

State of New Hampshire



PERSONNEL APPEALS BOARD

State House Annex
Concord, New Hampshire 03301
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APPEAL OF ELIZABETH B. DENNISON
N.H. Department of Transportation
Docket #89-T-24

Dated: February 1, 1990

The New Hampshire Personnel Appeals Board (McNicholas, Cushman and Johnson) met Wednesday, December 11, 1989 at 1:30 p.m. to hear the appeal of Elizabeth B. Dennison, a former employee of the Department of Transportation, who was terminated upon receipt of a third written warning for absenteeism and tardiness. Ms. Dennison was represented at the hearing by Attorney Bruce Friedman and Student Intern Bill Steimnetz of the Franklin Pierce Law Center. The State was represented by Assistant Attorney General Karen Levchuk.

Appellant, through her representatives, filed an amended, or amplified notice of appeal dated December 7, 1989, in which she alleged that she "was terminated, as stated in the third written warning/termination letter for excessive absenteeism. The appellant's absences were almost exclusively caused by a succession of illnesses that commenced prior to this employment ... and continued throughout this employment with chronic mononucleosis, chronic fatigue syndrome and a severe potassium deficiency." Further, Appellant argued that she should not have been terminated for excessive absenteeism or tardiness since none of the leave slips she submitted had been disapproved.

The State objected to the admission into evidence of physicians' statements which had not been made available to the appointing authority prior to the decision to terminate Ms. Dennison's employment. The Board overruled the objection, but indicated it would give those materials the weight the Board deemed appropriate during the course of its deliberations.

Appellant's counsel argued that the majority of Ms. Dennison's absences had been beyond her control, stemming from the condition of her health during the period of her employment with the Bureau of Materials and Research, Department of Transportation. Further, counsel argued that the Department of

Transportation had an affirmative obligation under the provisions of Per 308.03(4)(j) to offer Ms. Dennison the opportunity for demotion, transfer or reduction in hours to part-time in lieu of termination.

In her testimony before the Board, Ms. Dennison admitted that she had received complaints and had been counselled on numerous occasions about her attendance, but argued she had not been criticized about the quality of the work she produced, and had never been disciplined for poor work performance.

Ms. Dennison testified that during the period of October, 1988 through March, 1989, she had been diagnosed as suffering from chronic mononucleosis. According to Ms. Dennison, some days she felt well enough to go to work; other days she "just couldn't get up". She also testified that during the summer months she had begun taking diuretics for fluid retention and that this medication had resulted in a potassium deficiency which caused further fatigue.

With regard to her applications for leave, Ms. Dennison admitted that almost all of her leave requests, whether for annual leave, sick leave or leave without pay were submitted upon her return to work after each absence. She admitted that Bureau staff "weren't thrilled" about approving leave after the fact, but that they bureau always accepted and signed the leave slips. Ms. Dennison admitted she had received counselling concerning her continued absenteeism, and had received two letters of warning for absenteeism and tardiness from which no appeals were taken.

Ms. Dennison stated she was never notified of a possibility of converting to part-time work, and that the department never offered her that option. In many instances, the only available option appeared to be the taking of unpaid leave, although she could not afford to be in a no-pay status. She had not requested a reduction of her hours to part-time, stating that she needed the full-time income.

On cross-examination, Attorney Levchuk questioned the appellant concerning efforts made by staff in the Bureau of Materials and Research to assist Ms. Dennison in reducing her absenteeism. Ms. Dennison admitted that for a period of approximately one month, her immediate supervisor had called her every morning to be sure she was up and on her way to work. Her supervisor also offered to change her work hours to allow for an 8:30 a.m. to 4:30 p.m. schedule instead of 8:00 a.m. to 4:00 p.m. Ms. Dennison refused this offer, however, believing it unreasonable that she should stay until 4:30 p.m. since the office was officially closed at 4:00 p.m.

When asked why Ms. Dennison had never requested a second leave of absence without pay to allow her to fully recuperate, she answered that she "had to cope" and "had to earn some money."

Attorney Levchuk questioned the Appellant concerning the exacerbation of her fatigue by taking diuretics without the advice of her physician. Ms. Dennison testified that her physician had prescribed diuretics for her at some prior time, but admitted that her physician was unaware of her use of the diuretics when she was initially seen and treated for mononucleosis. The Board asked Appellant if all her problems with absenteeism and tardiness were because of medical problems. She responded, "The majority were".

State's witness Philip McIntyre, Administrator of the Bureau of Materials and Research, testified that Ms. Dennison began her employment with his bureau in March of 1988, having transferred in from another bureau within the Department of Transportation. Ms. Dennison was eligible for a salary increment on July 15, 1988, which Mr. McIntyre subsequently approved. While he believed the increment might not be warranted based upon her absenteeism, he felt she had not been with his bureau long enough for him to adequately evaluate her performance and recommend withholding of her increment. Mr. McIntyre testified that there were no real problems with Ms. Dennison's work when she was in the office, but that she was so frequently absent that the bureau could not count on the required work being completed.

In September 1988, Ms. Dennison did provide a letter from her doctor, as required by the bureau, which noted her current medical problems and the physician's concerns regarding her recovery. At that point, Ms. Dennison verbally requested and was granted a ten day leave of absence without pay. She requested no such leave subsequent to September, 1988.

Ms. Dennison was issued her first letter of warning for absenteeism and lateness on December 14, 1988. A second letter of warning for the same offenses was issued to Appellant on January 9, 1989. In spite of an offer by Ms. Dennison's supervisor to alter her work schedule to allow for better attendance, Ms. Dennison refused. On June 30, 1989, Mr. McIntyre withheld Ms. Dennison's annual increment, again on the basis of her continued absenteeism.

Mr. McIntyre testified that he virtually never pre-approved any leave for the appellant, and that her leave requests were always made after the fact. When questioned why he signed the leave slips to "approve" such absences, he explained that the payroll office needed some documentation of the employee's status for audit purposes. He believed that the issue of approval or denial was an academic question. Although he had counselled Ms. Dennison regarding the requirement for prior approval of annual leave and her continued practice of requesting leave after her absences, he believed he was obligated to "approve" such leave for payroll/auditing purposes.

When asked if it would have been possible to reduce Ms. Dennison's hours of work to a twenty hour schedule, Mr. McIntyre said that would have been impossible. He stated that the position was funded as a full-time, class 10 position, and that the amount of work assigned to that position could not under any circumstances provide for any reduction in hours from full to part-time because his section depended heavily upon those word processing functions. When Ms. Dennison was absent, it was necessary to look to another full-time employee from another floor in the bureau to cover and take over her assignments.

The Board found that Ms. Dennison was not terminated for being "of such physical condition as to make it impossible for [her] to satisfactorily perform [her] work assignments" [See Per 308.03 (4)]. Therefore, the appointing authority was under no obligation to transfer or demote her to "a type of employment the employee can perform". Both parties concurred that Appellant's performance was not at issue. The sole issue resulting in Ms. Dennison's termination was her continued absenteeism and tardiness. Appellant provided no evidence that transfer or demotion would have improved her attendance. This finding is supported by Appellant's own statement that "[she] should have been offered a transfer to a department or classification that could tolerate her good faith absences; offered a 'demotion' to part-time status; or given an extended leave of absence without prejudice". Based upon the foregoing, it would be unreasonable for the Board to rule that the Appointing Authority was under any obligation to transfer or demote in lieu of discharge under the provisions of Per 308.03(4)(j).

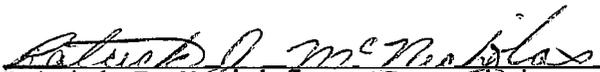
Upon review of the leave slips submitted by the parties, the Board determined that only 53 of the 649.5 hours of paid and unpaid leave utilized by Appellant between April 1, 1988 and September 8, 1989, listed "mono" as the reason for the absence. None cited fatigue. The majority of those for which any excuse was given at all listed "upset stomach" as the reason for incapacitation. Only 117.5 of the 649.5 hours were requested in advance, including only 6 days of pre-approved leave during the last nine months of employment.

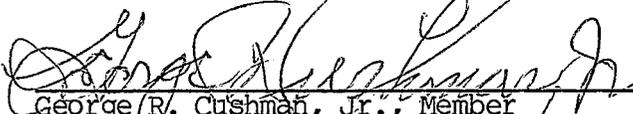
Further review of Ms. Dennison's leave records indicate that her attendance improved dramatically, although briefly, following the issuance of warnings from the Bureau of Materials and Research. The most dramatic improvement occurred immediately after notification that her annual increment was being withheld. It is during this period (July and August 1989) that Ms. Dennison supposedly was suffering from a severe potassium deficiency resulting in extreme fatigue. Ms. Dennison's testimony is directly contradicted by her attendance records,, which indicates that her only absence during the month of July was one day of pre-approved annual leave on July 3, 1989.

Finally, the Board in weighing the evidence presented, specifically the physicians' notes to which the Department of Transportation had earlier objected, the Board found these documents of little value in supporting Ms. Dennison's appeal. Had Ms. Dennison believed these letters to be the conclusive proof that she was making a good faith effort to seek effective medical treatment and improve her attendance, it would be reasonable to believe she would have made this correspondence immediately available to the Appointing Authority. She did not.

Based upon the evidence before it, the Board found that the Department of Transportation, Bureau of Materials and Research, was justified in its decision to discharge Elizabeth Dennison upon issuance of a third written warning for lateness and absenteeism. Accordingly, the Board voted unanimously to deny Ms. Dennison's appeal.

THE PERSONNEL APPEALS BOARD


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Robert J. Johnson, Member

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