

# State of New Hampshire



## PERSONNEL APPEALS BOARD

25 Capitol Street  
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### *APPEAL OF PHYLLIS DOBE*

*Docket #97-D-5*

*Department of Labor*

*March 13, 1997*

The New Hampshire Personnel Appeals Board (Miller, Bennett and Barry) met Wednesday, January 8, 1997, under the authority of RSA 21-I:58, to hear the appeal of Phyllis Dobe, an employee of the Department of Labor. Ms. Dobe, who was represented at the hearing by SEA Director of Field Operations Thomas Hardiman, was appealing a May 22, 1996, second written warning for sleeping at her desk. Diane Symonds, Commissioner of Labor, appeared on behalf of the State. The appeal was heard on offers of proof. The record in this matter consists of the documents submitted by the parties prior to the hearing and an audio tape of the oral argument and offers of proof made by the parties at the hearing.

Ms. Dobe alleged that after issuing the first warning, the department gave her insufficient time to take corrective action. She also argued that the Department should have been more proactive in assisting her with overcoming her problem of falling asleep at work. The Department argued that after the first written warning, Ms. Dobe had been advised to seek medical attention, but failed to provide timely or sufficient notification to the agency that she had taken any corrective measures. The Department also argued that by falling asleep at work, Ms. Dobe failed to meet the work standard and therefore was subject to appropriate disciplinary action.

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The following facts are not in dispute:

1. Ms. Dobe is the senior clerical employee within her work unit at the Labor Department.
2. On May 8, 1996, Ms. Dobe received a first written warning for sleeping at her desk. That warning was not appealed. Ms. Dobe attributed the problem of sleeping on duty to a medical problem and possible reaction to medication she was taking.
3. On May 22, 1996, Ms. Dobe received a second written warning for sleeping at her desk. In a meeting that same day with her supervisors, Ms. Dobe indicated that she had not taken medication since her prior warning.
4. On June 18, 1996, Ms. Dobe provided her employer with a note from Dr. Diane Arsenault indicating that Ms. Dobe sometimes took antihistamines for allergic rhinitis, and that the medication could cause drowsiness. Dr. Arsenault stated, "Ms. Dobe's 2 episodes of sleep at work are medication related."
5. Another note dated May 27, 1996, signed by Dr. Alex Medlicott, indicated that, "This patient claims she had an adverse drug reaction to chlor-trimaton (drowsiness) at work. Drowsiness is a very common side effect of this medication. She now knows to avoid it in the future when alertness is important for job performance."

The appellant argued that after receiving the second written warning, she had taken positive steps to resolve the problem of falling asleep at work. She argued that she had seen her doctor and had made an effort to see specialists such as a nutritionist, in an effort to address her problem. The appellant argued that by issuing a second written warning only two weeks after the first warning had been issued, the Labor Department violated the principles set forth in the New Hampshire Supreme Court's decision in the Appeal of Elaine Fugere, 134 NH 322 (1991). The appellant also argued that the Board should disregard the Department's claim that by having fallen asleep at work, the appellant failed to meet the work standard, since the Department had failed to provide the appellant with regular performance appraisals.

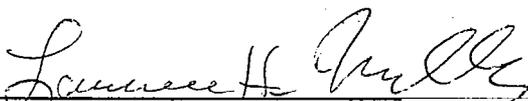
The Labor Department argued that by her own admission, Ms. Dobe had not taking medication before she was caught sleeping on duty in the second instance. The Department also asserted that when asked why she had fallen asleep at work, the appellant said that "her body took over." The Department argued

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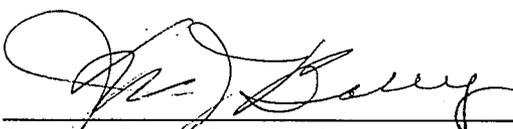
that Ms. Dobe failed to take appropriate corrective action following issuance of the first written warning, and that even if she were taking medication at that time, she failed to provide any information about possible adverse reactions to medication until June 18, 1996, nearly a month after the warning was issued.

Having considered the evidence, argument and offers of proof, the Board voted to sustain the warning, but to order that it cease to be effective as a basis for further discipline after a period of one year. In reaching that decision, the Board found that the Department did not act unreasonably in issuing a second warning fourteen days after the first warning for the same offense, and found that the situation was not sufficiently similar to that presented in the Fugere appeal to warrant a decision in the appellant's favor. Similarly, the Board found that a failure on the part of the Department to perform regular, timely performance appraisals had no bearing on the propriety of disciplinary action when employees are found sleeping on the job. However, the Board also found that Ms. Dobe appeared to be making a positive effort to correct her problem, and that if she continued to take appropriate corrective measures, further warnings should not be necessary.

THE PERSONNEL APPEALS BOARD

  
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Lawrence H. Miller, Chairman

  
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Mark J. Bennett, Commissioner

  
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James J. Barry, Commissioner

cc: Virginia A. Lamberton, Director of Personnel  
Diane Symonds, Commissioner of Labor  
Thomas F. Hardiman, SEA Director of Field Operations