

# State of New Hampshire



**PERSONNEL APPEALS BOARD**  
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## **APPEAL OF VINCENT MULLIGAN New Hampshire Youth Services Center (Tobey School) Docket #93 - D-7**

**(Letter of Warning Appeal)**

**October 21, 1993**

The New Hampshire Personnel Appeals Board (Bennett and Rule) met Wednesday, September 8, 1993, to hear the appeal of Vincent Mulligan, an employee of the Tobey School (Youth Services Center). Mr. Mulligan was represented at the hearing by Margo Hurley, SEA Field Representative. Sandra Platt, Human Resources Administrator, appeared on behalf of the Department of Health and Human Services (Youth services Center).

(3) Mr. Mulligan, a Youth Counselor at the Tobey School, was issued a letter of warning on June 12, 1992, for unsatisfactory job performance resulting from his alleged absence without approved leave or proper notification on Monday, May 25, 1992. The letter of warning described the specific offense" as follows:

"Pursuant to the provisions of the Rules of the Division of Personnel, PART Per 1001.03, (a)(3), this is a written warning for unsatisfactory job performance."

"It is a result of your absence from work on Monday, May 25, 1992 from 3:00 p.m. to 4:00 p.m. without approved leave or proper notification. On Friday, May 22, 1992, you informed Mr. Michael O'Hara, Assistant House Leader, that you had an employment interview on Monday, May 25, 1992 at 2:15 p.m., and that you would be late arriving to work on that day. Mr. O'Hara told you that you needed to reschedule the appointment because you could not report later than your scheduled time of 3:00 p.m. He explained that since May 25, 1992 was the day for the Federal observance of Memorial Day, three other employees had previously been granted leave and you were needed to provide sufficient coverage for the dormitory. He advised you to call the interviewer and explain that you could not be present for the 2:15 appointment on Monday and that it would have to be changed. ...

The appellant argued that his absence should not have given rise to a letter of warning because he had been granted time off under similar circumstances a few years earlier when he had applied for another State position. He argued that "past practice" must govern in this instance. Mr. Mulligan also argued that he was aware of the staffing shortage his absence would create and since he had made every effort to report to work at the earliest possible time, the agency should not have disciplined him.

On behalf of the State, Ms. Platt argued that the appellant knew he did not have permission to arrive late for work, and knew his absence would create a staffing shortage. She argued that the appellant had been told specifically by supervisory staff that he must report to work as scheduled, and that there should have been no confusion about having been denied approval to report late to work. Ms. Platt argued that the agency acted properly in issuing the appellant a letter of warning as the least severe form of discipline in this instance for unsatisfactory work performance.

Essentially, the parties agree that the facts as set forth in the June 12, 1992 letter of warning are accurate. Mr. Mulligan had a job interview with another state office scheduled for 2:15 p.m. on Monday, May 25, 1992, and advised his supervisor that he would be arriving for work between 4:30 p.m. and 5:00 p.m. instead of 3:00 p.m. when his shift began. His supervisor told him that other employees had already been granted time off on that date and that Mr. Mulligan needed to make arrangements to have the interview rescheduled. His supervisor also offered to explain to the interviewer why Mr. Mulligan would not be able to attend as scheduled.

Mr. Mulligan testified that when he spoke with Mr. O'Hara, his supervisor, Mr. O'Hara had expressed "some consternation" about Mulligan's plan arrive late for work on Monday afternoon. He said he knew Mr. O'Hara would not be "happy" if he failed to report to work as scheduled, but that he did not recall Mr. O'Hara actually telling him, "don't go". He said he knew Mr. O'Hara was opposed to his going to the interview, but that Mr. O'Hara never threatened him with disciplinary action. He testified that if anyone had told him that his absence would create any hazard to the health or safety of the students, he would have reported to work on time rather than going to the interview. He also testified that since he knew his absence would create a staffing problem, he made every effort to get to work as quickly as possible, reporting only one hour late rather than the hour and a half to two hours he had originally anticipated.

Per 1001.03(a)(3) provides that an employer may discipline an employee for unsatisfactory work performance in the event an employee is absent from work without approved leave or proper notification. Despite Mr. Mulligan's claim that he was exercising an "entitlement" to report late for work when work interfered with a job interview within his department, no such entitlement existed. The employer told the appellant he did not have approval to be absent from work, yet the employee chose to attend the interview anyway. The appellant failed to persuade the Board that "confusion" about the unit's policy existed. The appellant knew he had been granted time off without loss of pay or leave on a previous occasion so that he could attend a job interview. In this case, however, he was clearly informed that his absence would create a staffing problem, that he was expected to report to duty as scheduled, and that his supervisor "would not be happy" if he chose to attend the interview rather than reporting to duty on time.

As Ms. Platt pointed out in her closing arguments, Per 1203.08 (a) of the Rules of the Division of Personnel states:

"Annual leave shall be granted by the appointing authority at such times as, in the opinion of the appointing authority, shall least interfere with the efficient operation of the agency."

Ms. Platt also argued that Per 1203.02 also refers to employees "...not being unreasonably denied time off", but that in Mr. Mulligan's case, rather than securing the approval of his supervisor

and assuring that his absence was acceptable, Mr. Mulligan simply took the time off. In light of the fact that both Mr. Mulligan and the agency knew his absence would create a staffing problem and would interfere with the efficient operation of the agency, the Board found that Mr. Mulligan was not unreasonably denied approval for his absence. Further, if the agency would not have allowed Mr. Mulligan to use accumulated annual leave to cover the period of absence, it would have even less reason to pay him for an unapproved absence on the date in question.

Per 1001.03 (a) describes the written warning as "...the least severe form of discipline to correct an employee's unsatisfactory work performance." As Ms. Platt so astutely pointed out, it is the responsibility of the employee to be sure he has approval to be absent from work, and not of the employer to ensure that the employee knows he does NOT have approval. The Youth Services Center acted appropriately in disciplining Mr. Mulligan for absence without approved leave, and both the warning and corrective action are upheld. On the evidence, the Board found that Mr. Mulligan knowingly and wilfully absented himself from work for a period of approximately 1 hour on May 25, 1992, even though he clearly understood that his absence was not authorized and would create a short-term staffing problem for the Youth Services Center and its remaining personnel. Mr. Mulligan's actions constitute a violation of the Rules of the Division of Personnel subject to discipline as set forth in Per 1001.03 (a). Therefore, Mr. Mulligan's appeal is denied.

THE PERSONNEL APPEALS BOARD



Mark J. Bennett, Vice-Chairman



Lisa A. Rule, Commissioner

cc: Virginia A. Lamberton, Director of Personnel  
Margo Hurley, SEA Field Representative  
Sandra Platt, Administrator, Health and Human Services