

The State of New Hampshire

Supreme Court

No. 97-171 *Appeal of Daniel B. Roche*

TO THE CLERK OF N. H. PERSONNEL APPEALS BOARD #96-T-15

*I hereby certify that the Supreme Court has issued the following order
in the above-entitled action:*

*July 22, 1997. Appeal from administrative agency is declined. See
Rule 10(1).*

August 8, 1997

Attest: *Carol A. Belmain*
Carol A. Belmain, Deputy Clerk

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State of New Hampshire



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

Appeal of Daniel B. Roche
Docket #96 - T - 15
Department of Safety - Division of State Police

April 5, 1996

The New Hampshire Personnel Appeals Board (McNicholas, Bennett, and Rule) met Wednesday, March 20, 1996, under the authority of RSA 21-I:58, to hear oral argument on Appellee's Motion for Disposition Without Evidentiary Hearing and Appellee's Motion to Exclude Results of Disciplinary Hearing Board. Attorney Sheri J. Kelloway-Martin appeared on behalf of the Department of Safety. The appellant was represented by Attorney James Donchess. After hearing oral argument and offers of proof, the Board took both Motions under advisement. Having reviewed the pleadings in light of oral argument and offers of proof, the Board voted unanimously to dispose of those motions as follows:

Appellee's Motion for Disposition Without Evidentiary Hearing

In support of Appellee's Motion for Disposition Without Evidentiary Hearing, Ms. Kelloway-Martin argued that Per-A 202.04 of the Rules of the Personnel Appeals Board provides that in cases where there are no material facts in dispute, the Board may hear and decide an appeal without taking the testimony of witnesses. Ms. Kelloway-Martin argued that until filing his appeal with this Board, Mr. Roche never had disputed the material facts which had given rise to the termination. She argued that there was no dispute that Mr. Roche was involved in a physical altercation with a spectator at Foxboro Stadium, or that there was an incident of extreme misconduct on the chartered bus which was witnessed by some civilian passengers as well as State Police employees. She argued that based on the facts set forth in the disciplinary

charges, which were not in dispute, the Board would have to decide whether or not an employee can be disciplined for conduct occurring off-duty outside of the workplace, and if so, whether or not termination was a permissible discipline under the Rules of the Division of Personnel and the State Police Rules and Regulations. Ms. Kelloway-Martin asked the Board to find that Mr. Roche's appeal could be decided on offers of proof and oral argument.

Mr. Donchess objected to the State's Motion, arguing that there were numerous factual disputes including: the circumstances surrounding the incident(s), the decision of the Director of State Police to ignore the findings and recommendations of the Disciplinary Hearing Board which he had convened, the appropriateness of termination as a form of discipline, and the comparability of discipline in this case with other more serious incidents in which troopers had sexually assaulted female officers and civilians. Mr. Donchess argued that Mr. Roche's appeal could not be fairly heard without taking the testimony of witnesses.

Having considered the pleadings, oral argument, and the parties' offers of proof at the prehearing conference, the Board voted unanimously to deny Appellee's Motion for Disposition Without Evidentiary Hearing. The Board found that there are material facts in dispute, and that the appellant is entitled to present the testimony of witnesses, as well as to cross-examine the State's witnesses.

Appellee's Motion to Exclude Results of Disciplinary Hearing Board

Ms. Kelloway-Martin argued that the Board should exclude evidence concerning the Disciplinary Hearing Board, including that Board's findings and recommendations. She argued that under the Rules and Regulations of the Division of State Police, the State Police Director has absolute discretion in deciding whether or not to convene a Disciplinary Hearing Board, and whether or not to accept their findings and recommendations. She argued that the Director of State Police, after an independent review, determined which of the charges against Mr. Roche should be sustained and what discipline should be imposed as a result of Mr. Roche's conduct. She argued that the Personnel Appeals Board would need to make its own independent review of the facts, determine whether or not Mr. Roche's conduct warranted discipline and, if so, decide what discipline was appropriate. She argued that it would be inappropriate and

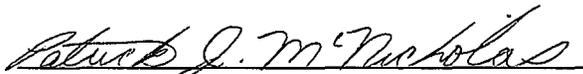
highly prejudicial if the Personnel Appeals Board were to consider any evidence concerning the State Police's Disciplinary Hearing Board's findings and recommendations without seeing and hearing exactly what the Disciplinary Hearing Board saw and heard. She argued that excluding the report of the Disciplinary Hearing Board would allow the Personnel Appeals Board, as an independent factfinder, to focus on the evidence of Mr. Roche's conduct. She argued that allowing the report to be admitted into the record would only cloud the underlying issue by shifting the focus to what the Disciplinary Hearing Board might have been thinking when they issued their report, and why the Director of State Police decided to reject their conclusions.

Mr. Donchess argued that the findings and recommendations of the Disciplinary Hearing Board offered strong evidence that the termination of Mr. Roche was too harsh a punishment, and that the Hearing Board's findings and recommendations should be given great weight in determining whether or not Mr. Roche's termination was unjust. Mr. Donchess argued that the Hearing Board was convened at the request of the State Police, that four of the five members were appointed by the Director of State Police, and that the individuals who sat on that Board had vast experience in the Division of State Police. He argued that the appellant should be entitled to produce evidence which would demonstrate that after hearing two days of evidence, the Disciplinary Hearing Board unanimously recommended only minor discipline. He argued that the Disciplinary Hearing Board's findings and recommendations would provide proof that the State Police Director's decision to terminate Mr. Roche's employment was arbitrary, inconsistent with previous disciplinary decisions, and fundamentally unfair. He argued that the appellant should be entitled to explore the reasons why the Director of State Police decided to sustain one charge which the Hearing Board would not sustain, and why the Director decided to terminate Mr. Roche's employment rather than adopting the Disciplinary Hearing Board's recommendations for a minor suspension.

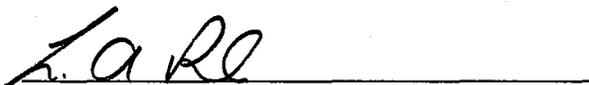
Having considered the pleadings, oral argument, and the parties' offers of proof at the prehearing conference, the Board voted unanimously to deny Appellee's Motion to Exclude Results of Disciplinary Hearing Board. In his objection to the State's Motion, Attorney Donchess argued that, "Trooper Roche should be entitled to show that the Hearing Board recommended only minor discipline for the purpose of demonstrating that the Division's

decision to terminate him was unfair and inconsistent with the standards of discipline and conduct which exist at the Division of State Police." Inasmuch as that argument lies at the heart of the appellant's appeal, the Board believes that he should not be precluded from offering evidence regarding the Disciplinary Hearing Board. While that evidence may not be entitled to the weight which the appellant has suggested, the Board found that it is both relevant and admissible.

THE PERSONNEL APPEALS BOARD


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Mark J. Bennett, Commissioner


Lisa A. Rule, Commissioner

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State of New Hampshire



PERSONNEL APPEALS BOARD

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APPEAL OF DANIEL B. ROCHE

Division of State Police

Docket #96-T-15

September 19, 1996

The New Hampshire Personnel Appeals Board (Bennett, Johnson and Rule) met on April 17, April 24, June 11, and June 12, 1996, under the authority of RSA 21-I:58, to hear the appeal of Daniel B. Roche, a former employee of the Department of Safety, Division of State Police. The appellant was represented at the hearing by Attorney James Donchess. Attorney Sheri J. Kelloway-Martin appeared on behalf of the Division of State Police,

Mr. Roche was terminated from his position as a Trooper in the Division of State Police, effective November 15, 1995, on charges that he engaged in off-duty conduct which violated the Rules and Regulations of the Division of State Police. Ms. Kelloway-Martin asserted that as a sworn member of the Division of State Police, Mr. Roche had an obligation to conduct himself at all times in a manner which would not reflect discredit upon himself or the Division of State Police. She said the evidence would prove that on September 10, 1995, while on an outing to a Patriots game at Foxboro Stadium in Massachusetts, Mr. Roche engaged in a fight with a fan at the stadium, requiring intervention by stadium security and local law enforcement personnel. Further, she stated that on the bus ride back to New Hampshire at the end of the outing, Mr. Roche engaged in sexual misconduct which was witnessed by several individuals including State Police and civilian personnel. She argued that Mr. Roche brought discredit upon himself and the Division of State Police, and that the only suitable discipline in light of the seriousness of the offenses, was immediate termination.

Mr. Donchess argued that the appellant was a good trooper with no prior record of discipline. He argued that the conduct for which Mr. Roche was discharged occurred while the appellant was out of State, off-duty, and therefore could not be considered an "offense" for which Mr. Roche could be

dismissed without prior warning. He argued that the fight at Foxboro Stadium was simply an incident of mutual combat for which no charges were filed, and that disciplining the appellant for mutual combat was inconsistent with the Division's past practice.

Mr. Donchess argued that the incident of sexual horseplay on the bus trip back to New Hampshire was nothing more than "locker room" humor, which he characterized as commonplace, particularly in an all-male environment such as that of the bus trip. He argued that the incident took place off-duty, in a privately chartered bus, out of the public eye, and that none of the witnesses were offended by the appellant's behavior. Mr. Donchess argued that termination in this instance also was inconsistent with the Division's past practice. He asserted that in other instances, State Police did not discipline personnel who had actually engaged in sexual harassment or sexual discrimination on the job. He argued that in Mr. Roche's case, when rumors about the bus trip were disseminated by the media, the State Police over-reacted, making Mr. Roche the "sacrificial lamb."

At the close of the hearing, Ms. Kelloway-Martin asked the Board for additional time in which to prepare and file Requests for Findings of Fact and Rulings of Law. Mr. Donchess said the appellant believed that the Board had sufficient information upon which to make its own findings; however, he did not object to the State's request, provided that the appellant was afforded the same opportunity to file Requests for Findings of Fact and Rulings of Law. The parties were permitted seven days in which to file their requests.

Per-A 202.04 of the Rules of the Personnel Appeals Board allows the parties to file requests for findings of fact and rulings of law. However, "Such requests shall not be unnecessarily numerous." [Per-A 202.04(c)] Having reviewed the parties' submissions, the Board voted to issue its own findings of fact and rulings of law. To the extent that the parties' requests are consistent with the order below, they are granted. Otherwise, they are denied.

First, despite the appellant's argument that he could not be disciplined for off-duty conduct, the Board found that the State Police Rules and Regulations clearly advise officers that they are accountable for their conduct at all times. The introduction to the Professional Standards of Conduct, Chapter 1, states:

"...the lack of a rule or regulation covering a specific situation should not be interpreted as lessening the requirement that personal conduct must at all times be well within the bounds of propriety and that discretion and good judgment must be exercised in the performance of duty. A member must strive at all times to fulfill the trust and responsibility that has been placed in him to serve the people well and faithfully."

1.5.1 A. of those Standards states:

"Each Sworn Division Member shall, while on or off duty, conduct himself in a manner that will reflect credit on himself and the Division of State Police. Conduct unbecoming an officer shall include that which tends to bring the Division of State Police into disrepute or reflects discredit upon the officer as a member of the Division of State Police or which tends to impair the operation or efficiency of the State Police or the employee."

While it is reasonable to conclude that a more rigorous standard of conduct applies to troopers while on duty, troopers are also accountable for their off-duty conduct when such conduct violates the Rules and Regulations of the Division of State Police. As such, if Mr. Roche's conduct on the September 10, 1995, trip to Foxboro Stadium violated the Rules and Regulations of the Division of State Police, he would be subject to appropriate disciplinary action up to and including his termination from employment.¹

The Board also considered the appellant's argument that equity demands consistency, and that if the appellant's off-duty conduct was subject to the Division's Rules and Regulations, any discipline which might be imposed had to be consistent with discipline imposed for similar infractions in the past. Although persuasive at first blush, that argument is not, nor should it be, dispositive of this appeal. First, the Board is not persuaded that the incidents cited by the appellant are sufficiently similar to be useful for the purposes of comparison. Second, even if the Board were to find that the incidents were similar, agencies are not obliged to employ poor management practices in the present simply because

¹ "...After a hearing, the Director [of State Police] may reprimand the employee or, with the concurrence of the Commissioner, take the following action against the employee: ...dismissal." [Rules and Regulations of the Division of State Police, Section 1.8.5 A. 4. f)]

they may have done so in the past.²

Most of the relevant facts are not in dispute. The discussion, and the decision which follows, are based largely on Mr. Roche's own representation of events during his investigative interview, and information he provided in testimony before this Board.

Mr. Roche participated in a bus trip to Foxboro, Massachusetts, on September 10, 1995, to see a New England Patriots football game. There were 28 people on the trip, including Department of Safety and Department of Transportation personnel, construction company employees, local law enforcement personnel, friends and family of those participants, and the bus driver. The trip was organized by Costas Papachristos, a Department of Transportation employee, who had arranged a similar outing the previous year. Mr. Papachristos chartered the bus for the trip, purchased tickets for the football game, and arranged for refreshments, including beer purchased for the trip. Many of the participants, including Mr. Roche, began drinking alcohol shortly after boarding the bus in New Hampshire. After arriving at the stadium in Foxboro, the group had a "tailgate" cook-out, following which they attended the football game. The group's seats for the game were in the same general area of the stadium, but they were not in a "block." As a result, the participants had to break into smaller groups in order to be seated.

During the game, Mr. Roche became involved in an argument with two other fans about whether or not Mr. Roche and his companions had tickets for the row in which they were seated. Initially, the appellant was unaware that his party had tickets for only two of the three seats they were occupying. Although he later discovered the error, he and his party remained in their original location.

The disagreement became more heated throughout the game, and late in the third period, one of the young men threatened to call the police. As the disagreement escalated, Mr. Roche called one of the two young men a "piece of shit," and one of them reached over and struck Mr. Roche in the face. Shortly thereafter, an officer arrived and told the young man to settle down or be removed.

² The appellant asserted that more serious violations by other uniformed personnel had resulted in only minor discipline, if any.

The young man continued to argue, challenging Mr. Roche to a fight. Mr. Roche did not want to fight in the stands, knowing that at the very least, he would be removed from the stadium. However, he did say, "Pal, I'll fight you anywhere you want, but right now I want to watch the ball game, so why don't you wait until after the ball game and I'll take you on anywhere you want to go." Another officer then arrived, inspected the tickets and told Mr. Roche that one of the three in his party would have to move. Neither Mr. Roche nor his companions advised either officer that Mr. Roche had been struck in the face. Mr. Roche left.

At the end of the game, as Mr. Roche was leaving the stadium with his brother James, his brother's friend Rob, Corporal Farrell, Trooper Jepson and Trooper Dinwoodie, they noticed the two young men from the stands waiting at the gate. In his interview with State Police Investigators³, Mr. Roche recalled walking toward the young men saying, "There are the two tough guys." When one of them answered, "I'm ready to go with you," Mr. Roche tried to get him outside of the stadium to avoid trouble with local police and stadium security. The young man replied, "No, I want to go with you right here." Mr. Roche responded, "Sure enough." He said he took off his sunglasses, handing them to Cpl. Farrell, and as the young man took a step toward him, the appellant said, "Are you ready to go, pal, 'cause I'm ready to go. Well, lets go." Mr. Roche then threw the first punch.

The two were separated by police officers and security personnel, and both were detained until Mr. Roche was identified by his fellow officers as a New Hampshire State Trooper. The officer holding him asked the appellant to verify that fact. Mr. Roche asked if it made a difference, and the officer responded that it did; they would not have had to hold him for fifteen or twenty minutes if they had realized he was a trooper. When the appellant confirmed that he was a State trooper, the officer asked him, "Mutual combat?" to which Roche responded, "Absolutely." They released the young man and then released Mr. Roche, who then returned to the bus.

After all the members of the group had boarded the bus, they were escorted by a Massachusetts State Trooper to a cook-out at the Foxboro Barracks of the Massachusetts State Police. They stayed

³ The Board found the documentary evidence to be the most reliable. The transcribed version of Mi. Roche's interview with State Police investigators was first in time, and most contemporary. The Board found it to be the most credible account of the incidents giving rise to disciplinary action.

approximately two hours. While there, Mr. Roche participated in several three-on-three basketball games. The group then returned to New Hampshire.

At some point on the return trip to New Hampshire, while Mr. Roche was at the front of the bus handing out cans of beer, a rider on the bus "pantsexed" the appellant, pulling the appellant's shorts down. Shortly thereafter, Mr. Roche and Mr. Prochilo exchanged graphic remarks about one giving the other a "blow job." Mr. Roche was uncertain whether he or Mr. Prochilo had initiated the exchange of remarks. Mr. Prochilo unzipped his own pants, exposing his penis. Mr. Roche told investigators, "I grabbed on to his cock, I made a motion like I was going to blow him and I came back up." At the time, the appellant did not believe himself to be inebriated.

Several days after the trip, in the wake of rumors that certain State Police officers had engaged in misconduct during the trip, the State Police initiated an internal investigation. At the conclusion of the investigation, Daniel Roche was charged with two separate violations of the Division of State Police Rules and Regulations for engaging in a physical altercation after the game with a fan at Foxboro Stadium, and for simulating an act of oral sex with Corporal Robert Prochilo during the bus ride back to New Hampshire.

The Director of the Division of State Police convened a Disciplinary Hearing Board⁴ to review the charges of misconduct and make recommendations to the Director for appropriate disciplinary action if the charges were sustained. The Disciplinary Hearing Board did not sustain the charge of fighting, finding that the appellant had engaged in mutual combat, since no criminal charges had been filed against the appellant. The Disciplinary Hearing Board did sustain the charge that the appellant engaged in an act of simulated oral sex. On the basis of that charge, the Disciplinary Hearing Board recommended a minor suspension as the appropriate discipline.

Colonel Presby rejected the Disciplinary Hearing Board's recommendations and sustained both charges against Mr. Roche. On November 15, 1995, he discharged Mr. Roche from his position as a State Trooper for violation of State Police Regulation 1.5.1 (A) – Personal Behavior, for engaging in an act

⁴ The Disciplinary Hearing Board included Major Booth, Captain Halias, Sergeant Miles, Corporal D'Auria and Trooper Johnson, all members of the New Hampshire State Police.

of simulated oral sex, and for violation of State Police Regulation 1.3.1 (A) - Laws, 1.3.2 (A) - Rules and Regulations and 1.5.1 (A) Personal Behavior, by initiating a physical confrontation and fighting with a spectator at Foxboro Stadium.

On the evidence, the Board voted unanimously to sustain the termination, thereby denying Mr. Roche's appeal. With regard to the charges themselves, the Board ruled as follows:

1. Following the football game, Mr. Roche initiated a physical confrontation with another spectator, approaching that spectator first, challenging the spectator to leave the stadium to fight, and ultimately delivering the first punch in the altercation which ensued. Mr. Roche and his party outnumbered the two spectators and it is reasonable to believe that they could have exited the stadium without a physical confrontation had he chosen to do so.
2. Mr. Roche did not act in self-defense. Before hitting the young man, or being hit by him, Mr. Roche had both the time and the presence of mind to hand his sunglasses to Cpl. Farrell. Before the fight started, he tried to persuade the young man to leave the stadium, where they were more likely to avoid detection and intervention by local police and stadium security. When he was unable to get the man to leave the stadium, Mr. Roche said, "Are you ready to go pal, 'cause I'm ready to go. Well, let's go." Mr. Roche then threw the first punch.
3. Until Mr. Roche had been identified by a fellow trooper as a member of the New Hampshire State Police, local law enforcement personnel would not release the appellant. Those officers on the scene did not appear to treat the altercation as mutual combat until after they had learned that Mr. Roche was a New Hampshire State Police trooper, and was with other State Police personnel who were preparing to leave the stadium.
4. Mr. Roche brought himself and the Division into disrepute by engaging in an act of simulated oral sex with a fellow State Police officer.

Discussion

Mr. Roche instigated a physical altercation with a private citizen at a public sporting event, thereby violating sections 1.5.1 A (Personal Conduct/Personal Behavior) and 1.3.1 A (Laws) of the Rules and Regulations of the Division of State

Police. In so doing, Mr. Roche also violated per 1001.08 (b) of the Rules of the Division of Personnel, making him subject to immediate dismissal without prior warning.

"Each Sworn Division Member shall, while on or off duty, conduct himself in a manner that will reflect credit on himself and the Division of State Police. Conduct unbecoming an officer shall include that which tends to bring the Division of State Police into disrepute or reflects discredit upon the officer as a member of the Division of State Police or which tends to impair the operation or efficiency of the State Police or the employee." (1.5.1 A. Rules and Regulations of the Division of State Police)

"All members of the Division of State Police are required to obey all laws of the United States of America, the State of New Hampshire, and the political subdivision thereof, to which they are subject." (1.3.1 A. Rules and Regulations of the Division of State Police)

The Board is troubled that any member of the State Police, particularly those appointed to serve on a Disciplinary Hearing Board, would ignore Mr. Roche's own description of his assault on a private citizen and discount it because the event could be described as the criminal code violation offense of "mutual combat." The public has a right to expect that members of the State Police, purportedly the most elite law enforcement agency in the State, will be held to the highest of personal and professional standards. At the very least, the public has a right to expect that a trooper will be accountable to the same standards which apply to the citizenry at large. If a private citizen could be charged criminally for "mutual combat," a State Police Officer should not have been excused after admitting to a similar offense simply because another officer in the law enforcement community chose to let him go rather than charge him with assault.⁵

⁵ It does not matter whether mutual combat is a violation or misdemeanor under the statutory scheme of the Criminal Code.

Mr. Roche violated section 1.5.1 A of the State Police Standards of Professional Conduct by engaging in an act of simulated oral sex with Corporal Robert Prochilo. In so doing, Mr. Roche also violated per 1001.08 (b) of the Rules of the Division of Personnel, making him subject to immediate dismissal without prior warning.

Contrary to the appellant's assertion, the Board has difficulty believing that this inchoate sexual act, carried out in view of civilian and non-civilian personnel, should be characterized as common "locker room" behavior.⁶ The act of one man grabbing another man's penis and, however briefly, pretending to engage in the act of fellatio for the amusement of potential onlookers, is hardly the kind of behavior the average citizen should expect from a sworn member of the New Hampshire State Police. Despite Mr. Roche's off-duty status, he was known to be a state police officer by others present who were themselves State officials and private citizens.

Decision and Order

The Board has some sympathy for the appellant, and believes that the appellant may be correct in his assertion that less severe punishment might have been imposed had his antics not been made public. True as that may be, it does not diminish the seriousness of the appellant's offenses, nor does it provide any compelling argument in favor of his reinstatement.

Mr. Roche knowingly and willingly initiated a physical confrontation with a private citizen in a public place. Additionally, the appellant engaged in outrageous sexual antics with a fellow State Police Officer in front of other officers and civilians, conducting himself in a manner which was more lewd than it was amusing. The appellant took no responsibility for the ensuing rumors or adverse publicity which subsequently spread throughout the law enforcement community and the community at large. He repeatedly downplayed the seriousness of his offenses, insisting that he was off duty, on his own time, and that there were no "victims" in either the assault at the stadium or his misconduct on the bus.

Mr. Roche refused to acknowledge that the Rules and Regulations of the Division of State Police

⁶ If that is true, a significant management problem is posed for the Division of State Police and the Administration of the Division is encouraged to address it.

applied to his conduct both on and off duty, yet the appellant seemed to be aware that this event "pushed the envelope" when seen in the cool light of hindsight. His delayed rather than contemporaneously exercised judgment served him poorly. Although he was ultimately correct about "the envelope," poor judgment can not and should not always excuse a mistake, especially when it is the judgment of one expected by virtue of his office, to exercise sound judgment, restraint, decorum and respect for the law as well as that office.

The appellant did not persuade the Board that his record of prior service provided sufficient justification for the Board to vacate or amend the appointing authority's decision in this instance. An outstanding record of achievements might have weighed more heavily in the appellant's favor had the circumstances involved less serious offenses. However, given the facts in evidence, it does not matter whether the appellant lead his patrol area in DWI arrests or not, nor does it matter how many times he was injured in the course of his career with the Division of State Police. Mr. Roche was not dismissed for unsatisfactory work performance. He was dismissed for engaging in conduct which violated the Rules and Regulations of the Division of State Police. By demonstrating such reckless disregard for any reasonable standard of conduct, and by failing to appreciate his responsibility to conduct himself in a manner befitting his position as a sworn member of the New Hampshire State Police, the appellant could not successfully rely on any past accomplishments to mitigate the damage which had already been done.⁷

The appellant also did not persuade the Board, on the facts in evidence, that it should adopt the findings and recommendations of the Disciplinary Hearing Board, thereby reversing the colonel's decision to sustain both charges against the appellant. On the facts in evidence, the Board found that a Disciplinary Hearing Board's findings and recommendations are only advisory in nature.

In the instant appeal, the Division of State Police made every effort to distance itself from the findings and recommendations of the Disciplinary Hearing Board, convened pursuant to its own regulations, to

⁷ Col. Presby seemed to have a great deal of difficulty remembering that Mi. Roche lead his troop for three years in DWI arrests. However, he had no difficulty remembering that three or four years earlier, there had been a complaint about Mr. Roche's behavior at a breathalyzer training school. Even though Mi. Roche's file contained more than a dozen notices of thanks and recognition for outstanding work, most of which were signed by Col. Presby himself, Mr. Presby repeatedly refused to acknowledge that the appellant had a good work record. Col. Presby's testimony is incredible on this point. ,

review the evidence against Mr. Roche and make recommendations for discipline.⁸ The evidence suggests that in most instances, the Director accepts the recommendations of the Disciplinary Hearing Board. In fact, the evidence further suggests that Disciplinary Hearing Board has sometimes made recommendations for disciplinary action which the Director considered too harsh. There is no dispute, however that the Division's regulations grant the Director of the Division of State Police sole discretion in determining when to convene such a Board. Those regulations also authorize the Director to accept or reject any or all of the Disciplinary Hearing Board's findings and recommendations.⁹

Termination may seem too a harsh penalty to pay for offenses which the appellant characterized as nothing more than a "tussle" between two football fans, and a "joke" taken one step too far. However, the Board believes that the citizens of New Hampshire deserve better from the members of the State's largest and most visible law enforcement agency. Mr. Roche engaged in conduct which was sufficiently outrageous to warrant his immediate dismissal. Mr. Roche knowingly and willfully engaged in conduct which violated the personal and professional standards he had sworn to uphold. Having done so, he faced the risk of discipline, up to and including termination from employment without prior warning. Under the terms of Per 1001.08 (b) of the Rules of the Division of Personnel, Mr. Roche was dismissed for violating posted and published agency regulations which, in and of themselves, warned of immediate termination. The Board voted unanimously to affirm that decision, and in so doing, voted to deny Mr. Roche's appeal.

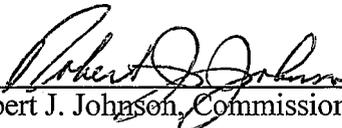
⁸ On a vote of 4 to 1, the Disciplinary Hearing Board sustained amended Charge #1, that Mr. Roche, "...stood at the front of the bus with his shorts down, allowing his buttocks to be exposed. While at the front of the bus, he held the exposed penis of Corporal Prochilo for several seconds. While holding Corporal Prochilo's penis, Trooper Roche bent down bringing his face in close proximity with Corporal Prochilo's penis, imitating oral sex with Corporal Prochilo. This activity took place in view of several passengers on the bus." The Board voted that Mr. Roche should receive a written warning, be suspended up to 10 working days, and not be allowed to work construction details for a period of six months. One board member recommended a 2 - 3 day suspension, one recommended a 3 day suspension, one recommended a 3 - 5 day suspension, and two recommended a 5 day suspension. On a vote of 4 to 1, the Hearing Board voted to not sustain the amended Charge #2, that the appellant "approached a spectator [after the football game] and a physical confrontation ensued."

⁹ Clearly, when the Director agrees with the Board, it provides a convenient mechanism for sharing responsibility for decisions which are, in fact, the sole purview of the appointing authority. In other cases, such as this, the Hearing Board is simply a vestigial structure, a fact which seems to only lend credence to the appellant's contention that all discipline meted out is not consistent, as testimony suggested that the Hearing Board usually "got it about right." The need for the Disciplinary Hearing Board can be questioned in terms of management practice and in terms of the risk of the Board suggesting a standard of conduct in a disciplinary case where a liability issue may be presented.

THE PERSONNEL APPEALS BOARD



Mark J. Bennett, Acting Chairman



Robert J. Johnson, Commissioner



Lisa A. Rule, Commissioner

cc: Virginia A. Lambertson, Director of Personnel
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APPEAL OF DANIEL ROCHE

DOCKET #96-T-15

Division of State Police

Response to Appellant's Motion for Rehearing and State's Objection

January 31, 1997

On October 8, 1996, the New Hampshire Personnel Appeals Board received Appellant's Motion for Rehearing in the above-captioned appeal. The Board received the Appellee's Objection to the Motion on October 11, 1996.

Per-A 204.06 of the Rules of the Personnel Appeals Board provides that any party to the action or proceeding before the Board or any person directly affected thereby may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order. Such motions, "...shall set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable." [Per-A 204.06 (b)]

The appellant argued that, "The loss of Trooper Walsh [of the Massachusetts State Police] as an expert witness prejudiced Mr. Roche's effort to show that violence he encountered on the job would make him more likely to become engaged in fighting off duty," one of the charges for which the appellant was dismissed. He asked the Board to allow him an opportunity to call an expert to testify on that issue.

The record reflects that on the second day of the four-day hearing, Attorney Donchess raised the issue of his expert's availability to testify. In support of the Motion which he had filed to

Require Disclosure and Production of Witness, he had argued that someone from the New Hampshire Division of State Police had contacted the Massachusetts State Police about Trooper Walsh's plan to testify, possibly for the purpose of discouraging his testimony or preventing him from testifying. He asked the Board to "...order the Division of State Police to disclose the name of the employee of the Division who contacted the Massachusetts State Police regarding the testimony of Trooper Walsh and produce the designated employee for testimony in this appeal."

Ms. Kelloway-Martin had argued that while the Division of State Police did not consider Trooper Walsh's testimony at all relevant, the State had no reason to discourage him from testifying. She also said she had no knowledge of anyone from the Division of State Police having called the Massachusetts State Police if, in fact, such a call had been made. For the record, the Chairman noted that there was neither an allegation nor evidence that the witness was unavailable to testify at that time or at any time prior to the conclusion of the hearing on the merits of Mr. Roche's appeal.' The Board found this ground for rehearing to be without merit.

The appellant also argued that it was prejudicial to Mr. Roche for the same Appeals Board members to hear and decide the appeal of Robert Prochilo while they were considering evidence in the Roche appeal. He also argued that it was improper for the Board to consider evidence regarding both appeals together in rendering the decision in both cases.

The names of the Appeals Board members scheduled to hear the Appeal of Daniel Roche as well as the Appeal of Robert Prochilo were a matter of public record, and both parties were provided an opportunity to object to any or all of the members who were scheduled to hear the cases. Neither party objected. As such, the Board found this ground for rehearing, raised after receipt of an unfavorable decision to the appellant, to be without merit.

With regard to the appellant's assertion that the decision took into consideration evidence from the Appeal of Robert Prochilo, the Board found this ground to be equally without merit. Mr. Prochilo was the other participant in one of the specific incidents giving rise to Mr. Roche's

¹ The appellant did not call Trooper Walsh or any other expert to testify on the issue of an officer's likelihood to engage in off-duty fighting if that officer were subjected to on-the-job violence and/or injuries.

termination from employment. It would be nearly impossible for the Board to describe the conduct which resulted in Mr. Roche's termination without some reference to Mr. Prochilo.

The appellant's remaining arguments in support of the Motion for Rehearing were raised by the appellant during his hearing on the merits of his appeal, and considered by the Board in reaching its decision to deny Mr. Roche's appeal. The Board continues to find that the weight of the evidence supports the Department of Safety's decision to dismiss Daniel Roche from his position as a Trooper in the New Hampshire Division of State Police.

Having considered the Motion and Objection in conjunction with the Board's September 19, 1996, Decision in this matter, the Board voted unanimously to deny the Appellant's Motion for Rehearing. The appellant failed to demonstrate that the Board's decision was either unlawful or unreasonable in light of the facts in evidence. Accordingly, the Board also voted to affirm its decision upholding the Department of Safety's decision to discharge the appellant from his position as a Trooper in the New Hampshire Division of State Police.

THE NEW HAMPSHIRE PERSONNEL APPEALS BOARD



Mark J. Bennett, Acting Chairman



Robert J. Johnson, Commissioner



Lisa A. Rule, Commissioner

cc: Virginia A. Lamberton, Director of Personnel
James W. Donchess, Esq.
Sheri J. Kelloway-Martin, Esq.