

State of New Hampshire



PERSONNEL APPEALS BOARD

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APPEAL OF FRANK WARDEN

Docket #96-T-23

Department of Youth Development Services

April 2, 1998

The New Hampshire Personnel Appeals Board (McNicholas, Bennett and Rule) met Wednesday, May 15, 1996, under the authority of RSA 21-I:58, to hear the appeal of Frank Warden, a former employee of the Department of Youth Development Services. Mr. Warden was discharged from his employment as a Youth Counselor, effective February 13, 1996, for allegedly violating the Department's Policy on Abuse and Neglect. The appellant was represented at the hearing by SEA Associate Counsel Bryan Clickner. Ronald G. Adams, Director of Residential Services, appeared on behalf of the Department of Youth Development Services.

Mr. Adams alleged that on January 27, 1996, without excuse and without provocation, Frank Warden intentionally struck a resident of the Youth Detention Services Unit in the mouth with a closed fist. Mr. Adams stated that after an initial report of possible abuse and neglect, the Department conducted a thorough investigation of the incident, and found that Mr. Warden was guilty of Class I Abuse. Mr. Adams said that the Department's Policy on Abuse and Neglect provides for the immediate dismissal of any employee who commits an act of Class I Abuse or Neglect. However, he said that the agency always considers any mitigating circumstances which might warrant the imposition of a lesser form of discipline. He argued that in this instance, the appellant's offense was so unwarranted and so egregious that termination was the only viable option. He asked the Board to uphold the Department's decision to dismiss the appellant without

prior warning.

Mr. Clickner argued that the agency violated the Rules of the Division of Personnel when it failed to provide copies of witness statements to Mr. Warden prior to his dismissal. He argued that the violation was so significant, that the Board should deem the termination invalid and require the agency to reinstate the appellant immediately. He also argued that even if the Board were to find that the agency had complied with the rules in effecting Mr. Warden's termination from employment, the evidence itself would not support a finding that the appellant intentionally struck the youth or had committed any act warranting immediate termination from employment.

Mr. Clickner argued that Mr. Warden had no record of prior discipline for abuse or mistreatment of residents and that the appellant's co-workers would attest to Mr. Warden's reputation for avoiding physical confrontations with residents. He argued that any contact that the appellant had with the youth in question was unintentional and merely incidental to a legitimate restraint, and that on all the evidence, the Board should order the Department to reinstate the appellant.

Mr. Warden was employed by the State for approximately sixteen years, working first at the Youth Development Center and later at the Anna Philbrook Center and Youth Detention Center. He was trained in the use of S.O.L.V.E.' techniques and was used as a S.O.L.V.E. trainer within the agency. The appellant knew that the Youth Development Services Policy on Abuse and Neglect defines Class 1 Abuse as, "...any act which results, or could result, in serious physical or psychological injury to a resident." "Use of corporal punishment, such as hitting with a closed fist, kicking, shoving, jumping on the resident, or using any type of implement in a way which could cause serious injury except as a means of self protection or the protection of others," is classified as Class

¹ Strategies On Limiting Violent Episodes

1 abuse under the YDS Policy on Abuse and Neglect. That policy provides for immediate termination without prior warning whenever an investigation results in a finding that an employee has committed an act of Class I Abuse.

Many of the facts are not in dispute. On January 27, 1996, at approximately 5:00 p.m., a Youth Detention Services Unit (YDSU) resident was ordered to the "time out room" as a consequence of his acting belligerent with staff on the unit. The youth refused to go to the time-out room on his own, requiring two staff members to physically escort the resident. When the youth resisted escort, the two Youth Counselors "restrained" him, wrestling the student to the floor where he was forcibly restrained in a prone position until he quieted down. He was again ordered to the time-out room. He refused to comply with orders, resisting further physical escort, and was again wrestled to the floor.

The second restraint took place in front of the nurse's station, where Joyce Johnson, R.N. was on duty. The Appellant was called from another part of the wing to assist in the restraint, and to help carry the youth to the time-out room if necessary. During the course of that restraint, the resident was heard to yell, "You f__ing hit me!" or "Why did you hit me in the f i n g mouth?" The resident was then taken to the time-out room.

Ms. Johnson, the State's principal witness, testified that she was at the nurse's station when the incident occurred. She testified that Mr. Warden had been summoned from the Level II room by Youth Counselors Lynch and LeVeille to assist them in restraining and transporting the youth. She testified that when Mr. Warden arrived on the scene, the youth was face-down on the floor with Mr. Lynch, one of the Youth Counselors, sitting astride the youth's back. She testified that Mr. LeVeille, a second Youth Counselor, then directed Mr. Lynch to secure the youth's legs so that he

could take the youth's left arm while Mr. Warden took the right. Ms. Johnson testified that as Mr. Lynch got off the youth's back and began moving to the left to hold his left arm, the youth lifted himself up off the floor, but was not struggling. She testified that Mr. Warden cocked his arm back and punched the youth in the side of the head hard enough that the youth's head "flew" to the left. She testified that he then grabbed the youth by the hair and began slamming his head into the floor. Ms. Johnson testified that when Mr. Warden struck him, the youth was not wrestling, fighting or swearing. She said that Mr. Warden, "just came up and punched the kid" with a blow that was so unexpected and so unprovoked that it made her physically ill to watch.

Ms. Johnson testified that she cleaned up blood from the floor where the restraint had occurred. She testified that the incident occurred near the end of her shift, and she did not personally check the student before leaving the unit or report the incident to supervisory personnel, although she did ask another nurse to assess the student because she believed excessive force had been used. She waited until her next regularly scheduled shift to report the incident. Neither of the other two Youth Counselors involved in the restraint saw Mr. Warden hit or otherwise mistreat the youth, and neither of them reported the restraint or possible injuries to the student.

Mr. LeVeille testified that the juvenile involved in the incident was assaultive and would make trouble simply to get himself restrained. He said the youth claimed it burned off energy. He testified that the incident began when the youth refused to go to the "time-out" room and then resisted escort. He testified that he and Mr. Lynch "took him down to the floor" and the youth began to settle down after several minutes. He said that once they had gotten him to his feet and again tried walking him off the unit, the youth began screaming at the top of his lungs, refusing to leave. He said that as they neared the door, the youth braced his feet against the door jamb to keep staff from getting him through the doorway into the other wing of the building. Mr. LeVeille

testified that he and Mi- Lynch again "put him on the floor" and sat on him for five minutes or so in an effort to calm him down. He testified that they had to get him off the unit before his behavior provoked a negative response from the rest of the students. He testified that he yelled down the hall, telling Youth Counselor Stacy Jolin to switch duty with Frank Warden so that the appellant could help carry the youth off the unit. He testified that as soon as Mr. Warden tried to grab the youth's right arm, the youth "flipped out," bucking both Mr. Lynch and Mr. LeVeille off of him, rolling onto his back. He testified that they lost control of the youth for a split second, and that Mr. Warden was the only person near him. He testified that they then regained control of the youth and got him off the unit without further incident. .

Mr. LeVeille testified that he heard the student say, "You f__ing hit me!" However, he said he saw no one strike the student. He testified that it was not unusual for this student to make accusations that someone had hurt him, and that it was common for the student to threaten to "get people after you." He testified that he did not report the incident, and chose to wait to see if the youth either asked for a grievance form or reported that he had been abused. He testified that while this was not a "textbook restraint," it also would have been, "...totally out of character for Frank to hit a kid."

Mr. Lynch testified that the youth was actively resisting restraint as he and Mi- LeVeille tried to escort him down the hall to the time-out room. Mr. Lynch testified that immediately after Mr. Warden arrived on the scene, while he, Mi- LeVeille and Mi- Warden were trying to get the youth under control, he heard the youth say, "Why did you punch me in the `f__ing mouth?" However, he testified that he did not see or hear anyone being hit. He testified that he did not see any hostile motion or hear any hostile remarks from Mr. Warden, although during the second restraint, he could not see everything which was occurring because he was too busy attempting to control the

youth's legs, so that none of the staff would be kicked.

Stacy Jolin testified that when the incident took place, Mr. LeVeille and Mr. Lynch were with the student, she was in "the bubble", Mr. Warden was in the Level II Room, and the other two Youth Counselors on duty were on the first floor. She testified that she watched the first restraint and the student being physically escorted down the hall. She testified that when Mr. Warden was summoned to help with the student, she went into the Level II room to cover Mr. Warden's assignments and didn't witness the incident itself. Ms. Jolin testified that after the incident, she saw blood on the floor in the lobby area², and cleaned it up. She said that some time later, when she asked Mr. Warden what had happened, he replied, "Let's just say his face hit my fist." When asked if she thought the appellant's reply was an admission, she replied, "It was the way he said it."

Mr. Warden testified that on the night of the incident, he was in the Level II room when he was summoned to help Youth Counselors Lynch and LeVeille restrain a youth. He said that when he arrived, Mr. LeVeille, who was astride the resident's back, was holding the youth's arms along his sides. He told Mr. Warden to get the youth's upper right arm and wrist, but as he "dismounted" the youth's arms began flailing. He said that to stabilize the youth's head, he grabbed the youth by the hair³, but released him as soon as the youth said, "You're pulling my hair!" He said that about a minute into the restraint, the youth then said, "You punched me."

Mr. Warden testified that any physical contact he had with the resident probably occurred as he was lunging forward trying to grab the youth's arm. He testified that he, Mr. LeVeille and Mr. Lynch

² The first restraint took place near the lobby, while the second restraint took place in front of the nurses' station.

³ Mr. Warden testified that taking someone by the hair is an acceptable procedure during a restraint.

did get control of the youth and carried him to the time out room. When questioned by the Board about what reason Ms. Johnson might have had to report that he had punched the youth if, in fact, that were untrue, Mr. Warden replied, "Sometimes when an incident is going 120 m.p.h., someone can see something," that didn't actually occur.

Neither Ms. Jolin, Mr. Leveille, nor Mr. Lynch saw the entire incident, and none could attest to the truth of Mr. Warden's assertion that he did not intentionally strike the youth. Ms. Johnson testified the appellant struck the student intentionally. The appellant failed to persuade the Board that Ms. Johnson's eye witness account was unreliable, or that Ms. Johnson had any reason for deliberately mischaracterizing the event in order to support the appellant's termination from employment:

Per 1001.08 (a)(3) of the Rules of the Division of Personnel provides for the immediate dismissal of an employee who is found to be in violation of a posted or published agency policy, the text of which clearly states that violation of same will result in immediate dismissal. Per 1001.08 (a)(4) of the Rules also provides for the immediate termination of an employee who is found to be the aggressor in a fight or an attempt to injure another person in the workplace. Under the standards established by the Rules and by the Department's Policy on Abuse and Neglect, the Department of Youth Development Services would be authorized to immediately dismiss an employee who was found to have committed Class I Abuse, or an employee who was found to be the aggressor in a fight or an attempt to injure another person in the workplace.

In spite of the appellant's evidence that he had a reputation for avoiding confrontations with the residents, Ms. Jolin's description of her conversation with Mr. Warden about the incident is extremely troubling. First, Ms. Jolin's and Mr. Warden's testimony on this point are completely contradictory. Ms. Jolin said that she asked Mr. Warden what had happened, and he replied, "Let's

say his face hit my fist." Mr. Warden testified that no such conversation occurred. He testified that the first time he heard that statement, it was made by Mr. Fitzgerald on the night Mr. Warden was suspended. The appellant claimed that when he told Mr. Fitzgerald how the student had accused Mr. Warden of hitting him, Mr. Fitzgerald cautioned him, suggesting, "Don't say that. Say his face hit my fist." The appellant offered no reasonable explanation why Mr. Fitzgerald would have made such a suggestion, what possible reason Ms. Jolin might have for fabricating such a report, or why the agency would be so willing to accept Ms. Jolin's representation. If Mr. Warden made the statement to Ms. Jolin, and the Board believes he did, his use of the term "fist" rather than the word "hand" is very revealing. It does not suggest contact incidental to a restraint. Further, if, as Mr. Warden suggested, he had been lunging forward to grab the student's arm, his hand would have been open. It would not have been in a fist.

Mr. Lynch and Mr. LeVeille testified that their attentions were devoted to their own role in the restraint, and neither had a view of what Mr. Warden was doing throughout the entire incident. Ms. Johnson was the only witness who saw all three Youth Counselors and the student throughout the entire incident, and she testified that the appellant struck the student with a closed fist. There was no apparent motive for Ms. Johnson to have embellished or misrepresented any of the evidence she provided. Similarly, there is no persuasive evidence to support the appellant's theory that Ms. Johnson misunderstood what she saw. Therefore, absent some reason to question Ms. Johnson's credibility, the Board found Ms. Johnson's testimony to be the most reliable eyewitness account of the incident.

The Youth Development Services Policy on Abuse and Neglect defines Class 1 Abuse as, "...any act which results, or could result, in serious physical or psychological injury to a resident." "Use of corporal punishment, such as hitting with a closed fist, kicking, shoving, jumping on the resident,

or using any type of implement in a way which could cause serious injury except as a means of self protection or the protection of others," is classified as Class 1 abuse under the YDS Policy on Abuse and Neglect.

Per 1001.08(f)(1) requires an appointing authority to meet with the employee to "discuss whatever evidence the appointing authority believes supports the decision to dismiss the employee prior to issuing notice of dismissal." Mr. Clickner argued that by failing to provide the appellant with copies of all the statements received, the agency violated the Rules, thereby rendering the termination invalid. The Board does not agree. At the time of termination, Mr. Warden was provided a copy of the investigator's report which listed the evidence on which the appointing authority relied, including the names of those interviewed, the dates of their interviews, and the substance of their reports to the investigator. The report not only summarized the written and oral testimony of each of the witnesses, it offered the investigator's conclusions, and the rationale used in reaching those conclusions. Accordingly, the Board found that the agency did comply with Per 1001.08 (f) by meeting with the employee to discuss whatever evidence the appointing authority believed supported the decision to dismiss the employee, and by providing the employee an opportunity at the meeting to refute the evidence presented by the appointing authority. The appointing authority was not satisfied with the appellant's explanation or his attempts to refute the evidence, and accordingly was dismissed.

Having considered the testimony, evidence and arguments, the Board found that Mr. Warden committed an act of Class 1 Abuse by striking a student with a closed fist. As such, he was subject to immediate termination under the provisions of Per 1001.08 (a) of the Rules of the Division of Personnel for violation of a posted agency policy that in and of itself warned of immediate

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termination from employment. The appellant failed to offer evidence of any mitigating circumstances to warrant a finding that the agency should have taken some lesser form of discipline.

FOR THE PERSONNEL APPEALS BOARD



MARK J. BENNETT, CHAIRMAN

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Department of Youth Development Services

Motion for Reconsideration/Rehearing

August 5, 1998

On May 4, 1998, SEA General Counsel Michael Reynolds filed a Motion for Reconsideration in the above-titled appeal, asking the Board to reconsider its decision dated April 2, 1998, and asking the Board to grant Mi- Warden a new hearing in his appeal of his termination from employment. In support of his motion, Mr. Reynolds argued that the Board had delayed issuing a decision following the original hearing, and that one of the Board members who had heard the appeal was no longer on the Board when the decision was issued. Mr. Reynolds said that the appellant was entitled to know when the decision was made, when the decision was written, and whether the decision was issued before or after that member left the Board.

There is no requirement for the Board to detail the manner of its deliberations. The Chairman's signature attests to the Board's findings that Mr. Warden committed Class 1 Abuse by striking a student with a closed fist, and that under the Rules of the Division of Personnel, he was subject to immediate termination under the provisions of Per 1001.08 (a) for violation of a posted agency policy that in and of itself warned of immediate termination.

Mi- Reynolds argued that the appointing authority is required to , "...tell the employee all of the evidence that it 'considered,' including that as accepted as true, that rejected, that found as not

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substantiated, or in any other way considered." He asserted that by failing to do so, the agency terminated Mr. Warden in violation of the Rules of the Division of Personnel. That argument was raised by the appellant in his hearing on the merits of the appeal, was considered by the Board in reaching its decision, and is reflected in its decision dated April 2, 1998. 'As the Board wrote, "Per 1001.08 (f)(1) requires an appointing authority to meet with the employee to 'discuss whatever evidence the appointing authority believes supports the decision..." It does not require an agency to address any information it "considered" in reaching its decision. The Board found that the agency complied with the requirements of Per 1001.08, and that Mr. Warden's termination did not violate the Rules of the Division of Personnel.

A quorum of the Board, consisting of Commissioner's Bennett and Rule, voted to deny the Motion for Reconsideration/Rehearing, and to affirm its decision denying Mr. Warden's appeal.

FOR THE PERSONNEL APPEALS BOARD



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