

# State of New Hampshire



## PERSONNEL APPEALS BOARD

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### Appeal of Thomas Sloan

Docket #2014-T-010

### Department of Agriculture

February 24, 2016

The New Hampshire Personnel Appeals Board met in public session on Wednesday, January 20, 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 Thomas Sloan, the Appellant. The following commissioners sat for this hearing: Chair, Charla Stevens, Esq., Commissioner Christopher Nicolopoulos, Esq., and Commissioner David Goldstein. Mr. Sloan, who was represented at the hearing by John G. Vanacore, Esq., was appealing his termination as an Agricultural Inspector in the Department of Agriculture, Markets & Food. Assistant Attorney General Kenneth Sansone and Assistant Attorney General Brian Buonamano appeared on behalf of the Department of Agriculture, Markets & Food.

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, and documents admitted into evidence.

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

Jennifer Z. Gornert, Director, Division of Regulatory Services  
Lorraine S. Merrill, Commissioner, Department of Agriculture  
Richard Uncles, Former Director, Division of Regulatory Services  
Thomas Sloan, Appellant

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Page 1 of 12

## **ISSUES OF LAW:**

Per 1002.08(c)(2)

## **BACKGROUND**

Mr. Sloan received four (4) Letters of Warning between July 22, 2013 and October 14, 2013 for violations of the Personnel Rules. During the beginning of the State's direct examination of its first witness, the parties agreed that the validity of the four (4) prior Letters of Warning were not at issue and agreed that if the Board found that Mr. Sloan violated the Personnel Rules for a fifth (5<sup>th</sup>) time on March 14, 2014, then his termination was just.

On March 14, 2014, Mr. Sloan drove from his home to Banks Chevrolet-Cadillac Buick-GMC (hereinafter Banks) on Manchester Street in Concord for repairs to and inspection of his State issued motor vehicle. Mr. Sloan worked in the office on this day and his schedule on "office days" was from 9:00 a.m. to 5:00 p.m. Mr. Sloan left the office at 4:00 p.m. this day without prior approval from his supervisor, Jennifer Gornert. Mr. Sloan argues that his commute from his home to Banks was compensable time and, therefore, he did not leave work an hour early.

The State's position is that Mr. Sloan's commute from his home to Banks is not compensable time because he worked in the office all day. Mr. Sloan arrived at Banks at approximately 9:00 a.m. and the State argues that his work day began when he arrived at Banks and not when he left his home, just prior to 8:00 a.m., to travel to Banks. Mr. Sloan was terminated from employment due to this unauthorized absence from work.

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

## FINDINGS OF FACT

1. Mr. Sloan had been employed by the Department of Agriculture, Markets & Food as an Agricultural Inspector since June 15, 1998. Mr. Sloan, in this capacity, was responsible for investigating, reviewing and sampling agricultural products for compliance with established State and Federal grade standards and also to ensure compliance relating to the sale of such products. This work is performed at the department's Concord office as well as out in the field throughout the State. (State's B p. 1).
2. Mr. Sloan's work hours were from 8:00 a.m.-4:00 p.m., except during the months of September-June. Mr. Sloan submitted a "Request for Flextime" to change his work hours to 9:00 a.m.-5:00 p.m. during the school year so he could accompany his son to the bus stop for transport to school. This request was approved by his immediate supervisor, Jennifer Gornert, and the Commissioner of the Department of Agriculture, Lorraine Merrill. (State's AA).
3. The typical workweek for an Agricultural Inspector includes one day in the office, usually Mondays, and the remainder of the week would be spent working in the field. Mr. Sloan worked from 9:00 a.m. to 5:00 p.m. during days when he worked in the office. (Testimony of Ms. Gornert and Mr. Sloan).
4. Mr. Sloan was provided a state motor vehicle to cover his territory in New Hampshire and it was his responsibility to have the motor vehicle maintained. On March 14, 2014, Mr. Sloan was having his state motor vehicle repaired and inspected at Banks. Mr. Sloan left his home just prior to 8:00 a.m. and arrived at Banks at approximately 9:00 a.m. (State's HH p.2). Since Mr. Sloan's vehicle was out of service, he had planned to work in the office that day and, thus, his work schedule was 9:00 a.m. to 5:00 p.m. (Testimony of Mr. Sloan).

5. On March 14, 2014, Mr. Sloan left the office for the day at 4:00 p.m. Ms. Gornnert was in the office when Mr. Sloan left but did not question why he was leaving at that time as she was trying to get her work done before the end of the day, and it was not uncommon for Mr. Sloan to leave work early on Fridays to work in the field by stopping at a farm or at a store before going home. (Testimony of Ms. Gornnert).
  
6. Mr. Sloan and the other two Agricultural Inspectors under Ms. Gornnert's supervision were required to put their work schedules in the Division of Regulatory Services Outlook Calendar by the end of the day on Monday each week. Mr. Sloan did not indicate in the Outlook Calendar that he would be leaving at 4:00 p.m. on March 14, 2014, nor did he amend his work schedule in the Outlook calendar to reflect the need for his motor vehicle to be repaired and inspected. Mr. Sloan also did not submit a leave slip requesting to leave work at 4:00 p.m. instead of 5:00 p.m. that day. (Testimony of Ms. Gornnert and State's BB p.2).
  
7. On Monday, March 17, 2014, Ms. Gornnert questioned Mr. Sloan why he had left work early on Friday, March 14, 2014. Mr. Sloan did not provide an explanation and stated that he could have worked until 5:00 p.m if she wanted him to. Ms. Gornnert informed Mr. Sloan that he was expected to work a full day on Friday and because he left work an hour early, he would need to use leave time to cover the one hour he had missed. During this conversation Mr. Sloan did not assert that he believed he worked a full-day due to his commute from home to Banks.
  
8. Ms. Gornnert stated in an e-mail, dated March 17, 2014, "Since you are working overtime this Saturday, please use the one hour missed from this past Friday, March 14, towards those hours. Meaning, you do not need to work an extra hour this week, simply subtract one hour from your total on Saturday. Any questions let me know." Mr. Sloan replied to that e-mail the very next day and stated, "That doesn't work for me. Outstanding is your response to time I put in for leave and didn't take on February 6. That's ¾ of an hour and I can put in for a ¼ leave hour for 3/14/14". Ms. Gornnert

replied the next day, stating, “Unfortunately, that will not work either. Sounds like we should discuss tomorrow when I am in the office”. Mr. Sloan did not state in his responsive e-mail that he worked a full-day on March 14, 2014. (Testimony of Ms. Gornnert and Mr. Sloan and State’s CC pp1-2).

9. On Monday, June 17, 2013, Ms. Gornnert sent Mr. Sloan an e-mail stating, “When you were not in the office on Friday upon my return from lunch I asked Pat where you were. She informed me that you left around 1:00 p.m. to get your car’s oil changed. I can’t imagine that took the entire afternoon. Did you use comp time to end early?” Mr. Sloan responded by e-mail on Friday June 21, 2013 and stated, “My day started at 7:30 a.m. The receipt from the garage has the check-out time on it (2:13-2:20?). I stopped for lunch in Manchester. Receipt sticks in my mind as ordering at 2:53. The remainder of the afternoon was driving home. No comp time submitted.” (Appellant’s 21).
10. Ms. Gornnert believes she responded to this e-mail but does not recall how she responded, whether it was in person or through writing. She had to speak to Mr. Sloan several times about him leaving work early without prior authorization and she did not document his every violation of the Personnel Rules. (Testimony of Ms. Gornnert)
11. Ms. Gornnert met with Mr. Sloan and the other two Agricultural Inspectors on August 19, 2013 to discuss where state vehicles should be serviced and that the Inspectors should not wait for the repairs to be completed. Although it was not mentioned in this particular meeting, it was an understood practice that when the inspectors work in the office, their travel time to and from work is not compensable. (Testimony of Ms. Gornnert and State’s GG).
12. Lorraine Merrill, Commissioner of the Department of Agriculture, Markets & Food, has been the Commissioner for approximately eight (8) years. Ms. Merrill wrote a memorandum regarding “Commuting/work hours” on September 27, 2011 due to “...some misunderstandings about allowances for travel to and from work out of the

required hours each employee must spend on the job". She wrote, in relevant part, "The following procedures are to be strictly followed:

1. On any day an employee is to work in the NHDAMF office or laboratory, that employee shall be on the job and ready to work at 8 a.m. in the case of those under the standard five-day, 37 ½ hour work week. Commuting time to work in the Concord office or laboratory is not part of the work day.

2. Similarly, the work day ends at 4 p.m. for all office and laboratory employees under the five-day, 37 ½-hour work week. Commuting time to return home after work in the Concord office or laboratory is not part of the work day."

3. Employees who work in the field an[d] who go directly from home to locations in the field begin their work day when they leave home at 8 a.m. ... " Travel time from home to work locations in the field is part of the work day".

4. Those employees who work in the field and who go directly from locations in the field to their home complete their work day when they arrive home at 4 p.m. ... " Travel time from field locations directly home is part of the work day".

(Testimony of Ms. Merrill and State's RR).

13. Ms. Merrill drafted the memorandum regarding work hours and commuting because she wanted to make sure that everyone had the same understanding of what is considered compensable time and what is not. She was not aware of any practice of paying employees for commuting to and from the office. Mr. Sloan had been critical of her performance as Commissioner of the Division and he had made suggestions to her about how she could do her job differently. She recalled a disagreement she had with Mr. Sloan about travel expenses wherein he told her that she was too strict when following the Personnel Rules. (Testimony of Lorraine Merrill)

14. Ms. Gornert issued a "Notice of Intent to Take Disciplinary Action Up To and Including Termination of Employment" to Mr. Sloan on March 25, 2014, due to his leaving early on March 14, 2014, without authorization. The letter states, in relevant part, "Before dismissing an employee, Per 1002.08 (d) requires the appointing [authority] to offer to meet with the employee to discuss whatever evidence the appointing authority believes supports the decisions to dismiss the employee. I have scheduled such a meeting in compliance with Per 1002.08 (d) on March 31, 2014 at 9:30 at the Commissioner's office. As the rule requires, you will have an opportunity at that meeting to refute the evidence presented to you and discuss why you believe you should not be dismissed by issuance of a final warning as specified above". (State's II).
15. The meeting was held on April 1, 2014, which led to a "Notice of Final Warning and Termination of Employment". The Notice states, in relevant part, "On April 1, 2014, I met with you, along with Commissioner Merrill, Beth Serrine, the department's human resource administrator, and your union representative, Sean Bolton, to discuss this March 14, 2014, unscheduled and unapproved absence; your fifth incident of failing to comply with the Personnel Rules. As part of the process to make a sound decision on what level of disciplinary action we should take, we discussed the events which lead to this meeting. Afterwards, you were given the opportunity to refute the evidence presented, and explain why you should be given another chance. You were asked several times what will you do immediately and differently to improve your work performance. In response, you stated that you have been making a diligent effort and did not offer any suggestions for change in behavior." Mr. Sloan was dismissed due to his fifth and final letter or warning. The Notice goes on to state, "This also constitutes your third letter of warning for repeated, unscheduled and unauthorized absences". (State's A p1-2).
16. Although Mr. Sloan testified that he explained he calculated that he worked an entire day because he had calculated his approximately one (1) hour commute from his home to Banks on March 14, 2014, neither Ms. Gornert nor Ms. Merrill recalled any type of assertion of this by Mr. Sloan during this meeting. Ms. Gornert and Ms. Merrill also

expressed that it had been a difficult day for each of them but Ms. Merrill believed she would have recalled if Mr. Sloan had refuted the evidence with his explanation of compensatory time from driving from his home to Banks. (Testimony of Mr. Sloan , Ms. Gornert and Ms. Merrill).

17. The “Notice of Final Warning and Termination of Employment” does not state that Mr. Sloan refuted the evidence by arguing that his work day began when he left his home and began traveling to Banks. (State’s A pp 1-3).

**RULINGS OF LAW:**

- A. Per 1002.08 (c) of the Division of Personnel Rules authorizes appointing authorities to dismiss an employee pursuant to Per 1002.04 by issuance of a fifth (5<sup>th</sup>) written warning for various offenses within a period of five (5) years.
- B. The Board received Mr. Sloan’s Motion for Summary Disposition on December 30, 2015, and the State’s response on January 7, 2016. The parties were allowed to present their arguments to the Board at the Final Hearing, January 20, 2016, due to the timing of the Motion and Objection. After careful thought and consideration, the Board denied the Motion for Summary Disposition. First, the filing of said motion was not timely. Per-A 206.05 (a)(2) requires that when an adjudicatory hearing has been scheduled more than thirty-days (30) in advance, as the hearing in this case was, a motion for summary disposition must be filed at least thirty (30) days before the scheduled date of the hearing. Secondly, the Motion was not attested to by Mr. Sloan. Lastly, the Board held that there were material facts in dispute and, therefore, summary disposition was not appropriate.
- C. Mr. Sloan also filed a Motion *In Limine* to Exclude Respondent’s Exhibit MM and a Motion *In Limine* to Exclude all Irrelevant and Immaterial Records and Other Evidence. These Motions were moot at the time of the Final Hearing per the agreement between the parties outlined in paragraph 1 under **BACKGROUND** of this Order.

D. Pursuant to the Federal Portal to Portal Act, 29 U.S.C. 254(a),:

- (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
- (2) activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities. For purposes of this subsection, the use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting area for the employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee.

**(b) Compensability by contract or custom**

Notwithstanding the provisions of subsection (a) which relieve an employer from liability and punishment with respect to any activity, the employer shall not be so relieved if such activity is compensable by either-

- (1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or
- (2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

E. According to Per-A 207.12 (b) of the Board's rules, "In disciplinary appeals, including termination, disciplinary demotion, suspension without pay, withholding of 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.”

### **DISCUSSION and ORDER**

Mr. Sloan’s work hours were typically 8:00 a.m. to 4:00 p.m. Monday through Friday with the exception of when his son was attending school and when he worked in the office. During the school year and on “office days” his work schedule was from 9:00 a.m. to 5:00 p.m. On March 14, 2014, Mr. Sloan brought his state issued motor vehicle for repair and inspection and, as a result, worked in the office all day. As such, his work hours were from 9:00 a.m. to 5:00 p.m.

Mr. Sloan argued that he did not leave an hour early on March 14, 2014, because he counted his commute from his home to Banks as compensable work time. Mr. Sloan asserted that he has counted this type of commute as compensable time for the past fifteen (15) years without issue. Ms. Merrill, however, issued a memorandum to “Division leaders and ALL DAMF Staff” on September 27, 2011, outlining when commuting to and from work is considered part of the work day and when it is not. The memorandum states that commuting back and forth to the office is not part of the work day if one is to be in the office that day. She included in her memorandum that the procedures she set forth in the memorandum were to be “strictly followed”.

Under the Portal to Portal Act, “walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform” is not considered compensable work time. 29 U.S.C. § 254(a). “The use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting area for the employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee”. Id.

There was no testimony or evidence that the State was contractually obligated to pay Mr. Sloan for his commute from home to Banks. Further, at the time of Mr. Sloan's dismissal, Ms. Merrill had been the Commissioner of the Department of Agriculture for approximately eight (8) years and she testified that she was not aware of any custom or practice of paying employees for commuting to and from the office. On cross-examination, Mr. Sloan testified that if he was working an "office day" and stopped during his commute home to put gas in his state vehicle, he would be expected to be compensated only for the time it took him to put gas in the vehicle and not the entire commute.

Mr. Sloan commuted from his home to Banks, which is 2.9 miles away, according to Bing Maps, from his office in Concord. Mr. Sloan was compensated from the time he arrived at Banks to have the motor vehicle repaired and inspected but not for his commute from his home to Banks. Based upon the plain reading of the Portal to Portal Pay Act, the Board finds that Mr. Sloan was traveling in his state issued motor vehicle within his normal commuting area and, as a result, was not participating in "principal activities" when commuting to Concord and is not entitled to be compensated.

Although there was contradictory testimony about whether Mr. Sloan informed Ms. Gornnert that he counted his commute time on March 14, 2014, as work time prior to his dismissal, the Board is persuaded by the testimony and the evidence that the first time he made such an assertion was only after his dismissal. There was testimony from Ms. Gornnert that he did not make this claim to her and there was also an e-mail dated March 18, 2014, from Mr. Sloan where he, essentially, agrees with Ms. Gornnert and proposes a resolution for him leaving an hour early on March 14, 2014. Mr. Sloan was issued a Notice of Intent to Take Disciplinary Action on March 25, 2014, and a meeting regarding this Notice was ultimately held on April 1, 2014.

Ms. Merrill testified that she would have recalled if Mr. Sloan had represented that he included his commute time to Banks when calculating his seven and one half (7 ½) work hours that day. There is also no mention of this assertion in the Notice of Final Warning and Termination of

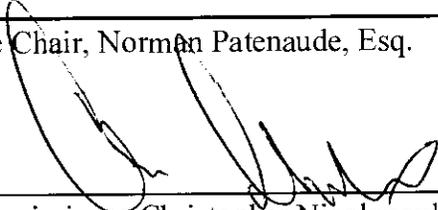
Employment, which was authored and signed by Ms. Gornert and signed by Ms. Merrill and Mr. Sloan.

For all the reasons set forth above, the Board voted unanimously to DENY the appeal and to uphold the agency's decision to dismiss Mr. Sloan.

THE PERSONNEL APPEALS BOARD

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Vice Chair, Norman Patenaude, Esq.



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Commissioner Christopher Nicolopoulos, Esq.



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Commissioner David Goldstein

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