THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Case No. 2017-0515

APPEAL OF NICOLE COLLINS

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# BRIEF OF APPELLANT
# NICOLE COLLINS

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State Employees' Association of New Hampshire, Inc. SEIU, Local 1984
Through Counsel
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## TABLE OF CONTENTS

## TABLE OF CASES



## TABLE OF STATUTES AND OTHER AUTHORITIES

### Statutes



### Other Authorities

## I. QUESTION PRESENTED FOR REVIEW

A. Whether the PAB erred as a matter of law by failing to apply the 'whatever evidence' rule, Per. 1002.08(d), and the ruling in Boulay where the State did not provide the Appellant any of the supporting evidence in before the State terminated the Appellant.

## II. STATUTORY/PERSONNEL RULES PROVISIONS

**N.H. Admin. Rules, PER 1002.08 (d) Dismissal.**

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(d) No appointing authority shall dismiss a classified employee under this section until the appointing authority:
(1) Offers to meet with the employee to discuss whatever evidence which the appointing authority believes supports the decision to dismiss the employee;
(2) Offers to provide the employee with an opportunity to refute the evidence presented by the appointing authority provided, however: a. An employee's failure to respond to a request for a meeting with the appointing authority shall not bar the appointing authority from dismissing an employee pursuant to this part; and b. An employee's refusal to meet with the appointing authority shall not bar the appointing authority from dismissing an employee pursuant to this part;

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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

**NH RSA 21-I:46 Powers and Duties of Board.**

I. The personnel appeals board shall hear and decide appeals as provided by RSA 21-I:57 and 21-I:58 and appeals of decisions arising out of application of the rules adopted by the director of personnel except those related to:

(a) Performance evaluations of classified employees; provided, however, that an employee who is disciplined or has other adverse action taken against him as the result of an evaluation may appeal that action.

(b) The refusal of an appointing authority to grant a leave of absence without pay.

(c) Classification decisions of the director of personnel when the reasons for appeal are based on any of the following:

(1) The personal qualifications of an employee exceed the minimum requirements for the position in question.

(2) The employee has held the position for a long period of time.

(3) Any positions previously held by the employee or any examinations passed by the employee which are not required for the position in question.

(4) The employee has reached the maximum of the assigned salary grade.

(5) The cost of living or related economic factors.

II. The board shall meet as often as necessary to conduct its business, provided that no more than 30 days shall elapse between meetings whenever there is any appeal pending before the board. Two members of the board shall constitute a quorum.

III. In the event that a member of the board is unable, for any reason, to attend a meeting of the board, the chairman shall designate an alternate member to serve in his place. In the absence of the chairman, the vice chairman shall designate the alternate member to serve.

IV. The board shall have the power to subpoena witnesses, and administer oaths in any proceeding before it, and to compel the production of any books, papers or other memoranda or documents by subpoena duces tecum.

V. The board may advise the director with regard to all existing rules of the division. The director shall submit all proposals to adopt rules to the board for their advice prior to filing a notice of proposed rule under RSA 541-A:6.

VI. The board shall by September 1 of each year submit an annual report to the governor, commissioner of administrative services, and director of personnel. This report shall include a narrative summary of the work of the board during the previous fiscal year. The report shall also include a description of problems related to the personnel system and the board's recommendations for dealing with those problems.

VII. The board shall adopt rules under RSA 541-A regarding procedures for the conduct of its business.

VIII. The board may, with the approval of the governor and council, contract for legal services in any action in which the attorney general determines that he cannot provide such services to the board. The governor shall draw his warrant on funds not otherwise appropriated to cover the costs of such legal services.

VIII-a. The board shall be limited to existing job titles within the classification plan when rendering decisions regarding appeals of denial of reclassification. The board is explicitly prohibited from creating new job classifications or job titles.

IX. The board shall issue final decisions on all appeals within 45 days of the date of hearing or upon the receipt of relevant evidence requested by the board as a result of such hearing, whichever is later. If the board determines that it requires additional time for the proper investigation or determination of the facts or issues involved, it shall notify the employee or employees making the appeal in writing of the reasons for the delay and provide an estimate to such employee or employees of the additional time required.

**Source.** 1986, 12:1. 1988, 269:2. 1994, 412:6, eff. Aug. 9, 1994.

**NH RSA 21-I:58 Appeals.**

I. Any permanent employee who is affected by any application of the personnel rules, except for those rules enumerated in RSA 21-I:46, I and the application of rules in classification decisions appealable under RSA 21-I:57, may appeal to the personnel appeals board within 15 calendar days of the action giving rise to the appeal. The appeal shall be heard in accordance with the procedures provided for adjudicative proceedings in RSA 541-A. If the personnel appeals board finds that the action complained of was taken by the appointing authority for any reason related to politics, religion, age, sex, race, color, ethnic background, marital status, or disabling condition, or on account of the person's sexual orientation, or was taken in violation of a statute or of rules adopted by the director, the employee shall be reinstated to the employee's former position or a position of like seniority, status, and pay. The employee shall be reinstated without loss of pay, provided that the sum shall be equal to the salary loss suffered during the period of denied compensation less any amount of compensation earned or benefits received from any other source during the period. "Any other source" shall not include compensation earned from continued casual employment during the period if the employee held the position of casual employment prior to the period, except to the extent that the number of hours worked in such casual employment increases during the period. In all cases, the personnel appeals board may reinstate an employee or otherwise change or modify any order of the appointing authority, or make such other order as it may deem just.

II. Any action or decision taken or made under this section shall be subject to rehearing and appeal as provided in RSA 541.

III. In the event of an appeal from a decision of the personnel appeals board in accordance with the provisions of RSA 541, the fee for the copy of the record and such testimony and exhibits as shall be transferred, and the fee for manifold copies shall be established by the governor and council and collected by the director of personnel from the party making the appeal. Any fees collected by the director of personnel under the provisions of this section shall be credited to the appropriation for the division of personnel. The appeals board shall not be required to certify the record upon any such appeal, nor shall the appeal be considered until the fees for the copies have been paid.

**Source.** 1986, 12:1. 1988, 269:4. 1990, 140:2, XII. 1997, 108:5, eff. Jan. 1, 1998.

## III. STATEMENT OF THE CASE

This case involves an April 20, 2016 termination of a State employee that violates the 'whatever evidence' rule, N.H. Admin. Rules, Per 1002.08(d), and runs contrary to this Court's decision in Appeal of Boulay, 142 N.H. 626 (1998). The Appellant was fired from her job following an April 7, 2016, hour long 'intent' meeting where documentary evidence was asked for but not provided, only to receive a termination letter dated two weeks later that contained one hundred and three (103) pages of documentary evidence, allegedly supporting the State's termination decision.

On May 3, 2016, the SEA timely appealed the termination on behalf of the Appellant to the New Hampshire Personnel Appeals Board (PAB) raising the 'whatever evidence' rule violation. On August 23, 2016, the SEA filed a Motion for Summary Disposition (See, N.H. Admin. Rules, Per-A 2006.05) since it is undisputed that the Appellant was not provided any of the 103 pages of evidence at the 'intent' meeting. The PAB denied the motion finding that there were 'material facts in dispute', even where the State acknowledges that the 103 pages of evidence were not provided.

Following two days of hearings, where evidence and argument was heard on Appellant's pending dispositive motion, the PAB upheld the termination based on the underlying merits of the case. The PAB's decision contains no discussion whatsoever of the Appellant's argument on the 'whatever evidence' rule nor any mention of Appellant's outstanding motion. Following a denial of Appellant's timely reconsideration motion, this appeal followed.

## IV. STATEMENT OF THE FACTS

For purposes of this appeal the salient facts center on 1) the conduct of the April 7, 2016 'intent' meeting and 2) the content of the April 20, 2016 letter of termination. Hearings on this matter were conducted at the PAB on April 12 and 13, 2017 where, along with the underlying merits of the termination, evidence was taken as to the conduct of the April 7th 'intent' meeting. See, Transcript of Hearing, (hereafter "Tr.") Day 1 at 166-186 and Day 2 at 60-66 and 185-192.

Nicole Collins testified on direct about the April 7th meeting:

1. Present at the meeting were Collins, SEA representative Bolton, DHHS representatives Braley and Karen Spires, and DHHS Attorney Berry; (Day-2 Tr.60)
2. The meeting lasted about an hour with the State's presentation taking up 45 minutes; (Day-2 Tr.61)
3. Spires presented for the State, strictly reading from her notes, and referenced various text messages, e-mails and statements; (Day-2 Tr.62)
4. Spires refused to provide, when directly asked, any of the texts, e-mails, or statements she referenced during the 45-minute presentation; (Day-2 Tr. 62)
5. "We asked several times if it was -- where the information was coming from, and she had mentions -- Karen [Spires] had mentioned that she was reading from her notes"; (Day-2 Tr. 61-61)
6. "I wasn't provided a copies of anything"; (Day-2 Tr. 62)
7. Nothing in the 103 pages of evidence appended the termination letter was provided at the meeting; (Day-2 Tr. 63-64), and

8. Collins could not meaningfully discuss the charges against her without seeing the documents and she explained that to Spires; (Day-2 Tr. 65)

On cross, Collins acknowledged receiving certain dates, times and frequencies regarding alleged infractions. (Day-2 Tr. 185-186). On redirect, Collins explained that the presentation by Spires did not include a 'stop and discuss' method, rather, Spires spoke for 45-minutes and then asked Collins to respond (Day-2 Tr. 188). Collins concluded, and expressed to Spires, that in order to give an intelligent response she needed the documentation Spires was referencing. (Day-2 Tr. 189).

Spires acknowledged that her presentation on the 7th took up the vast majority of the hour long meeting and that her presentation involved only reading from her prepared notes (Day-1 Tr. 166-167). Spires testified that she did not provide the 103 pages of evidence to Collins at the intent meeting (Day-1 Tr. 174). Spires explained that she was advised to merely discuss the evidence with Collins (Day-1 Tr. 171). Spires insisted that her presentation 'included everything' and that the 103 pages of evidence (including 63 exhibits) "just supports what was stated" (Day-1 Tr. 170 line 17). Spires explained, that there was nothing presented at the meeting that Collins "did not already possess or wasn't already aware of". (Day-1 Tr. 170) Further, "what I was advised was to provide, if asked for" (Day-1 Tr. 171).

On re-direct, Spires testified she read her notes "verbatim" to Collins (Day-2 Tr. 175) and provided specific dates and times of the allegations against Collins (Day-2 Tr. 175-178).

## V. SUMMARY OF ARGUMENT

Appellant, Nicole Collins, was terminated by way of a letter of termination that included 103 pages (63 exhibits) as attachments. The first time Nicole Collins saw these documents was when she received her termination letter. At her 'Intent to Dismiss' meeting, conducted two weeks before the termination letter was signed, all Collins was provided was a 45-minute presentation where the State read aloud from prepared notes, outlining alleged infractions and when and how often they occurred. In the presentation, the State referred to e-mail, text messages, and other documents but would not provide them to Collins, although she repeatedly asked for them.

This case presents a clear violation of the 'whatever evidence' rule [Per. 1002.08(d)] and ignores the ruling of this Court in Boulay.

## VI. ARGUMENT

### A. THE PAB ERRED AS A MATTER OF LAW BY NOT APPLYING THE 'WHATEVER EVIDENCE' RULE AND THE DECISION IN BOULAY.

RSA 21-I:58 requires that if an appointing authority takes an employment action that violates a personnel rule, "the employee shall be reinstated without loss of pay…". RSA 21-I:58, I (emphasis added). The 'whatever evidence' rule is codified at N.H. Admin. Rules, Per 1002.08(d):

> (d) No appointing authority shall dismiss a classified employee under this section until the appointing authority:

(1) Offers to meet with the employee to discuss whatever evidence which the appointing authority believes supports the decision to dismiss the employee;

(2) Offers to provide the employee with an opportunity to refute the evidence presented by the appointing authority provided, however: a. An employee's failure to respond to a request for a meeting with the appointing authority shall not bar the appointing authority from dismissing an employee pursuant to this part; and b. An employee's refusal to meet with the appointing authority shall not bar the appointing authority from dismissing an employee pursuant to this part; and

* * * * * *

Thus, the personnel rules dictate, that "whatever evidence" the State believes supports a termination decision must be provided and the employee allowed to refute it, before the termination is effected.

In, Appeal of Boulay, 142 N.H. 626 (1998), an employee was terminated for violating a Sexual Harassment Policy. Prior to the termination, the employer met with employee several times and provided the employee with a statement of misconduct and a summary of its investigation. Boulay at 628. Just before Boulay's hearing, the State provided more detailed evidence. Id. The 'whatever evidence' in effect at the time (former rule Per 1001.08(f))[1] provided that "no appointing authority shall dismiss a classified employee ... until the appointing authority meets with the employee to discuss

[1] In substance the same rule in effect now.

*whatever evidence* the appointing authority believes supports the decision to dismiss…". Boulay at 628 (emphasis in original).

A unanimous Court ruled that simply meeting with an employee and providing a summary of its evidence does not meet the standard of the 'whatever evidence' rule and ordered reinstatement and back pay pursuant to RSA 21-I:58.

In this case, a substantially similar situation (or perhaps a more egregious one) exists. The single event the State undertook before terminating Nicole Collins was to conduct, on April 7, an hour long 'intent' meeting at which no evidence was provided and no meaningful opportunity to refute given. Instead, like in Boulay, a summary was read aloud, from notes (not provided as well), outlining the dates and times of alleged infractions. When asked many times for the documents referenced in the presentation (including referenced e-mails, text messages, documents and witness statements) the State refused to provide them. Further, the State dismissed the Appellant's plea that without the documents she could not meaningfully respond to the allegations.

Two weeks later, the State issues its termination letter (9 pages in length) with attachments that include 63 exhibits spanning 103 pages.[2] None of the exhibits were proved at the 'intent' meeting. The Appellant saw no e-mails, text messages, witness statements, supervision notes, badge reports, or other form of documentation on April 7,

[2] These documents were obviously available on April 7.

2016. The State should suffer the same result in this case as it did in Boulay [3]- Nicole Collins should be reinstated with full back pay.

In the alternative, the Court should at least remand the case back to the PAB for a meaningful analysis of the 'whatever evidence' rule as applied to the facts of this case. The matter was raised in Appellant's initial appeal to the PAB and again through a prehearing Motion for Summary Disposition and again at hearing with no reply from the PAB.[4]

## V. CONCLUSION

For the reasons set forth above, the Appellant requests this Honorable Court to reverse the decision of the PAB, or alternatively, remand the case for further proceedings.

## VII. CERTIFICATE OF COMPLIANCE

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 29th day of January, 2018.

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[3] Indeed, this case has aggravating factors not present in Boulay. Collins knew the evidence existed as Spires referenced them at the intent meeting. Collins repeatedly asked for the evidence and told Spires she could respond without it.

[4] Interestingly, the dispositive motion was denied based on the State's argument that 'material facts' were in dispute. Yet, the State has never disputed that the 103 pages of evidence was not provided before the termination was effected.

In accordance with New Hampshire Supreme Court Rule 16 (10), the undersigned hereby certifies that two (2) copies of Brief of Appellant have been hand-delivered to Attorney Laura E.B. Lombardi; one (l) copy to the NH Personnel Appeals Board, and to the appellant.

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 Glenn R. Milner, Esq. be designated as the attorney to argue its merits on behalf of the State Employees' Association of New Hampshire, SEIU Local 1984. Counsel respectfully requests fifteen (15) minutes for argument.

Dated: January 29, 2018

Glenn R. Milner, General Counsel

State of New Hampshire

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**Appeal of Nicole Collins**

**Docket #2016-T-012**

**Department of Health and Human Services**

June 14, 2017

The New Hampshire Personnel Appeals Board met in public session on Wednesday, April 12, 2017 and Thursday April 13, 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 Nicole Collins, the Appellant. The following commissioners sat for this hearing: Commissioner Christopher Nicolopolous, Esq., and Commissioner David Goldstein. Ms. Collins, who was represented at the hearing by Sean Bolton, SEA Grievance Representative, appealed the final Letter of Warning and Dismissal dated April 20, 2016, in her capacity as an Administrative Supervisor of the Seacoast District Office of the Division of Client Services. Robert Berry, Esq., appeared on behalf of the Department of Health and Human Services.

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, documents admitted into evidence and post hearing memorandums.

**ISSUES OF LAW**:

Per 1002.04 (b) (1)
Per 1002.04 (b) (2)
Per 1002.08 (c) (1)

## BACKGROUND

The Appellant began her employment with the State of New Hampshire on June 29, 2007 with the Department of Health and Human Services, Division of Client Services, as a Family Services Specialist. At the time of her dismissal, the Appellant was employed as an Administrative Supervisor at the Division of Client Services, in the Seacoast District Office.

The Appellant was issued a Letter of Warning (hereinafter LoW) on April 21, 2015 for unauthorized use or misuse of communication systems and violation of a posted agency policy. This LoW was appealed but settled prior to being heard by the Board. The Appellant was issued a second LoW on October 23, 2015 for failure to meet the work standard and working unauthorized overtime. The Appellant appealed the second LoW and the Board unanimously voted to deny the appeal. The Board found the Appellant had failed to meet any work standard by failing to complete the required number of monthly case reviews and also found the Appellant worked unauthorized overtime. The second LoW contained a Corrective Action Plan (hereinafter CAP) and the Appellant was advised that failure to follow the CAP shall result in additional disciplinary action up to, and including, discharge from employment.

The Appellant was issued a third LoW on November 20, 2015 for failure to meet any work standard, failure to take corrective action as directed and working unauthorized overtime. The Appellant appealed this LoW and the Board voted unanimously to deny the appeal. Similar to the second LoW, this LoW contained numerous allegations of how the Appellant failed to meet any work standard, however, the Board addressed the Appellant's alleged failure to meet any work standard by failing to complete the requisite number of monthly case reviews. The LoW also alleged that the Appellant failed to take corrective action and continued to work unauthorized overtime. This LoW also contained a CAP that, again, advised the Appellant that failure to follow the CAP shall result in additional disciplinary action up to, and including, discharge from employment.

The Appellant was issued a final LoW on April 20, 2016. Similar to the second and third LoW, this LoW contains numerous allegations of how the Appellant failed to meet any work standard and follow corrective action as directed. The Board, however, will address the Appellant's alleged failure to meet any work standard by not completing the requisite number of monthly case reviews and the allegation that she failed to follow the CAP by continuing to work unauthorized overtime.

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

## FINDINGS OF FACT

## FAILURE TO MEET ANY WORK STANDARD:

1. The Appellant began her employment as an Administrative Supervisor at the Department of Health and Human Services on September 28, 2012. The Appellant was the Administrative Supervisor for the Seacoast District Office of the Division of Client Services. (Appellant's Exhibit #2 pg. 25)

2. On April 20, 2016 the Appellant was issued a final LoW for failing to meet any work standard, failure to take corrective action as directed and she continued to work unauthorized overtime. (Appellant's Exhibit #2 pg. 25 &26)

3. The Division of Client Services supervisors were instructed, as part of its corrective action plan regarding the food stamp error rate, to review cases to ensure accuracy. The Appellant was informed in June 2015 that she had to review 20 cases each month and this number increased to 30 case reviews in the month of August 2015. (State's Exhibit #6 p.4 & 5)

4. Although the directive to review 30 cases each month was still applicable in November 2015, the Appellant completed only 3 case reviews. (Appellant's Exhibit #2 p. 28 & 94)

5. Although the directive to review 30 cases each month was still applicable in December 2015, the Appellant completed only 7 case reviews. The Appellant believed she completed more than 7 case reviews and presented evidence which she believed would demonstrate that her supervisor, Karen Spires, had deleted at least one of her case reviews. (Appellant's Exhibit #2 p. 28 &95 and Appellant's Exhibit # 41 p. 271 &272)

6. In the month of December 2015, Family Services Specialist (hereinafter FSS) Laura Utley was due for her Performance Evaluation. The Appellant chose to allow Ms. Utley to review the errors cited because this would impact her accuracy rating that would be put in her performance evaluation. Ms. Utley disagreed with an error she received on August 27, 2015. This error was documented by someone outside of the Seacoast office and the Appellant also disagreed with the error cited. Because the error was cited by someone outside the Seacoast office and the Appellant disagreed with the finding, Ms. Spires had to review the alleged error. After reviewing the error, Ms. Spires agreed with Ms. Utley and the Appellant and deleted the error. This particular case would not have counted toward the requisite number of monthly case reviews as she was reviewing only medical. (Appellant's Exhibit #41 p. 271 & 272 and Testimony of Ms. Spires)

7. The Appellant chose an FSS worker in the month of December who did not have 30 cases for the Appellant to review. As a result, the Appellant combined the months of December and January to review cases for this particular FSS worker. The Appellant completed 16 case reviews in January and 7 case reviews in December for a total of 23 case reviews, 7 short of the expectation. (Appellant's Exhibit #2 p. 28 and Testimony of Appellant)

8. The Appellant was aware that she was expected to review 30 cases each month as she was given the directive by her supervisor and it was reinforced in the October 2015 LoW and the November 2015 LoW.

UNAUTHORIZED OVERTIME:

9. On November 12, 2015 Chief of Operations, Melody Braley, sent an e-mail at 12:48pm to the Appellant and other staff regarding overtime. Ms. Spires was copied on this e-mail. The subject of the e-mail is entitled "Overtime Clarification" and states, "For Supervisors, I want to clarify that overtime continues to be approved for case reviews only. If you have a special need for other work then it must be discussed and approved by your Regional prior to it being worked." The e-mail concludes by Ms. Braley asking the recipients of the e-mail to let her know if they have any questions. The Appellant acknowledged receiving the e-mail. (State's Exhibit #1 Attachment and Testimony of Appellant)

10. On November 30, 2015 the Appellant worked 2.15 hours of overtime and conducted 2 case reviews. On December 9, 2015, the Appellant worked 1 hour of overtime and did not conduct any case reviews. On December 11, 2015 the Appellant worked 2.50 hours of overtime and conducted 1 case review. A typical case review should take approximately 10-15 minutes to complete and a complicated case review may take 20 minutes to complete. (Appellant's Exhibit #2 p.28 and Testimony of Appellant and Ms. Spires)

11. On December 14, 2015 the Appellant worked 1.50 hours of overtime and the number of case reviews was in dispute. The Appellant argued that she acted on 3 cases and the Appellant's LoW indicates that she worked on 2 case reviews. The Appellant asserted that she was working on case reviews the entire time. (Appellant's Exhibit #2 p. 28 and Testimony of Appellant)

12. On December 17, 2015 the Appellant worked 3.0 hours of overtime and completed 1 case review. (Appellant's Exhibit #2 p. 28)

13. On December 29, 2015 the Appellant worked 1 hour of overtime and did not complete any case reviews. (Appellant's Exhibit #2 p. 29)

14. On January 4, 2016 the Appellant worked 2.5 hours of overtime and completed 3 case reviews. The Appellant was aware that she was being scrutinized by her supervisor and, as a result, was tracking the case reviews that she had completed. The Appellant noticed that what she considered to be a case review was missing. She looked under the name of the FSS and tried to determine why it was no longer present. It took the Appellant approximately 1 hour to resolve what she considered to be a problem. However, it was determined that Ms. Spires deleted the entry for just cause. Even if the entry had not been deleted, it would not have counted as a case review as it only dealt with medical. (Appellant's Exhibit #41 p. 271 & 272 and Testimony of the Appellant and Ms. Spires)

15. On January 5, 2016 the Appellant worked 1.5 hours of overtime and completed 1 case review. On January 7, 2016 the Appellant worked 1 hour of overtime and did not complete any case reviews. On January 9, 2016 the Appellant worked 1.5 hours of overtime and did not complete any case reviews. On January 14, 2016 the Appellant worked 1.5 hours of overtime and did not complete any case reviews. On January 15, 2016 the Appellant worked 2.5 hours of overtime and did not complete any case reviews. On January 27, 2016 the Appellant worked 2.5 hours of overtime and completed 2 case reviews. (Appellant's Exhibit #2 p. 29 and Testimony of Appellant)

**RULINGS OF LAW**:

A. Per 1002.04 (b) (1) an appointing authority may issue a written warning to an employee for unsatisfactory work performance or conduct including, but not limited to, the following: Failure to meet any work standard.

B. Per 1002.04 (b) (2) an appointing authority may issue a written warning to an employee for unsatisfactory work performance or conduct including, but not limited to, the following: Failure to take corrective action as directed.

C. Per 1002.08 (c) (1) 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 any 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. Per-A 207.12 (b) In disciplinary appeals, including termination, disciplinary demotion, suspension without pay, withholding of an employee's 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, and (4) the disciplinary action was unjust in light of the facts in evidence.

**DISCUSSION and ORDER**

The Appellant was informed in June 2015 that she had to complete at least 20 case reviews each month. Two months later, she was informed that the number of cases she had to review each month was increased to 30. The Appellant was issued a LoW in October 2015 for, in part, failure to meet any work standard by failing to review at least the required number of case reviews. In November 2015 the Appellant was issued another LoW for, in part, failure to meet any work standard by not completing at least 30 case reviews per month.

On April 20, 2016 the Appellant was issued a third and final LoW and notice of dismissal. In November 2015, the Appellant conducted only 3 case reviews when the expectation was that she complete 30 case reviews. The Appellant argued that in December 2015 she chose an FSS that did not have 30 cases to review. As a result, the Appellant combined the months of December and January. The Appellant asserted that she believed that Ms. Spires deleted at least one case review that she had performed. However, on rebuttal testimony, Ms. Spires explained why the

item had been deleted and asserted that even if it had not been, it would not have counted as a monthly case review. Therefore, the Appellant conducted only 7 case reviews for December 2015. Assuming arguendo, even if the Appellant had completed 8 case reviews instead of 7 in December, she still would not have completed 30 for the combined months of December and January, because she completed only 16 case reviews in January; the total number of case reviews for the months of December and January combined would have been 24.

The Appellant was made aware of the case review expectations in June 2015, August 2015, in the LoW in October 2015 and in the LoW in November 2015. The Appellant acknowledged that she did not perform the requisite number of monthly case reviews, beginning in June 2015.

The Appellant received e-mails, beginning in July 2015, informing her that overtime was to be used exclusively for completing case reviews. The Appellant also received e-mails explaining that overtime continued to be available for case reviews but could also be used for other tasks so long as it was discussed and approved by a supervisor. For example, on November 12, 2015 the Chief of Operations, Melody Braley, sent an e-mail to the Appellant and other staff stating that overtime for supervisors was to be used for case reviews only, unless given permission by her supervisor prior to the overtime being worked.

The Appellant testified that most of the overtime she worked between November 30, 2015 and February 2016 was for work that did not involve case reviews. The Appellant, however, testified that she had approval for each and every hour of overtime that she worked that was not case review related. For example, she testified that she had obtained permission from Ms. Braley to work 1 hour of overtime on December 29, 2015. She testified that she did not have any documentation to prove this authorization as her e-mail was not working at that time and, therefore, received permission from Ms. Braley via the telephone. Part of the Board's job is to weigh the credibility of the witnesses. With respect to overtime and whether the Appellant was authorized by Ms. Spires or another member of DCS senior management to work on items other than overtime on the days and times referenced above, the Board found Ms. Spires to be

credible. As such, the Board found that the Appellant failed to follow the CAP set forth in the October 2015 and November 2015 and also continued to work unauthorized overtime.

The Appellant was issued 2 LoWs, October 23, 2015 and November 20, 2015, for failing to meet any work standard by failing to complete the requisite number of monthly case reviews. The Appellant appealed both LoWs and the Board voted unanimously to deny each one. On April 20, 2016 the Appellant was issued her third and final LoW for, in part, failing to meet any work standard by failing to complete the requisite number of monthly case reviews.

The Appellant had been issued two previous LoWs, October 23, 2015 and November 20, 2016, for working unauthorized overtime. The Appellant appealed both LoWs and the Board unanimously voted to deny both appeals. The Appellant was issued her third and final LoW for, in part, working unauthorized overtime. The Board found that the Appellant continued to work overtime, without authorization from Ms. Spires or another supervisor, on items that were not related to case reviews.

Pursuant to Per 1002.08 (c) "An appointing authority may dismiss an employee for conduct described in 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." The Board found that the first 2 LoWs and the final LoW were for the same or substantially similar type of conduct regarding the Appellant's failure to meet any work standard by not completing the requisite number of monthly case reviews. In addition, the Board found the same regarding the Appellant working unauthorized overtime. The Appellant continued to work overtime, on matters other than case reviews, without the authorization from Ms. Spires or another DCS supervisor.

For all the reasons set forth above, the Board voted unanimously to DENY the appeal and uphold the final written warning and dismissal.

THE PERSONNEL APPEALS BOARD

Christopher Nicolopoulos, Esq., Commissioner

David Goldstein, Commissioner

cc: Sara Willingham, Director of Personnel, 28 School Street, Concord, NH 03301
Sean Bolton, SEA Field Representative, 207 North Main Street, Concord, NH 03301
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State of New Hampshire

PERSONNEL APPEALS BOARD
25 Capitol Street
Concord, New Hampshire 03301
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AUG 10 2017

**Appeal of Nicole Collins**
**Docket #2016-T-012**
**Department of Health and Human Services**
**Division of Client Services**
**New Hampshire Personnel Appeals Board's Decision on Appellant's Motion for Reconsideration and/or Rehearing**

August 10, 2017

The New Hampshire Personnel Appeals Board met in public session on April 12, 2017 and April 13, 2017 to hear the appeal of Nicole Collins. The Board issued its decision on June 14, 2017. The Appellant filed a Motion for Reconsideration and/or Rehearing on July 14, 2017, and the Appellee filed its Objection on July 19, 2017. On July 19, 2017 the parties were advised that the Board was invoking Per-A 208.02(b), due to the Board's schedule, and informed the parties that the Board anticipated issuing a decision on the Motion for Reconsideration and/or Rehearing on or before August 14, 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."

The Board held a full and fair hearing on the merits over the course of two days. During thoughtful and thorough deliberations, the Board considered the parties' pleadings, evidence, the testimony of the parties and witnesses, and arguments, including the Appellant's argument relative to a violation of Per 1002.08(d)(1) &(2).

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

Commissioner Christopher Nicolopoulos, Esq.

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