

# State of New Hampshire



## PERSONNEL APPEALS BOARD

State House Annex  
Concord, New Hampshire 03301  
Telephone (603) 271-3261

### Appeal of Brian Lemire

Docket Nos. 91-D-15 and 91-T-21 (Consolidated)

Brian Lemire was employed as a Building Service Worker III at the New Hampshire Veterans Home. He was terminated from that position upon receipt of a third letter of warning issued on account of lateness in reporting for duty. Mr. Lemire received his first letter of warning for this infraction on September 5, 1989, which letter was not appealed. He received his second letter therefore on January 17, 1991, which he did appeal. Hearing on that appeal has been consolidated, without objection, with Mr. Lemire's appeal of his third letter of warning for the same offense of May 22, 1991, which served as his letter of termination. Per. 308.03(4)(e). The **third** written warning was issued within two years of the first such warning.

Mr. Lemire was represented at the consolidated hearing on December 4, 1991, by Michael C. Reynolds, State Employees Association General Counsel. The agency was represented by Barry E. Conway, its Commandant. As the letter of warning of September 5, 1989, was not appealed, we accept it in accordance with Per 308.03(4)(e) without further scrutiny, excepting only the

appellant's arguments as to circumstances and appropriate remedies in light of equitable considerations, if any, in the case as a whole.

Accordingly, we commence our review with the letter of January 17, 1991. This letter cites eight instances of lateness. The appellant contests five of these on the grounds that they are unsupported by notations in the **BSW's** log book. The log is not used for payroll purposes, but does contain entries and communications made by staff regarding their rounds, status of the facilities, etc. Assuming arguendo that the absence of the entries is significant and that those instances were not considered, the three **documented** instances of lateness are a sufficient foundation to support this letter of warning. The appellant does not particularly contend that the instances did not occur.

On the evidence as a whole we do not find that the appellant met his burden of proof as to this letter of warning, and accordingly, sustain it. The Board did not find any equitable considerations raised by the evidence warranting a different outcome. The appellant alleges that the issuance of this letter was retaliatory for several complaints or comments he made regarding another employee. The Board is unpersuaded by this argument in light of the evidence adduced at hearing. The appellant raises the same allegation with respect to the final letter. The Board ultimately rejects this argument on the evidence received as it pertains to the final letter as well.

Let us turn now to the final letter of warning which serves as the letter of termination pursuant to Per **308.03(4)(e)**. This letter focuses on one instance of lateness, unlike the prior letters. The letter is fairly self-explanatory. Accordingly, we review the facts surrounding it from Mr. **Lemire's** point of view, as presented in his testimony.

May 16, 1991, was said by Mr. Lemire to be a 90 degree day. He had been trimming shrubs at his home that day and took ten pickup truck loads of clippings to the dump. Mr. Lemire was exhausted and not feeling all that well when he lay down in front of a fan for a rest. He usually awoke around **11:20** p.m. on a work day, as the sixteenth was. On this day we awoke between **11:15** and **11:30**, but he was shaking, had cramps, found it difficult to stand and feared that he **couldn't** work. Mr. Lemire called John **Weldon** who was the BSW he was scheduled to relieve when he arrived at work at midnight. Lemire feels this call was made before **12:30** a.m. **Weldon** says it was **12:50** a.m. As he had done on previous occasions, Lemire asked **Weldon** if he could take his shift and he related the reasons. **Weldon** advised him that his leg was bothering him so he **couldn't** take Lemire's shift. Mr. Lemire **didn't** want to bother any of his co-workers, and although he **couldn't** work easily, or perhaps adequately, he came to work anyway, working through the night until he was permitted to leave early by Don Kunar, Plant Maintenance Engineer, the next morning. Mr. Lemire says that Kunar didn't question that he was sick.

Lemire contends that the Maintenance Department had been "written up" for failing to respond to a nurse's equipment maintenance call. He contends that, presumably as a result of this, he overheard Kunar "slandering" him to a nurse, stating that Lemire was "having a bad time" had been "**kicked out of the house**" and was "back on drugs."

The termination was actually effected by Maurice Guimond, Assistant Commandant, acting in the Commandant's stead. Guimond prepared detailed notes of the termination interview which were presented to the Board. The notes suggest the possibility of a meeting between Commandant **Conway** and Mr. Lemire when **Conway** returned, but this did not occur and Lemire objects to the absence of an opportunity to meet with the Commandant, who actually signed the termination letter. Lemire contends that this is a violation of Per. **308.03(4)(i)**.

The Board disagrees, and notes that that section provides as its opening clause that such a meeting should occur "**whenever possible.**" Here, the evidence suggests that Mr. Lemire's supervisors had spent eighteen months or so working on his lateness problem. They had had little success and were unlikely to change their minds about the appropriateness of termination after warnings. Further, Lemire had a meeting with Guimond, who was acting as the person in charge of the Veteran's Home at the time.

However, the Board is mindful of issues of procedural fairness. While we do not consider this particular point to invalidate this termination, we do express our view that such

meetings as was requested here are appropriate, are consistent with the purposes of Per. 308.03(4)(i), and should routinely occur, if requested. In any case, appointing authorities (such as Mr. Guimond) should meet with the employee at the time of discharge, present the proposed letter of discharge, explain the reasons for the action and listen to and consider any points made by the employee. We cannot conclude that the procedure followed here was fatally flawed.

Lemire argues further that there were no credible witnesses that he was indeed ever late. He contends that there was no real system for passing duties to **one's** relief, and that as a result, he **wasn't** generally late. He contends that there is no prohibition on calling in after the start of a shift, and that he was therefore not guilty of lateness on the night of May 16-17, hence there is no legally cognizable third letter for the offense of lateness, thus his discharge is not sustainable. Finally, he argues that the appointing authority failed to meet its burden of production. On the evidence received, the Board rejects these arguments.

The point has been made that night work is destabilizing to the **individual's** body and that Lemire has endeavored to be timely. Yet in almost two years of trying, a level of consistency was still eluding him. His co-workers telephoned him to remind him to come to work on occasion. The last incident of apparent lateness was not atypical. However, on all the evidence the Board is persuaded that Mr. Lemire has minimally met his burden of persuasion. Lemire was sick on the night of May 16-17, to a degree permitting us to

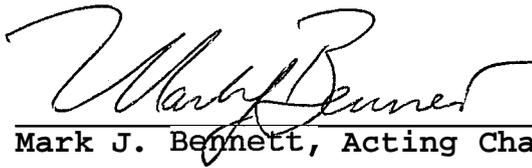
forgive his tardy call to work to arrange coverage for his sickness, and his resultingly tardy arrival at work.

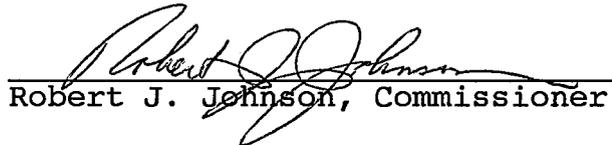
Unlike the prior warnings given Lemire, this last one dealt with but one instance of lateness coupled with this illness. Accordingly, on these equities, the Board is not persuaded that discharge is warranted in this instance. The Board is persuaded that Lemire has a tardiness problem that he must address if he is to retain his employment with the State. The Board admonishes the agency to continue to work with marginal workers (in terms of attendance) such as Lemire and to continue to use discipline, such as letters of warning, as warranted.

Had the instant letter cited more than one instance of lateness, or one where no mitigating circumstances are presented, as here, the termination would have been sustained. In an attempt to apply our powers equitably and to consider the equities as they appear herein, the Board orders Mr. Lemire reinstated to his position as a BSW III without back pay or benefits. The Board expects Mr. Lemire to solve his **attendance/tardiness** problem, or to prepare for the inevitability of further disciplinary action. The Board can only hope that the remedy we order will provide the impetus for a good worker, in terms of work quality, to remain an employable one.

14 January 1992

The Personnel Appeals Board

  
Mark J. Bennett, Acting Chairman

  
Robert J. Johnson, Commissioner

  
Lisa A. Rule, Commissioner

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Date of Distribution: February 3, 1992

cc: Virginia A. Vogel, Director of Personnel

Barry E. Conway, Commandant, N. H. 'Veterans' Home

Michael C. Reynolds, SEA General Counsel

# State of New Hampshire

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## PERSONNEL APPEALS BOARD

State House Annex  
Concord, New Hampshire 03301  
Telephone (603) 271-3261

APPEAL OF BRIAN LEMIRE  
New Hampshire Veterans' Home  
Docket #92-T-21 (Consolidated with #91-D-15)

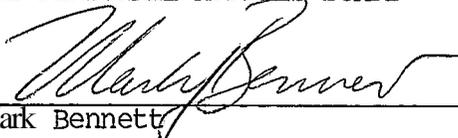
October 14, 1992

By letter dated February 24, 1992, SEA General Counsel filed a Motion for Reconsideration on behalf of Brian Lemire, relative to the Board's decision to reinstate him to his position of Building Service Worker III, but to make such reinstatement without back pay or benefits. In his motion, Attorney Reynolds indicated he was certain the Veterans' Home would also be filing a Motion for Reconsideration. However, he limited his request as follows:

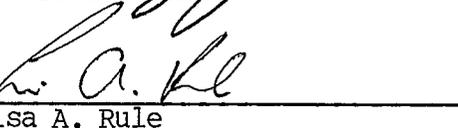
"Should the appointing authority not file a timely appeal of the Board's February 3, 1992 decision, on Mr. Lemire's behalf I hereby withdraw all requests contained in this motion except the request that Mr. Lemire receive pay (reduced by other earnings, if appropriate) and benefits commencing February 3, 1992. If the Board's February 3, 1992 order denying retroactive pay and benefits referred to the period prior to February 3, 1992 only, and that pay (reduced if appropriate) and benefits would commence February 3, 1992, please consider this a motion to so clarify rather than a motion for reconsideration." (SEE: Motion for Reconsideration, February 24, 1992, page 2)

Inasmuch as the Board found Mr. Lemire to have a chronic problem of attendance/tardiness, the Board is not persuaded the appellant is entitled to pay or benefits for any period in which he is not actually, physically working. Accordingly, the appellant's motion for reconsideration is denied.

THE PERSONNEL APPEALS BOARD

  
Mark Bennett

  
Robert J. Johnson

  
Lisa A. Rule

cc: Virginia A. Vogel, Director of Personnel  
Michael C. Reynolds, SEA General Counsel  
Barry E. Conway, Commandant, N.H. Veterans' Home