

State of New Hampshire



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

Appeal of Russell Hobby

Docket #2007-T-006

Department of Safety

January 26, 2007

The New Hampshire Personnel Appeals Board (Wood, Johnson and Casey) met in public session on Wednesday, January 10, 2007, under the authority of RSA 21-I:58 and Chapters Per-A 100-200 of the NH Code of Administrative Rules regarding the appeal of Russell Hobby, a former employee of the Department of Safety. Mr. Hobby, who was represented at the hearing by Thomas Tardif, was appealing his July 27, 2006 termination from employment for allegedly being less than truthful during the course of a sexual harassment investigation, and for filing a purposefully false complaint. Attorney Marta Modigliani appeared on behalf of the Department of Safety, which had asserted that the appellant's conduct in relation to his complaint of sexual harassment was "tantamount to, if not more egregious than 'willful falsification of agency records' (Per 1001.08(a)(8))."¹

The Board met with the parties at scheduled conferences on Wednesday, November 15 and Friday, December 29, 2006 to establish the scope of the hearing and review pending motions. The Chair met with the parties for a final prehearing conference on Friday, January 5, 2007; at which time the parties were asked to prepare legal memoranda dealing with issue of whether or not the events reportedly observed by Hobby would be classified as sexual harassment that would warrant the filing of a sexual harassment claim.

¹ Former Per 1001.08(a)(8) in effect on the date of the termination has since been replaced by rules adopted and effective 10/18/06.

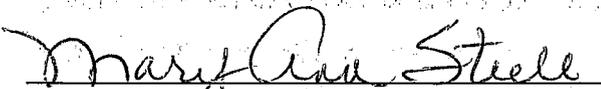
The record of the hearing in this matter consists of pleadings submitted by the parties and the audio tape recording of the hearing on the merits of the appeal. The Board also reviewed, and provided to the parties, a copy of a decision issued by the 11th Circuit Court of Appeals on August 7, 2000 in the matter of EEOC vs. Total System Service Inc., Case no. 99-13196, DC 96-00147-CV-4-DF-4. Board provided copies of that decision to the parties.

After reviewing the pleadings and memoranda submitted by the parties, the Board advised the parties that it intended to decide the appeal on the basis of the documents filed by the parties and argument offered by the parties at the hearing on the merits of the appeal. Neither party objected to the appeal being decided on that basis.

At the conclusion of the hearing, the Board issued its decision orally, ordering Mr. Hobby reinstated effective January 12, 2007. On all the evidence and argument offered by the parties, the Board determined that suspension without pay rather than termination would have been the appropriate level of discipline under the facts in evidence. Accordingly, under the authority of RSA 21-I:58, I, the Board voted to modify the decision of the appointing authority, reducing the termination to a disciplinary suspension without pay under the provisions of (former) Per 1001.05 for the entire period of separation. A complete written decision will be issued within 45 days.

For the Personnel Appeals Board

By its Executive Secretary



Mary Ann Steele

As authorized by the Board this date. 1-26-07

cc: Karen Levchuk, Director of Personnel
Thomas Tardif, Representative for the Appellant
Attorney Marta Modigliani for the Department of Safety

State of New Hampshire



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Concord, New Hampshire 03301
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Appeal of Russell Hobby

Docket #2007-T-006

Department of Safety

March 28, 2007

The New Hampshire Personnel Appeals Board (Wood, Johnson and Casey) met in public session on Wednesday, January 10, 2007, under the authority of RSA 21-I:58 and Chapters Per-A 100-200 of the NH Code of Administrative Rules regarding the appeal of Russell Hobby, a former employee of the Department of Safety. Mr. Hobby, who was represented at the hearing by Thomas Tardif, was appealing his July 27, 2006 termination from employment for allegedly being less than truthful during the course of a sexual harassment investigation, and for filing a purposefully false complaint. Attorney Marta Modigliani appeared on behalf of the Department of Safety, which had asserted that the appellant's conduct in relation to his complaint of sexual harassment was "tantamount to, if not more egregious than 'willful falsification of agency records' (Per 1001.08(a)(8))."¹

The Board met with the parties at scheduled conferences on Wednesday, November 15 and Friday, December 29, 2006 to establish the scope of the hearing and review pending motions. The Chair met with the parties for a final prehearing conference on Friday, January 5, 2007, at which time the parties were asked to prepare legal memoranda dealing with the issue of whether or not the events reportedly observed by Hobby would

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be classified as sexual harassment that would warrant the filing of a sexual harassment claim.

The record of the hearing in this matter consists of pleadings submitted by the parties and the audio tape recording of the hearing on the merits of the appeal. The Board also reviewed, and provided to the parties, a copy of a decision issued by the 11th Circuit Court of Appeals on August 7, 2000 in the matter of EEOC vs. Total System Service Inc., Case no. 99-13196, DC 96-00147-CV-4-DF-4.

After reviewing the pleadings and memoranda submitted by the parties, the Board advised the parties that it intended to decide the appeal on the basis of the documents filed by the parties and argument offered by the parties at the hearing on the merits of the appeal. Neither party objected to the appeal being decided on that basis.

At the conclusion of the hearing, the Board issued its decision orally, ordering Mr. Hobby reinstated effective January 12, 2007. On all the evidence and argument offered by the parties, the Board determined that suspension without pay rather than termination would have been the appropriate level of discipline under the facts in evidence. Accordingly, under the authority of RSA 21-I:58, I, the Board voted to modify the decision of the appointing authority, reducing the termination to a disciplinary suspension (without pay under the provisions of (former) Per 1001.05 for the entire period of separation. The Board issued a preliminary written order on January 26, 2007, advising the parties that a complete written decision would be issued within 45 days.

Position of the parties:

The State argued that:

1. None of the actions alleged by the appellant in his sexual harassment claim could reasonably be construed as harassment.

Attorney Modigliani argued that the appellant claims he saw a pregnant female employee expose herself to a group of women by showing off her pregnant belly. Attorney Modigliani disputed the Appellant's characterization of what he saw. She argued that when the appellant came upon the group, it made him uncomfortable because he was concerned that it would result in a later claim of sexual harassment against him for watching them. Attorney Modigliani said that the Appellant reported that both instances occurred within a 24-hour period. They were not reported to the allegedly offending female, to the agency's HR representative, or to any other supervisor within the Department of Safety, but were reported to the Director of Personnel. The complaint was investigated in accordance with the State's policy.

Attorney Modigliani argued that the appellant knew that he had not been the victim of sexual harassment, since he admits that he filed the complaint in order to avoid the possibility that a complaint would be filed against him in the future, not because he found the conduct offensive or objectionable.

Attorney Modigliani argued that the Appellant knew whatever he witnessed was not intended to be visible to Appellant. Appellant was very much aware of the standard used in evaluating sexual harassment investigations, having been the subject of such an investigation previously.

Even if the incidents occurred as alleged in detail by Appellant, which details the State denies, the behavior would have to be far more egregious in order to constitute harassment under the "reasonable person standard," as the behavior was neither severe nor pervasive. In other words, she explained, a reasonable person would not have found the alleged conduct to be objectionable.

Mr. Tardif argued that the Department's decision to dismiss Mr. Hobby was based on what it believed to be in Mr. Hobby's mind at the time. He argued that there is nothing in the law that even allows that sort of discussion to take place. Mr. Tardif argued that when an individual makes a complaint of sexual harassment, that person can not be fired simply because the complaint can not be proven by a preponderance of the evidence.

Mr. Tardif argued that Mr. Hobby did not report the first incident, but when it happened a second time, he became alarmed and filed a complaint, believing that his complaint would be investigated and "that would be the end of it." Mr. Tardif argued that a woman unbuttoning her pants and exposing her belly in the workplace was clearly inappropriate, and Mr. Hobby's making a report of that behavior was neither malicious nor false. Mr. Tardif noted that the Respondent in this case was the Appellant's supervisor, and that she controlled any number of conditions affecting the Appellant's conditions of employment.

Mr. Tardif argued that in assessing Mr. Hobby's state of mind, the Board needed to remember that Mr. Hobby was focusing on the fact that he had already been accused of sexual harassment based on a complaint that he stood outside a female co-worker's cubicle and stood over her. Having been accused of sexual harassment for that, Mr. Tardif argued, Mr. Hobby knew he might be accused again and was understandably concerned about another complaint being filed.

Attorney Modigliani argued that it was specifically because of Mr. Hobby's own experience with the process for reporting and investigating claims of sexual harassment that the Appellant clearly would have known what did or did not constitute sexual harassment. Attorney Modigliani noted that there were facts in dispute, as the State did not agree with the Appellant's assertion of facts related to the sexual harassment claim. She argued that while the Appellant asserted that he saw his supervisor's "private parts," the State asserts that the Appellant's supervisor was wearing beige clothes. Ms. Modigliani argued that even if the Appellant did see what he claimed to have seen, the alleged conduct was neither severe nor pervasive.

Ms. Modigliani argued that the department relied in good faith on the investigators' report, and that it was the investigators' report that raised the issue of whether or not Mr. Hobby was being truthful. Ms. Modigliani asked the Board to note that it was the investigators who concluded that Mr. Hobby purposefully filed a false report, and was less than truthful during the investigation.

Based on the parties' presentations, the Board found as follows:

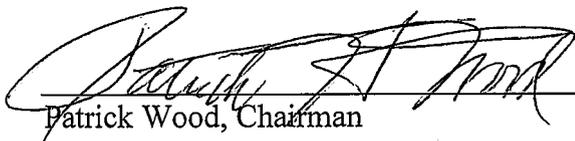
1. Some activity observed by Mr. Hobby did take place, although there are differences in the details between the parties.
2. The Board does not believe that the activity reportedly observed by Mr. Hobby constitutes sexual harassment, as it did not have the purpose or effect of creating a hostile or intimidating working environment.
3. The incident reportedly observed was not evidence of harassment, and Mr. Hobby should have known by reading the policy and knowing the rules that there was no possible violation of the policy.
4. Filing a sexual harassment complaint was inappropriate.

The Board considered whether or not the behavior described above warranted termination under the provisions of Per 1001.08, and whether it was tantamount to the willful falsification of agency records as set forth in Per 1001.08 (a)(8).

There appears to be no dispute that the Appellant observed something, even if it was clear that what he says he observed could not reasonably be considered sexual harassment or conduct that violated the State's sexual harassment policy. Accordingly, unless the State had alleged and could prove that the report was a fabrication, the Board did not find that the filing of the complaint would constitute a willful falsification of agency records under the provisions of Per 1001.08 to warrant dismissal. However, the Board does believe that the Appellant's report was not made because he observed offensive conduct, or believed that the conduct he observed created a hostile working environment. As such, the Board found that the Appellant's conduct in this case is evidence of bad faith action by the Appellant to harass another State employee which action warrants discipline, including the issuance of a written warning and suspension without pay as described in Per 1001.05.

The Board found that Mr. Hobby's behavior was better described as conduct that, in effect, injured or attempted to injure another person in the workplace. The Board believes that Mr. Hobby should have been suspended without pay, and that suspension should continue through the date of the Board's decision, as issued orally at the hearing. The Board found that the Appellant should be entitled to return to work at his previous classification, grade and step, with the clear understanding that he has received written warnings, that he has been suspended without pay for disciplinary purposes, and that further disciplinary action can be brought against him in the future for similar conduct. The Board reminded the Appellant that the State's policy on sexual harassment is not intended as a sword, but as a shield. The Board believes that the Appellant used the policy as a sword, and should have been disciplined accordingly.

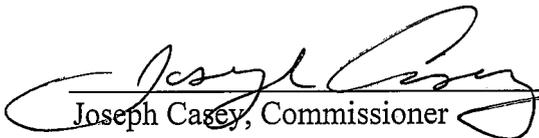
THE PERSONNEL APPEALS BOARD



Patrick Wood, Chairman



Robert Johnson, Commissioner



Joseph Casey, Commissioner

cc: Karen A. Levchuk, Director of Personnel
Thomas Tardiff, Representative for Mr. Hobby
Russell Hobby, Appellant
Marta Modigliani, Attorney, Department of Safety