per 1001.08 can not be sustained.

Officer Patrick is hereby ordered reinstated to his former position classification as a Corrections Officer. Such reinstatement shall occur without loss of seniority, status, or pay under the conditions set forth in RSA 21-I:58. Officer Patrick's reinstatement shall occur within 30 calendar days of the date of this decision, on a date and time mutually agreeable to the parties.

The Department of Corrections may exercise its discretion, however, in determining the unit and shift to which the appellant shall be assigned upon his reinstatement.

THE PERSONNEL APPEALS BOARD


Patrick H. Wood, Chairman


Lisa A. Rule, Commissioner


Robert J. Johnson, Commissioner

cc: Thomas F. Manning, Director of Personnel, 25 Capitol St., Concord, NH 03301
Atty. Michael C. Reynolds, SEA General Counsel, PO Box 3303
Atty. John Vinson, Corrections Counsel, 105 Pleasant St., Concord, NH 03301