

State of New Hampshire



PERSONNEL APPEALS BOARD

25 Capitol Street
Concord, New Hampshire 03301
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Appeal of Mark Rokes

Docket #1997-T-014

Department of Corrections

October 29, 2009

On August 17, 2009, Mark Rokes, a former employee of the NH Department of Corrections, telephoned the NH Personnel Appeals Board's staff to request information concerning an appeal filed on his behalf in March 1997 by Andrew W. Moeller, SEA Legal Intern. Although Mr. Rokes had a docket number for his appeal and a copy of an Objection to a Motion to Dismiss that had been filed by Mr. Moeller on his behalf on April 29, 1997, he said he had no copy of a decision from the Board. He indicated that he had contacted the State Employees Association and was informed that the file was closed.

The Board's staff reviewed data in the Appeals Board's Access database, where records of appeals received and decided are maintained, and found no information listed by either the appellant's name or docket number. After contacting Human Resources personnel at the Department of Corrections and determining that the department had a file containing a scheduling notice, a motion to dismiss and an objection to the motion, the Board's staff then searched through hard-copy files that had been archived by the Board at the Division of Personnel. Mr. Rokes' Personnel Appeals Board appeal file was located, and it contained the following documents:

1. March 24, 1997 Letter from Andrew Moeller, SEA Legal Intern, Re: Appeal of Mark L. Rokes (Termination from employment from New Hampshire Department of Corrections) with attachment: March 11, 1997 notice of dismissal signed by Warden Michael Cunningham
2. April 15, 1997 Memorandum from Attorney John E. Vinson, Re: Motion to Dismiss with attachments: March 4, 1997 letter to the Department of Corrections from the Police Standards and Training Council, Administrative Rule Pol 301.07 Vision Standards (adopted June 14, 1994)
3. April 29, 1997 Letter from Andrew Moeller, SEA Legal Intern, Re: Objection to Motion to Dismiss with attachment: March 4, 1997 Letter to Mr. Rokes from the Police Standards and Training Council
4. Handwritten notes of a hearing convened on May 7, 1997 to hear oral argument on the Motion to Dismiss and Objection

Notes from the May 7, 1997 meeting indicate that the Board (Bennett and Johnson) tentatively scheduled the case for a hearing on the merits of the appeal for June 18, 1997. According to information contained in the Board's database, another appeal was heard on June 18, 1997, and there is no record of an actual hearing for Mr. Rokes on that or any subsequent date.

Reviewing notes from the Board's May 7, 1997 meeting, the Board believes that the parties may have received an oral order from the Board indicating that the appeal had been dismissed, which would explain why neither the State Employees Association nor the Department of Corrections have requested any further information from the Board about the status of this appeal since 1997. However, as the Board can not locate any written notice dismissing the appeal, or any correspondence memorializing an oral order of the Board dismissing the appeal, the current members of the Board reviewed the pleadings and decided to issue an order addressing the arguments raised in the pleadings and raised by the parties at the meeting of May 7, 1997, as reconstructed from the hand-written notes.

The facts as asserted by the appellant in his request for a hearing and his Objection to Motion to Dismiss, and as explained in the attachments to both parties' pleadings, are as follows:

1. Mr. Rokes applied for employment as a Corrections Officer Trainee early in the summer of 1996.
2. He underwent a mandatory physical examination on August 7, 1997, and was informed by Dr. Silverman, the Department of Corrections assigned physician, that he had "failed" the vision portion of the examination.
3. When Mr. Rokes informed DOC Sergeant Guimand and DOC Employee Health Coordinator Lisa Angelini that he had failed the vision portion of the examination, Ms. Angelini instructed Mr. Rokes to set up another eye appointment with his own doctor. Ms. Angelini did not specify a date or deadline by which the second examination needed to be completed.
4. Mr. Rokes began working as a probationary Corrections Officer Trainee at the Men's Prison in Concord on August 16, 1996.
5. On February 21, 1997, Ms. Angelini again instructed Mr. Rokes to have a vision examination.
6. After receiving a referral from his primary care provider, Mr. Rokes was examined by an ophthalmologist, Dr. Erin Fogel, M.D., on February 25, 1997. In her report, Dr. Fogel wrote, "...because this is very close to your visual requirements for the Police Academy, I would ask that you give consideration to his [Mr. Rokes'] application."
7. By letter dated March 4, 1997, addressed to Lisa Currier at the Human Resources Office in the Department of Corrections, Earl M. Sweeney, Director of the Police Standards and Training Council wrote: "We have

received a report from an ophthalmologist, Dr. Erin S. Fogel, that the above Corrections Academy applicant failed to meet the Council's minimum Corrections Officer eyesight standards contained in Council rule Pol 301.07 of correctable to at least 20125 distant vision. The doctor says he is only correctable to 20130, which does not meet the minimum standard. Under Council rule Pol 301.06, we are required to notify the hiring authority in writing, and to defer his attendance at the academy. Since the defect is not correctable, an extension does not seem to be in order. When a defect appears to be of a permanent nature, rule Pol 301.06 provides that the hiring authority may request a case-by-case review by a medical review board, which can make a written recommendation to the Council whether or not the applicant should remain disqualified."

8. In a March 4, 1997 letter to Mr. Rokes, Director Sweeney wrote, "As you know, your attendance at the NH Corrections Academy was deferred because you failed to meet the Council's minimum eyesight standards as contained in Council rule Pol 301.02... which are that the eyes be capable of correction to at least 20125 Snellen in each eye for visual acuity, distant vision. According to your ophthalmologist, Dr. Erin S. Fogel, you cannot be corrected to better than 20130 visual acuity, distant vision, on the left eye. This does not meet the Council's minimum standards."
9. On March 11, 1997, Mr. Rokes was informed in writing that he was being dismissed prior to completion of his initial probationary period. The letter of termination stated, in pertinent part, that the Department of Corrections had received notice that Mr. Rokes was "...unable to be accepted in the Corrections Academy as scheduled. As a result of the above determination, the Department of Corrections cannot continue your employment as a Corrections Officer Trainee as you are unable to meet the required work standard for the position. This position requires that you participate in the Corrections Academy and become a certified corrections officer prior to the expiration of your probationary period."

In the notice of appeal, the appellant argued that he worked successfully in his trainee role for six months and that his eyesight never prevented from carrying out the requirements of his position. The appellant argued that the Academy's vision standards were not reasonable, and had been created by Police Standards and Training without input from the Department of Corrections. The appellant argued that the Department of Corrections could have applied for a waiver of the vision requirement or, in the alternative, could have allowed Mr. Rokes to continue working as a trainee and allow him additional time to achieve the required level of corrected vision in order to participate in the Academy.

In the Motion to Dismiss filed by Attorney John Vinson on behalf of the Department of Corrections, Attorney Vinson argued that the Police Standards and Training Council would not have allowed the appellant to participate in the

Corrections Academy unless his vision could be corrected to 20125, and that although he was permitted several additional months in order to see if his vision could be corrected, he was unable to comply. Attorney Vinson argued that the appellant's vision, according to his own doctor's report, was only corrected to 20130. Attached to Attorney Vinson's Motion was a copy of the March 4, 1997 letter from Director Sweeney to the Department of Corrections which stated, in part, "Since it appears the defect is not correctable, an extension does not seem to be in order. When a defect appears to be of a permanent nature, rule Pol 301.06 provides that the hiring authority may request a case-by-case review by a medical review board, which can make a written recommendation to the Council whether or not the applicant should remain disqualified."

On April 29, 1997, Mr. Moeller filed an Objection to Motion to Dismiss, arguing that the Department of Corrections had misrepresented and omitted important issues pertinent to the appeal. Specifically, he argued that the vision requirements outlined in Pol 301.07 did not legitimately reflect the requirements of a Corrections Officer and, as such, were arbitrary, capricious, illegal, and/or made in bad faith. He argued that the appellant received his first pair of eyeglasses on March 7, 1997, and that they might have corrected his vision sufficiently to allow him to participate in the Academy. He also argued that the hiring authority could have requested a case-by-case review to determine if the applicant would be capable of performing the training and other functions required of his position, and that their failure to do so should be deemed arbitrary, capricious, illegal, and/or done in bad faith. He argued that Mr. Rokes was an NRA licensed firearms instructor, and that the Army National Guard was at that time considering him for a part-time position after receiving a recommendation for a waiver of the eyesight requirement by the Army doctor. Mr. Moeller argued that Mr. Rokes had never been impaired from any activity due to his eyesight, and that the policies and/or Policy and Procedure Directives under which Mr. Rokes was dismissed should be deemed invalid.

On May 7, 1997, a quorum of the Personnel Appeals Board (Bennett and Johnson), met under the authority of RSA 21-I:58 and Chapters Per-A 100-200 of the Rules of the Personnel Appeals Board and convened to hear oral argument on the State's Motion to Dismiss and the appellant's Objection. John Vinson appeared on behalf of the Department of Corrections. SEA Chief Legal Counsel Michael Reynolds appeared on behalf of the appellant.

The Board began by advising the parties that it did not intend to look behind the standard created by the Police Standards and Training Council unless the parties could persuade the Board that it had the authority to do so. Mr. Reynolds argued that the appellant believed he could meet any performance standard for his position and could pass the tests at the Academy. He suggested that if Mr. Rokes could pass the "shooting test" he should be permitted to participate in the Academy. He also argued that the appointing authority could have taken some action short of

termination by waiving the requirement for completion of the Academy prior to the conclusion of the appellant's probationary period, or by extending the probationary period.

Attorney Vinson argued that the Department could not waive the requirement; they could only appeal it. He argued that the eyesight requirement was not simply for shooting, but for many of the other duties associated with the position. He argued that the agency had given the appellant nearly nine months in which to get his vision within correctable limits, but that he was unable to do so. He noted that Mr. Rokes did not take steps to correct his vision to acceptable levels until after he received the March 4, 1997 letter from Director Sweeney informing him that he would not be permitted to participate in the Academy.

Attorney Reynolds argued that Mr. Rokes had worked at the institution for more than six months, and that eyesight had not been a problem. He reiterated that the agency had the option to request a medical review board, but failed to do so. He argued that the appellant had worked for the department in good faith, and although it was true that he could have "moved faster" in taking steps to achieve an appropriate level of vision correction, he still worked in good faith without any correction to his eyesight. He also argued that under the Rules, the agency could have extended the appellant's probationary period in order to allow him to complete the Academy before his extended probationary period expired.

1. There is no dispute that the appellant was unable to satisfy the minimum standards for visual acuity required for entrance into the Corrections Academy. Although the appellant argues that the standards established by the Police Standards and Training Council and adopted in their administrative rules were arbitrary and unrelated to the work actually performed by Corrections Officers, that issue is outside the Board's subject matter jurisdiction.
2. According to then Director Sweeney, the Department of Corrections could have requested an individual review by a medical review board, which could then make a written recommendation to the Council whether or not the applicant should remain disqualified from attending the Academy. The agency was under no obligation to make such a request, and according to the Council's own rules, Pol 301.06 (b), the Council was under no obligation to accept whatever the review board might recommend. As such, a request by the Department of Corrections would not necessarily result in the granting of a waiver.
3. There is no dispute that in order to work independently as a Corrections Officer, a trainee must successfully complete the Corrections Academy, and must do so prior to the conclusion of the probationary period. The probationary period may not exceed 12 months in length, except to the extent that it may be extended by periods of unpaid leave. As such, the Board found that the agency had no authority to extend the appellant's probationary period even if it had wished to do so.

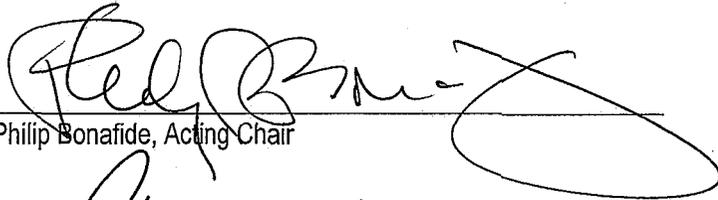
Decision and Order

Per 1001.02 (a) of the Rules of the Division of Personnel in effect at the time of the appellant's separation from service stated: "At any time during the initial probationary period an appointment authority may dismiss an employee who fails to meet the work standard provided the dismissal is not: (1) Arbitrary; (2) Illegal; (3) Capricious; or (4) Made in bad faith."

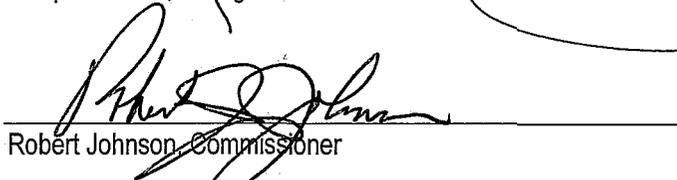
The appellant did not persuade the Board that the agency's decision to dismiss him prior to completion of his probationary period violated the Personnel Rules, or was improper under the applicable standard. The appellant did not meet the minimum requirements for admission to the Corrections Academy, and although the appellant argues that the standards established by Police Standards and Training were arbitrary, the Department of Corrections was under no obligation to challenge those standards on his behalf. The agency gave the appellant ample opportunity to meet the standard and demonstrate his ability to participate in the Corrections Academy, but he failed to take the necessary steps to prove his eligibility or gain entrance to the Academy. As such, the appellant failed to meet the work standard during his initial probationary period and the agency was well within its authority in dismissing him.

For all the reasons set forth above, the Board voted to DENY the appeal and affirm the agency's decision.

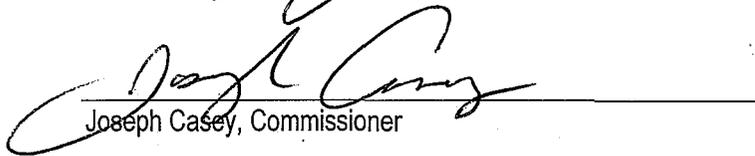
THE PERSONNEL APPEALS BOARD



Philip Bonafide, Acting Chair



Robert Johnson, Commissioner



Joseph Casey, Commissioner

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