

State of New Hampshire



PERSONNEL APPEALS BOARD

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APPEAL OF ANNE ARNOLD

Docket #97-D-15

Department of Safety - Division of Motor Vehicles

September 4, 1997

The New Hampshire Personnel Appeals Board (Bennett, Johnson and Rule) met on Wednesday, July 2, 1997, under the authority of RSA 21-I:58, to hear the appeal of Anne Arnold, an employee of the Division of Motor Vehicles, Department of Safety. SEA Field Representative Margo Steeves appeared on behalf of the appellant. Sheri J. Kelloway-Martin, Esq., appeared on behalf of the Department of Safety. Ms. Arnold was appealing a January 13, 1997, letter of warning for allegedly being absent without approved leave or proper notification, and for allegedly having an excessive number of unscheduled absences, resulting in a lack of dependability.

Ms. Arnold's appeal was heard on offers of proof. The record in this matter consists of the audio-tape recording of the hearing, pleadings submitted prior to the hearing and documents admitted into evidence as follows:

Appellant's Exhibits (submitted May 7, 1997):

- #1 January 13, 1997 written warning (with attached counseling memo) issued to Anne Arnold by Virginia Beecher
- #2 January 8, 1997 note from Dr. Thomas re: Anne Arnold
- #3 Article XI, 1995-1997 Collective Bargaining Agreement
- #4 Arbitration decision in re: John Supry
- #5 January 22, 1997 letter from Margo Steeves to Virginia Beecher
- #6 February 13, 1997 letter from Virginia Beecher to Margo Steeves
- #7 February 19, 1997 letter from Margo Steeves to Richard Flynn
- #8 March 4, 1997 letter from Richard Flynn to Margo Steeves
- #9 March 6, 1997 letter from Margo Steeves to Virginia Lamberton

- #10 March 24, 1997 letter from Virginia Lamberton to Margo Steeves
- #11 March 18, 1997 letter from Virginia Lamberton to Margo Steeves (with copies of Ms. Arnold's attendance records attached)

Appellant's Exhibits (submitted June 27, 1997)

- #1 Article XI, 1995-1997 Collective Bargaining Agreement
- #2 Dept. of Safety printout of Ms. Arnold's accrual and use of leave - 7/1/96 through 3/13/97
- #3 January 12, 1997 note from Dr. Thomas
- #4 Copies of Ms. Arnold's approved leave requests - 12/4/95 to 2/6/97

State's Exhibits:

- #1 November 7, 1995 Counseling Memo from Virginia Beecher to Anne Arnold
- #2 November 5, 1996 Counseling Memo from Virginia Beecher to Anne Arnold
- #3 December 31, 1996 Application for Leave signed by Anne Arnold
- #4 January 8, 1997 note from Dr. Kenneth Thomas re: Anne Arnold
- #5 January 13, 1997 written warning issued to Anne Arnold for Being absent Without Approved Leave or Proper Notification and Excessive Unscheduled Absences
- #6 Per 1001.03 of the Rules of the Division of Personnel regarding written warnings
- #7 April 24, 1997 letter from Virginia Lamberton, Director of Personnel, to Margo Steeves, SEA Field Representative denying Ms. Arnold's appeal of a written warning
- #8 Affidavit of Madeline R. Drouse

The undisputed facts of the appeal are as follows:

1. Ms. Arnold, who has been employed by the Department of Safety for more than nine years, is currently employed as a Data Entry Operator III assigned to the Bureau of Financial Responsibility.
2. In November, 1995, Ms. Arnold was counseled, verbally and in writing, about her use of leave when Department of Safety records revealed that during the previous 24 month period, Ms. Arnold had used 236 hours of sick leave and 68 hours of leave without pay.
3. In November, 1996, Ms. Arnold again was counseled in writing about her use of leave when Department of Safety records revealed that during the previous 12 month period she had been absent 72 full or partial days, and that 35 blocks of time taken by Ms. Arnold as sick leave were contiguous to other scheduled time off.

4. The counseling memorandum issued to Ms. Arnold on November 5, 1996, advised her that any requests for leave had to be made through her immediate supervisor.
5. Ms. Arnold requested permission to use sick leave for an anticipated absence on January 8, 1997, for an 11:30 a.m. appointment with a physician in Manchester, New Hampshire. On her leave slip, Ms. Arnold indicated that the leave would begin at 10:30 a.m. The parties understood that Ms. Arnold would fill-in the section entitled "leave ending" upon her return to work after the appointment.
6. Ms. Arnold did not report for duty at all on January 8, 1997, nor did she speak with her supervisor or transmit a message to her supervisor through any other Department of Safety employee that day to indicate that she would not be reporting to work at all that day.
7. On January 9, 1997, one of Ms. Arnold's co-workers informed the appellant's supervisor that Ms. Arnold was not at work January 8, 1997, and would not be at work on either January 10th or 11th. Ms. Arnold did not contact her own supervisor directly.

Ms. Steeves argued that the Department's insistence that Ms. Arnold notify her supervisor directly of any unscheduled absences was unduly burdensome, and that Ms. Arnold found the requirement intimidating. She argued that on January 8th, Ms. Arnold did try to call her supervisor, but that because she was feeling so ill, she gave up trying to call after making several unsuccessful attempts. She argued that it was unreasonable for the Department of Safety to say they had no idea where the appellant was on the morning of January 8th since they knew that Ms. Arnold was scheduled to see her physician that day.

Ms. Steeves argued that the basis for the warning was flawed in that the Department of Safety had never accused the appellant of abusing her leave. She argued that the appellant's leave record showed no pattern of leave usage, no large blocks of sick leave used, and no consistent record of sick leave taken in conjunction with other scheduled time off. She argued that the Department has an unreasonable expectation that employees

will not use more than 4 or 5 days of sick leave a year, and that employees who exceed that amount without putting in an ADA or FMLA claim are treated as if they were abusing their leave. Ms. Steeves argued that the workload had increased without sufficient staff to handle the volume. She argued that the situation caused employees to work longer hours in more stressful conditions, and that the result for some employees was increased reliance on sick leave.

Ms. Kelloway-Martin argued that there were two components to the written warning, absence without approved leave or proper notification and excessive unscheduled absences. Ms. Kelloway-Martin argued that of the 2060 hours of all leave available to Ms. Arnold since she began her employment, the appellant had used all but 48 (including annual leave and sick leave). Ms. Kelloway-Martin argued that the warning had not charged Ms. Arnold with abuse of leave, but had warned her that her excessive, unscheduled absences were making her undependable. She also argued that the appellant had been informed, in writing, of the requirement that any sick leave absences be reported directly to her supervisor.

Ms. Kelloway-Martin argued that on the morning of January 8th, the appellant was expected to report to work at 8:15 a.m. and remain at work until 10:30 a.m. She argued that for that 2 hour and 15 minute period, Ms. Arnold was absent without approved leave or proper notification. She also argued that although Ms. Arnold had been ordered to report any unscheduled absences directly to her supervisor, she failed to speak with her supervisor to obtain approval for leave on January 8th, 9th or 10th. Instead, the appellant had a message relayed to her supervisor through a co-worker.

Ms. Kelloway-Martin argued that the Personnel Rules describe the written warning as the least severe form of discipline an appointing authority is authorized to use to correct an employee's unsatisfactory work performance. She argued that the appellant has a history of poor attendance and unscheduled absences, and that the Department had attempted to address those issues through verbal and written counseling. She said that when

counseling failed to produce the necessary correction in Ms. Arnold's attendance, the Department took the least severe discipline available to it by issuing a written warning.

On the evidence, argument and offers of proof, the Board voted unanimously to uphold the written warning, thereby denying Ms. Arnold's appeal.

The State's Collective Bargaining Agreement provides for a generous amount of leave, and while there is no dispute that employees may use their leave for the purposes set forth in the Agreement, their use of that leave must also conform to the terms and conditions of the Collective Bargaining Agreement and of the Rules of the Division of Personnel. Employers have a right to expect their employees to report to work as scheduled. When illness or emergency cause an employee to be absent unexpectedly, the employee has an obligation to notify the employer in a timely fashion, and in a manner acceptable to the employer. The employer reasonably expected Ms. Arnold to be at work on the morning of January 8th. When Ms. Arnold did not report to work as scheduled, she had an obligation to notify her supervisor. In light of Ms. Arnold's extensive use of leave, the number of times her leaves have been "unexpected," and the uncontroverted offer of proof that Ms. Arnold had several phone numbers available to her for telephoning her employer, her claim that she was unable to reach her supervisor because "the line was busy" is not particularly compelling. The evidence reflects that Ms. Arnold had no difficulty reaching a co-worker on January 9th. In light of the employer's requirement that the appellant speak directly with her supervisor for any unexpected absence, the Board finds it difficult to believe that it was impossible for Ms. Arnold to speak directly with her supervisor at some point during her three day absence.

Per 1001.03 (a) of the Rules of the Division of Personnel authorizes an appointing authority, "...to use the written warning as the least severe form of discipline to correct an employee's unsatisfactory work performance for offenses including, but not limited to... (3) being absent without approved leave or proper notification; (4) excessive unscheduled absences, [and] (9) lack of dependability." On the evidence, argument and offers of

proof, the Board found that the Department of Safety was acting within its authority by issuing Ms. Arnold a written warning for those offenses.

THE PERSONNEL APPEALS BOARD



Mark J. Bennett, Chairman



Robert J. Johnson, Commissioner



Lisa A. Rule, Commissioner

cc: Virginia A. Lamberton, Director of Personnel
Sheri J. Kelloway-Martin, Litigation Office, Department of Safety
Margo Steeves, SEA Field Representative