

# State of New Hampshire



## PERSONNEL APPEALS BOARD

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

### *Appeal of Artziro Reynoso*

*Docket #2003-T-004*

*Department of Health and Human Services*

*March 21, 2003*

The New Hampshire Personnel Appeals Board (Wood, Johnson and Urban) met on November 6 and December 11, 2002, under the authority of RSA 21-I:58, to hear the appeal of Arturo Reynoso, a former employee of the Department of Health and Human Services, Division for Children, Youth and Families. The appellant was represented at the hearing by SEA General Counsel Michael Reynolds and was appealing his termination from employment effective July 25, 2002 upon receipt of a third written warning for failing to meet the work standard. Legal Coordinator Rogers Lang appeared on behalf of the Department of Health and Human Services.

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

#### State's Exhibits

1. 1<sup>st</sup> Work Plan to Arturo Reynoso April, 9, 2002
2. Letter of Counseling to Arturo Reynoso April 26, 2002
3. 1<sup>st</sup> Letter of Warning to Arturo Reynoso May 21, 2002
4. 2<sup>nd</sup> Work Plan to Arturo Reynoso May 21, 2002
5. 2<sup>nd</sup> Letter of Warning to Arturo Reynoso June 26, 2002
6. 3<sup>rd</sup> Work Plan to Arturo Reynoso June 26, 2002

7. 3<sup>rd</sup> Letter of Warning to Arturo Reynoso July 23, 2002
8. Letter to Arturo Reynoso July 23, 2002 concerning termination
9. Letter of Dismissal to Arturo Reynoso July 25, 2002
10. Report of Manchester District Office Family Services Placement Case Review with explanatory material
11. Affidavit of Susan Desmet dated November 4, 2002
12. Performance Evaluation for Arturo Reynoso dated October 1, 2001

Appellant's Exhibits

- A. Undated three-page letter to Commissioner Donald Shumway from employees in the Manchester District Office
- B. July 12, 2002 letter to Commissioner Donald Shumway from employees in the Manchester District Office
- C. Excerpts from Driving Fear out of the Workplace: Creating the High-Trust, High-Performance Organization, Ryan, Kathleen D., Oestreich, Daniel K.
- D. December 6, 2000 e-mail message from Kathy Minaert to Joan Whitfield

The following persons gave sworn testimony:

Arturo Reynoso	Joyce McKinnon
Susan Marino	Gail Meinhold
Germano Martins	Sharon Face
Maggie Bishop	Russan Chester-Niles
Karin Strand-Pelich	

The Board held the record of the hearing open until 4:00 p.m. on Wednesday, December 18, 2002 in order to allow the parties time in which to prepare and submit their closing arguments in writing.

### Position of the Parties

In closing arguments received by the Board on December 18, 2002, SEA General Counsel Michael Reynolds argued that DCYF hired the appellant "for the express purpose of putting his experience and ideas into effect at this previously under-performing district office." He contended that the agency never raised concerns about the appellant's performance until "he began challenging the Borg-like authority structure of the organization." Attorney Reynolds admitted that the appellant openly opposed the administration's management Wyle, and argued that the appellant's relationship with management began to deteriorate when he challenged "the methodologies utilized by DCYF in a particular employee termination." Attorney Reynolds characterized the warnings and work plans that DCYF developed for the appellant as "part of the plan to get rid of this troublemaker who wanted to begin a new management paradigm at DCYF, which they perceived as threatening their very power base."

Attorney Reynolds characterized the work plans designed by DCYF as devices designed simply to harass the appellant. He also argued that the appellant's supervisors knew that the appellant "would have to skimp in the more substantive areas if he were to comply with these unnecessary written directives." Attorney Reynolds admitted that the appellant never produced any of the written reports that his supervisors demanded, but insisted that the appellant did fulfill the substantive requirements outlined in plans. He argued that the Board should reject the notion that the appellant's failure to comply with these unreasonable technical requirements "was sufficient to justify dismissing him from his position."

In closing arguments received by the Board on December 17, 2002, Attorney Rogers Lang argued that the State gave the appellant fair notice of what it considered deficiencies in his work performance and provided ample opportunity for him to correct the problems his supervisors had identified. He argued that the appellant "steadfastly refused to provide any of the documentation, which he was instructed to create, maintain, and provide to his superiors," and asserted that the appellant failed to "make any real effort to comply, [or] request any modification of the work plan."

Attorney Lang argued that an April 2002 Case Review of Family Services Placements in the Manchester District Office "revealed serious failures to comply with DCYF policy and other legal requirements in very many of the cases reviewed." He indicated that the deficiencies were "all the more striking in view of prior assurances by Mr. Reynoso that all was well and that the Office would pass the Review with flying colors." Attorney Lang argued that in order to apprise the appellant of those deficiencies and monitor the district office's progress in correcting them, the agency issued a counseling memo to the appellant and devised a work plan to assist the appellant in addressing those deficiencies. He argued that regular reports are essential to "the orderly function of any sizable organization" and the agency reasonably expected the appellant to report on his and his subordinates' weekly activities.

Attorney Lang argued that the State employed a series of performance reviews, work plans and written warnings in an effort to persuade the appellant to take corrective action and document the steps he was taking to improve performance in the Manchester District Office. He argued that the appellant's co-workers and managers continually urged the appellant to comply, noting that in one instance, Program Manager Germano Martins offered to assist by creating a computerized format that the appellant could use to submit his reports. He argued that the appellant refused that assistance and refused to submit his reports, knowing full well that such refusal ultimately could lead to his dismissal.

After considered the evidence and argument offered by the parties, the Board made findings of fact and rulings of law as set forth below. Many of the material facts are not in dispute.

#### Findings of Fact

1. The appellant was hired by the Department of Health and Human Services in November 2000 to serve as the Manchester District Office Supervisor for the Division for Children, Youth and Families. He held that position until his dismissal from employment on July 23, 2002. As the Manchester DCYF Supervisor, the appellant was responsible for supervising a staff of twenty, including assessment workers, family service workers and three DCYF Coordinators/Assistant Supervisors.

2. In a December 6, 2000 e-mail message to DCYF Administrator Joan Whitfield (Appellant's Exhibit D), Program Manager Kathy Minaert described the appellant as "doing a great job in the rebuilding of the structure [within the Manchester District Office]." She listed several tasks that the appellant had completed during his first few weeks on the job and explained several goals she and the appellant had set for staff.
3. In an initial performance evaluation dated October 2, 2001, the appellant was rated as meeting expectations in all categories, although his supervisor also identified concerns related to "Management of Subordinates," noting that because the appellant was new to his position, he met expectations. "However," she noted, "as he moves into his second year as District Office Supervisor, he will need to more clearly define the above expectations with his staff..."
4. During the week of April 1, 2002, as part of a system-wide DCYF compliance audit, the Manchester District Office was scheduled for a review of 100% of its cases in out-of-home placements. The appellant was notified of the review at least 30 days before it was scheduled to begin. He assured his supervisors that the files were in good order and the review would be successful.
5. The case review began on April 3, 2002. The reviewers reported that "Lack of supervisory monitoring and oversight of cases was found in several areas" (State's Exhibit #10). With the exception of one worker's records, the files were unorganized, documents were missing from the files, case records were difficult to locate at the various work stations, and Bridges contact logs and supporting documentation were missing.
6. The Administrator and Assistant Administrator of Child Protective Services agreed to allow the District Office staff an additional month in which to update records, locate and organize files, and prepare for the compliance audit. They advised the appellant and his supervisors that the reviewers would attempt to complete the audit on or about May 3, 2002.
7. On April 26, 2002, Acting Assistant Administrator Sharon Face issued a letter of counseling to the appellant in which she cited specific deficiencies identified in the compliance review. The letter referred to a work plan issued to the appellant on April 9, 2002 and outlined specific steps the appellant was expected to take to bring the office into compliance. Those steps included: "Randomly pulling and reviewing one case

record per month for each Family Services CPSW and addressing with the worker's supervisor any problems needing attention or correction. Each file reviewed was to be logged. The appellant also was directed to conduct a random review of Bridges entries at the rate of one case per month for each of the Family Services Child Protective Service Workers. The appellant was directed to review entries for quantity and quality, insuring that they included "actual contacts such as telephone conversations and face-to-face contacts with clients, providers and other collaterals in the case." The appellant was again instructed to log the reviews that he conducted and to address with the worker's immediate supervisor any deficiencies that he uncovered. Finally, the appellant was instructed to "model a commitment to good case practice, documentation and follow-through" (State's Exhibit #2). Ms. Face scheduled a follow-up review for May 24, 2002.

8. On or about April 29, 2002, Ms. Face called the appellant to ask why he had submitted none of the required reports. Ms. Face and Program Manager Germano Martins met with the appellant on May 9, 2002 to review the steps he had taken to comply. The appellant indicated that he had met weekly with his subordinate supervisors. He did not provide a schedule of those meetings, however, which he had been instructed to do. He also failed to produce any verbal or written report of his and his subordinates' activities.
9. On May 21, 2002, Ms. Face issued a first written warning to the appellant for failure to meet the work standard. The letter noted that the appellant had not complied with the instructions outlined in an April 9, 2002 work plan or the April 26, 2002 counseling letter.
10. The May 21, 2002 warning advised the appellant that he had fifteen days in which to request that the matter be resolved through the process of informal settlement outlined in Per 202.01 of the Rules of the Division of Personnel. The warning also advised the appellant that failure to take the corrective action outlined in the warning would result in additional disciplinary action, up to and including his termination from employment.
11. The appellant did not offer evidence or argument to rebut the factual allegations contained in the May 21, 2002 letter of warning. He made no request for informal settlement of the warning and filed no appeal. The warning was placed on file as a first official written warning for failure to meet the work standard.

12. Attached to the May 21, 2002 written warning was a work plan that set out specific tasks the appellant was expected to complete, deadlines by which those tasks were to be completed, and reports the appellant was required to submit to document those activities.
13. The appellant failed to carry out or document the various case review activities he was directed to complete. He provided no schedule or record of supervisory meetings, and failed to submit activity reports. The only reason offered by the appellant for his failure to comply was that he was too busy running the office.
14. On June 26, 2002, Ms. Face issued a second written warning to the appellant, citing his failure to meet the work standard. Ms. Face acknowledged the appellant's assurances that he had done some of the required work, such as scheduling weekly supervision. She noted, however, that the appellant had not documented any of the work he had completed and offered no explanation for failing to comply with the work plan other than telling her that his time was being spent running the office.
15. The letter advised the appellant that failure to take corrective action would result in additional disciplinary action, up to and including his termination from employment. The warning included another copy of the work plan, with detailed task lists and deadlines for completion. It also informed the appellant that he had fifteen days in which to file a request for informal settlement of the warning.
16. The appellant submitted no rebuttal to the factual allegations contained in the June 26, 2002 letter of warning, made no request for informal settlement, and filed no appeal. The warning was placed on file and remains a valid written warning for failure to meet the work standard.
17. The appellant was fully aware of the consequences of continued failure to complete or report the tasks outlined in the various work plans he had received since April 2002. He fully expected to be dismissed from his position.
18. Program Manager Martins met with the appellant on Friday, July 19, 2002 and attempted to persuade the appellant to file the necessary reports in order to avoid further discipline and the possibility of dismissal from his position. Even after Mr. Martins offered to create a computerized form that the appellant could use to submit his weekly activity reports, the appellant indicated that he had no intention of producing or submitting that information.

19. The appellant expressed his objection to what he described as DCYF's "management by fear." He also told Mr. Martins he was surprised that he had not been dismissed already.
20. On July 23, 2002, Ms. Face issued a third and final written warning to the appellant, citing his continued failure to meet the work standard. The letter summarized, in chronological order, the counseling sessions and formal discipline that had occurred since April 9, 2002, including a meeting between the appellant and his supervisors on June 26, 2002. The letter stated, "As recently as Friday, July 19, 2002, you indicated to Germano Martins that you had no intentions of complying with the work plan."
21. In a separate letter dated July 23, 2002, Ms. Face informed the appellant that the agency believed there were sufficient grounds to support his dismissal as a result of his "inability to consistently meet the work standards associated with [his] position." The letter invited the appellant to a meeting on July 25, 2002, to discuss evidence that the agency believed would support his dismissal.
22. The appellant met with Ms. Face, Ms. Bishop and Mr. Martins to review and discuss the evidence supporting his termination. The appellant chose not to discuss his performance or offer any explanation for his continued refusal to take the corrective action that the agency demanded. The appellant did not dispute any of the factual allegations outlined in the third and final warning.
23. The appellant did take exception to the text of the letter, claiming he had not said "I am at peace with myself, I'm on a trail going upward, but rather that it was "like looking at it from the top of a mountain." He said, "I am very much at peace with myself."
24. The appellant believed that counseling, formal work plans, and disciplinary action taken by the agency between April and July 2002 served no useful purpose and reflected badly on him. He made a conscious choice not to comply with management's directives, despite his understanding that failure to do so could lead to his dismissal.
25. The appellant freely admitted that he disagreed with what the agency believed should be his role as a supervisor and he had "philosophical differences" with the agency on how to provide the support he believed the office needed.

## Rulings of Law

- A. An appointing authority shall be authorized to use the written warning as the least severe form of discipline to correct an employee's unsatisfactory work performance or misconduct for offenses including, but not limited to: (1) Failure to meet any work standard..." [Per 1001.03 (a), NH Code of Administrative Rules]
- B. "Each written warning shall: (1) Contain a narrative describing in detail the reason for the warning; (2) List specifically the corrective action which the employee shall take to avoid additional disciplinary action; (3) Notify the employee that failure to take corrective action shall result in additional disciplinary action up to, and including, discharge from employment..." [Per 1001.03 (b), NH Code of Administrative Rules]
- C. "If an employee fails to take corrective action as outlined in a written warning, the employee shall be subject to additional disciplinary action up to, and including, discharge from employment pursuant to Per 1000." [Per 1001.03 (c), NH Code of Administrative Rules]
- D. "An appointing authority shall be authorized to dismiss an employee pursuant to Per 1001.03 by issuance of a third written warning for the same offense within a period of 5 years." [Per 1001.08 (b)(1), NH Code of Administrative Rules]
- E. "No appointing authority shall dismiss a classified employee under this rule until the appointing authority: (1) Offers to meet with the employee to discuss whatever evidence the appointing authority believes supports the decision to dismiss the employee; (2) Offers to provide the employee with an opportunity to refute the evidence presented by the appointing authority... and (3) Documents in writing the nature and extent of the offense." [Per 1001.08 (c), NH Code of Administrative Rules]
- F. "If an appointing authority, having complied with the provisions of Per 1001.08(c), finds that there are sufficient grounds to dismiss an employee, the appointing authority shall: (1) Provide a written notice of dismissal, specifying the nature and extent of the offense; (2) Notify the employee in writing that the dismissal may be appealed under the provisions of RSA 21-I:58, within 15 calendar days of the notice of dismissal; and ... (3) Forward a copy of the notice of dismissal to the director." [Per 1001.08(d), NH Code of Administrative Rules]

### Standard of Review

"In disciplinary appeals, including termination, disciplinary demotion, suspension without pay, withholding of an employee's annual increment or issuance of a written warning, the board shall determine if the appellant proves by a preponderance of the evidence that:

- (1) The disciplinary action was unlawful;
- (2) The appointing authority violated the rules of the division of personnel by imposing the disciplinary action under appeal;
- (3) The disciplinary action was unwarranted by the alleged conduct or failure to meet the work standard in light of the facts in evidence; or
- (4) The disciplinary action was unjust in light of the facts in evidence." [Per-A 207.12(b), NH Code of Administrative Rules]

### Decision and Order

There is no dispute that the appellant disapproved of his agency's management style and objected to management's approach to social services. It is equally clear that the appellant disagreed with management's assessment of how he should supervise staff, carry out the various administrative tasks assigned to him, and document the work that had been performed. Such disagreement, however, did not give the appellant license to ignore the lawful orders of his superiors.

The appellant understood what his managers expected of him. He also knew what disciplinary action they were likely to take if he failed to comply with their instructions. Nevertheless, the appellant made a conscious decision to reject management's work plans and refused to report on his own or his subordinates' activities. Even after receiving two written warnings for failure to meet the work standard, the appellant rebuffed an offer from Germano Martins to create a computerized form the appellant could use to submit his reports.

The Board found that the agency was authorized under the provisions of Per 1001.03 of the Rules of the Division of Personnel to issue a third written warning to the appellant for failure to meet work standards. The appellant failed to persuade the Board that the warning was unlawful; or that the appointing authority violated the rules of the division of personnel by imposing such discipline. The appellant also failed to persuade the Board that the warning was unwarranted, or that it was unjust in light of the facts in evidence." [Per-A 207.12(b), NH Code of Administrative Rules] Therefore, the Board voted to uphold the third written warning for failure to meet the work standard.

Agencies have the authority to manage, direct and control their operation, to determine how best to carry out the work assigned to them, and to establish performance standards against which work will be evaluated as meeting or not meeting expectations. When an employee fails to perform in a manner that the employer deems satisfactory, the employer is authorized to use the written warning as the least severe form of discipline to correct the employee's unsatisfactory work or conduct.

In this case, the agency informed the appellant that he was failing to meet the work standard. He was instructed to take certain steps in order to avoid additional disciplinary action. He made a conscious decision to disregard those instructions and refused to comply. The appellant also chose not to challenge or appeal the warnings. The fact that a warning has not been appealed does not mean that every allegation contained in the warning is necessarily true. However, when an employee fails to make a timely appeal, the warning will stand as a valid warning for the offense(s) stated therein, and as a valid basis for additional disciplinary action, up to and including termination from employment.

The appellant demonstrated that he was unwilling to take any of the corrective action outlined in the three written warnings that he received between April and July 2002. The Board found that the Division for Children, Youth and Families was justified in dismissing the appellant by issuance of a third and final warning for failure to meet standards.

Therefore, for all the reasons set forth above, the Board voted unanimously to DENY the appeal of Arturo Reynoso.

The NH Personnel Appeals Board

  
Patrick H Wood, Chairman

  
Robert J. Johnson, Commissioner

  
Anthony B. Urban, Commissioner

cc: Thomas F. Manning, Director of Personnel, 25 Capitol St., Concord, NH 03301  
Michael C. Reynolds, SEA General Counsel, 105 N. State Street, PO Box 3303, Concord,  
NH 03302-3303  
Rogers Lang, Legal Coordinator, Department of Health and Human Services, OPS/Legal  
Services, 129 Pleasant Street, Concord, NH 03301-3857  
Karen Hutchins, Human Resources Manager, Department of Health and Human Services,  
129 Pleasant Street, Concord, NH 03301-3857