

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

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DIV. OF PERSONNEL
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In Case No. 93-482, Appeal of Carolyn Lindstrom, the court upon June 1, 1994, made the following order:

Appeal withdrawn. Appellant's motion to suspend briefing schedule is, therefore, moot.

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Personnel Appeals Board 92-D-12
Theresa Hayes, Supreme Court
File

Howard J. Zibel,
Clerk

State of New Hampshire



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APPEAL OF CAROLYN LINDSTROM
Docket #92-D-12
Department of Safety

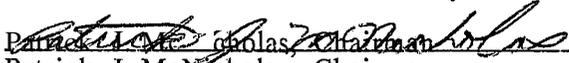
Response to Appellant's Motion for Reconsideration

June 23, 1993

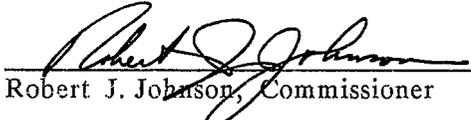
On May 19, 1993, the Personnel Appeals Board received SEA Field Representative Hurley's letter dated May 18, 1993, requesting reconsideration of the Board's April 29, 1993 decision denying Ms. Lindstrom's appeal of a letter of warning. The Board reviewed the appellant's Motion in conjunction with its April 29, 1993 decision and found that Ms. Hurley has mischaracterized both the evidence and the Board's findings to support her claim that the Board's order contains "inaccuracies". Otherwise, the arguments raised in support of her motion are the same arguments raised in the hearing on the merits, which arguments were duly considered by the Board in reaching its decision.

Accordingly, the Board voted unanimously to deny the instant motion and to affirm its decision upholding Ms. Lindstrom's letter of warning.

THE PERSONNEL APPEALS BOARD



Patrick J. McNicholas, Chairman



Robert J. Johnson, Commissioner

cc: Virginia A. Lamberton, Director of Personnel
Claude J. Ouellette, Human Resources Administrator, Dept. of Safety
Margo Hurley, SEA Field Representative

State of New Hampshire

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APPEAL OF CAROLYN LINDSTROM

Docket #92-D-12
Department of Safety

April 29, 1993

The New Hampshire Personnel Appeals Board (McNicholas and Johnson) met Wednesday, February 9, 1993, to hear the appeal of Carolyn Lindstrom, an employee of the Department of Safety, regarding a letter of warning issued to her on December 19, 1991. That warning, signed by Robert K. Turner, Director of Motor Vehicles, and Safety Commissioner Richard Flynn charged Ms Lindstrom with excessive use and possible abuse of sick leave, and a resulting inability to satisfactorily perform her work. Ms Lindstrom, a Title Examiner in the Division of Motor Vehicles, was represented at the hearing by SEA Field Representative Margo Hurley. Claude J. Ouellette, Human Resource Administrator for the Department of Safety, appeared on behalf of the State.

In her March 19, 1992 letter of appeal, filed on Ms Lindstrom's behalf, Ms Hurley argued that use of a negotiated benefit may not serve as grounds for discipline. Ms Hurley argued that the appellant has a history of poor health, and that she suffers from "sick building syndrome", requiring her to use her sick leave for "...other Agreement entitlements such as medical appointments and dependent care..". (SEA March 19, 1992 notice of appeal) She further argued that Ms Lindstrom could not be disciplined for excessive use of sick leave, since she had been "excessively sick", and that no rule provided for disciplining an employee who is sick.

Mr. Ouellette argued that the Department of Safety had issued Ms Lindstrom a letter of warning for excessive use and possible abuse of sick leave in an effort to improve her attendance record as well as her ability to satisfactorily perform her required duties. He offered into evidence Ms Lindstrom's attendance and leave record, which he said would demonstrate that Ms Lindstrom's use of leave was excessive, if not abusive. He also argued that the issue was not one of whether or not Ms Lindstrom's sick leave requests were bona fide, but whether or not an employer can expect full-time employees to come to work on a full-time basis. He asked the Board to take note of the fact that Ms Lindstrom always used as much leave as the department would permit, and that the only improvement in her overall attendance record occurred when the Department told her in April, 1990, that

it would no longer grant her approval for unpaid leave if she exhausted all her available accrued leave. Mr. Ouellette argued that the burden of proof was on the employee to demonstrate that the agency had acted improperly when it warned the employee her use of leave was excessive and was causing her work to be less than satisfactory.

The Board sustained the appellant's objection to any evidence predating the April, 1990 letter of warning, finding that such evidence was not relevant to corrective action which the employee may or may not have taken subsequent to that warning and prior to the December, 1991 warning under appeal. Also, in the absence of any evidence of "sick building syndrome", the Board limited its consideration of this appeal to whether or not Ms. Lindstrom's absences after April, 1990 were excessive, and if so, whether or not she had taken any corrective action to avoid further discipline,

Having considered the testimony and evidence offered by the parties, the Board voted unanimously to deny Ms. Lindstrom's appeal. In so doing, the Board made the following findings of fact and rulings of law:

Although the Rules of the Division of Personnel in effect at the time this warning was issued did not specifically provide for disciplining "sick" employees, Per 308.03(4)j stated the following:

"At the discretion of appointing authorities, permanent employees who are of such physical condition as to make it impossible for them to satisfactorily perform their work assignments can be discharged for unsatisfactory work..."

Inasmuch as the Rules provided for discipline of employees who were physically unable to perform their work assignments satisfactorily, it would only be reasonable to believe an employee could be disciplined for absences associated with such physical inability. Therefore, the Board found that the Department was within its right to discipline Ms. Lindstrom for excessive sick leave if it resulted in unsatisfactory work performance.

Carolyn Lindstrom has been employed by the State of New Hampshire in excess of twenty years. She has worked in the Title Bureau at the Division of Motor Vehicles under the supervision of Dennis Smith for approximately sixteen years.

On April 30, 1990, Ms. Lindstrom acknowledged receipt of a letter of warning which advised her that because she was habitually out sick, she was unable to perform her duties, and that the morale of her co-workers was suffering because they were required to perform her duties when she was absent. Although the Department admitted Ms. Lindstrom was a good employee "when she was there", her habitual absences affected her ability to complete a

satisfactory volume of work. That letter also advised her that she could be dismissed under the provisions of Per 308.03(4)j., unless she took corrective action to reduce her use of sick leave and to demonstrate that she could perform her duties satisfactorily.

Per 308.03 (4) b of the Rules of the Division of Personnel in effect at the time of Ms Lindstrom's December 19, 1991 letter of warning stated:

"If the appointing authority feels oral warnings have been, are, or would be ineffective or insufficient in view of the attitude of the employee, and/or the nature of the offense, a written warning shall be prepared. Warnings must indicate that unless corrective action is taken the employee will be subject to discharge."

The Board found that Ms Lindstrom had had ample notice that her attendance record was unacceptable to the Department of Safety, and that as early as April, 1990, the Department was considering termination of her employment under the provisions of former Per 308.03(4)j. When the Department refused to approve Ms Lindstrom's use of unpaid leave in addition to all her accrued, paid leave, Ms Lindstrom's attendance improved, but only to the extent that her absences were roughly equivalent to the amount of paid leave available to her instead of exceeding the amount of paid leave available to her.

On December 20, 1991, Ms Lindstrom acknowledged receipt of a letter of warning dated December 19, 1991 for excessive use and possible abuse of sick leave. That letter also stated that because Ms Lindstrom was habitually out sick, she was unable to perform the duties of her position. It again referred her to Per 308.03(4)j., which advised that she could be terminated from employment for unsatisfactory work unless corrective action was taken. Ms Lindstrom offered no evidence that her attendance record had improved between April, 1990, and December, 1991, except to the extent that she did not request additional unpaid leave which the Department had already advised her it would not approve. Both Ms Lindstrom and Mr Dennis Smith, her supervisor in the Title Bureau, agreed she had been warned verbally to improve her attendance.

The December, 1991 letter of warning issued to Ms Lindstrom stated, in pertinent part:

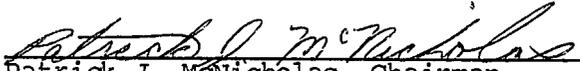
"The record reflects that you are habitually out sick and unable to perform your duties. The morale of your fellow workers suffers, as they must absorb your work whenever you are out. ... " [SEA letter of warning, December 19, 1991]

Ms. Lindstrom insisted that unless the Department could demonstrate that her absences were not legitimate, she could not be disciplined for "excessive use of leave". She noted that because of the general state of her health, she was frequently absent due to illness, and missed additional work time because of doctors' appointments. Ms. Lindstrom testified she was unable to make those appointments outside of her regular work schedule and said that her department would not want to authorize a "flex" schedule because of lack of supervision outside of regular business hours.

However, as set forth in former Per 308.03 (4)j., the Rules of the Division of Personnel provided for discipline of employees, up to and including termination from employment, when those employees were of such physical condition as to make it impossible for them to perform their duties. Clearly, Ms. Lindstrom has represented that she is of such physical condition as to make it impossible for her to report regularly for work, thereby resulting in work performance below acceptable levels for a full-time employee. Even after having been repeatedly warned and counselled that her use of leave was excessive and that she should make every effort to conserve her accrued leave, Ms. Lindstrom offered no evidence of attempting to improve her attendance by such methods as scheduling medical appointments so that they would not conflict with her work schedule. Although Ms. Lindstrom testified that the Department would not allow her to work a flexible work schedule to accommodate even a portion of her absences for medical appointments, Ms. Lindstrom offered no evidence of having requested a flexible work schedule. Accordingly, the Board found Ms. Lindstrom had made no meaningful effort to improve her attendance.

The Board found that the Department of Safety was justified in issuing Ms. Lindstrom a formal warning under the provisions of Per 308.03 for excessive absences, by applying the disciplinary standards of Per 308.03(4)j., whereby an agency could discipline employees who are of such physical condition as to make it impossible for them to satisfactorily perform their work assignments.

THE PERSONNEL APPEALS BOARD


Patrick J. McNicholas, Chairman


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cc: Virginia A. Lamberton, Director of Personnel
Claude O. Ouellette, Human Resource Administrator, Dept. of Safety
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