

# State of New Hampshire



## **PERSONNEL APPEALS BOARD**

25 Capitol Street  
Concord, New Hampshire 03301  
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### *Appeal of Madeleine Mullin*

*Docket #2002-D-12*

*Department of Safety*

*April 24, 2002*

The New Hampshire Personnel Appeals Board (Rule, Johnson, and Urban) met on Wednesday, April 17, 2002, under the authority of RSA 21-I:58 and Chapters Per-A 100-200 of the NH Code of Administrative Rules (Rules of the Personnel Appeals Board), to hear the appeal of Madeleine Mullin, an employee of the NH Department of Safety. Ms. Mullin, who was represented at the hearing by Thomas Hardiman, SEA Director of Field Operations, was appealing a written warning issued to her on October 31, 2001. Attorney Sheri J. Kelloway appeared on behalf of the Department of Safety, Division of Motor Vehicles.

Without objection, the appeal was heard on offers of proof by the representatives of the parties. The record of the hearing in this matter consists of pleadings submitted by the parties prior to the hearing, orders and notices issued by the Board, the audio-tape recording of the hearing on the merits of the appeal, and documents admitted into evidence as follows:

#### Joint Exhibits:

- A. Denial of Step IV Informal Settlement by Director of Personnel, dated January 7, 2002
- B. Request for Step IV Informal Settlement by SEA, dated January 4, 2002
- C. Denial of Step III Informal Settlement by Commissioner of Safety, dated December 27, 2001
- D. Request for Step III Informal Settlement by SEA, dated December 7, 2001

- E. Denial of Step II Informal Settlement by Director of Motor Vehicles, dated December 5, 2001
- F. Request for Step II Informal Settlement by SEA, dated November 21, 2001
- G. Denial of Step I Informal Settlement by Supervisor of Registration, dated November 13, 2001
- H. Request for Step I Informal Settlement by SEA, dated November 7, 2001
- I. Letter of Warning to Madeleine Mullin, dated October 31, 2001
- J. Voided Leave Slip Issue

State's Exhibits

- K. Affidavit from Kelly A. Michael, Supervisor of Registration, dated April 15, 2002
- L. Counseling Memo Issued to Madeleine Mullin, dated June 22, 2001

Appellant's Exhibit

- M. Class Specification for "Supervisor of Registration"

Ms. Mullin received a written warning on October 31, 2001, from Kelly Michael, Supervisor of Registration. In the warning, Ms. Michael alleged that the appellant failed to meet the work standard "by acting in an insubordinate manner towards [her] supervisor."

The State argued that although the incident giving rise to the warning began with questions about the appellant being late for work, the actual basis for the warning was the appellant's inappropriate behavior. Ms. Kelloway argued that for a number of years, the Department of Safety has had a policy in place that requires employees who report late for work to submit leave requests to cover their absence, and to request that leave in 15-minute increments. She said that on the morning of October 18, 2001, Kelly Michael, the Supervisor of Registrations, noticed that Ms. Mullin was not at her desk at 8:15 a.m. as required. She said that Ms. Michael put a leave slip on the appellant's desk with a note to see her when she arrived. She said that Ms. Michael saw the appellant entering the work area at approximately 8:18 a.m. and told her to wait in the lobby until 8:30 a.m. and submit a leave slip.

Ms. Kelloway said that when the appellant returned at 8:30 a.m. with her leave slip, she had requested only 3 minutes of leave instead of the 15 minutes she was expected to request under the agency's policy. She said that Ms. Michael told the appellant the leave slip was not filled out properly, to which the appellant replied, "What am I supposed to do? I was sick. Next time I will just let it run down my legs."

Ms. Kelloway said that Ms. Michael asked the appellant to come to her office and the appellant replied that she needed to make a work-related phone call. She said that after waiting several minutes, she had to ask the appellant a second time to come to her office. She said that Ms. Michael told the appellant that her behavior had been rude and insubordinate, and that Ms. Mullin's only excuse was that she was sick. She said that once Ms. Michael determined that the appellant actually had been in the building at 8:15 a.m., she voided the leave slip. However, she said, being sick did not excuse the appellant's behavior. She said that the appellant's comments were inappropriate, particularly since they were spoken in a public area where she could be heard by her co-workers.

Mr. Hardiman said that the appellant arrived at work on time on the morning of October 18, 2001, but was ill and went immediately to the ladies' room. He said that if Ms. Michael believed that the appellant was late, she should have discussed that issue with her in private. Instead, he argued, Ms. Michael confronted the appellant in the open area of the office in front of their co-workers, creating a situation that was later blown out of proportion. Even under those circumstances, he argued, the appellant was neither rude nor insubordinate. He said that a co-worker at a desk not far from the appellant's desk would testify that there was no confrontation and the conversation between Ms. Mullin and Ms. Michael was quite normal. He argued that the evidence would not support a finding that the warning was warranted.

Mr. Hardiman further argued that the Board also needed to decide if a supervisor can issue a warning when that person is not qualified to hold her own job. Mr. Hardiman argued that in order to certify as a Supervisor of Registration, an employee would be required to possess an

associate degree and have five years of business management experience, two of which must have been in Registrations. He said that Ms. Michael had been hired in August 1998 at a labor grade 4 and in only three years had been promoted nineteen labor grades to Supervisor of Registration, labor grade 23. He argued although the appointment was temporary, and Ms. Michael was the “Acting Supervisor,” that the appointment violated the Personnel Rules. He said that temporary appointments may not exceed 90 days, yet Ms. Michael had held the position for more than a year. He argued that the position was never posted, and there was tension in the office because employees were aware of the relationship between Ms. Michael and the Commissioner’s Office.

Having reviewed the documentary evidence and having considered the parties offers of proof, the Board made the following findings of fact and rulings of law. In so doing, the Board notes that the material facts are not in dispute.

#### Findings of Fact

1. Ms. Mullin is employed by the Department of Safety, Division of Motor Vehicles, as a Clerk IV in the Bureau of Registration.
2. Kelly Michael was hired by the Department of Safety in August, 1998, and has worked as the Acting Supervisor of Registration since March, 2001.
3. On the morning of October 18, 2002, at approximately 8:18 a.m., Ms. Michael noticed that the appellant was not at her desk.
4. The appellant is expected to be at her desk and working at 8:15 a.m.
5. Ms. Michael left a leave slip and a note on the appellant’s desk instructing her to come to Ms. Michael’s office when she reported for work.
6. As she was leaving the appellant’s desk, Ms. Michael saw the appellant entering the office. She directed the appellant to go out and wait in the lobby until 8:30 a.m. and fill out a leave slip when she returned.
7. Ms. Mullin said that she had been in the building but was in the restroom.
8. Ms. Mullin was still required to wait until 8:30 a.m. and to submit a leave slip.

9. Ms. Mullin submitted a leave slip indicating that she needed sick leave between 8:15 and 8:18.
10. When Ms. Mullin returned to the office and gave Ms. Michael the leave slip, Ms. Michael said that the slip was not completed correctly. The women were standing in the open area of the office and there were five or six other employees present.
11. Ms. Mullin said, "What am I supposed to do? I was sick. Next time I will just let it run down my legs."
12. Ms. Michael directed the appellant to come to her office.
13. In her office, Ms. Michael told the appellant that she found the appellant's behavior to have been rude and disrespectful, particularly since the remarks were made to the supervisor in front of other employees.
14. After determining that the appellant was in the building at 8:15 a.m., Ms. Michael voided the leave slip.
15. The appellant's remarks were rude and disrespectful, whether they were uttered publicly or privately.
16. Prior to the October 18, 2001 incident, the appellant had not questioned Ms. Michael's supervisory authority within the bureau.
17. The letter of warning issued to Ms. Mullin was signed by Kelly Michael as Supervisor of Registration; Virginia Beecher, Director of the DMV; and Richard Flynn, Commissioner of Safety.

#### Rulings of Law

- A. "An appointing authority shall be authorized to use the written warning as the least severe form of discipline to correct an employee's unsatisfactory work performance or misconduct for offenses including, but not limited to: (1) Failure to meet any work standard..." [Per 1001.03 (a)(1)]
- B. "Any permanent employee who is affected by any application of the personnel rules, except for those rules enumerated in RSA 21-I:46, I and the application of rules in

classification decisions appealable under RSA 21-I:57, may appeal to the personnel appeals board within 15 calendar days of the action giving rise to the appeal. ... In all cases, the personnel appeals board may reinstate an employee or otherwise change or modify any order of the appointing authority, or make such other order as it may deem just.” [RSA 21-I:58, I]

#### Per-A 207.12 (b) Standard of Review

(b) In disciplinary appeals, including termination, disciplinary demotion, suspension without pay, withholding of an employee's annual increment or issuance of a written warning, the board shall determine if the appellant proves by a preponderance of the evidence that:

- (1) The disciplinary action was unlawful;
- (2) The appointing authority violated the rules of the division of personnel by imposing the disciplinary action under appeal;
- (3) The disciplinary action was unwarranted by the alleged conduct or failure to meet the work standard in light of the facts in evidence; or
- (4) The disciplinary action was unjust in light of the facts in evidence.

#### Decision and Order

The Personnel Rules describe the written warning as the least severe form of discipline available to an appointing authority to correct an employee’s unsatisfactory performance or behavior. In this instance, the evidence reflects that Ms. Michael addressed Ms. Mullin’s purported late arrival for work in accordance with the Department of Safety’s policy and procedure. <sup>1</sup>

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<sup>1</sup> The Board makes no specific finding with respect to the policy itself, either with respect to its adoption or its conformance with the current Collective Bargaining Agreement or the Rules of the Division of Personnel.

There appears to be no dispute that employees at the Department of Safety are routinely asked to submit leave slips when they are late reporting for work. There also appears to be no dispute that those employees also are expected to request that leave in 15-minute increments. If, as the parties agree, the appellant was on time but somehow indisposed, it is understandable that she would object to Ms. Michael's insistence that she was late, should delay reporting for work until 8:30 a.m., and she should submit a leave request because she was tardy. That objection, however, does not justify the appellant's behavior toward Ms. Michael. The appellant's comments were rude, inappropriate, unprofessional, and disrespectful. Even if the appellant's co-workers would characterize the conversation as "normal," the behavior that the State alleged and to which the appellant has admitted did warrant a written warning.

With respect to Ms. Michael's qualifications to hold her position as Acting Supervisor of the Registration Bureau, that issue may be significant in terms of workplace dynamics and morale. It is not material, however, to the question of Ms. Michael's authority to issue a warning. That issue also is not properly before the Board to decide in this case.

The parties agree that Ms. Michael has held the position as Acting Supervisor of Registration since March 2001. The law and the administrative rules provide that in order to be timely, an appeal must be filed within fifteen calendar days of the date of the action giving rise to the appeal. If the appellant wished to raise questions about Ms. Michael's appointment, including whether the position was properly posted prior to Ms. Michael's appointment and whether or not Ms. Michael had the education and experience necessary to certify for the position, those questions should have been raised in March, 2001, when she was appointed the Acting Supervisor of Registration.

Having considered the documentary evidence and having considered carefully the parties' oral arguments and offers of proof, the Board voted unanimously to DENY Ms. Mullin's appeal and to uphold the written warning issued to her for failure to meet the work standard.

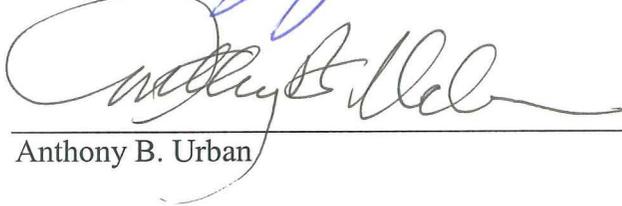
THE PERSONNEL APPEALS BOARD



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Lisa A. Rule, Acting Chair



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Robert J. Johnson



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Anthony B. Urban

cc: Thomas Manning, Director of Personnel, 25 Capitol St., Concord, NH 03301  
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*Docket #2002-D-12*

*Department of Safety*

*Personnel Appeals Board Response to  
Appellant's Motion for Reconsideration and State's Objection*

*June 20, 2002*

By letter dated May 21, 2002, Thomas Hardiman, SEA Director of Field Operations, requested reconsideration of the Board's April 24, 2002 decision denying Ms. Mullin's appeal of a written warning. The Board received the State's Objection on May 29, 2002.

According to Per-A 208.03 (b) of the NH Code of Administrative Rules, Rules of the Personnel Appeals Board, "Such motion for reconsideration or rehearing shall set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable." In support of her Motion for Reconsideration, Appellant lists six separate "areas" for the Board's review. They are summarized as follows:

1. The Acting Supervisor of Registration does not meet the minimum qualifications for the position that she occupies.
2. The Department of Safety failed to post a vacancy prior to filling the Supervisor of Registration position with an "acting" supervisor, so there was no date from which the Appellant might have taken a timely appeal of Ms. Michael's appointment as Supervisor of Registrations, and the Department has allowed the incumbent to remain in that position in excess of 90 days.
3. The Acting Supervisor of Registration has attained neither the education nor the experience required for the position she occupies.

4. An evidentiary hearing would disclose that the Appellant never made the statement that gave rise to her written warning.
5. An evidentiary hearing would disclose that the administration at the Department of Safety ordered that the Acting Supervisor of Registrations be certified as meeting the minimum qualifications for the position, and that the certification occurred without the Division of Personnel's cooperation and review of the application.
6. The written warning under appeal was issued by someone not qualified to issue such discipline.

In its objection, the State argued that the Appellant failed to offer sufficient grounds upon which to claim that the Board's decision was either unreasonable or unlawful. The State argued that the appellant merely restated the evidence and arguments presented during the hearing and misstated several of the facts. Finally, the State objected to certain statements made by the Appellant's representative in the Motion for Reconsideration, arguing that they constituted personal and accusatory allegations directed specifically at the agency's representative.

First, the question of Ms. Michael's qualifications<sup>1</sup> and the manner in which she assumed the role of the Acting Supervisor of Registrations<sup>2</sup> are matters outside the scope of this hearing. Concerns about Ms. Michael's qualifications and the method of her certification are not the subject of this appeal and they have no bearing on the legitimacy of the written warning that was issued to the Appellant. As the signatures affixed to the warning indicate, the warning was issued jointly by Ms. Michael, Acting Supervisor of Registrations; Virginia Beecher, Director of the Division of Motor Vehicles; and Richard Flynn, Commissioner of the Department of Safety. Even if the Board were to have found that Ms. Michael lacked the authority to issue the warning (which it did not), Director Beecher and Commissioner Flynn did.

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<sup>1</sup> If the Appellant believes these issues warrant investigation by the Director of Personnel, they should be presented to the Director. Even if the Board believed that such an investigation was warranted, the Board has no independent authority to order the Director to conduct one.

<sup>2</sup> Although the Appellant asserts that there was "no specific date for the supervisor's position being filled" from which a timely appeal might have been filed, the appellant and others within the Bureau should have known when Ms. Michael became their supervisor.

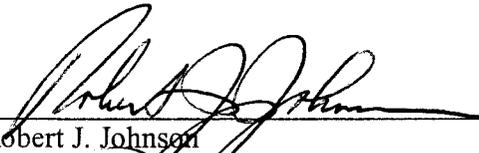
Throughout the process of informal settlement and appeal, in pleadings submitted for the Board's consideration, and in the Appellant's oral argument and offers of proof, the Appellant repeatedly maintained that her exchange with Ms. Michael had been misinterpreted and blown out of proportion. The Board accepted the documentary evidence presented by the parties and accepted their offers of proof, including the Appellant's representation that she could produce witnesses who would testify that she was neither rude, sarcastic, nor insubordinate when speaking to her supervisor. Nevertheless, the evidence and argument reflect that up until she filed her Motion for Reconsideration on May 22, 2002, the Appellant never officially denied making the remark for which the warning was issued.

The arguments raised by the Appellant in support of the Motion do not provide a basis upon which to conclude that the decision was unlawful or unreasonable. Therefore, having carefully reviewed the Motion and the Objection in conjunction with the pleadings, the exhibits, and the Board's decision, the Board voted unanimously to AFFIRM its decision to DENY Ms. Mullin's appeal of a written warning.

THE PERSONNEL APPEALS BOARD



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Lisa A. Rule, Acting Chair



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Robert J. Johnson



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