

State of New Hampshire



PERSONNEL APPEALS BOARD

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

POST-HEARING ORDER APPEAL OF HEINZ SEIBERT

Docket #89-T-4

February 1, 1990

On August 30, 1989, the New Hampshire Personnel Appeals Board issued an order for reinstatement of Heinz Seibert, an employee of Laconia Developmental Services who had been discharged from his position as an attendant at Gardner's Grove Cottage, a residential group home operated directly by Laconia Developmental Services (LDS). The terms of reinstatement, included the following:

"Further, it is ordered, and it is noted that Mr. Seibert has concurred that this would be agreeable (letter from Michael Reynolds of January 30, 1989), that Mr. Seibert, upon reinstatement, be referred to and participate in the Employee Assistance Program, so long as the Program shall deem his participation to be appropriate under its guidelines."

The Board's August 30, 1989 order "...encourage[d] cooperation by Mr. Seibert in this endeavor."

By letter to the Board dated December 27, 1989, LDS Human Resource Coordinator Lisa Currier requested that the Board clarify whether or not Mr. Seibert, under the terms of the reinstatement order, was obligated to provide LDS with proof of his meeting with Employee Assistance Program representative and of the EAP's decision/recommendation for his participation in an approved EAP program.

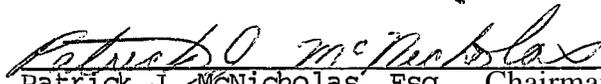
Mr. Seibert is ordered to provide both the Board and the Human Resource Coordinator of Laconia Developmental Services with proof of compliance with the Board's order of August 30, 1989. Included shall be a statement from the Employee Assistance Program representative attesting to Mr. Seibert's efforts to comply with the terms of the Board's order. Such proof shall be received by Laconia Developmental Services and the Personnel Appeals Board within twenty (20) calendar days of the date of this order.

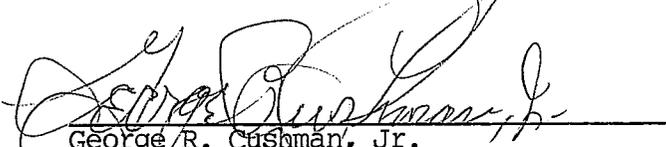
POST-HEARING ORDER
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January 17, 1990

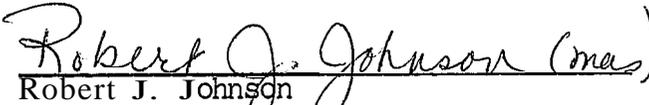
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Failure to comply, or prove a good faith effort to comply within the time specified may result in additional orders from the Board.

THE PERSONNEL APPEALS BOARD


Patrick J. McNicholas, Esq., Chairman


George R. Cushman, Jr.


Robert J. Johnson

cc: Lisa Currier, Human Resource Coordinator
Laconia Developmental Services

Heinz Seibert
Laconia Developmental Services

Virginia A. Vogel
Director of Personnel

State of New Hampshire



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Docket #89-T-4

This is an appeal of the termination of Heinz Seibert by Laconia Developmental Services (LDS), by whom he was employed. The termination was effected as of January 20, 1989, and the appeal timely brought by letter dated January 30, 1989. At the time of Mr. Seibert's termination, he was a permanent employee of LDS, employed as an attendant at the Gardner's Grove Cottage, the first residential group home operated directly by LDS.

Mr. Seibert admits, in connection herewith, that he did bring alcohol on the premises and did consume one drink thereof along with two other employees of LDS on December 24, 1988, Christmas Eve. Mr. Seibert acknowledges that he committed a serious error of judgment and that he feels some disciplinary action would be due him as a result.

LDS contends that the foregoing constitutes a violation of an agency posted rule that in itself warns of immediate discharge, and under the circumstances, immediate discharge is appropriate.

Reference is made to the tape recorded record and official file of the Division of Personnel relative to references, testimony, factual findings and documents referred to herein. Specific references to evidence are made where deemed necessary. An evidentiary hearing on the foregoing was held before the Board [Commissioners M. Bennett (Chair), G. Cushman and R. Johnson] on July 12, 1989. A quorum of the Board was present. The testimony was received from duly sworn witnesses and all actions and proceedings of the Board were regular, unless otherwise noted.

Lisa Currier, Human Resources Coordinator, represented LDS. Michael C. Reynolds, Esq., State Employees' Association General Counsel, represented the appellant.

An opening statement was received from Ms Currier. She then presented the testimony of Arlene LaFoe. Ms LaFoe has worked for LDS for 14 years and is a Resident Care Assistant I. Her duties include assuring client safety and assisting clients in performing daily living skills. She worked on the second (3 p.m. to 11 p.m.) shift at the time of the incident. She had met Mr. Seibert while working on the first shift. The Cottage serves four highly skilled mentally retarded clients. Ms LaFoe communicated the incident in question to Brenda Daly, the supervisor, due to conscience. One of the duties of the staff is to transport clients to shopping or work sites.

On the day in question, December 24, 1988, Mr. Seibert asked Ms. LaFoe if she wanted a holiday eggnog. Ms. LaFoe indicated that she did, and noted that her mother's recipe contained cream, rum flavoring, and eggs, and that she thought that was what would be in this eggnog. Mr. Seibert retrieved the eggnog from the office and Ms. LaFoe sipped it. She determined that it was strong and contained alcohol and poured it down a sink. She was concerned, but did not mention it to Mr. Seibert, who was to go off duty within the next 15 to 30 minutes. Ms. LaFoe did not report the incident to her supervisor then because she did not want to get Mr. Seibert in trouble. She testified that her conscience made her feel that the incident could happen again, perhaps when Mr. Seibert was driving with a client, prompting her to report these events.

After cross examination by Mr. Reynolds, LDS called Sandra Dow, a co-worker of Ms. LaFoe's and Mr. Seibert's who usually works third shift (11 p.m. to 7 a.m.). Ms. Dow worked second shift with Mr. Seibert on December 24th. She explained that in the early afternoon, Mr. Seibert suggested that a batch of eggnog be prepared for the holiday. Ms. Dow concurred and gave Mr. Seibert some money as a partial contribution to procure the ingredients. Mr. Seibert did so and offered the product to her and Ms. LaFoe. Ms. Dow felt that it contained strong liquor and dumped the remainder down the sink. She indicated that earlier in that day a conversation was had regarding what alcoholic beverage is best added to eggnog. Mr. Seibert allegedly recommended vodka, but Ms. Dow recommended rum, which became the additive of choice. Mr. Seibert procured this in Franklin while out with a client, although no rum was consumed at the time and the client is not believed by Mr. Seibert to have observed the procurement.

Brenda Daly, the house manager at Gardner's Grove, testified that Mr. Seibert had not signed off on the duty sheet (or work assignment compendium), on third shift when he worked on that shift. Ms. Daly, apparently concerned about Mr. Seibert's work performance, then transferred him to the first shift (in October of 1988). She wanted to provide greater supervision and it was an acceptable transfer in light of Mr. Seibert's seniority (since 1982). Ms. Daly learned of the incident in question by letter from Arlene LaFoe, and she questioned those on duty, resulting in the statement from Sandra Dow, on or about January 20, 1989. Mr. Seibert indicated to her that he indeed put alcohol in the eggnog and knew it was an infraction of the pertinent rules and acknowledged that it was an error in judgment.

Some testimony regarding prior incidents where Mr. Seibert was allegedly drinking on duty, and had stopped at a liquor store with a client along, was received. A motion to strike this (by Mr. Reynolds) was denied, but a motion to exclude further testimony of that ilk was granted.

Apparently, in the past (i.e., more than 10 years ago), drinking parties involving clients occurred. Enforcement of pertinent rules has occurred since, and the situation is improved. This and other testimony about the

program was received from Joyce Slayton, Director of Residential Services, LDS. She indicated that this is the second termination resulting from alcohol in the workplace.

Mr. Seibert testified in his own behalf, and indicated that on December 23rd he had a discussion with his co-workers regarding which alcoholic beverage was appropriate to put in eggnog. The decision was rum, and he did indeed procure some, bringing it to Gardner's Grove, preparing the eggnog, and giving some to his co-workers. He gave none to the clients, they did not observe the procurement or preparation of the eggnog, and he left duty shortly thereafter for the day, probably within one half hour. Mr. Seibert says he had no client contact after consuming one glass of eggnog. Mr. Seibert claims that he did not know that termination would result (automatically) under the circumstances set forth above.

A decision of the Appeals Tribunal of the New Hampshire Department of Employment Security offered by Mr. Seibert was marked as Exhibit A., and received for whatever limited evidentiary value it may have.

The audiotape transcription of the hearing and documents submitted to the Personnel Appeals Board comprise, in addition to the evidence received on hearing itself, the evidence in this appeal.

On all the evidence, the Board is of the opinion that, by a preponderance of the evidence received, the appellant has sustained his burden, and his appeal is, accordingly, granted. Mr. Seibert is hereby ordered, as of the date hereof, reinstated to his former position with LDS. He shall suffer no loss of seniority; however, no back benefits or back pay are awarded by the Board. RSA 21-I:58, I. Note statute, and the appellant's request that we assert our equitable powers thereunder (letter of appeal by counsel, dated January 30, 1989).

The Board is of the opinion, and accepts the appellant's statements, that he committed a grave error of judgment warranting some punishment. The Board believes that suspension would very likely have been an appropriate action under the circumstances, but the optional discharge permitted under the Rules, and the agency posted rules, is excessive in light of the evidence. This appeal does not pose a mandatory discharge situation under the Rules of the Division of Personnel, or the agency posted rules.

Further, it is ordered, and it is noted that Mr. Seibert has concurred that this would be agreeable (letter from Michael Reynolds of January 30, 1989), that Mr. Seibert, upon reinstatement, be referred to and participate in the Employee Assistance Program, so long as the Program shall deem his participation to be appropriate under its guidelines. It appears to the Board that such participation may be appropriate for and beneficial to Mr. Seibert, as we believe that the instant incident could be indicative of a broader need or problem. The Board is sympathetic in this regard, and encourages cooperation by Mr. Seibert in this endeavor.

APPEAL OF HEINZ SEIBERT

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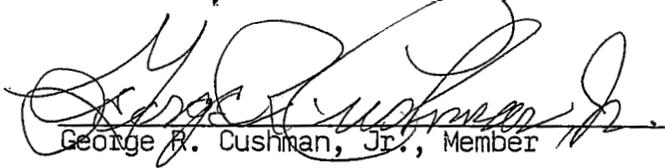
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Lastly, by way of comment, the Board is of the opinion that Laconia Developmental Services may have been able, if it wished, to make a sustainable case for the termination of Mr. Seibert. Rather, it terminated Mr. Seibert for a concise set of reasons as set forth in its letter of January 23, 1989. Upon warning of poor performance and the citation of other incidents generally alluded to during the hearing, sustainable termination may have resulted. The letter of termination, however, restricted itself to a single incident. The evidence suggests a larger and longer standing concern by the agency regarding Mr. Seibert, but the termination circumstances, the termination letter, and accordingly, the evidence which we could reasonably and lawfully receive, do not.

THE PERSONNEL APPEALS BOARD



Mark J. Bennett, Chairman



George R. Cushman, Jr., Member



Robert J. Johnson, Member

cc: Michael C. Reynolds, Esq.
SEA General Counsel

Lisa Currier, Human Resource Coordinator
Laconia Developmental Services

Virginia A. Vogel
Director of Personnel

DATED: August 30, 1989