THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Case No. 2017-0295

APPEAL OF JAMES COLE

BRIEF FOR APPELLANT JAMES COLE

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2. Whether the PAB acted unlawfully, unjustly or unreasonably in failing to determine that the third and final letter of warning was not the same or substantially similar offense under Per 1002.08(c) and the case of *Appeal of Murdock*, 156 N.H. 732 (2008) in comparison with the first and second letters of warning? CR at 14-17.

II. STATUTORY PROVISIONS

Per 1002.04 Written Warning.

(a) A written warning shall be the least severe form of discipline used by an appointing authority in order to correct a full-time employee's unsatisfactory work performance or conduct.

(b) An appointing authority may issue a written warning to an employee for unsatisfactory work performance or conduct including, but not limited to, the following:

(1) Failure to meet any work standard;

(2) Failure to take corrective action as directed;

(3) Unauthorized absences from work;

(4) Repeated unscheduled absences, unless authorized;

(5) Sexually harassing conduct, including unwelcome sexual advances, requests for sexual favors, or other verbal, non-verbal or physical conduct of a sexual nature;

(6) Working unauthorized overtime;

[1] The Certified Record will be cited as "CR" hereafter.

(7) Failure to report immediately to the appointing authority the expiration of a license, a certificate or other form of permission required by the class specification or supplemental job description for performance of the duties of a position;

(8) Unauthorized use of information or communications systems;

(9) Disruptive, disorderly or disrespectful conduct in the workplace, including the use of insulting or abusive language or gestures;

(10) Exhibiting physically or verbally abusive or threatening behavior, including spoken or written communications, toward any employee or any individual served by the agency;
(11) Violation of a posted or published state or agency policy or procedure, or of a law or administrative rule applicable to the agency.

(c) Each written warning shall:

(1) Contain a narrative describing in detail the reason for the warning;

(2) Except when issued as a final written warning and notice of dismissal as described in Per 1002.08(c)(1) or Per 1002.08(c)(2), list specifically the corrective action which the employee shall take to avoid additional disciplinary action, including the time frame, if any, in which the corrective action must be taken;

(3) Except when issued as a final written warning and notice of dismissal in accordance with Per 1002.08(c)(1) or Per 1002.08(c)(2), notify the employee that failure to take corrective action shall result in additional disciplinary action up to, and including, discharge from employment; (4) Be signed by the supervisor who issues the written warning;

(5) Inform the employee that within 15 calendar days of the notice, the warning may be resolved through the procedures for settlement of disputes pursuant to Per 205 or by appeal to the personnel appeals board;

(6) Be signed by the employee receiving the written warning to acknowledge receipt of the warning provided, however, that:

a. If an employee takes exception to the written warning, he or she may so note in addition to acknowledging receipt;

b. Notice that the employee takes exception to the warning shall not be deemed a properly filed appeal; and

c. Failure of the employee to sign the warning shall neither affect its validity nor delay the time for appeal; and

(7) The original letter shall be issued to the employee and copies distributed to the:

a. Employee's agency personnel file; and

b. Employee's file in the division.

(d) If an employee fails to take corrective action as outlined in a written warning, the employee shall be subject to additional disciplinary action up to, and including, discharge from employment pursuant to Per 1002.

(e) Notice to the appointing authority that an employee is seeking resolution of the warning through the procedures for settlement of disputes pursuant to Per 205 or through appeal to the personnel appeals board shall not bar the appointing authority from taking additional disciplinary action as authorized by Per 1002.

Source. (See Revision Notes at chapter heading for Per 100) #8738, eff 10-18-06; ss by #10817, eff 5-17-15; ss by #10937, eff 9-22-15

Per 1002.08 Dismissal.

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(c) An appointing authority may dismiss an employee who has received multiple warnings for the offenses described in this part as stated below:

(1) An appointing authority may dismiss an employee for conduct described in Per 1002.04 when the employee has previously received 2 written warnings for the same or substantially similar type of conduct or offense within a period of 5 years, by issuing a final written warning and notice of dismissal as set forth in this rule; and

(2) An appointing authority may dismiss an employee for conduct described in Per 1002.04 when the employee has previously received 4 written warnings for similar or disparate types of conduct or offenses within a period of 5 years by issuing a final written warning and notice of dismissal.

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Source. (See Revision Notes at chapter heading for Per 100) #8738, eff 10-18-06; ss by #10817, eff 5-17-15

III. STATEMENT OF THE CASE/STATEMENT OF THE FACTS

On February 1, 2017, the Parties held a hearing with the PAB regarding the Appeal of the termination from State employment concerning James Cole. (CR at 289). The Appellant, Mr. Cole, was a 15-year employee with the State of New Hampshire at the Department of Information Technology (DOIT). (CR at 290). On March 1, 2016, the State issued Mr. Cole a Memo of Counsel due to concerns regarding Mr. Cole's work product, which contained recurrent

errors. *Id.* On April 13, 2016, the State issued a letter of warning (hereafter "LoW 1") to Mr. Cole alleging that Mr. Cole failed to follow the corrective action plan provided for by the March 1, 2017 Memo of Counsel, and that the quality of work was still an issue because he continued to make errors in his assigned tasks. (CR at 105-06). Specifically, this letter stated there were issues with Mr. Cole's execution and processing of Account Security Forms. *Id.*

On May 6, 2016, the State again issued a letter of warning (hereafter "LoW 2") to Mr. Cole pursuant to the quality of his work product, his ability to carry out tasks, and his failure to take corrective action. (CR at 102-04). This letter of warning dealt specifically with Mr. Cole's communication skills with customers, and his failure to hold a "kick-off" meeting, which is a meeting used to start dialogue with the customers. (CR at 102-03).

The State conducted Mr. Cole's Annual Performance Evaluation on June 7, 2016. (CR at 130-44A). Mr. Cole's evaluator and supervisor, Mr. Burns, made note of ongoing concerns regarding Mr. Cole's quality of work, his timeliness to complete projects, and other related work quality issues. *Id.* On June 16, 2016, Denis Goulet, the Commissioner of the Department of Information Technology, issued to Mr. Cole a letter of warning (hereafter "LoW 3"), which simultaneously served as his Intent to Dismiss Letter. (CR at 33). This letter stated that DOIT was dismissing Mr. Cole because of his previous performance record, which specifically named the aforementioned Memo of Counsel, the two letters of warning, and the negative performance evaluation, but provided no details otherwise regarding his work quality. *Id.* The letter goes on to further state that the reasons for the letter's issuance had to do with Mr. Cole doing a crossword puzzle at his desk while on work time and for performing overtime work without proper consent. *Id.*

Following the issuance of the June 16, 2016 intent to dismiss letter, the State and Mr. Cole held an intent to dismiss meeting on July 25, 2016. (CR at 297). The State subsequently terminated Mr. Cole from employment on August 1, 2016. (CR at 99-01). The notice of dismissal reiterated the findings stated in the June 16, 2016 intent to dismiss letter. *Id.* Mr. Cole appealed the State's termination on August 5, 2016. (CR at 13-17). Mr. Cole's hearing in front of the PAB occurred on February 1, 2017. (CR at 289). On, March 6, 2017, the PAB erroneously upheld the State's termination on the grounds that all three letters of warning were for the same or substantially similar conduct or offenses pursuant to the standard of Per 1002.04, Per 1002.08, and the case of *Appeal of Murdock*. Per 1002.04; Per 1002.08; *Appeal of Murdock*, 156 N.H. 732, 736-38 (2008); (CR at 33, 102-06, 301-02).

In its decision, the PAB, against the weight of the law and evidence, failed to consider the differing categories of offenses that give rise to letters of warning and the differences of the underlying behavior of Mr. Cole in the three letters of warning. Per 1002.04(b); Per 1002.08(c)(1); *Murdock,* 156 N.H. at 737-38; (CR at 33, 102-06, 301-02). It thus incorrectly concluded that LoW 3 was the same or substantially similar to LoW 1 and LoW 2, and determined that the regulatory requirements for dismissal were met by the State under Per 1002.04 and Per 1002.08, and upheld the termination. *Id.*

On April 5, 2017, Mr. Cole timely filed a motion for reconsideration with the PAB. (CR at 304). On April 26, 2017, the PAB denied Mr. Cole's motion for reconsideration. (CR at 320-21). Mr. Cole then filed a timely appeal to this Court on May 26, 2017.[2] The State filed a motion to dismiss and a motion for summary affirmance on June 12, 2017. Mr. Cole filed a response to

[2] The initial appeal contained an error, which named the State Employees' Association as the Appellant. Mr. Cole filed a motion to amend, which sought to name Mr. Cole as the Appellant. This Court granted the motion on September 20, 2017.

the State's motions and also filed a motion to amend on June 23, 2017. On September 20, 2017, this Honorable Court denied the State's motions for summary affirmance and dismissal, accepted Mr. Cole's motion to amend, and accepted this case. On December 21, 2017, Mr. Cole filed a motion to amend the official record by adding the transcript of the PAB hearing. On January 2, 2018, the State responded and took no position. On January 5, 2018, this Honorable Court accepted Mr. Cole's motion to amend the record by adding the transcript.

IV. SUMMARY OF ARGUMENT

The PAB erred, as a matter of law, when it upheld the termination of Mr. Cole. *See* Per 1002.04; *see* Per 1002.08; *see Murdock,* 156 N.H. at 736-738, (CR at 33, 102-106, 301-02). The pivotal case at issue here is the case of *Murdock*, which analyzed the requirements of the State for terminating an employee after receiving three letters of warning. *Murdock*, 156 N.H. at 735-38. In that case, Donald Murdock (Appellant) was a Highway Patrol Foreman for the Department of Transportation. *Id.* at 733. On May 12, 2003, Murdock received a letter of warning for transporting alcohol in a state vehicle. *Id.* The State classified this offense as "failure to meet any work standard" under then Per 1001.03(a)(1).[3] *Id.* On September 20, 2004, the State issued a second letter of warning to Murdock for having Sports Illustrated swimsuit model photos around his work area. *Id.* at 733-34. The State again cited Per 1001.03(a)(1) as the cause for the letter of warning. *Id.*

On July 15, 2005, the State issued Murdock a third letter of warning, which also served as his letter of dismissal pursuant to Per 1001.08.[4] *Id.* at 734. That letter alleged that Murdock had yet again violated Per 1001.03(a)(1), "Failure too meet any work standard", when he

[3] Per 1001.03 has been changed to, and is now cited as, Per 1002.04.
[4] Per 1001.08 has been changed to, and is now cited as Per 1002.08.

exercised poor judgment on the job. *Id.* Examples in the letter included parking his vehicle near a restaurant after lunch hours and for going over his lunch break period by 5 minutes. *Id.* There were additional allegations in this letter that Murdock had also left work early without approval, and had failed to accurately document the work time of his crew. *Id.*

In order to determine if the violations of rules by Murdock were sufficiently the same to warrant termination, the Court analyzed the purpose and meaning of Per 1001.03 and Per 1001.08. *Murdock*, 156 N.H. at 737-38. The Court first considered the State's classification of each of Murdock's letters of warning under Per 1001.03, which were all classified as "Failure to meet any work standard". *Murdock*, 156 N.H. at 736. Per 1001.03(a) provided a list of categories by which different forms of improper conduct can be classified for purposes of issuing a letter of warning, and the Court determined in *Murdock* that this list is instructive in determining how an offense is classified for purposes of Per 1001.08. *Id.* at 736-37.

The Court found that the State's view of the rules at issue would render every other category under Per 1001.03(a) superfluous because every offense or violation of any policy, regulation, or procedure can be classified as a "failure to meet any work standard". *Id.* at 736-37. Additionally, the Court noted that several of the offenses at issue were arguably better placed under other categories in Per 1001.03. *Id.* at 737. The Court further noted that the State's broad interpretation, if accepted, would nullify Per 1001.08(b)(2), which states that an employee can be terminated for having five letters of warning in a five year period, when those letters of warning are similar or different. *Id.* Thus, if the State's broad categorization of Murdock's offenses was accepted, the distinction between Per 1001.08(b)(1) and Per 1001.08(b)(2) would be without meaning. *Id.*

The Court also took note of the underlying meaning of a letter of warning, and stated that the reason for such discipline is largely to notify the employee of the offense, and to instruct the employee as to the appropriate future course of conduct. *Id.* So if an employee were to receive a letter of warning, he should then have sufficient instruction to be able to avoid the specific action or inaction that led to the discipline, and thus would be able to avoid dismissal for the same action. *Id.*

Next, the Court stated that when determining whether or not the underlying issue of a letter of warning is the same, or similar or different, the focus should be on the offense, and not the corrective action. *Murdock*, 156 N.H. at 738. The Court stated, "The corrective action is the remedy to the offense, not the part of the offense itself". *Id.* The Court reasoned that the corrective action could be the same for several different offenses, but that would not be relevant to determination of whether not the offenses were the same. *Id.* As such, it does not matter if the required remedy for the offense is the same. *Id.* Instead, what matters is the actual offense, and each one must be the same. *Id.* Based on all of the above, the Court determined that the underlying offenses cited in the three letters of warning were not the same, and it reversed and remanded the case. *Id.*

In Mr. Cole's case, the State is trying to do precisely the same thing again that it did to Murdock. *See id.* at 737-38; (CR at 33, 102-06). The underlying offenses in Mr. Cole's third letter of warning differ substantially from his first and second letters. (CR at 33, 102-06). Despite these distinctions, the State has ignored the differences and instead categorized all of them as a "Failure to meet any work standard" even though the offenses should be categorized under several different parts of Per 1002.04(b). *See Murdock*, 156 N.H. at 736-38; (CR at 33, 102-06).

Second, even if the offenses were to be categorized together, the nature of the underlying behavior or offenses in all three letters still must be the same. *Murdock*, 156 N.H. at 737-38. In Mr. Cole's case the underlying behavior is not the same or substantially similar. *See Murdock*, 156 N.H. at 736-38; (CR at 33, 102-06). The first letters of warning dealt primarily with Mr. Cole's failure to execute timely and proficient work product, while the third letter of warning dealt primarily with Mr. Cole's playing a crossword puzzle, and working unauthorized overtime. (CR at 33, 102-06). While the regulation at issue, Per 1002.08, has been expanded since that ruling to include "substantially similar" as well as the "same" offenses, there still must be some meaningful distinction between Per 1002.08(c)(1) and Per 1002.08(c)(2) as was stated in *Murdock*. Per 1002.08(c); *Murdock*, 156 N.H. at 737. To allow the broad application asserted by the State and upheld by the PAB would violate the ruling in *Murdock*, as well as Per 1002.04 and Per 1002.08. Per 1002.04; Per 1002.08(c); *Murdock*, N.H. 156 at 737; (CR at 33, 102-06).

V. ARGUMENT

A. THE PAB AND THE STATE IGNORED THE NUANCES OF THE DIFFERENT CLASSIFICATIONS IN PER 1002.04 AS DELINEATED IN MURDOCK, AND IMPROPERLY CLASSIFED MR. COLE'S THIRD LETTER OF WARNING.

The State terminated Mr. Cole and violated Per 1002.04 and Per 1002.08 in the same way that it had done so in the case of *Appeal of Murdock*. Per 1002.04; Per 1002.08(c); *Murdock*, N.H. 156 at 737; (CR at 33, 102-06). As previously stated, PER 1002.04 provides eleven different categories by which a letter of warning can be classified. PER 1002.04(b). The categories are as follows:

> (b) An appointing authority may issue a written warning to an employee for unsatisfactory work performance or conduct including, but not limited to, the following:

(1) Failure to meet any work standard;

(2) Failure to take corrective action as directed;

(3) Unauthorized absences from work;

(4) Repeated unscheduled absences, unless authorized;

(5) Sexually harassing conduct, including unwelcome sexual advances, requests for sexual favors, or other verbal, non-verbal or physical conduct of a sexual nature;

(6) Working unauthorized overtime;

(7) Failure to report immediately to the appointing authority the expiration of a license, a certificate or other form of permission required by the class specification or supplemental job description for performance of the duties of a position;

(8) Unauthorized use of information or communications systems;

(9) Disruptive, disorderly or disrespectful conduct in the workplace, including the use of insulting or abusive language or gestures;

(10) Exhibiting physically or verbally abusive or threatening behavior, including spoken or written communications, toward any employee or any individual served by the agency;

(11) Violation of a posted or published state or agency policy or procedure, or of a law or administrative rule applicable to the agency.

Per 1002.04(b)

While the first two letters of warning properly fell under Per1002.04(b)(1) "Failure to meet any work standard"; and Per 1002.04(b)(2) "Failure to take corrective action as directed", the third clearly falls under a different category or even different categories. *Id;* (CR at 33, 102-06). The State never alleged, nor did the PAB conclude that working on a crossword puzzle had any impact on Mr. Cole's work product, nor was he ever counseled not to work on crossword puzzles at his desk. (CR at 301-302). Even if the State had made such an assertion, no causal nexus exists between Mr. Cole's one-time action of doing a crossword puzzle at work, and his performance issues. *See id.*

The Appellant's ongoing issues with his subpar work product cannot be proven to be caused by the puzzle, nor can it be even rationally linked to his performance issues because the performance issues preceded the crossword puzzle. *See id.* As a result, the behavior of doing a crossword puzzle at work should be categorized under Per 1002.04(b)(9), which concerns "Disruptive, disorderly or disrespectful conduct in the workplace, including the use of insulting or abusive language or gestures". Per 1002.04(b); (CR at 33). The act of playing a game on work time may be disorderly and disrespectful, but does not necessarily impact the work quality or timeliness of an employee. *See id.* As a result, it cannot be said that Mr. Cole violated Per 1002.04(b)(1) or Per 1002.04(b)(2) in LoW3, and so his conduct was not the same or substantially similar to his conduct in LoW 1 or LoW 2 . *See* Per 1002.04(b); (CR at 33, 102-06).

Additionally, the second allegation of LoW 3 concerning unauthorized performance of overtime is specifically addressed in Per 1002.04(b)(6) which states the following: "An appointing authority may issue a written warning to an employee for unsatisfactory work performance or conduct including, but not limited to, the following: Working unauthorized overtime". Per 1002.04(b)(6); (CR at 33). Thus, it is clear that issues of performing unauthorized overtime are *per se* different from the ten other categories of discipline under PER 1002.04(b). *See* Per 1002.04(b). As a result, because the offenses in the third letter of warning are in entirely different categories under Per 1002.04(b) than the first two letters of warning, they are not the same or similar for the purposes of Per 1002.08. *See* Per 1002.04; *see* Per 1002.08; *see Murdock*, 156 N.H. at 737-38.

The case of *Appeal of Murdock* further delineates the standard and meaning of Per 1002.04 and Per 1002.08. In that case, the petitioner, Donald Murdock, appealed on the grounds that the State violated his rights when it terminated him for three letters of warning that were not

for the same conduct. *Murdock,* 156 N.H. at 738. The first letter of warning was issued for transporting alcohol in a State vehicle, the second arose from the petitioner placing Sport Illustrated Swim Suit photos at his work place as well as violating safety policies, and the third was for parking his truck outside of a restaurant for a time that was longer than his allotted break time. *Id.* at 733-34. The State argued that each offense was the same under the regulations because each instance showed a "failure to meet any work standard". *Id.* at 733.

The Court, however, ruled that the State was incorrect in its argument for several reasons. *Id.* at 735-36. First, the Court found that the State's interpretation would render the other causes for discipline under the regulations superfluous, because its broad interpretation would allow every offense simply to be a "failure to meet any work standard". *Id.* at 736. Thus, if a certain behavior or offense can be characterized under a more specific section of Per 1002.04(b), then the State must do so. *Id.* The Court further noted the State's argument would nullify a later section of the personnel rules which allows for the dismissal of an employee after five letters of warning for any reason [now PER 1002.08(c)(2)], and so the underlying behavior of the offense must be the same for each letter of warning. *Id.* at 736-37.

Second, the Court found that the regulatory language refers to the behavior of the offense, not merely the same type of the violation as the State contended. *Id.* at 737. The Court stated that to be dismissed because of three letters of warning, it must be for the "same offense" for a "particular behavior, and not merely for any behavior that might be characterized as a similar violation". *Murdock,* 156 N.H. at 738. As a result, the Court concluded that transporting alcohol in a State vehicle, having inappropriate pictures and failing to follow safety procedures, and taking a lunch break for longer than allowed were not the same offense, and ruled in favor of the petitioner. *Id.*

Although the regulation interpreted by the Court in *Appeal of Murdock* has been updated to include "same or substantially similar" offenses, the case of *Murdock* is still relevant and valid. *See* Per 1002.08. Just as it was improper in *Murdock* for the State to take a broad view of various offenses and categorize all of them under the standard for "failure to meet any work standard", it is likewise improper to do so here in the case of Mr. Cole. *See Murdock,* 156 N.H. at 735-37; (CR at 33, 102-06). As was mentioned above, Mr. Cole's behavior in the third letter of warning would fall under the behaviors of Per 1002.04(b)(6) and Per 1002.04(b)(9), and do not fall under Per 1002.08(b)(1) like the behaviors in the first two letters of warning. *See* Per 1002.04(b); *see* Per 1002.08; *see Murdock,* 156 N.H. at 735-37; (CR at 33, 102-06). As such, like in *Murdock*, the State has failed to properly categorize the different offenses of Mr. Cole and has terminated Mr. Cole in violation of PER 1002.08(c). *Id.*

B. THE PAB AND THE STATE HAVE INCORRECTLY DETERMINED THAT MR. COLE'S CONDUCT IN HIS THREE LETTERS OF WARNING WERE THE SAME OR SUBSTANTIALLY SIMILAR UNDER PER 1002.08 AND IN ACCORDANCE WITH MURDOCK.

The PAB erred as a matter of law when it determined that all three letters of warning issued by the State to Mr. Cole were for the same or substantially similar offense. *See* Per 1002.08; *see Murdock*, 156 at 736-38; (CR at 301-302). The relevant regulation at issue here is Per 1002.08(c) and reads as follows:

> (c) An appointing authority may dismiss an employee who has received multiple warnings for the offenses described in this part as stated below:
>
> > (1) An appointing authority may dismiss an employee for conduct described in Per 1002.04 when the employee has previously received 2 written warnings for the same or substantially similar type of conduct or offense within a period of 5 years, by issuing a final written warning and notice of dismissal as set forth in this rule; and
> >
> > (2) An appointing authority may dismiss an employee for conduct described in Per 1002.04 when the employee has previously received 4

> written warnings for similar or disparate types of conduct or offenses within a period of 5 years by issuing a final written warning and notice of dismissal.
>
> Per 1002.08(c)

In *Appeal of Murdock*, the Court considered three letters of warning that occurred within a five year period. *Murdock*, 156 at 733-34. The first letter of warning was for transporting alcohol in a state vehicle, the second was for having Sports Illustrated Swim Suit photos in and around his work area, and the third was for parking his truck outside of a restaurant after normal lunch hours, exceeding his designated lunch time, not receiving approval to leave work early, and for improperly documenting the work time of his crew. *Id.* The Court stated that when determining sameness for the purposes of Per 1002.08(c), the underlying offense is what must be considered, not merely the type of violation. *Id.* at 737. The Court went on to say that the State's broad interpretation for determining similarity between the offenses of Mr. Murdock would render the distinctions between Per 1002.08(c)(1) and Per 1002.08(c)(2) meaningless, because the first deals with offenses that are the same, and the second deals with offenses that are similar or different. *Id.* at 737. As a result, the Court determined that because the offenses listed above differed, the State had violated Per 1002.08. *Id.* at 738.

The Appellant agrees with the State and the PAB that the behavior in LoW 1 and LoW 2 are likely the same or at least substantially similar in that they both are concerned with the quality of Mr. Cole's work, which includes error rates and timeliness of completion, and recommendations for counseling on improving those aspects of his job. (CR at 102-06, 293-96, 302). As such these letters were likely properly classified by the State and the PAB in accordance with Per 1002.04(b) as "(1) Failure to meet any work standard", and/or "(2) Failure to take corrective action as directed". *See* Per 1002.04(b); *See Murdock,* 156 N.H. at 736-38; (CR

at 294-95, 301-02). Additionally, the underlying behavior in LoW 1 and LoW 2 which concerns Mr. Cole's failure to perform work in a timely and proficient manner is likewise sufficiently the same or substantially similar. *See* Per 1002.08; *See Murdock,* 156 N.H. at 736-38; (CR at 294-95, 301-02).

However, the offense that gave rise to LoW 3 is completely different from that in LoW 1 and LoW 2, and is not the same or substantially similar. *See Murdock*, 156 N.H. at 736-38; Per 1002.08; (CR at 32, 102-06). While LoW 3 does mention Mr. Cole's past quality of work in reference to the Memo of Counsel and LoW 1 and LoW 2, it does not mention any other new and specific work issues arising following those previous letters. (CR at 33). Moreover, the other specific work place offenses mentioned in LoW 3 concerned doing a crossword puzzle while on work time and performing overtime work without proper authorization. *Id.* Contrary to the PAB's findings, these offenses provided by LoW 3 have nothing in common with LoW 1 and/or LoW 2, and certainly cannot be considered the same or substantially similar. (*See* CR at 32, 102-06).

Because, like the petitioner in Murdock, Mr. Cole's letters of warning do not stem from the same (or substantially similar) behavior, the State could not terminate him for having only three letters of warning. *See* Per 1002.04; *see* 1002.08; *see Murdock*, 156 N.H. at 736-38; (*see* CR at 32, 102-06). As mentioned above, one must look at the underlying behavior of the offense, and not merely the type of violation. *Id.*

Furthermore, in applying the standard under Per 1002.08(c)(1), one must also look at Per 1002.08(c)(2). *See Murdock*, 156 N.H. at 737. Because a separate termination threshold exists for those that have received letters of warning for similar or different offenses under Per 1002.08(c)(2), any letters that qualify as the same or substantially similar under Per

1002.08(c)(1) must truly be for the same or substantially similar offense. *See id.* Like in *Appeal of Murdock*, the underlying offenses of Mr. Cole are not sufficiently the same in all three letters to satisfy the standard of 1002.08(c)(1). *See id*; (CR at 33, 102-06). It is thus clear that the final letter of warning has nothing in common with the preceding first two letters because the violations of doing a crossword puzzle and performing unauthorized overtime fit into different categories of violations, and constitute an entirely different kind of offense than performing untimely or inadequate work. *See id.* Thus, the PAB erred when it upheld Mr. Cole's termination pursuant to Per 1002.08(c)(1). *See id.*

VI. CONCLUSION

For the reasons set forth above, the Appellant requests this Honorable Court to reverse the decision of the Personnel Appeals Board.

VII. CERTIFICATE OF SERVICE

In accordance with New Hampshire Supreme Court Rule 16(7), the undersigned hereby certifies that an original and eight (8) copies of Brief of Plaintiff/Appellant have been hand-delivered to the Clerk of the Supreme Court on this 22nd day of January, 2018.

In accordance with New Hampshire Supreme Court Rule 16(10), the undersigned hereby certifies that two (2) copies of the Brief of Appellant have been forwarded, via First Class Mail, postage prepaid, to Scott Sakowski, Esq. and Jeanine Girgenti, Esq., and one (1) copy to the Personnel Appeals Board.

In accordance with New Hampshire Supreme Court Rule 16(10), the undersigned hereby requests that this matter be heard on oral argument and, further, that Gary Snyder Esquire be designated as the attorney to argue its merits on behalf of James Cole. Counsel respectfully requests fifteen (15) minutes for oral argument.

In accordance with New Hampshire Supreme Court Rule 16(3)(i), the undersigned hereby certifies that the decision being appealed is appended to this Brief.

Dated: January 22, 2018

Gary Snyder, Esq.

State of New Hampshire

PERSONNEL APPEALS BOARD
25 Capitol Street
Concord, New Hampshire 03301
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Appeal of James Cole

Docket #2017-T-001

New Hampshire Department of Information Technology

March 6, 2016

The New Hampshire Personnel Appeals Board met in public session on Wednesday, February 1, 2017 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 James Cole, the Appellant. The following commissioners sat for this hearing: Chair Charla Stevens, Esq., Vice Chair Norman Patenaude, Esq., Commissioner Christopher Nicolopolous, Esq., and Commissioner David Goldstein. Mr. Cole, who was represented at the hearing by SEA Union Representative, Charles McMahon, appealed his termination as a Systems Development Specialist IV. Assistant Attorney General Jeanine Girgenti and Assistant Attorney General Scott Sakowski appeared on behalf of the State.

The record of the hearing in this matter consists of pleadings filed by the parties prior to the date of the hearing, notices and orders issued by the Board, the audio recording of the hearing on the merits of the appeal, and documents admitted into evidence.

THE FOLLOWING PERSONS GAVE SWORN TESTIMONY[1]:

Charles Burns, Information Technology Manager II
Julie Seiger, Information Technology Manager III
Dawn Shriever, Administrator II
James Cole, Appellant

[1]The witnesses were sequestered at the request of the Appellant.

ISSUES OF LAW:

Per 1002.04(b)(1)

Per 1002.04(b)(2)

Per 1002.08 (C)(1)

BACKGROUND

The Appellant had been a State employee for approximately fifteen (15) years as a programmer at the Department of Information Technology. He was employed by the Department of Information Technology but was assigned to the Department of Safety. In May 2015 a representative from the Department of Safety contacted the Human Resources Administrator at the Department of Information Technology, Dawn Shriever, to inform her that they were defunding the Appellant's position. Ms. Schriever explored other positions within the State in which the Appellant would qualify. It was determined that he would be assigned, with the Appellant's agreement, to the Department of Transportation as a Systems Development Specialist IV.

The Appellant was provided weekly supervisory meetings in order for his supervisor to provide guidance and feedback. The Appellant also met with his direct supervisor and his supervisor's manager bi-weekly in order for them to assist the Appellant in becoming successful in his new position. The Appellant also attended one-day courses on project management in June and August in 2015.

The Appellant was issued a Memorandum of Counsel on March 1, 2016 for his poor quality of work. He was given recommendations to improve his work. The Appellant's work quality did not improve, however, and he was issued a Letter of Warning for failure to meet any work standard and failure to take corrective action as directed. On May 6, 2016 the Appellant was issued a second Letter of Warning for failure to meet any work standard and failure to take corrective action as directed. On June 16, 2016 the Appellant was issued a third Letter of Warning along with a Notice to Dismiss due to his poor quality of work and his failure to take

corrective action as directed. The Appellant was dismissed in accordance with Per 1002.08 (c)(1) and this appeal followed.

After carefully considering the parties' testimony, evidence and arguments, the Board made the following findings of fact and rulings of law:

FINDINGS OF FACT

1. The Appellant had been a State employee for approximately fifteen (15) years as a programmer at the Department of Information Technology (hereinafter DoIT). He was employed by DoIT but was assigned to the Department of Safety. (Testimony of Appellant)

2. In May 2015 a representative from the Department of Safety contacted the Human Resources Administrator at DoIT, Dawn Shriever, to inform her that they were defunding the Appellant's position. Ms. Schriever explored other positions within the State in which the Appellant would qualify. It was determined that he would be assigned, with his agreement, to the Department of Transportation (hereinafter DOT) as a Systems Development Specialist IV. Prior to assigning the Appellant in this position, Ms. Shriever reviewed and considered, amongst others things, the Administrative Rules, the Appellant's last four (4) annual reviews, the Appellant's work history as well as the requirements of the aforementioned job. The Appellant remained an employee of DoIT but was assigned to DOT. (Testimony of Ms. Shriever)

3. The Appellant began working in his new position on June 12, 2015. His immediate supervisor was Charles Burns. Mr. Burns assisted the Appellant in becoming acclimated in his new position. Mr. Burns had the Appellant "shadow" him and Mr. Burns also oversaw the Appellant's first few tasks. Mr. Burns held weekly supervisory meetings with the Appellant and Mr. Burns and the Appellant also met with Mr. Burns' supervisor, Julie Seiger, bi-weekly. (Testimony of Mr. Burns, Ms. Seiger and the Appellant)

4. On March 1, 2016 the Appellant was issued a "Memo of Counsel" (hereinafter MOC) by Mr. Burns. The MOC was issued due to concerns Mr. Burns had with the quality of the Appellant's work. The Appellant had recurrent errors, above normal work review was required and the Appellant was not learning from his mistakes. (State's Exhibit #1 pg. 1)

5. The Appellant's first assignment was the Account Security Form (hereinafter ASF) project. The Appellant was tasked with determining how the ASF form was currently being used, to explore how he could improve the process, to implement the improvements into a new form and put the new form in place. Although it was a simple form, its purpose was significant as it was an important part of managing access to sensitive systems and information. The Appellant did satisfactory work on designing the document, however, there were multiple incidents in which incorrect processing had been discovered. The incorrect processing was significant enough that audits had to be conducted on the Appellant's work to ensure accuracy. The audit revealed that there were forms without the required signatures and a number of forms had been submitted that did not have the Appellant's required signature that a Computer Use Agreement was on file. The Appellant did make suggestions to improve the form and reviewed these suggestions with the customer but he failed to accurately record their input and, as a result, the form needed further changes to make it usable. (State's Exhibit #1 pg. 1 and Testimony of Mr. Burns and Ms. Seiger)

6. The impact of the Appellant's inferior quality of work could have resulted in customers not getting correct access, inaccurate or improperly processed documents could have resulted in security and/or audit issues and the need to conduct audits was a drain on agency resources. The Appellant received a "Recommended Corrective Actions" for this particular project. The ASF project continued to be an issue throughout the Appellant's employment. (State's Exhibit #1 pg. 1 and Testimony of Mr. Burns)

7. The MOC also included another project the Appellant worked on known as the Wireless Access Point (hereinafter WAP) project. This project called for the Appellant to coordinate with customers who had requested the installation of the WAP and coordinate with those who would be responsible for physically mounting the WAP equipment. The Appellant failed to hold a "kickoff meeting", which was used, amongst other things, to meet the

customer, determine the customer's needs and learn the details of the project. Although the Appellant was experienced with the "TSR process," the Appellant used the wrong process. There was also limited to no contact with the customer and the Appellant was not listed as the contact person for the project. As a result, the vendor who was doing the actual work contacted the customer instead of the Appellant. In addition, the Appellant failed to notify the customer that the WAP had been installed and the Appellant also did not demonstrate how to use it. Consequently, the customer did not know how to connect to and use the WAP. (State's Exhibit #1 and Testimony of Mr. Burns)

8. The Appellant's shortcomings on this project were unprofessional and wasted the time of the customers, demonstrated lack of attention to detail, demonstrated that the Appellant failed to learn from his previous experience and also demonstrated a lack of follow up and communication. The Appellant was provided "Recommended Corrective Actions" for future projects. The Appellant, with a lot of encouragement and coaching from Mr. Burns, was able to eventually complete the project. (State's Exhibit #1 pg. 2 and Testimony of Ms. Seiger)

9. The Appellant believed that installing a router and a projector were maintenance tasks and not projects. The Appellant believed that "projects" included multiple parties, were large scale and had multiple tasks being performed at the same time. However, the Appellant asserted that the DOT bureaucracy called tasks "projects" when they were merely minor tasks. (Testimony of Appellant)

10. The MOC also contained a Corrective Action Plan (hereinafter CAP) that informed the Appellant that in order for him to begin to meet the work standard associated with his position, he must immediately begin the following (1) Create a detailed action plan based on (but not limited to) the recommendations provided in "Recommended Corrective Actions" and identify any dependencies and a rough timeline, (2) Review the action plan with Mr. Burns within two weeks, (3) Document steps taken and review with Mr. Burns on a weekly basis. The Appellant was advised in the MOC that failure to meet the work standard or failure to take corrective action as directed may result in disciplinary action. (State's Exhibit #1 pg. 2 and Testimony of Mr. Burns)

11. On April 13, 2016 the Appellant was issued a Letter of Warning (hereinafter LoW) for failure to meet any work standard and failure to take corrective action as directed. The Appellant was issued the LoW because the same types of issues, outlined in the MOC, continued to occur. The customers of the ASF project continued to make complaints and this short-term project had now turned into a long-term project. On March 25, 2016 the Appellant met with Mr. Burns to discuss the issues that had been found in the ASF forms. The audit of thirty (30) forms that were processed by the Appellant contained six (6) items with issues. Of the six (6) issues, four (4) of them had issues that were significant enough that they had to retroactively acquire the required approvals and make "post-corrections". As a result of these actions, Mr. Burns rescheduled a meeting with the Appellant that was originally scheduled for March 30, 2015 out to April 13, 2016 to give the Appellant more time for the corrective actions to have an impact. (State's Exhibit #2 and Testimony of Mr. Burns)

12. On April 5, 2016 the Appellant and Mr. Burns discussed an audit that occurred on March 25, 2016, the same day the two met to discuss issues with the ASF. It was discovered that two (2) additional issues were created in the forms the Appellant processed; one (1) occurred on the same day shortly after the Appellant's discussion with Mr. Burns. (State's Exhibit #2 pg. 1)

13. The ASF project goals were not only to process forms but to look for areas where the process could have been improved. The Appellant did achieve some of the goals as updates were made to the ASF. However, it took eleven (11) major revisions to achieve this goal and the end result was very similar to the original. Mr. Burns expected the ASF project to be completed by this point, however, the ASF was essentially the same as when the Appellant began working on the project. (State's Exhibit #2 pg. 1 and Testimony of Mr. Burns)

14. The Appellant did receive a CAP as part of the LoW which included the following: (1) Immediately begin checking your work to ensure that the quality issues are addressed; (2) immediately follow your self-defined corrective actions. Items such as the checklist you defined need to be used and updated as necessary to prevent errors of the type which are

occurring; (3) the processes that you helped define and solely documented need to be followed; (4) within one (1) week, make any needed changes to your existing corrective action procedures, checklist, forms, etc.; (5) within two (2) weeks you must demonstrate that your efforts are effective. This will require that we do additional audits to ensure things are working, which is a resource drain; and (6) within one (1) week, demonstrate that others can successfully follow and use the process you have created. The LoW informed the Appellant that failure to meet any work standard and to take corrective action shall lead to further disciplinary action, up to and including dismissal. (State's Exhibit #2 pg. 2)

15. On May 6, 2016 the Appellant was issued a LoW for failure to meet any work standard and failure to take corrective action as directed. The second full paragraph of the LoW states, in relevant part, "[t]his is a continuation of our previous and ongoing discussions concerning the quality of your work..." In December 2015 the Appellant was assigned an "IMP" project. It was not a difficult project but required the Appellant to complete all aspects of a project. The fundamentals of managing a project include, but are not limited to, meeting with the customers, meeting with individuals who would be involved in the project, initiating the project, holding a kickoff meeting, developing a schedule and project plan, executing the plan, monitoring the results, and staying within the budget. Each project may be different but the basics of each project were the same for every project. (State's Exhibit #3 pg. 1 and Testimony of Mr. Burns)

16. On January 15, 2016 Mr. Burns reminded the Appellant that he should schedule a kickoff meeting and begin a dialogue with the customer, including a communication plan. Mr. Burns again reminded the Appellant about setting up a kickoff meeting on January 27, 2016. The Appellant sent Mr. Burns a "PCD" document but it included the wrong team members with no communication plan and no date for a kickoff meeting. Two days later, Mr. Burns reminded the Appellant of the importance of communication with the customer. This work action is outlined in the Appellant's Supplemental Job Description under "Develop and manage the project communication plan for all stakeholders." On April 1, 2016 a kickoff meeting was held. The meeting went well, however, after the meeting it was noted that there

was no usable time-line and the customers were still uninformed. (State's Exhibit #3 pg. .1 and Testimony of Mr. Burns)

17. In January 2016 the Appellant was assigned a project to establish internet connectivity to a DOT shed. This was a small project that required a kickoff meeting to establish assignments and deadlines. On March 30, 2016 the customer brought forward a new requirement, which had not been discussed at the kickoff meeting. The next day Mr. Burns expressed again the importance of speaking with the customer as a "requirements email thread" was ongoing and the Appellant did not provide any input. The Appellant told the customer not to get his hopes up about the new requirement being met. On April 4, 2016, Mr. Burns asked the Appellant to cease working on this project because management had received an email complaint from the customer about how the Appellant conducted a discussion wherein after the customer had described a requirement, the Appellant had seemed "put out" to address this need. Management determined that the requested requirement could be met and communicated this to the customer. In addition, management informed the customer that it would be responsible for customer interactions on that specific part of the project because the Appellant had so upset the customer. (State's Exhibit #3 pg. 2 and Testimony of Mr. Burns and Ms. Seiger)

18. A CAP was included in the LoW which included the following: (1) The Appellant immediately needed to begin checking his written work to ensure that the quality issues are addressed, specifically the word choice and how the message impacts the customer, (2) the Appellant immediately needed to begin checking his verbal statements to ensure that the quality issues are addressed, specifically how what he says impacts the customer, (3) the Appellant was required, within one (1) month, to register for a Customer Service Training Course. In addition, the Appellant was informed that if he failed to take corrective action as directed, further discipline would be issued, up to and including dismissal. (State's Exhibit #3 pg. 2)

19. Mr. Burns performed an Annual Performance Evaluation regarding the Appellant on June 7, 2016. The Evaluation notes the ongoing concerns about the Appellant's quality of work, lack of communication with others involved in the same project, lack of progress, lack of timelines being established on projects, lack of kickoff meetings being held on projects and

inaccuracies in the Appellant's work despite the previous CAP's. (State's Exhibit #4 pgs. 1-15)

20. On June 9, 2016 Mr. Burns met with the Appellant at the Appellant's cubicle to inquire about a project that was overdue. The Appellant explained to Mr. Burns that it was not yet complete and he felt that he was not given a sufficient amount of time to complete the project. Shortly after Mr. Burns' discussion with the Appellant, Mr. Burns found the Appellant working on a crossword puzzle at his desk during work hours. Mr. Burns asked the Appellant if he was on a scheduled break and the Appellant responded in the negative. (State's Exhibit #5 pg. 1 and Testimony of Mr. Burns)

21. On June 16, 2016 Mr. Burns drafted the Appellant's third LoW and Intent to Dismiss Letter and cited that the Appellant's quality of work for his position continued to be below expectations as outlined in the Annual Performance Evaluation. Mr. Burns also referenced the day the Appellant was observed working on a crossword puzzle shortly after telling Mr. Burns that he did not have enough time to complete a project. This LoW also states, "It is clear that you have failed to meet the work standard of a Project Manager for the Department of Information Technology." (State's Exhibit #5 pg. 1 and Testimony of Mr. Burns)

22. The Appellant's Intent to Dismiss meeting was originally scheduled for July 18, 2016 but did not occur until July 25, 2016 as the Appellant requested more time to prepare for said meeting. The Appellant had been provided the evidence that supported his dismissal including his LoW's, his performance evaluation and his complete personnel file prior to the meeting. The evidence that supported DoIT's decision was also provided to the Appellant during the Intent meeting. (State's Exhibit #6 pg. 1 and Testimony of Ms. Shriever)

23. During the Intent to Dismiss meeting the Appellant asserted that the three (3) LoW's were not for the same reason. Also, the Appellant argued that he had been receiving conflicting assignments from Mr. Burns and Ms. Seiger. Ms. Seiger acknowledged that the Appellant brought this to her attention approximately 6-9 months into his employment. She told the Appellant that if this was happening it was unacceptable and that he should immediately notify her if he believed it was reoccurring. He never approached her again about this topic.

The Appellant also asserted that he believed the issues he had were due to mismanagement. Further, the Appellant asserted that he received incomplete information regarding projects and minimal or no guidance regarding his position within the agency. The Appellant also now asserted that he was actually on a break when he was found working on the crossword puzzle. (State's Exhibit #6 pg. 2, Appellant's Exhibit 7 pg. 1 and Testimony of Ms. Seiger)

24. Mr. Burns conducted a supervisory meeting with the Appellant on a weekly basis and Mr. Burns and the Appellant met with Ms. Seiger bi-weekly to review projects the Appellant was working on. Ms. Seiger did not typically meet with Mr. Burns' supervisees but felt it was necessary with the Appellant in order to provide him feedback and instructions as needed. In addition to the supervisory meetings, the Appellant attended one-day courses on project management in June and August 2015 in Nashua. Mr. Burns also tried to assign the Appellant tasks that he believed the Appellant would be interested in and would fit his skillset. (Testimony of Ms. Seiger and the Appellant)

25. The Commissioner of DoIT, Dennis Goulet, reviewed all of the evidence provided by DoIT and the Appellant and concluded that DoIT had done everything it could think of to help the Appellant be successful at his job. In fact, he went on to state that Mr. Burns had gone above and beyond what is typical to help an employee succeed. As such, the Commissioner drafted the Appellant's dismissal letter on August 1, 2016. (State's Exhibit #5 and Testimony of Ms. Shriever)

26. The dismissal letter informed the Appellant that he was being discharged from state service in accordance with 1002.08 (c)(1). The Appellant received two (2) LoW's for failure to meet any work standard and failure to take corrective action as directed. After receiving these two (2) LoW's the Appellant continued to fail to meet any work standard and continued to fail to take corrective actions as directed and, as a result, a third LoW/Notice of Intent to Dismiss was issued. The Appellant was dismissed on July 29, 2016.

RULINGS OF LAW:

A. Per 1002.04(b)(1) Failure to meet any work standard

B. Per 1002.04(b)(2) Failure to take corrective action as directed

C. Per 1002.08 (C)(1) An appointing authority may dismiss an employee for conduct described in Per 1002.04 when the employee has previously received 2 written warnings for the same or substantially similar type of conduct or offense within a period of 5 years, by issuing a final written warning and notice of dismissal as set forth in this rule.

D. According to Per-A 207.12 (b) of the Board's rules, "In disciplinary appeals, including termination, disciplinary demotion, suspension without pay, withholding of annual increment or issuance of a written warning, the board shall determine if the appellant proves 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."

DISCUSSION and ORDER:

Prior to being issued a LoW, the Appellant was issued a MOC on March 1, 2016 for his poor quality of work. The Appellant had recurrent errors, above-normal work review was required and the Appellant was not learning from his mistakes or heeding the guidance from his supervisor. Approximately six (6) weeks later the Appellant was issued a LoW. This LoW begins, in the narrative section of the LoW, with, "This is a continuation of our previous and ongoing discussions concerning the quality of your work." The ASF project was meant to be a short-term project but turned into a long-term project because of the Appellant's deficiencies in meeting the work standard. The customers complained about the Appellant and his work and many problems had arisen in this project. Of the thirty (30) forms that the Appellant processed, six (6) of them or twenty percent (20%) were problematic. Four (4) of the issues were significant enough that the Appellant's supervisor had to retroactively obtain the required approval to make corrections. It was discovered on April 5, 2016 that two (2) additional issues were created in the forms the Appellant processed, one (1) of which occurred on the very same day after the Appellant and Mr. Burns spoke about the previous issues. Essentially, the

Appellant continued to make the same and/or similar mistakes processing the forms just hours after discussing previous issues. The Appellant received a CAP within the LoW which, essentially, informed him he needed to improve the quality of work and addressed how he could do so.

Approximately three (3) weeks after the first LoW was issued, the Appellant was issued a second LoW. This LoW begins the same as the first LoW in that it state's, "This is a continuation of our previous and ongoing discussions concerning the quality of your work." The Appellant failed to complete the fundamental aspects of a project. Each project may be different, but the basics of each project were the same for every project. The Appellant was told on January 15, 2016 that he should schedule a kickoff meeting and was reminded again on January 27, 2016. Thereafter, the Appellant sent Mr. Burns a "PCD" document that included the wrong team members, did not include a communication plan and did not have a date for a kickoff meeting.

Even though the Appellant was provided a CAP with each LoW he received, he continued to fail to take corrective action to improve his quality of work. Mr. Burns performed an Annual Performance Evaluation regarding the Appellant on June 7, 2016. The Evaluation notes the ongoing concerns about the Appellant's quality of work, lack of communication with others involved in the same project, lack of progress, lack of timelines being established on projects, lack of kickoff meetings being held on projects and inaccuracies in the Appellant's work despite the previous CAP's.

Approximately one (1) month after receiving his second LoW, Mr. Burns approached the Appellant's cubicle to discuss a project that was already overdue and the Appellant explained that he believed he was not given enough time to complete the project. A short time later, however, Mr. Burns found the Appellant working on a crossword puzzle during work hours. The Appellant was asked if he was on break and he stated that he was not. This prompted the issuance of the Appellant's third LoW/Intent to Dismiss.

During the Appellant's closing argument he asserted that the reason he was dismissed was not for the same or substantially similar conduct or offenses pursuant to Per 1002.08 (c)(1). The

Appellant cited Appeal of Donald W. Murdock, 156 NH 732 (N.H. 2008) to support his argument. In Murdock, the Petitioner was issued his first LoW for "failure to meet any work standard" due to transporting alcohol in a state vehicle, which was contrary to DOT policy. The second LoW was issued for "failure to meet any work standard" due to the Petitioner allowing a swimsuit model calendar to be displayed in the workplace after he had been told to remove it. The warning also alleged that there were tripping hazards in the office, as well as the presence of a wash basin without the proper caution warnings, all amounting to failure to meet any work standard. The Petitioner was issued his third and final warning because he took a late lunch and his work truck was seen parked outside a restaurant for thirty-five (35) minutes, five (5) minutes longer than permitted. This "warning also served as a letter of dismissal pursuant to Per 1001.08(b)(1), which permitted dismissal of an employee after three written warnings for the same offense within a five-year period."

The Court held that to read Per 1001.08(b)(1), as the State suggested, would require the Court to ignore several other provisions within the rules. The Court stated, "[w]e will not interpret the rule in such a way as to render a significant portion of it meaningless" At the time of the PAB hearing, there were eight (8) reasons, including failure to meet any work standard, why an employee could be issued a written warning. The Petitioner's various warnings address behavior that could have fit into other categories of the rule. The Court held that it was clear that the term "same offense" was intended to permit dismissal following three written warnings for a particular behavior, and not for any behavior that may be characterized as a similar violation.

It should be noted that Per 1002.08 (c)(1) (formerly 1001.08(b)(1)) was modified after the Murdock decision and now reads "[a]n appointing authority may dismiss an employee for conduct described in Per 1002.04 when the employee has previously received 2 written warnings for the same or *substantially similar* type of conduct or offense within a period of 5 years, by issuing a final written warning and notice of dismissal…" Per 1002.08 (c)(1).

The present case can be distinguished from Murdock. In Murdock, the Court held that the Petitioner's behavior could have fit into other categories under former 1001.08(b)(1) and

including the three (3) violations into one category (failure to meet any work standard) would deem the others superfluous. In the present case, all three (3) LoW's were issued to specifically address the Appellant's poor quality of work. The Appellant's continued mistakes during the ASF project does not fit into any other category listed under 1002.04 other than failure to meet any work standard. The Appellant continued to make the same or substantially similar mistakes even after receiving supervision and direction from not only his supervisor but his supervisor's manager. The Appellant continued to demonstrate poor quality of work when he supplied his supervisor with a "PCD" document with the wrong team members, no communication plan and did not have a kickoff meeting scheduled. Lastly, the Appellant informed his supervisor that he did not have enough time to complete a project that was already overdue and was then found working on a crossword puzzle during work hours. The fact that the Appellant did not complete the project on time demonstrates that this, too, fits only into the category of failure to meet any work standard. The Board finds that the LoW's were issued for the same or substantially similar conduct or offenses.

Having carefully considered the evidence and arguments presented, the Board finds that the LoW's were issued for the same or substantially similar conduct or offenses and, as a result, voted unanimously to DENY the appeal and to uphold the agency's decision to dismiss the Appellant.

THE PERSONNEL APPEALS BOARD

Chair Charla Stevens, Esq.

Vice Chair Norman Patenaude, Esq.

Commissioner Christopher Nicolopoulos, Esq.

Commissioner David Goldstein

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State of New Hampshire

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APR 27 2017

Appeal of James Cole

Docket #2017-T-001

Department of Information Technology

NH Personnel Appeals Board's Decision on Appellant's Motion for Reconsideration and/or Rehearing

April 26, 2017

The New Hampshire Personnel Appeals Board met in public session on Wednesday, February 1, 2017, to hear the appeal of James Cole. The Board issued a unanimous decision, denying the appeal, on March 6, 2017. The Appellant filed a Motion for Reconsideration and/or Rehearing on April 5, 2017 and the Appellee filed its Objection on April 10, 2017. Per-A 208.03 (c) (Rehearing), states "such motion for rehearing shall set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable.

Having carefully considered the Appellant's arguments in support of his request for reconsideration and/or rehearing, the Board found that they are essentially the same arguments raised by the Appellant before the Board during the hearing on the merits of his appeal. The Appellant offered neither evidence nor argument that would support the

conclusion that the Board's decision was unlawful or unreasonable, and that the appeal should be reconsidered and/or reheard. Accordingly, the Board voted unanimously to DENY the Appellant's Motion for Reconsideration and/or Rehearing.

THE PERSONNEL APPEALS BOARD

Norman A. Patenaude

Vice Chair, Norman Patenaude Esq.

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