

# State of New Hampshire



## **PERSONNEL APPEALS BOARD**

25 Capitol Street

Concord, New Hampshire 03301

Telephone (603) 271-3261

## **Appeal of Michael Tensel**

### **Decision on Appellant's Motion to Amend Decision and State's Objection to Motion to Amend Decision**

May 8, 2013

On May 11, 2011, the New Hampshire Personnel Appeals Board met in a public session, under authority of RSA 21-I:58 and N.H. Admin. Rules Per-A 100-200, to hear the appeal of Mr. Tensel. The Board issued its decision in this appeal on August 4, 2010.

Appellant, Mr. Tensel, on March 15, 2013, has filed a motion asking the Board to redact certain portions of that decision. The Department of Corrections, on March 22, 2013, has filed an objection to the Appellant's motion.

Under the Rules of the Personnel Appeals Board, all decisions of the Board "shall be available for examination by the public unless the board determines that some or all of the material is exempt from disclosure under RSA 91-A: 5 or applicable case law." Per-A 205.02. Mr. Tensel did not, until this current motion, request the Board before or during the hearing or after the issuance of the decision to determine that all or any portions of the materials submitted prior to or during the proceedings or any portions of the decision are exempt from disclosure under RSA 91-A: 5 or any applicable case law. Mr. Tensel's motion does not set forth any case law that would support this request nor does the motion provide any information that would indicate the information contained in the August 4, 2010, decision of the Board is exempt from disclosure under RSA 91-A: 5.

The decision of the Board dated August 4, 2010, was based on the evidence submitted and the testimony provided by both the Appellant and the Department of Corrections. Mr. Tensel does not question the substance of that evidence as set forth in the Board's decision.

After reviewing the August 4, 2010, decision, the Board believes the findings set forth in the decision are an integral part of the reasoning and determination of that decision. The Board finds that the 2010 proceedings and decision were conducted and issued in public in accordance with the rules of the Personnel Appeals Board. The Board also rules that there has been no showing that the public nature of the proceedings or the decision are in violation of RSA 91-A: 5 or any applicable case law.

Accordingly, the Board DENIES the Appellant's request to redact any portions of the August 4, 2010, decision.

The New Hampshire Personnel Appeals Board

  
Philip Bonafide, Commissioner

  
Robert Johnson, Commissioner

  
Joseph Casey, Commissioner

cc: Karen Hutchins, Director, NH Division of Personnel  
Attorney Michael J. Sheehan for the Appellant  
Senior Assistant Attorney General Lynmarie Cusack for the NH Department of  
Corrections  
Michael Tensel, Appellant

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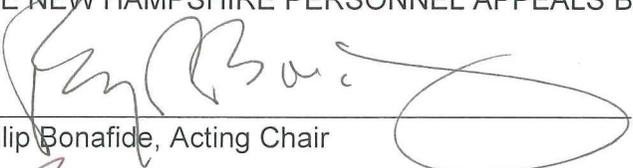
### Appeal of Michael Tensel – Docket #2010-D-022 Department of Corrections October 17, 2011

By letter dated June 22, 2010, the above-named Appellant requested a hearing before the New Hampshire Personnel Appeals Board to appeal a written warning issued to him on March 2, 2010, for failure to meet the work standard, failure to take corrective action as directed, and violation of a posted or published state or agency policy or procedure. On June 23, 2010, the Appellant was dismissed from his position as a Correctional Counselor/Case Manager. He appealed the dismissal as well (PAB Docket #2011-T-001)

During several prehearing conferences, the parties agreed that the department's authority to dismiss the Appellant was not dependent on the status of the March 2, 2010, written warning. As a result, the Board advised the parties that it would hold the letter of warning appeal in abeyance pending the outcome of the hearing on the Appellant's dismissal. The parties agreed that if the Board were to reinstate the Appellant, the Board would then hear the appeal of the written warning; otherwise, if the Board denied the termination appeal and upheld the dismissal, the letter of warning appeal would be considered moot.

On August 4, 2011, the Board issued its decision denying the Appellant's appeal of his dismissal. The Appellant's June 22, 2010, appeal of a March 2, 2010, letter of warning is therefore dismissed as moot.

THE NEW HAMPSHIRE PERSONNEL APPEALS BOARD

  
Philip Bonafide, Acting Chair

  
Robert Johnson, Commissioner

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Joseph Casey, Commissioner

cc: Karen Hutchins, Director of Personnel, 25 Capitol Street, Concord, NH 03301  
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Assistant Attorney General Lynmarie Cusack, Dept. of Justice,  
Assistant Attorney General Lisa English, 33 Capitol Street, Concord, NH 03301

# State of New Hampshire



## PERSONNEL APPEALS BOARD

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### Appeal of Michael Tensel – Docket #2011-T-001

#### Department of Corrections

August 4, 2011

The New Hampshire Personnel Appeals Board (Bonafide, Johnson and Casey) met in public session on Wednesday, May 11, 2011, under the authority of RSA 21-I:58 and Chapters Per-A 100-200 of the NH Code of Administrative Rules, to hear the appeal of Michael Tensel, a former employee of the New Hampshire Department of Corrections. Mr. Tensel, who was represented at the hearing by Attorney Michael Sheehan, was appealing his June 23, 2010, termination from employment as a result of his receiving a third written warning for the same type of offense within a period of five years. Assistant Attorneys General Lynmarie Cusack and Lisa English appeared on behalf of the State.

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

#### State's Exhibits:

1. January 15, 2010, email from Linda Levasseur to Lori Seog responding to Lori Seog's December 29, 2009, email Re: M. Tensel
2. March 1, 2010, email from Linda Levasseur to Lori Seog Re: Michael Tensel
3. October 21, 2009, email from Linda Levasseur to Lori Seog and Kelly Mathews
4. Intermediate Employee Evaluation for Michael Tensel dated August 12, 2009
5. June 26, 2009, memo from Linda Levasseur to Michael Tensel
6. Performance Evaluation for Michael Tensel dated May 11, 2009

7. June 23, 2010, letter of dismissal (with prior warnings attached) issued by William McGonagle to Michael Tensel
8. Performance Evaluation for Michael Tensel dated May 19, 2006
9. Incident Report dated June 11, 2009, completed by Lori Seog regarding Michael Tensel
10. June 26, 2009, counseling memo issued by Lori Seog to Michael Tensel concerning PPD 2.16, V, 30 regarding conduct
11. Department of Corrections PPD 2.16, Rules and Guidance for DOC Employees
12. Acknowledgement of Receipt for DOC Policy 2.39 and DOC Policy 2.16 signed by Michael Tensel on May 18, 2001
13. April 15, 2005, counseling memo issued by Captain Christopher Kench to Michael Tensel
14. Performance Evaluation for Michael Tensel dated May 15, 2008
15. Performance Evaluation for Michael Tensel dated May 12, 2004
16. June 29, 2009, email from Linda Levasseur to Michael Tensel

The following persons gave sworn testimony:

Linda Levasseur, former Administrator of Programs, NH State Prison for Men  
Lori Seog, former Director of Programs, NH State Prison for Men  
William McGonagle, Assistant Commissioner, Dept. of Corrections  
Michael Tensel, Appellant

Having carefully reviewed the evidence, arguments and pleadings, the Board made the following findings of fact and rulings of law.

1. On March 6, 2006, while employed at the Department of Corrections' Lakes Region Facility as a Corrections Counselor/Case Manager, the Appellant received a written warning from Warden Jane Coplan for a variety of offenses, including an alleged violation of PPD 2.16, for Inappropriate Conduct toward staff and inmates. The warning (part of State's Exhibit 7) describes an incident on February 26, 2006, in which the Appellant allegedly engaged in an angry, inappropriate, insulting exchange with his supervisor, Bernadette Brauns, while they were discussing the Appellant's work performance. That warning was not appealed to this Board and remains a part of the Appellant's personnel file.

2. In January, 2009, the Appellant transferred from the Lakes Region Facility to the Men's Prison in Concord, and was assigned to Intervention Services as a Corrections Counselor/Case Manager under the direct supervision of Linda Levasseur, who was then the Administrator of Programs at the prison.
3. Although Ms. Levasseur was the Administrator of several different programs including Intervention Services, she had no authority to hire or fire. She was not authorized to take any form of disciplinary action, and was limited to counseling employees whose performance or conduct was unsatisfactory. If she believed that one of her employees needed to be disciplined, she would contact Ms. Seog, her supervisor, let her know that letters of counsel had been issued to the employee but that the conduct or behavior had not changed, and request that disciplinary action be taken. She would then rely on Ms. Seog to take whatever action Ms. Seog considered to be appropriate. Ms. Levasseur admitted that waiting for disciplinary action to be taken by someone else was a source of frustration. (Testimony of Linda Levasseur)
4. In the months preceding the Appellant's dismissal, Ms. Levasseur had counseled the Appellant repeatedly about his work performance, including the quality and quantity of his work, routinely returning work to him to be corrected. Ms. Levasseur also discussed with the Appellant his unprofessional demeanor, how his work and workplace attitude impacted his co-workers, and why his discussing violent crimes with inmates and co-workers was inappropriate in the workplace. Ms. Levasseur testified that when she would show the Appellant errors he had made or when she criticized his interactions with inmates or staff, he would glare at her, become defensive, and accuse her of being intimidating, offensive and cruel. (Testimony of Linda Levasseur)
5. As the Appellant's supervisor, Ms. Levasseur spent a disproportionate amount of time reviewing and correcting the Appellant's work. After nearly a year as his supervisor, Ms. Levasseur concluded that she had tried everything she could to help the Appellant be successful in his position, but nothing was improving. Ms. Levasseur testified that her "number one hope was that Michael would be able to get the help and would be able to do the job... After that, it was unfair to me, unfair to my staff, unfair to the inmates, unfair to the whole Department of Corrections."
6. The Appellant admitted that he expected the job to entail more counseling and less record-keeping, and in that regard, the job was more demanding than he had expected. He admitted that he was unable to keep up with the computer work, and every time he thought

- he had corrected his errors, more errors were pointed out to him. Having been counseled repeatedly about his failure to meet work standards, the Appellant concluded there would be additional disciplinary action forthcoming, describing it as “the handwriting was on the wall.”
7. On November 6, 2009, the Appellant received a second written warning (part of State’s Exhibit 7) from Assistant Commissioner William McGonagle for multiple violations of PPD 2.16, including the Appellant’s alleged failure to obey a written order, regulation or directive issued by appropriate authority; conduct; and performance of assigned duties. Among the allegations, the Appellant reportedly engaged in an angry, unprofessional exchange with the Lori Seog, in June, 2009, and later, unspecified incidents of unacceptable workplace conduct that reportedly caused co-workers to “express discomfort” and “concern for their welfare and safety...”. That warning was not appealed to this Board and remains a part of the Appellant’s personnel file.
  8. Ms. Seog testified that the Appellant tries to “face you down,” stating that she herself had counseled the Appellant about being a bully.
  9. In late February, 2010, Ms. Levasseur returned some work to the Appellant that had to be corrected. On February 26, 2010, the Appellant came to Ms. Levasseur’s office to show her the corrections he had made. The meeting lasted approximately one hour. Ms. Levasseur testified that although the purpose of the meeting had been to review the Appellant’s work, the Appellant brought up a series of disturbing, unrelated subjects throughout the course of the meeting. The Appellant described himself by saying, “Yes – sometimes I speak out of turn and I’m over-emphatic.” However, he denied ever trying to threaten or intimidate his supervisor.
  10. The Appellant testified that when he met with Ms. Levasseur on February 26, 2010, he did go off on tangents, but said he was simply trying to make Ms. Levasseur aware of misinformation about him that was circulating through the office. The Appellant testified that he told Ms. Levasseur, “I want to let you know I’m at the point where I can’t take it any more and there’s not a lot left for resolution, and I don’t want to hurt you at all, but I’m going to do what I need to do to save whatever is left of my career.” The Appellant said that he “...had gotten to the point where [he] knew there was very little hope at all of [his] being able to salvage [his] position at the Department of Corrections.”
  11. Ms. Levasseur testified that the Appellant’s conduct at their February 26, 2010, meeting left her terrified. “[The Appellant] said he didn’t want to hurt me, but he didn’t say he wouldn’t hurt me.” As soon as the meeting ended, Ms. Levasseur called her supervisor, Lori Seog to

report what had happened. Ms. Seog asked Ms. Levasseur to outline her concerns in writing. (Testimony of Linda Levasseur)

12. On March 1, 2010, Ms. Levasseur sent an email to her supervisor, Lori Seog (State's Exhibit 2), describing what she recalled of her meeting with the Appellant on February 26, 2011. Ms. Levasseur wrote, "He spoke in tangents and would weave back and forth to the topic of discussion. When he wasn't talking about the corrections to his work he was speaking about violent acts..." Although the Appellant made no direct threats to harm her, Ms. Levasseur was frightened and reported to her supervisor that she believed her life was at risk.
13. Ms. Levasseur testified that the Appellant's conversation with her included the following:
  - a. The Appellant asked Ms. Levasseur if she owned a gun, telling her that if he had a private practice, he would want to own a gun.
  - b. The Appellant told Ms. Levasseur that because of his FBI record, and because of a conviction he needed to have expunged, he was unable to obtain a permit for a gun.
  - c. The Appellant told Ms. Levasseur about a prowler that reportedly had been spotted near his home and how frightened his wife would be if she knew about it.
  - d. The Appellant talked about prisoners wanting to rape women or bash in the skulls of corrections officers, asking Ms. Levasseur how she thought it would feel to be afraid for your life.
  - e. The Appellant talked about how he knew really bad people and criminals, and that he had done some really bad things in the past.
  - f. The Appellant spoke of being in a knife fight.
  - g. The Appellant talked about Columbine.
  - h. The Appellant talked about taking Ambien and how it was possible, because of the medication, that he could do something and not remember doing it.
  - i. The Appellant demanded to know with whom Ms. Levasseur had shared information about his work performance.
14. The Appellant testified that he did not discuss Columbine with Ms. Levasseur on February 26, 2010, but instead had discussed it on another occasion with Nellie Chancy, one of his coworkers. The Appellant testified that after hearing news of a Columbine-style attack, he had told Ms. Chancy about "some guy" coming to school with his father's bolt action weapon and that a teacher had jumped the individual and "saved the day." According to the Appellant, Ms. Chancy commented, "That was lucky," and the Appellant replied, "Sometimes

they go in with guns in each hand.” The Appellant testified that Ms. Chancey must have, “turned that around,” causing his conversation to be misunderstood and misinterpreted by other members of the staff.

15. The Appellant testified that he never owned a gun, although he did mention during the February 26, 2010, meeting with Ms. Levasseur, that he would want a gun if he were to open a private practice counseling inmates. He testified that he did ask if Ms. Levasseur if she owned a gun, and shared with her his story about his having applied for a pistol permit, having an old record of conviction “pop up,” and why he would need to have that record expunged. The Appellant testified that although he had talked about a prowler being discovered near his home, it was not intended to frighten Ms. Levasseur but to call attention to the fact that he was working long hours and getting home late. The Appellant denied ever talking about specific violent acts against staff in his office, although he said he had talked about violence in terms of the impact of crime. The Appellant testified that, “I’ve never been involved in a knife fight. First of all, my idea of a knife fight would be the classic West Side Story, two guys with a knife. I said it out of concern for the staff.” The Appellant testified that there was an incident that occurred when he was seventeen years old, and he was attacked by someone with a knife. The Appellant testified that he simply wanted the staff to remember always to be careful and safe. The Appellant stated, “It’s not safe, with staff and inmate movement. I was very concerned about my colleagues a lot of the time, because somebody could just come out of the blue.”
16. On March 2, 2010, the Appellant received a third written warning (part of State’s Exhibit 7) from Assistant Commissioner William McGonagle for alleged violations of PPD 2.16 for Conduct and Performance of Assigned Duties covering the period between November 30, 2009, and January 21, 2010. That warning, which is currently under appeal to this Board and identified as Docket #2010-D-022, was identified as a “third letter of warning for the same issues regarding your conduct and performance of assigned duties within a five year period.” It states, “As provided under Per 1002.08(c)(1) an appointing authority may dismiss an employee pursuant to Per 1002.04 by issuance of a third letter of warning for the same type of offense within a period of five years. However, at his time, I’ve chosen to issue this third letter of warning in lieu of dismissal to provide you one last opportunity to take the required corrective action.”

17. On March 2, 2010, the same day that the Appellant received the third written warning described above, the Appellant was notified that he was under investigation as a result of his interactions during his meeting with Ms. Levasseur on February 26, 2010.
18. Ms. Levasseur's initial interview with investigators was conducted on March 10, 2010. Her follow-up interview occurred on June 7, 2010.
19. By letter dated June 23, 2010, (part of State's Exhibit 7) the Appellant was notified of his dismissal for allegedly violating PPD 2.16 as it applied to conduct. In the letter of dismissal, Assistant Commissioner McGonagle wrote, "On March 2, 2010, you were notified that you were under investigation due to allegations that you used intimidating and threatening behavior towards you supervisor. Upon review of that investigation, there is evidence of threatening and intimidating misconduct which you directed towards your Supervisor, Ms. Linda Levasseur, during a meeting that took place on February 26, 2010 in her office."
20. Department of Corrections PPD 2.16, V, states, "Any employee who violates, including but not limited to, any provisions outlined below may be subject to DISCIPLINARY ACTION UP TO AND INCLUDING IMMEDIATE DISMISSAL from employment under this policy and the Rules of the Division of Personnel." (State's Exhibit 11) According to PPD 2.16, V, 30, "Conduct: Employees of the department are to conduct themselves at all times with mutual kindness and respect, and are required to strictly avoid collusion, jealousies and strife that may affect their duty performance." (State's Exhibit 11)
21. Per 1002.08(c)(1) provides for the dismissal of an employee upon issuance of a third written warning for the same type of offense within a period of five years. Letters of warning issued to the Appellant on March 6, 2006, November 6, 2009, March 2, 2010, and June 23, 2010, all refer to violation of PPD 2.16, V, 30 resulting from the Appellant's inappropriate communications and conduct in the workplace. The final warning issued to the Appellant on June 23, 2010, as a notice of dismissal states, in part, "After meeting with you, and after reviewing the investigation packet and your personnel file, I have decided that this third letter for the same type of offense shall be issued as a dismissal letter from your employment, for your failure to take appropriate corrective action regarding your inappropriate conduct and behavior towards your supervisors in the workplace. Therefore, you are dismissed from employment with the NH Department of Corrections upon issuance of this letter."

### Position of the parties

Attorney Sheehan argued that the Board's review of the Appellant's third and final warning for violation of PPD 2/16, Section V, (30) Conduct, should remain focused on the agency's claim that the Appellant's conduct during a meeting with his supervisor on February 26, 2010, was threatening and intimidating. Attorney Sheehan argued that it was irrelevant whether the Appellant was "a good guy or a bad guy," or whether the Appellant had "been a bad guy for months or years." The review, he argued, must be limited to the specific charges in the warning that related to a single meeting between the Appellant and his supervisor in February, 2010.

Attorney Sheehan argued that there was no doubt that Ms. Levasseur, the Appellant's supervisor, was "incredibly struck" by something that occurred during her meeting with the Appellant on February 26, 2010, but that the evidence would show that the Appellant made no direct threat and made no effort to intimidate her. Attorney Sheehan argued he was not attempting to discredit Ms. Levasseur's testimony or her reaction to the Appellant's conversation at their meeting on February 26, 2010, but that her reaction alone was not enough to prove that the Appellant's conduct was threatening and intimidating, or that it warranted his dismissal.

Assistant Attorney General Cusack argued that the Department of Corrections was justified in dismissing the Appellant from his position as a Corrections Counselor/Case Manager after having issued the Appellant multiple warnings for the same offense: violation of the agency's Policy and Procedure Directive PPD 2.16, V, 30 – Conduct. Ms. Cusack argued that although the Appellant wanted the Board to focus on a single event described in the notice of dismissal, the decision to dismiss the Appellant was based on multiple warnings for the same or similar offenses as they related to his interactions with staff and supervisory personnel.

### Decision and Order

In accordance with the provisions of Per-A 207.12 (b), in order to prevail on appeal, an Appellant must prove by a preponderance of the evidence that "(1) The disciplinary action was unlawful; (2) The appointing authority violated the rules of the division of personnel by imposing the disciplinary action under appeal; (3) The disciplinary action was unwarranted by the alleged conduct or failure to meet the work standard in light of the facts in evidence; or (4) The disciplinary action was unjust in light of the facts in evidence." Having carefully considered the

testimony, evidence and argument offered by the parties, the Board found that the Appellant did not sustain his burden.

RSA 21-I:58, I, provides, in pertinent part, "...If the personnel appeals board finds that the action complained of was taken by the appointing authority for any reason related to politics, religion, age, sex, race, color, ethnic background, marital status, or disabling condition, or on account of the person's sexual orientation, or was taken in violation of a statute or of rules adopted by the director, the employee shall be reinstated to the employee's former position or a position of like seniority, status, and pay..." RSA 21-I:58, I, also authorizes the Board, in all cases to, "reinstatement an employee or otherwise change or modify any order of the appointing authority, or make such other order as it may deem just."

Although the Board did not believe that the Appellant made any overt threats to harm Ms. Levasseur, the Board found that the Appellant's demeanor during the meeting and the violent topics he chose to discuss, when viewed in light of previous warnings, ongoing counseling and repeated instances of angry outbursts toward supervisors, were sufficient to cause significant alarm on Ms. Levasseur's part, and certainly sufficient to constitute a violation of the agency's PPD 2.16, V, 30 concerning conduct. As such, the Board found that the agency acted within its authority in issuing the final warning on June 10, 2010. That decision was not "...related to politics, religion, age, sex, race, color, ethnic background, marital status, or disabling condition, or on account of the person's sexual orientation, or [was] taken in violation of a statute or of rules adopted by the director," as set forth in RSA 21-I:58, and did not, therefore require his reinstatement. Further, having found that the warning was justified, the Board was not persuaded to exercise its equitable powers, as authorized by RSA 21-I:58, I, to "...reinstatement an employee or otherwise change or modify any order of the appointing authority, or make such other order as it may deem just."

Therefore, for all the reasons set forth above, the Board voted unanimously to DENY the appeal of Michael Tensel, finding that the agency acted within its authority when it dismissed him from his position as a Corrections Counselor/Case Manager upon issuance of a third written warning for the same type of offense within a period of five years.

THE NEW HAMPSHIRE PERSONNEL APPEALS BOARD

/s/ Philip Bonafide

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Philip Bonafide, Acting Chair

/s/ Robert Johnson

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Robert Johnson, Commissioner

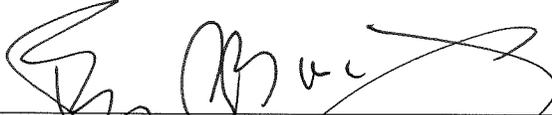
/s/ Joseph Casey

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Joseph Casey, Commissioner

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THE NEW HAMPSHIRE PERSONNEL APPEALS BOARD



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