

State of New Hampshire

WPPID1062



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

93-F 902

APPEAL OF DOMINICK TARALLO
Department of Corrections
Docket #93-T-2

Response to State's Motion for Reconsideration and Clarification

April 28, 1993

By letter dated March 23, 1993, received by the Board on March 25, 1993, Department of Corrections Staff Attorney John E. Vinson submitted a Motion for Reconsideration and Clarification on behalf of the State in the above-captioned appeal. Attorney Vinson argued that the Board, by reinstating Mr. Tarallo, was "...elevating form over substance", since the Board independently found sufficient evidence to terminate the appellant for violations other than those cited by the State.

The Board's order and decision in this matter requires no clarification. The specific charges made by the State against the appellant arising from an alleged "consensual sexual relationship" were completely unsupported by credible evidence. The State, in presenting its case to the Board, agreed that falsification of records was not one of the offenses relied upon to support the termination decision. Having consciously excluded that charge from consideration when it issued the notice of termination and when the Department appeared before the Board to defend its decision, the appointing authority may not now rely upon it in requesting reconsideration or rehearing.

Per 1001.08(f) states:

"No appointing authority shall dismiss a classified employee under this rule until the appointing authority: (1) meets with the employee to discuss whatever evidence the appointing authority believes supports the decision to dismiss the employee prior to issuing notice of dismissal; (2) provides the employee an opportunity at the meeting to refute the evidence presented by the appointing authority...." (emphasis added).

Mr. Tarallo was not discharged for making false official statements, failing to report or act upon an infraction of rules committed by the inmate, or for giving or selling anything to an inmate. As such, Mr. Tarallo never had an opportunity, as provided by Per 1001.08(f), to discuss and refute any evidence of same which the appointing authority might have offered in support of its decision to terminate his employment. The appellant would be hard pressed through rehearing to prove those offenses did not occur when the Board has already made findings of fact to that effect.

The department discharged the appellant on five separate charges, each arising from an alleged consensual sexual relationship between Tarallo and an inmate. Pursuant to RSA 21-I:58, the Board convened a hearing to consider evidence related to the facts in dispute related to those charges. The State offered virtually no credible evidence to support its claim that a consensual sexual relationship existed between Tarallo and the inmate, or that because of such relationship, Tarallo violated the five policies and/or procedures cited in the notice of termination. The State knowingly excluded from consideration those charges which it now wishes to raise as an appropriate basis for immediate discharge without prior warning.

In essence, the State has asked the Board to discharge the appellant for violation of policies and procedures which the State neither cited nor applied appropriately in the first instance, yet to overlook the State's own failure to conduct itself in accordance with the Rules of the Division of Personnel and the Department's own policies. In the alternative, the State has asked the Board for another hearing, presumably to allow it to explore its new charges that Mr. Tarallo, "...is a liar", that "...he cannot be trusted", that he "...let an inmate extort things of value from him", and that these constitute "character flaws which cannot be corrected with warnings". (SEE: State's Motion, page 2).

Having reviewed its order of March 4, 1993 in conjunction with the State's Motion, the Board voted unanimously to deny the Motion and to affirm its decision, reinstating Mr. Tarallo under the terms and conditions set forth in the original decision in this matter.

THE PERSONNEL APPEALS BOARD



Mark J. Bennett, Acting Chairman



Robert J. Johnson, Commissioner



Lisa A. Rule, Commissioner

cc: Virginia A. Lamberton, Director of Personnel
Commissioner Ronald L. Powell, Department of Corrections
Michael C. Reynolds, SEA General Counsel
John Vinson, Esq., Department of Corrections

State of New Hampshire

WPPID1043



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

93-T-902

APPEAL OF DOMINICK TARALLO
Department of Corrections
Docket #93-T-2

March 4, 1993

The New Hampshire Personnel Appeals Board (Bennett, Johnson and Rule) met Wednesday, January 20, 1993, to hear the termination appeal of Dominick Tarallo, a former employee of the Department of Corrections. Mr. Tarallo, who was represented at the hearing by SEA General Counsel Michael Reynolds, was dismissed from his employment effective July 27, 1992, for alleged violations of departmental policy and procedure directives related to the following: becoming unduly familiar with persons under departmental control; failure to devote entire time and attention to duties; dereliction of duty; failure to support all policies and programs of the department; and failure to obey a lawful order of a superior. The Department of Corrections was represented at the hearing by Attorney John Vinson.

In its letter of July 27, 1992, the Department of Corrections alleged that then Sergeant Tarallo had consensual sexual relationships with a female prisoner while he was assigned to the Lakes Region Facility (hereinafter "Facility"), that he had provided cigarettes to the same female inmate, and that he had failed to report same to his superiors. The Department said the appellant had admitted to the allegations during the course of its investigation of his conduct, but failed to supply a written statement to Lt. McGill as he had been ordered during the investigation.

Specifically, Attorney Vinson said the evidence would support a finding that Sgt. Tarallo had followed a female inmate from his office to a nearby rest room where he witnessed her in a state of almost complete undress, then failed to report the incident to his superiors. He said the evidence would further support a finding that in a second incident involving the same inmate, Tarallo had rubbed the inmates naked breasts, then attempted to buy her silence by providing her cigarettes. Finally, he argued the evidence would support a finding that even after admitting to the offenses, Tarallo had failed to provide a statement as part of a formal investigation.

Attorney Reynolds argued that the facts would differ in very important elements, specifically that the allegation of a consensual sexual relationship was untrue. He said the appellant would admit that he had seen the inmate in a state of undress, and had not reported it. He also said the appellant would admit that on at least one occasion he had given the inmate cigarettes. He said the appellant would agree his violations of departmental policy warranted discipline. However, he argued, termination was much too harsh a punishment in light of Tarallo's superior work record and length of service with the Department.

After considering the testimony and evidence presented by the parties in this case, the Board made the following findings of fact and rulings of law:

In May or June of 1992, a female inmate from Summit House alleged that while she had been on medical call at the State Prison, Tarallo had committed an unspecified act of sexual misconduct. She claimed she had waited to report the incident until after Tarallo had been transferred from the Prison in Concord to the Lakes Region Facility out of concerns for her own security.

After the initial allegation, John Sanfilippo, Superintendent at the Facility, told the appellant to be more careful around the female prisoners. He suggested the appellant should not "...get caught alone" with any of the female inmates. He also told the appellant that if he should be caught off guard and be alone with a female prisoner, he should not "run and make it obvious". The appellant was sufficiently aware of the risks of being alone with female prisoners that on at least one occasion, after being ordered to take an inmate with him to set up one of the Facility's beach houses for a meeting, the appellant contacted Sanfilippo to try to have another officer assigned the duty with him.

While employed at the Lakes Region Facility, the appellant's duties included, but were not limited to, receiving and distributing mail and property delivered to the facility for the inmates. When property was received, the appellant would complete a receiving slip listing the contents of the package(s). The inmates scheduled to receive mail or property would then be called to the appellant's office to pick up the items, where they would sign and receive a copy of the receiving slip. The appellant retained copies of the slips for the Department's records.

Some of the property received at the facility included cigarettes which the inmates could purchase from the canteen at the Prison in Concord from monies earned by them during their incarceration and paid to them on a monthly basis. Inmates are strictly limited in the amount of property they are allowed to have at any time (i.e., three shirts, two cartons of cigarettes, etc.). Cigarettes are a form of "currency" within correctional institutions

and the number of cigarettes inmates are allowed to hold at any one time is limited in order diminish the opportunity for bribery or blackmail. On occasion, the Superintendent would allow bona fide family members to send in cigarettes. He made such an exception in the case of Inmate Greenwood.

Before the first incident of alleged sexual contact occurred, Inmate Greenwood had started asking the appellant if her cigarettes had come in. He kept telling her they had not. In the course of receiving and distributing property to the inmates, Greenwood was called to the appellant's office to pick up property. When she arrived at his office, Inmate Greenwood asked to use the bathroom and the appellant directed her to the rest room for inmates several doors down the hall. Three or four minutes later when she had not returned, the appellant went to look for her. Instead of using the inmate rest room, she had gone to the staff rest room across the hall from the appellant's office. The door was open and the lights were out. The appellant looked in, where he saw the inmate with her pants down to just above her knees and her shirt up exposing her breasts. The appellant told her to get dressed then called her back to the office to pick up her property. She signed the receiving slip and left.

After that time, three or four times a day the inmate would asked Sgt. Tarallo if her cigarettes had come in. He kept telling her he had not received them. A week or two after the incident described above, Greenwood asked the appellant if he would get her some cigarettes. when he told her he would not, she asked if he remembered Sherry Kluzak¹ and said that if he didn't get her some cigarettes, she would report that he had seen her naked. Shortly thereafter, he did get her two packs of cigarettes.

In a separate incident a week or two later, Inmate Greenwood came to the appellant's office to pick up property belonging to her. She leaned toward the appellant as if to sign the property slip, lifted her shirt and laid her breast on the appellant's arm. He pulled away from her. He had her sign the paperwork and she left.

1/ Sherry Kluzak was the inmate who had originally complained of Tarallo's conduct at the prison in Concord, claiming some unspecified sexual misconduct. Kluzak and Greenwood were believed to have bunked together at the Women's Prison almost immediately after Greenwood's escape from the Lakes Region Facility, apprehension and transfer.

The appellant then bought a carton of cigarettes and put Inmate Greenwood's name on it. He was scheduled to go on vacation, and left the carton of cigarettes in the property room at the Facility. During his vacation, he learned that Inmate Greenwood had escaped, and he was called back to the Facility. Greenwood was apprehended by the Laconia Police Department, where the appellant went to identify her. Greenwood was returned to the Lakes Region Facility, from which she was then transferred to the Women's Prison in Goffstown. Greenwood's property was collected from the Facility for transfer to the Women's Prison. Among the items transferred to her was the carton of cigarettes which the appellant had purchased and tagged with her name. The receiving slip for the cigarettes incorrectly showed they had been received from Greenwood's mother. The appellant was aware that the information on the documents was false.

Prior to termination, Lt. McGill from investigations contacted the appellant and told him he was "in trouble." He said that if Tarallo were to resign, the department of corrections would give him "a good letter". During the meeting with McGill, the appellant said he wasn't feeling well and wanted to go home. McGill excused him and told him to complete a written statement outlining what they had discussed during the meeting. No statement was provided to the Department of Corrections by the appellant or by his representative at that time, SEA Field Representative Stephen McCormack. John Sanfilippo allowed Mr. McCormack to participate at the pre-termination meeting. Mr. McCormack apparently advised the appellant not to speak in his own defense in that meeting, and to let the Board take up his appeal.

The evidence certainly supports a finding that the appellant exercised dangerously poor judgment in his dealings with Inmate Greenwood. There is no evidence, however, of "consensual sexual relationships with a female prisoner", the basis for his termination from employment. On the charges, the Board found the following:

1. Becoming unduly familiar with persons under Departmental Control.

The Department provided no evidence that the appellant's relationship with Inmate Greenwood constituted undue familiarity. The charge would appear to be supported by the appellant supplying the inmate with 12 packages of cigarettes. However, the evidence more readily suggests extortion than familiarity or friendship. The inmate created situations which would place the appellant in a very compromising position if his superiors were to learn of them. The inmate then used those situations and her knowledge of an earlier allegation of sexual misconduct to obtain cigarettes which otherwise would not have been available to her.

2. Failure to devote your entire time and attention to your duties.

The Board found this charge to be nothing more than make-weight, since the charge is predicated upon the appellant's alleged inability to remain attentive to his duties while engaged in sexual relationships. Since the charge of consensual sexual relations was not proven, this charge as well must be considered insufficient for termination.

3. Dereliction of duties.

The Department attempted to introduce a charge of falsifying documents, specifically receiving slips for cigarettes which the appellant provided to the inmate, to support its charge of dereliction of duties. The termination letter makes no reference to such a charge, and the State stipulated during the hearing that it had not charged the appellant with falsification of records. The appellant admitted that he had knowingly participated in creating and retaining inaccurate records of inmate property. The Department was fully aware of that fact prior to his termination, yet it failed to include a charge of making false official statements in its letter of termination. Therefore, the Board did not find the State had supported its charge that the appellant was derelict in his duties.

4. Failure to support all policies and programs of the department.

To the extent that the appellant admitted he had given cigarettes to Inmate Greenwood, the appellant failed to support all policies and programs of the department by violating 2.2.16 IV P 2 of the Rules of Conduct:

No employee shall give or sell anything to a person under departmental control, or buy, sell, or accept anything from or to persons under departmental control or their families or extend to them any favors without permission of the Commissioner.

5. Failure to obey a lawful order of a superior.

Investigator McGill's Statement Form (State's Exhibit #3) relates the following:

After telling me his story he stated that he wasn't feeling well and did not want to continue the interview at that time. I told him that if he would write a statement reflecting what he had told me and bring it to my office or leave it at LRF the next day, that would be fine. He agreed to do this and left. In the afternoon of the next day I still had not received his statement nor had he left it at LRF. I talked to Tarallo by

telephone that afternoon and asked where his statement was. He told me he had not written it yet. I asked him if he could come in to give me his statement. He asked if he could drop it off at the Prison the next day and I told him as long as he made sure I got it before Monday the 27th. As of this date (07/30/92), I still have not received his statement.

Little of what Investigator McGill said in his statement even suggests that the appellant was ordered to produce and deliver a statement. Therefore, the Board did not find that the appellant failed to obey a lawful order of a superior.

The letter of termination, dated July 27, 1993, advises the appellant his termination was effected "in accordance with Personnel Rule Per 1001.08 (a)" which states:

Dismissal without prior warning. An appointing authority shall be authorized to take the most severe form of discipline by immediately dismissing an employee without warning for offenses such as, but not necessarily limited to, the following:

- (1) Theft of valuable goods or services from the state or from any other employee or client of the agency.
- (2) Willful abuse or destruction of state property or the property of any employee or client of the agency which, in the opinion of the appointing authority, represents a substantial cost for repair or replacement.
- (3) violation of a posted or published agency policy, the text of which clearly states that violation of same will result in immediate dismissal.
- (4) Being the aggressor in a fight or an attempt to injure another person in the workplace.
- (5) Engaging in subversive activities prohibited by RSA 648.

Per 1001.08 (a) clearly provides an agency the authority to terminate an employee without prior warning for offenses other than those listed above. However, it is incumbent upon the appointing authority to specify what offense gave rise to immediate dismissal without prior warning, and why such offense rose to the level of those listed in Per 1001.08 (a) (1) - (5). The Department of Corrections failed to offer any such explanation. Accordingly, the Board can only surmise from the text of the dismissal notice that the Department considered Sgt. Tarallo to have violated a posted or published agency policy, the text of which clearly states that violation of same will result in immediate dismissal.

The Department's Policy and Procedure Directive 2.2.16 IV states the following:

"Any employee who violates any provisions outlined below may be subject to disciplinary action and/or dismissal from employment, under the Rules of the Department of Personnel." (Emphasis added)

Clearly the appellant abused the record keeping policy at the facility, as well as the "cigarette" policy. The appellant showed incredibly poor judgment by failing to report Greenwood's early threats, and made matters worse when he bought her cigarettes to keep her from reporting the first incident. The appellant's story of a contemplated "sting" operation is neither credible nor is it supported by any of the evidence, particularly since the appellant sent Inmate Greenwood the carton of cigarettes after she had been transferred from the Lakes Region Facility to the Women's Prison in Goffstown.

Those offenses which the appellant did commit are not described by the Department's policy and procedure directive as immediate dismissal offenses. In fact, the offenses which the appellant committed, and to which he admitted, could have supported termination had the Department of Corrections actually applied its policy and the Rules of the Division of Personnel to the facts of the matter. Specifically, the Department might have relied upon the following violations of Policy and Procedure Directive 2.2.16 to discipline Sgt. Tarallo:

- IV J (Making False Official Statements)
- IV K (Failure to Report or Act Upon an Infraction of Rules Committed by a Person under Departmental Control)
- IV P-2 (Giving or selling anything to a person under departmental control...).

Per 1001.08(b) provides the following:

"In cases such as, but not necessarily limited to, the following, the seriousness of the offense may vary. Therefore, in some instances immediate discharge without warning may be warranted while in other cases one written warning prior to discharge may be warranted.

...(3) Violation of a posted or published agency policy, the text of which clearly states that violation of same may result in immediate dismissal."

Rather than taking appropriate disciplinary action for the acts and omissions actually committed by the appellant, the Department relied upon the unsupported allegation that the appellant engaged in a consensual sexual relationship with an inmate in deciding to terminate him from his employment. While the Board can not support that termination, the Board finds the appellant's acts and omissions warrant substantial discipline. Therefore, the Board orders the appellant reinstated to his former rank. However, such reinstatement shall be made without back pay or benefits, including accrual of

APPEAL OF DOMINICK TARALLO
Docket #93-T-2
page 8

leave, seniority, retirement credit, insurance benefits or pay. His reinstatement shall be completed within 30 days of the date of this order, unless otherwise mutually agreed to by the parties. The Department may assign the appellant to a shift and duty station appropriate to his rank and experience.

THE PERSONNEL APPEALS BOARD



Mark J. Bennett, Acting Chairman



Robert J. Johnson, Commissioner



Lisa A. Rule, Commissioner
Lisa A. Rule, Comr

cc: Virginia A. Lamberton, Director of Personnel
Commissioner Ronald L. Powell, Department of Corrections
Michael C. Reynolds, SEA General Counsel
John Vinson, Esq., Department of Corrections