

# State of New Hampshire



**PERSONNEL APPEALS BOARD**  
25 Capitol Street  
Concord, New Hampshire 03301  
Telephone (603) 271-3261

## **Appeal of Dennis McKean**

**Docket #2016-T-006**

## **Department of Transportation**

June 8, 2016

The New Hampshire Personnel Appeals Board met in public session on Wednesday, April 20<sup>th</sup> 2016, under the authority of RSA 21-I:58 and Chapters Per-A 100-200 of the NH Code of Administrative Rules, to hear the appeal of Dennis McKean, the Appellant. The following commissioners sat for this hearing: Norman Patenaude, Esq., Vice-Chair, Christopher Nicolopoulos, Esq., Commissioner and David Goldstein, Commissioner. Mr. McKean, who was represented at the hearing by Kenneth E. Ryan, Esq., appealed his termination as a Highway Maintainer II at the Department of Transportation. Senior Assistant Attorney General Rebecca Woodard Ross appeared on behalf of the State.

The record of the hearing in this matter consists of pleadings filed by the parties prior to the date of the hearing, notices and orders issued by the Board, the audio recording of the hearing on the merits of the appeal, documents admitted into evidence and post hearing memorandums.

### **THE FOLLOWING PERSONS GAVE SWORN TESTIMONY:**

Dennis McKean, Appellant  
Douglas King, DOT District Engineer  
Deborah Louzier, DOT Administrative Secretary  
Kevin Carley, DOT Highway Patrolman Foreman

**ISSUES OF LAW:**

Per 1201.05 (a)

Per 1205.02 (a)

Per 1002.02(a)

**BACKGROUND**

The Appellant's first day of employment with the Department of Transportation (hereinafter the Department) was June 8, 2015. At the time of his dismissal the Appellant was serving as a probationary employee. In July 2015, the Appellant ceased working due to a hernia of an unknown origin. The Appellant was working ten (10) hour days, four days a week. Due to the limited amount of time that he was employed by the Department prior to his hernia, he only accrued enough annual and sick leave to cover eighteen (18) hours of work. He also did not qualify for the benefits of the Family Medical Leave Act (FMLA) since he was only employed for approximately one (1) month. Although the Appellant did not complete the appropriate paperwork, he was allowed to be in an unpaid leave status.

The Appellant had surgery in August 2015 to repair the hernia and was allowed to continue to be in an unpaid leave status. On August 10, 2015, the District 2 Office received a physician's certificate stating that the Appellant would be able to return to work on September 1, 2015 and after follow-up with surgeon. The District Supervisor interpreted this certificate to mean the Appellant could return to work on September 1, 2015. The Appellant did not return to work on September 1, 2015. The Appellant provided "progress notes" from his doctor dated September 22, 2015. The Appellant was terminated for failing to provide documentation supporting his absence from work from September 1, 2015 through September 22, 2015 resulting in his work status being changed to absence without authorized leave.

After carefully considering the parties' testimony, evidence, arguments and post hearing briefs, the Board made the following findings of fact and rulings of law:

## FINDINGS OF FACT

1. The Appellant's first day of employment with the Department was June 8, 2015 and, thus, was serving as a probationary employee under the New Hampshire Code of Administrative Rules. ( State's Exhibit #1 pg. 1)
2. The Appellant's last day of work was July 9, 2015. On Sunday July 12, 2015, the Appellant was seen at the Dartmouth-Hitchcock Emergency Department due to a hernia of unknown origin. (State's Exhibit #1 Attachment 2 and the Record)
3. As of July 13, 2015 the Appellant had accrued only ten (10) hours of sick time and eight (8) hours of leave time. At the time, the Appellant was working four (4) ten (10) hour days and, as a result, the Appellant was on unpaid leave status at the discretion of the Department after the eighth (8<sup>th</sup>) hour on July 14, 2015. (the Record)
4. Since the Appellant had only been employed by the State for approximately five (5) weeks, he was not entitled to the benefits of the Family Medical Leave Act. (the Record)
5. Shortly after the Appellant was hired by the Department he attended a two (2) day orientation program. Part of the content of the two (2) day orientation consisted of informing employees that they are responsible to manage their own leave time. The Appellant signed a New Employee Expectation form indicating that he attended said orientation. (the Record)
6. Deborah Louzier, DOT Administrative Secretary, testified that she explained to the Appellant the process of requesting leave. Ms. Louzier also testified that there are over one-hundred (100) employees at the DOT District 2 Office, making it difficult for her to manage everyone's leave time. Consequently, the employees must keep track of their own leave time. (the Record)

7. The Appellant testified that he did not keep track of his accrued leave and sick time and was more focused on his health and treating his condition. (Testimony of the Appellant)
8. The Appellant was questioned on cross-examination whether he understood that taking unpaid leave during his probationary status was at the sole discretion of the appointing authority and he answered in the affirmative and he again replied that his focus was on his health and not his employment status. (the Record)
9. Douglas King, the District Supervisor, testified that although the Appellant never asked for unpaid leave status he exercised his discretion and allowed it as he wanted to give the Appellant the benefit of the doubt. (Testimony of Mr. King)
10. The Appellant provided a note from the Emergency Department that stated he would be able to return to work on July 19, 2015. The Appellant did not return to work on July 19, 2015 but telephoned the office on July 20, 2015 and stated he would be out until after his surgery. The Appellant was seen at Dartmouth-Hitchcock on July 21, 2015 and provided a note from Dartmouth-Hitchcock stating that he would be able to return to work "Post Op." but would be "unable to lift heavy thing (sic)." (State's Exhibit #1, Attachments 2 &3)
11. The Appellant was seen at Dartmouth-Hitchcock on August 4, 2015 and the Department received a correspondence from Dartmouth-Hitchcock on August 10, 2015 that stated, "He/She may return to work/school on 9/1/15 and after follow up with surgeon." (State's Exhibit #1)
12. Mr. King interpreted this correspondence to mean that the Appellant was ready to return to work on September 1, 2015 and exercised his discretion under the New Hampshire Code of Administrative Rules and withdrew his approval for the Appellant's unpaid leave status on September 1, 2015. (Appellant's Exhibit #2 and the Record)
13. The Appellant failed to appear for work on September 1, 2015. Mr. King testified that he was expecting another document supporting his absence from work beyond September 1,

2015. Mr. King testified that he received a progress note from the Appellant's physician on September 28, 2015 but it did not support his absence from work between September 1, 2015 and September 22, 2015. (the Record)

14. A Pre-Disciplinary meeting was held and Mr. King testified that the Appellant did not refute the evidence presented and, in fact, also stated that he may not be qualified to perform the physical labor that is part of the essential job functions as a Highway Maintainer II.

15. The Appellant was terminated on October 9, 2015 for failure to return to work without acceptable reason on the next business day following the expiration of the approved leave of absence.

**RULINGS OF LAW:**

- A. Per 1205.02 (d) failure on the part of an employee to report to work without acceptable reason on the next business day following the expiration of the approved leave of absence shall be a cause for termination.
- B. Per 1201.05 (a) an employee shall be considered absent without authorized leave if such employee fails to appear for work or fails to remain at work, without receiving prior approval from the appointing authority to be absent. (b) an employee who fails to comply with the provisions of Per 1201.05(a) shall be subject to disciplinary action, up to and including termination. (c) at the discretion of the appointing authority, an employee who is absent without authorized leave may be granted some form of paid or unpaid leave for an unauthorized absence.
- C. Per 1002.02 (a) at any time during the initial probationary period an appointing authority may dismiss an employee without prior warning if that employee fails to meet the work standard or engages in any conduct for which discipline is authorized pursuant to this Part, provided the dismissal is not (1) arbitrary (2) illegal (3) capricious or (4) made in bad faith.

D. Per-A 207.12 (a) in probationary termination appeals, the board shall determine if the appellant proves by a preponderance of the evidence that the termination was arbitrary, illegal, capricious or made in bad faith. Allegations that the appellant does not know the reason(s) for the dismissal, or evidence that the appointing authority took no formal disciplinary action to correct the employee's unsatisfactory performance or failure to meet the work standard prior to dismissing the employee, shall not be deemed sufficient to warrant the appellant's reinstatement.

### **DISCUSSION and ORDER**

The Appellant was a Probationary Employee at the time of his termination and worked for the Department for approximately five (5) weeks before being absent from work for approximately nine (9) weeks due to a hernia of an unknown origin. The Appellant exhausted his sick and annual time accrued after less than two (2) days. The Appellant acknowledged that he attended a two (2) day orientation, which included content regarding the employee's responsibility to manage their own leave time. Ms. Louzier also testified that she meets with new employees to review policies and procedures of the Department. She testified that she reviewed how the Appellant should request leave time. Although the Appellant did not follow the proper procedures to request unpaid leave time, Mr. King allowed the Appellant to continue to be employed under this status.

Per-A 207.12(a) of the New Hampshire Code of Administrative Rules states:

“In probationary termination appeals, the Board shall determine if the appellant proves by a preponderance of the evidence that the termination was arbitrary, illegal, capricious or made in bad faith. Allegations that the appellant does not know the reason(s) for the dismissal, or evidence that the appointing authority took no formal disciplinary action to correct the employee's unsatisfactory performance or failure to meet the work standard prior to dismissing the employee, shall not be deemed sufficient to warrant the appellant's reinstatement.”

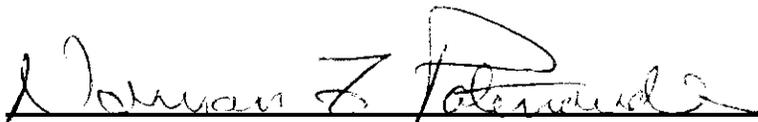
The fact that Mr. King allowed the Appellant to remain on unpaid leave status as a probationary employee for nearly twice as long as he had actually performed work for the Department demonstrates to the Board that Mr. King was being more than fair with the Appellant and wanted him to return to work. According to New Hampshire Code of Administrative Rule 1203.04(a) “employees on probationary appointment **may** be granted leave without pay.” This rule allows a supervisor to use his/ her discretion in determining to allow a probationary employee any unpaid leave. Mr. King was not required to authorize any unpaid leave but he chose to give the Appellant the benefit of the doubt when he allowed the Appellant to be on unpaid leave status without the Appellant requesting such leave.

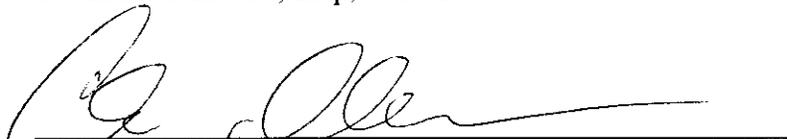
Mr. King received a letter from the Appellant’s doctor on August 10, 2015 and he reasonably interpreted the content of the letter to mean that the Appellant could return to work on September 1, 2015. It was the Appellant’s responsibility to keep the Department informed about his condition and request the appropriate leave time. The Appellant, when questioned on cross-examination, acknowledged that he was more concerned about his health condition than his employment status. The Appellant failed to provide appropriate documentation as to why he was not working between September 1, 2015 and September 22, 2015. The Board believes that Mr. King exercised reasonable discretion when he considered the Appellant to be absent without authorized leave after September 1, 2016.

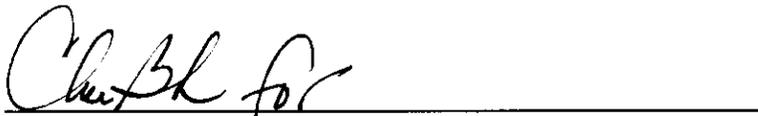
In a decision issued on March 23, 2012 in the *Appeal of William Harris*, the New Hampshire Supreme Court held that Under New Hampshire Administrative Rules, Per 1002.02(a), “the discretion to dismiss a probationary employee who fails to meet the work standard” rests with the appointing authority, not the board. “The dismissal of a probationer must not be arbitrary, illegal, capricious or made in bad faith, but the courts will not interfere with a reasonable exercise of discretion by a department head or an administrative official.” *Clark v. Manchester*, 113 NH 270 (1973). Similarly, once the board found that the dismissal was not arbitrary, illegal, capricious or made in bad faith, it was not entitled to interfere with the agency’s exercise of discretion in terminating Harris’ employment.

The Board found that Mr. King's decision to terminate the Appellant was not arbitrary, illegal, capricious or made in bad faith and, as a result, the Board voted unanimously to DENY the appeal and to uphold the agency's decision to dismiss the Appellant.

THE PERSONNEL APPEALS BOARD

  
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David Goldstein, Commissioner

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