THE STATE OF NEW HAMPSHIRE

SUPREME COURT

No. 2017-0515

Appeal of Nicole Collins

APPEAL BY PETITION PURSUANT TO RSA 541:6
(New Hampshire Personnel Appeals Board)

BRIEF FOR THE STATE OF NEW HAMPSHIRE DEPARTMENT OF HEALTH AND HUMAN SERVICES

THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF HEALTH AND HUMAN SERVICES

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February 28, 2018

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QUESTION PRESENTED

Whether Ms. Collins established that DHHS's decision to dismiss her from state employment was clearly unlawful and unreasonable when DHHS provided significant detailed reasons for its decisions to dismiss her in accordance with Per 1002.08(d)?

TEXT OF RELEVANT STATUTES

541:13 Burden of Proof.

Upon the hearing the burden of proof shall be upon the party seeking to set aside any order or decision of the commission to show that the same is clearly unreasonable or unlawful, and all findings of the commission upon all questions of fact properly before it shall be deemed to be prima facie lawful and reasonable; and the order or decision appealed from shall not be set aside or vacated except for errors of law, unless the court is satisfied, by a clear preponderance of the evidence before it, that such order is unjust or unreasonable.

Per 1002.08 Dismissal.

(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

(3) Documents in writing the nature and extent of the offense.

(e) If an appointing authority, having complied with the provisions of Per 1002.08 (d) finds that there are sufficient grounds to dismiss an employee, the appointing authority shall:

(1) Provide a written notice of dismissal, specifying the nature and extent of the offense;

(2) Notify the employee in writing that the dismissal may be appealed under the provisions of RSA 21-I: 58, within 15 calendar days of the notice of dismissal; and

(3) Forward a copy of the notice of dismissal to the director.

(f) An appeal filed under the provisions of RSA 21-I:58 shall not stay the dismissal decision.

STATEMENT OF THE CASE

This appeal arises out of a decision of the Personnel Appeals Board (hereinafter the "Board") dated June 14, 2017. R. 267-76[1]. The Appellant, Nicole Collins, appealed her April 20, 2016 dismissal from employment. In her appeal to the Board, Collins contested the dismissal on a number of grounds; however, only one issue is raised on appeal before this Court. Both before the Board and now on appeal, Collins argues that the Department of Health and Human Services (DHHS) failed to comply with the requirements of New Hampshire Administrative Rule, Per 1002.08(d) and this Court's decision in *Appeal of Boulay*, 142 N.H. 626 (1998). R. 136; AB 1. Specifically, Collins argued that DHHS's April 7, 2016 meeting where DHHS verbally explained in detail the reasons for Ms. Collins' dismissal did not meet the requirements of the Personnel rule and the *Boulay* decision because DHHS did not also provide certain documentation to support the decision. AB 1.

The Board conducted an evidentiary hearing on the matter on April 12, 2017, and April 13, 2017. R. 267. The Board concluded, by order dated June 14, 2017, that Collins' dismissal was lawful and upheld DHHS's decision. R. 275.

On July 14, 2017, Collins filed a motion for rehearing of the Board's June 14, 2017 decision. R.277-81. DHHS filed an objection to the motion, indicating that the original decision was both lawful and reasonable. R. 282-83. The Board denied the motion. R. 286-87. This appeal followed.

[1] "R" refers to the certified record on appeal filed by the Personnel Appeals Board; "SA" refers to State's Appendix; "AA" refers to Appellant's Appendix; "AB" refers to Appellant's Brief; "T1" refers to transcript of the April 12, 2017 hearing contained within the certified record; "T2" refers to the transcript of April 13, 2017 hearing contained within the certified record.

STATEMENT OF THE FACTS

Ms. Collins began her employment with DHHS on June 29, 2007 as a Family Services Specialist. R. 268. At the time of her dismissal, Collins was employed as an Administrative Supervisor in the Seacoast District Office of DHHS. R. 268. On October 23, 2015 and November 20, 2015, Ms. Collins was given a letter of warning for failure to meet work standards and working unauthorized overtime. R. 268, 291-330, 519-24.

On April 7, 2016, Ms. Collins attended an "Intent to Discipline" meeting with her Regional Supervisor, Karen Spires and the Chief of Operations, Melody Braley. T1 166, T2 60. At the "Intent to Discipline" meeting, Ms. Spires read verbatim from her prepared notes all of the evidence she believed supported the decision to dismiss Ms. Collins. R. 507-12, T1 175. The notes consist of five detailed pages of specific concerns with regard to meeting deadlines in case files, completing performance evaluations, submitting timely quarterly reports required by her corrective action plan, processing fair hearing requests and other requests in a timely manner, meeting the standards for number of case reviews completed, working unauthorized overtime, following agency policy regarding using her access badge, and certain inappropriate and unprofessional behaviors. R. 507-12. In presenting this information to Ms. Collins, Ms. Spires included the names of specific cases, fair hearings and dates that were the basis for discipline. T1 175-76, R 507-09. Ms. Spires also detailed the months where Ms. Collins did not meet the minimum number of case reviews and detailed the hours of unauthorized overtime. T 177-78, R 509-10.

Ms. Collins does not dispute, and specifically confirmed, that each and every item that was outlined in the April 20, 2016 dismissal letter was discussed at the April 7, 2016 "Intent to Discipline" meeting. T2 79, 83, 84-5, 93, 112, 115, 116, 118, 134, 137, 141, 143, and 147. In

addition, Ms. Collins was provided an opportunity to respond to the information that was presented during the meeting. T2 191. Further, Ms. Collins provided specific and detailed responses to the allegations, which were noted and addressed in the April 20, 2016 dismissal letter. R 336-38.

Following the April 7, 2016 "Intent to Discipline" meeting, DHHS considered all of the evidence, including information provided by Ms. Collins, and, on April 20, 2016, issued a letter dismissing Ms. Collins from state employment. R. 331-39.

SUMMARY OF THE ARGUMENT

Prior to dismissing an employee, DHHS is required by New Hampshire Administrative Rule Per 1002.08(d) to "meet with the employee to discuss whatever evidence which the appointing authority believes supports the decision to dismiss the employee" and "provide the employee with an opportunity to refute the evidence presented by the appointing authority." Here, DHHS met with Ms. Collins and provided significant and detailed reasons for its decision to dismiss her from state employment. This Court's decision in *Boulay* did not also require DHHS to provide the documents that were the basis for the dismissal decision at the meeting required by Per 1002.08(d). Thus, DHHS met the requirements of Per 1002.08(d) and the requirements of this Court's decision in *Appeal of Boulay*, 142 N.H. 626 (1998) when it dismissed Ms. Collins.

ARGUMENT

I. STANDARD OF REVIEW

Any appeal from a decision of the Personnel Appeals Board is reviewed under the standards as set forth in RSA 541:13. This statute provides:

> Upon the hearing the burden of proof shall be upon the party seeking to set aside any order or decision of the commission to show that the same is clearly unreasonable or unlawful, and all findings of the commission upon all questions of fact properly before it shall be deemed to be *prima facie* lawful and reasonable; and the order or decision appealed from shall not be set aside or vacated except for errors of law, unless the court is satisfied, by a clear preponderance of the evidence before it, that such order is unjust or unreasonable.

Id.; *see also Appeal of Murdock,* 156 N.H. 732, 735 (2008); *Appeal of Waterman*, 154 N.H. 437, 439 (2006). It is also well established that the findings and conclusions of the Personnel Appeals Board are "entitled to great weight and cannot be set aside lightly." *See Peabody v. Personnel Commission,* 109 N.H. 152, 155 (1968) (predecessor Commission to the Personnel Appeals Board).

Additionally, an agency will be given deference in interpreting its regulations. *Appeal of Morin*, 140 N.H. 515, 518 (1995). While that deference is not total, the reviewing court will determine whether the agency's interpretation "is consistent with the language of the regulation and with the purpose which the regulation was intended to serve." *Id.* (citing *Appeal of Alley*, 137 N.H. 40, 42 (1993)).

II. COLLINS' DISMISSAL WAS LAWFUL, REASONABLE AND CONSISTENT WITH DIVISION OF PERSONNEL RULES WHERE DHHS GAVE NOTICE OF THE DISCIPLINE IN ACCORDANCE WITH THE RULES.

The process required for dismissing an employee is set forth in New Hampshire Administrative Rules, Per 1002.08. Prior to dismissing an employee, the New Hampshire Administrative Rules require the following:

> 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
>
> (3) Documents in writing the nature and extent of the offense.

N.H. Admin. Rules, Per 1002.08(d). Here, DHHS followed the required procedure prior to dismissing Ms. Collins.

The facts are not in dispute. On April 7, 2016, DHHS met with Ms. Collins, provided a detailed description of the evidence that supported the dismissal decision, and offered Ms. Collins the opportunity to refute the evidence. T1 166, T2 60, AB 5-6. Ms. Spires, Ms. Collins' supervisor, read verbatim from her prepared notes all of the evidence she believed supported the decision to dismiss Ms. Collins. R. 507-12, T1 175, AB 5-6. The notes consist of five detailed pages of specific concerns with regard to meeting deadlines in case files, completing performance evaluations, submitting timely quarterly reports required by her corrective action

plan, processing fair hearing requests and other requests in a timely manner, meeting the standards for number of case reviews completed, working unauthorized overtime, following agency policy regarding using her access badge, and certain inappropriate and unprofessional behaviors. R. 507-12, AB 5-6. In presenting this information to Ms. Collins, Ms. Spires included the names of specific cases, fair hearings and dates that were the basis for discipline. T1 175-76, R 507-09, AB 5-6. Ms. Spires also detailed the months where Ms. Collins did not meet the minimum number of case reviews and detailed the hours of unauthorized overtime. T 177-78, R 509-10, AB 5-6. Ms. Collins does not dispute, and specifically confirmed, that each and every item that was outlined in the April 20, 2016 dismissal letter was discussed at the April 7, 2016 "Intent to Discipline" meeting. T2 79, 83, 84-5, 93, 112, 115, 116, 118, 134, 137, 141, 143, and 147, AB 5-6.

The content of the meeting was detailed and thorough and met the requirement of the rule to "meet with the employee to discuss whatever evidence which the appointing authority believes supports the decision to dismiss the employee." N.H. Admin. Rules Per 1002.08(d)(1). As a result, Ms. Collins has failed to demonstrate that the Board was clearly unreasonable or unlawful and its decision should be affirmed. RSA 541:13.

Ms. Collins argues that, as a result of this Court's holding in *Appeal of Boulay*, 142 N.H. 626 (1998), DHHS did not meet the requirements of the Per 1002.08(d)(1) because it was required to provide her the specific documents at the "Intent to Discipline" meeting in order to meet the rule's requirement to "discuss whatever evidence...supports the decision to dismiss." AB 7-9. There is no such requirement stemming from the holding in *Boulay* and DHHS's actions were consistent with the requirements of *Boulay*.

In *Boulay*, the New Hampshire Technical Institute terminated an employee for violating the State's Sexual Harassment Policy. *Id.* at 627. NHTI met with employee several times prior to his dismissal, but only provided him "a statement of misconduct and a short summary of its investigation." *Id.* at 628. The Court found that this did not meet the requirement of Per 1001.08(f)[2] because NHTI did not provide "important details of the investigation, including names of complainants, dates, and specific details of the alleged misconduct." *Id.* at 628. The Court concluded that the failure to provide such information violated the requirements of Per 1001.08(f).

In reaching this decision, the Court cited to *Ackerman v. Ambach*, 530 N.Y.S.2d 893, 894 (App. Div. 1988), thus likening the "intent to discipline" process here to the notice requirements prior to imposing discipline on an occupational licensee. *Boulay,* 142 N.H. at 628. In *Ackerman*, the State Board for Professional Medical Conduct imposed discipline on a licensee and one of the issues before the Court was whether the licensee received adequate notice. *Ackerman*, 530 N.Y.S.2d at 893-94. The Court detailed the requirements of adequate notice: "The dates and nature of the alleged misconduct must be sufficiently precise, when considered with information available to the charged individual, to allow the presentation of an intelligent defense." *Id.* at 894. In the *Boulay* decision, this Court specifically quoted this notice requirement from *Ackerman* as the basis for determining that the information provided by NHTI did not provide the employee adequate notice under Per 1001.08(f). Thus, while the Court noted that NHTI "withheld several documents" from the employee at the meeting, it was not the failure to provide the documents that violated Per 1001.08(f). Rather, it was NHTI's failure to provide the specific

[2] At the time of the *Boulay* decision, the personnel rule in effect that set forth the requirements for dismissal was Per 1001.08(d). It is provided in the State's Appendix at pages 16-19. The prior rule is substantively similar to the current rule with regard to the "intent to discipline" meeting, with the exception that there is no requirement in the current rule that the employer "list the evidence the appointing authority used in making the decision to dismiss the employee." *See* Per 1001.08(f)(4) (former rule) SA 16-19; Per 1002.08(d) (current rule).

information contained within those documents that was the basis of finding that the employee did not have adequate notice of the basis for the discipline in violation of Per 1001.08(f). *Id.* at 628. Thus, contrary to Ms. Collins' assertion, *Boulay* does not require DHHS to provide her with specific documentation to support the decision to dismiss at the "intent to discipline" meeting.

Furthermore, such a reading of *Boulay* fails to take into account that Ms. Collins has a statutory right to appeal any disciplinary decision to the Personnel Appeals Board. RSA 21-I:58.[3] As part of the appeal process, the parties may request prehearing conferences, Per-A 206.03, are required to exchange information, Per-A 206.07, may file motions for discovery, Per-A 206.09, may request the board to subpoena witnesses, Per-A 206.10, and the employer has the burden to produce evidence supporting the discipline action under appeal, Per-A 207.01. To hold that the employer is required to produce all of its documentary evidence at the "intent to discipline" meeting conflates the purpose of that meeting with the employee's right to later appeal a disciplinary decision to the Personnel Appeals Board and receive a full hearing on the merits.

Here, DHHS fully met the requirements of Per 1002.08(d) and the expectations of *Boulay*. DHHS provided significant specific detail to Ms. Collins regarding the reasons for her dismissal. T1 175, R 507-12. Unlike in *Boulay*, DHHS provided information that included specific cases names, dates, and the individuals involved. T1 175-76, R 507-12. Ms. Collins does not dispute that she was informed of these details. T2 79, 83-85, 93, 112, 115-18, 134, 137, 141, 143, 147, and 185-86. In addition, through the appeals process, Ms. Collins has since been provided all of the documentation that was the basis for the dismissal and had a full hearing on the merits of the dismissal. T1, T2. DHHS called witnesses and introduced evidence that supported its decision to dismiss her from employment. T1, T2. Ms. Collins also called

[3] It is well established that a State employee has no expectation of continued employment that qualifies as a property right protected by the due process clause of the Federal or State Constitution. *Desmarais v. State*, 117 N.H. 582, 588 (1977); *see also Colburn v. Personnel Commission,* 118 N.H. 60, 64 (1978).

witnesses, testified herself, and submitted her own evidence to challenge the dismissal. T1, T2. Following a full hearing, the Board upheld the dismissal decision and Ms. Collins has raised no issue on appeal with regard to that decision. As a result, Ms. Collins has failed to demonstrate that the Board was clearly unreasonable or unlawful and its decision should be affirmed. RSA 541:13

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court affirm the judgment of the Personnel Appeals Board.

The State does not believe oral argument is necessary. In the event the Court seeks oral argument, Assistant Attorney General Jill A. Perlow will present oral argument on behalf of the State.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF HEALTH AND
HUMAN SERVICES

By its attorneys,

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Date: February 28, 2018

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Certificate of Service

I certify that two copies of the foregoing have on this 28th day of February, 2018 been mailed, postage prepaid to Gary Snyder, Esq., State Employees' Association of NH, SEIU Local 1984, 207 North Main Street, Concord, NH 03301.

Jill A. Perlow

APPENDIX

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(e) Notice to the appointing authority that the employee is seeking resolution of the demotion through the procedures for settlement of disputes pursuant to PART Per 202 or is appealing the demotion to the Personnel Appeals Board pursuant to RSA 21-I:58 shall not bar the appointing authority from taking additional disciplinary action as authorized by this PART.

Per 1001.08 Dismissal shall be considered the most severe form of discipline.

(a) Dismissal without prior warning. An appointing authority shall be authorized to take the most severe form of discipline by immediately dismissing an employee without warning for offenses such as, but not necessarily limited to, the following:

(1) Theft of valuable goods or services from the state or from any other employee or client of the agency.

(2) Willful abuse or destruction of state property or the property of any employee or client of the agency which, in the opinion of the appointing authority, represents a substantial cost for repair or replacement.

(3) Violation of a posted or published agency policy, the text of which clearly states that violation of same will result in immediate dismissal.

(4) Being the aggressor in a fight or an attempt to injure another person in the workplace.

(5) Engaging in subversive activities prohibited by RSA 648.

(b) Optional dismissal. In cases such as, but not necessarily limited to, the following, the seriousness of the offense may vary. Therefore, in some instances immediate discharge without warning may be warranted while in other cases one written warning prior to discharge may be warranted.

(1) Theft of goods or services from the state or from any other employee or client of the agency when the value of such goods or services is minimal.

(2) Willful abuse or destruction of state property or the property of any employee or client of the agency when, in the opinion of the appointing authority, the cost of repair or replacement of that property is minimal.

(3) Violation of a posted or published agency policy, the text of which clearly states that violation of same may result in immediate dismissal.

(4) Refusal to accept a job assignment.

(5) Knowingly performing work which requires a valid license or certificate when such license or certificate has:

a. expired;

b. been suspended; or

c. been revoked.

(6) Willful falsification of agency records, including, but not limited to:

a. Requests for annual leave, sick leave, civil leave or military leave.

b. Payment vouchers or audit documents.

c. Requests for payment of overtime or compensatory time.

d. Personnel action forms and eligibility for employment forms.

e. Applications for employment.

(7) Willful insubordination.

(8) Willful misuse of a supervisory position.

(9) Absence for a period of 3 or more consecutive work days without proper notification or adequate reason.

(10) Willful release of confidential information, provided that the agency has a policy detailing which records are deemed confidential.

(11) Failure to report promptly to work at the conclusion of an approved leave.

(12) Inability to perform duty assignments due to being under the influence of alcohol or drugs.

(13) Consumption of alcohol while on duty.

(14) The use, possession, distribution, dispensation, or manufacture of a controlled substance at any duty station or work place, unless such use, possession, distribution, dispensation or manufacture is lawful under state or federal law regulating controlled substances.

(15) Failure to report in writing to the appointing authority any criminal conviction based on the unlawful use, possession, distribution, dispensation or manufacture of a controlled substance at a state workplace within 5 days from entry of the trial court's decision, regardless of whether an appeal is taken.

(16) Conviction of any criminal offense based upon the unlawful use, possession, distribution, dispensation or manufacture of a controlled substance at a state workplace, provided that:

a. Appointing authorities shall take appropriate disciplinary action, including possible conditional discipline, for violations of this subparagraph within 30 days after learning of a conviction.

b. An appointing authority shall have the discretion to condition the severity or nature of any disciplinary sanctions for violations of Per 1001.08 (b) (12), (13), or (14), or for any other misconduct in which abuse of a controlled substance is a substantial factor, upon the employee's satisfactorily completing a specific controlled substance rehabilitation program recommended or certified for such purposes by the Office of Alcohol and Drug Abuse Prevention, the Division of Public Health Services, or an appropriate federal or local agency.

(c) An appointing authority shall be authorized to immediately dismiss an employee without additional warning if the employee has been warned for the same offense as provided in Per 1001.08(b) during the previous 2 years.

(d) An appointing authority shall be authorized to immediately dismiss an employee who commits more than one of the offenses listed in Per 1001.08(b) during the previous 2 years.

(e) An appointing authority shall be authorized to dismiss an employee who has received multiple warnings for the offenses described in this part as described below:

(1) An appointing authority shall be authorized to dismiss an employee pursuant to Per 1001.03 by issuance of a third written warning for the same offense within a period of 2 years.

(2) An appointing authority shall be authorized to dismiss an employee pursuant to Per 1001.03 by issuance of a fifth written warning for different offenses within a period of 2 years.

(f) No appointing authority shall dismiss a classified employee under this rule until the appointing authority:

(1) meets with the employee to discuss whatever evidence the appointing authority believes supports the decision to dismiss the employee prior to issuing notice of dismissal.

(2) provides the employee an opportunity at the meeting to refute the evidence presented by the appointing authority, 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.

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.

(3) documents in writing the nature and extent of the offense;

(4) lists the evidence the appointing authority used in making the decision to dismiss the employee;

(g) If an appointing authority, having complied with the provisions of Per 1001.08 (f), finds that there are sufficient grounds to dismiss an employee, the appointing authority shall:

(1) prepare a written notice of dismissal, specifying the nature and extent of the offense;

(2) notify the employee in writing that the dismissal may be appealed under the provisions of RSA 21-I:58, within 15 calendar days of the notice of dismissal;

a. An appeal filed under the provisions of RSA 21-I:58 shall not stay the dismissal decision.

(3) forward a copy of the notice of dismissal to the director.

(h) Nothing in this rule shall prohibit an appointing authority from allowing an employee to request that he or she be allowed to resign in lieu of discharge provided that:

(1) The employee makes such request in writing.

(2) The employee certifies that his resignation was given after review and consideration of the evidence used to support the decision to dismiss the employee.

(3) The employee certifies in writing the employee's understanding that a resignation given in lieu of dismissal for cause may not be resolved through the settlement of disputes, pursuant to PART Per 202, or by appeal to the Personnel Appeals Board pursuant to the provisions of RSA 21-I:58.

(i) Nothing in this rule shall require that an appointing authority allow an employee to resign in lieu of being dismissed for cause as provided in this PART.

Per-A 206.03 Prehearing Conferences.

(a) Upon its own motion, or if it agrees with the motion of a party, the board shall convene one or more pre-hearing conferences before one or more of its members or alternates to facilitate the scheduling and hearing of an appeal.

(b) Pursuant to RSA 541-A: 31, V, prehearing conferences shall be convened to narrow the factual issues or to consider matters including, but not limited to, one or more of the following:

(1) Offers of settlement;

(2) Simplification of the issues;

(3) Stipulations or admissions as to issues of fact or proof by consent of the parties;

(4) Limitations on the number of witnesses;

(5) Changes to standard procedures desired during the hearing by consent of the parties;

(6) Consolidation of examination of witnesses; or

(7) Any other matters which aid in the disposition of the proceeding.

(c) If neither the appellant nor the appellant's representative appears at a prehearing conference from which he or she has not been excused, the board shall order the appellant to show good cause, as set forth in Per-A 207.03 (c), why the appeal should not be dismissed for lack of prosecution.

Per-A 206.07 Exchange of Information Generally.

(a) To the extent possible, parties shall make complete and timely responses to the other party's request for information pertinent to the appeal.

(b) Where a dispute between the parties exists with respect to production of facts or documents pertinent to the appeal, either party may file with the board a motion for discovery.

Per-A 206.09 Motions for Discovery.

(a) Except as hereinafter provided, prehearing discovery shall be limited to the procedures set forth in Per-A 206.07 and Per-A 206.08.

(b) Either party may request that the board order formal discovery, including:

(1) Requests for admissions;

(2) Requests for production of documents;

(3) Interrogatories; and

(4) Depositions.

(c) The requesting party shall set forth in detail those factors that it believes support its request for additional discovery.

(d) The requesting party shall list, with specificity, those facts or documents it is seeking to discover.

(e) Discovery motions shall not be filed later than 10 days before a scheduled hearing.

(f) The board shall not grant requests for additional discovery under (b) above unless the board concludes that:

(1) The information requested is not privileged or prohibited from disclosure under statutory or case law; and

(2) The person making the request has established:

a. That he or she would be unable to sustain his or her burden under Per-A 207.01 or establish his or her specific defense to a relevant allegation without the additional formal discovery identified; and

b. That there exist exceptional circumstances beyond the control of the party, such as the unavailability of a witness.

Per-A 206.10 Subpoenas.

(a) Pursuant to RSA 21-I: 46, IV, the board shall subpoena witnesses and compel the production of any books, papers or other memoranda or documents by subpoena duces tecum when necessary for full and fair disclosure of the evidence.

(b) The board shall not issue a subpoena later than 72 hours before the scheduled start of a hearing.

(c) A party requesting a subpoena from the board shall be responsible for all costs of witness fees, mileage payments and allowable expenses.

Per-A 207.01 Burden of Proof and Production.

(a) In all cases except as otherwise provided in Per-A 207.12 (e) the burden of proof shall be upon the party making the appeal.

(b) In appeals involving disciplinary action, removal for non-disciplinary reasons, involuntary transfer, non-selection to a vacancy, or the interpretation and application of a rule adopted by the director of personnel, the appointing authority shall have the burden of producing evidence supporting the action under appeal.