

# State of New Hampshire



## PERSONNEL APPEALS BOARD

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

### *Appeal of Gregory Vrabel .*

*Docket #98-T-25*

### *Department of Environmental Services*

December 7, 1998

The New Hampshire Personnel Appeals Board (Bennett, Johnson Barsy) met on Wednesday, September 30, 1998, and Wednesday, October 7, 1998, to hear the appeal of Gregory S. Vrabel, a former probationary employee of the Department of Environmental Services. Attorney Justin C. Richardson from the Department of Justice appeared on behalf of the Department of Environmental Services. Mr. Vrabel, who appeared *pro se*, was appealing his termination from employment, effective April 15, 1998, from a position of Enforcement Investigator (Environmentalist II, salary grade 18) assigned to the Wetlands Bureau of the Department of Environmental Services.

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

#### State's Exhibits

1. Supplemental Job Description for Environmentalist II, Enforcement Investigator
2. Single page taken from the State's Sexual Harassment Policy
3. Statement signed by Gregory S. Vrabel on 01/13/98 attesting to his having read the Department's Sexual Harassment Policy dated July 15, 1991
4. State of New Hampshire Policy on Sexual Harassment
5. Draft "Request for Enforcement Action - File #97-02102"

Appellant's Exhibits

A. July 21, 1998, letter from Nancy Perry to Gregory Vrabel

At the hearing, the following persons gave sworn testimony:

Richard deSeve  
Amanda Barker  
Dorie Wiggin  
Mary **Ann** Tilton  
Tracy Boisvert

Gino Infascelli  
Kenneth Kettenring  
Harry Stewart  
Gregory Vrabel

Position of the Parties

Attorney Richardson argued that the appellant would be unable to meet his burden of proving that the agency's decision to terminate his employment was arbitrary, illegal, capricious, or made in bad faith. He stated that the position of Environmentalist II for which Mr. Vrabel had applied required a high degree of organization and the ability to work with minimal supervision.

Attorney Richardson argued that the agency expected Mr. Vrabel to "hit the ground running," since he had ten years of experience performing similar duties for the Florida Environmental Protection Agency, and represented himself in the employment interview as a "quick study."

Attorney Richardson argued that the appellant simply lacked the basic skills to carry out his responsibilities. He said that despite continued assistance from several of his co-workers, the appellant made little progress. Mr. Richardson argued that the State would offer sufficient evidence to support findings that: 1) Mr. Vrabel lacked the essential skills to perform the tasks associated with his position, 2) that he did not produce the quantity or quality of work expected of an employee within the first two months of employment, and 3) that his constant need for assistance had affected his co-workers' ability to complete their own work assignments.

In his notice of appeal, Mr. Vrabel claimed he was the victim of harassment and discrimination. He wrote, in part, "...not only do I believe the terms of my dismissal to be wrong, I believe them to be a willful act of discrimination and harassment. During my first week of employment, Mary

Ann Tilton told me that she did not like working with men, cause [sic] she could not relate to them. She also made numerous remarks that she wanted the woman from Virginia (Crystal) to get hired instead of me and she used this to try to gain advantage over me."

At the hearing, Mr. Vrabel argued that he was terminated because his supervisors did not like him. He described himself as a "squeaky wheel," irritating his co-workers and supervisors by constantly "holding them accountable." He argued that the agency disliked the fact that he freely expressed his ideas on matters ranging from collection of fees for overdue permits to management's reliance on the Department of Safety Marine Patrol for use of a boat. Mr. Vrabel argued that any complaints about his work performance were "retrofit" to provide an excuse to get rid of him. He argued that the agency failed to provide a specific "work standard" against which to measure his performance, and violated their "contract" with him by dismissing him for failing to perform work that was not listed on his supplemental job description.

Having considered the testimony, evidence and arguments, the Board made the following findings of fact and rulings of law:

#### **Findings of Fact**

1. Mr. Vrabel was hired in February, 1998, as a probationary Enforcement Investigator (Environmental II, salary grade 18) for the Wetlands Bureau of the Department of Environmental Services.
2. The "Scope of Work" listed on Mr. Vrabel's Supplemental Job Description reads as follows: "Performs skilled professional work including the analysis and interpretation of environmental impact associated with violations, the development of enforcement cases, and the review of after-the-fact permit applications."
3. The "Accountabilities" listed on the appellant's supplemental job description include the following: "Develops recommendations for enforcement action providing clear and accurate information based on statute and administrative rules. Develops proposed findings of fact and determinations of law to support those recommendations." "Assists

in the maintenance and refinement of case prioritization and tracking systems, to assure that enforcement cases are pursued in a fair, effective and efficient manner, and that all enforcement deadlines are met."

4. The appellant's supplemental job description includes a disclaimer statement: "This class specification is descriptive of general duties and is not intended to list every specific function of this class title."
5. Mr. Vrabel signed his supplemental job description on February 19, 1998.
6. Enforcement actions the appellant was expected to carry out included issuing notices of alleged violations, letters of deficiency, administrative orders, and notices of fines. The appellant was also required to research and draft referrals to the Department of Justice for civil or criminal prosecution of certain violations.
7. Notices of alleged violations are generated by bureau support staff and given to the Investigators for review and signature. All other correspondence and reports are generated by the individual investigators on personal computers using Windows, WordPerfect and FoxPro database software.
8. Mr. Vrabel had difficulty finding, retrieving and saving files, as well as generating correspondence and reports.
9. Ms. Barker, Ms. Boisvert and Ms. Wiggin observed that even when employees had no prior computer training or experience, most were able to generate documents almost immediately, and be comfortable with the elements of the database for use in record keeping, reporting and preparing correspondence in less than two weeks.
10. After receiving assistance from Mr. deSeve, Ms. Tilton, Ms. Barker, Ms. Wiggin, Ms. Boisvert, and Ms. Perry, the appellant still was unable to produce the necessary letters or reports.
11. On more than one occasion, Mr. deSeve, Ms. Tilton, and Ms. Barker all witnessed Mr. Vrabel "nodding off" at work.
12. Ms. Tilton and Mr. deSeve met with the appellant on February 26, 1998, to discuss concerns about the appellant's work performance, his difficulty learning to use the computer system, and his apparent inability to stay awake during working hours.

13. Mr. Vrabel was assigned to do a referral to the Attorney General's Office on a case that was described to him as "high profile" and "politically sensitive." The draft report he submitted was incomplete, poorly documented, and failed to list one of the named parties.
14. In a meeting with Ms. Tilton to review the referral for corrections, the appellant did not demonstrate an understanding of the importance of the document, and he had difficulty remaining awake and alert while Ms. Tilton reviewed the corrections.
15. The appellant met with Director Harry T. Stewart on the date of termination to review the allegations supporting dismissal.

### **Standard of Review**

#### Per 1001.02 Dismissal During Initial Probationary Period

- (a) At any time during the initial probationary period an appointing 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.

### **Rulings of Law**

- A. "No appointing authority shall dismiss a probationary employee under this rule until the appointing authority meets with the employee prior to issuing the notice of dismissal, to discuss the appointing authority's reason(s) supporting the decision to dismiss the employee." Per 1001.02 (b)
- B. "If an appointing authority determines that there are sufficient grounds to dismiss the probationary employee, the appointing authority shall: (1) Prepare a written notice of dismissal to be given to the probationary employee specifying the reason(s) for dismissal; and (2) Notify the employee in writing that the employee may appeal the dismissal within 15 calendar days of the notice of dismissal to the board if the employee can allege facts sufficient on their face to support an allegation that the dismissal was: Arbitrary; Illegal; Capricious; or Made in bad faith. (3) Forward a copy of the written notice of dismissal to the director." Per 1001.02 (c)

## Discussion

The job specification for Environmentalist does not refer to any computer skills. However, the appellant was apprised during his pre-employment interview that he would be responsible for generating his own correspondence and reports. Ms. Barker remembered discussing the requirements of the position with the appellant during the interview, and receiving assurances from the appellant that he had used computers before and would need very little training in order to handle the job. The evidence reflects that other individuals who were hired for similar positions had no difficulty learning how to use the system. In fact, there was ample evidence that in most cases, employees with no prior training were able to generate correspondence within their first day on the job, and generally felt comfortable using the database within the first few weeks. The agency had good reason to question the appellant's ability to meet the work standard, having observed his continuing difficulties and lack of progress over a period of two months, in spite of his independent study of program tutorials and the assistance he received from co-workers.

The appellant's difficulty remaining awake and alert on the job also provided ample reasons for concern on the agency's part. The appellant's assertion that he might have been in "a meditative state" when others believed him to be sleeping, and that none of those who observed him sleeping were qualified to know whether or not he was asleep, are arguments without merit. Mr. deSeve described how he formed his opinion that the appellant was sleeping: "When your head is down, your eyes are closed and your head is bobbing, I think you're asleep. I am confident that I know the difference between a meditative state and sleeping."

The agency also had reason to question the appellant's ability to perform satisfactorily after reviewing his first draft of the Frucci case. The evidence reflects that the appellant failed to grasp the gravity of the case, did not include any of his investigative documentation with the file, produced a draft that failed to name one of the parties to the complaint, and attempted to excuse his failure to produce a professionally executed report by insisting that it was merely a draft.

The appellant failed to offer evidence to support his allegations Ms. Tilton disliked him, harassed him, discriminated against him, or resented the decision to hire him. On the contrary, although Ms. Tilton testified that the appellant would not have been her first choice on the strength of his interview, his prior work experience and consistently positive work references persuaded her that he was the best candidate for the position. The evidence reflects that Ms. Tilton and others attempted to work with the appellant to improve his performance. When it became apparent to them that he was showing little or no progress, the decision was made to terminate his employment.

The appellant failed to provide evidence that the decision to terminate his employment was arbitrary, illegal, capricious, or in made in bad faith. Accordingly, the Board voted unanimously to DENY his appeal.

THE PERSONNEL APPEALS BOARD

  
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Mark J. Bennett, Chairman  
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Robert J. Johnson, Commissioner

  
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James J. Barry, Commissioner

cc: Virginia A. Lamberton, Director of Personnel, 25 Capitol St., Concord, NH 03301  
Attorney Justin C. Richardson, Dept. of Justice, 33 Capitol St., Concord, NH 03301  
Gregory S. Vrabel, 12 Country Club Dr., #35, Manchester, NH 03102