

State of New Hampshire



PERSONNEL APPEALS BOARD
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Concord, New Hampshire 03301
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Martin Kelly

Docket #98-T-19

Department of Transportation

September 2, 1998

The New Hampshire Personnel Appeals Board (Bennett, Johnson and Barry) met on Wednesday, June 10, 1998, under the authority of RSA 21-I:58, to hear the appeal of Martin Kelly, a former employee of the Department of Transportation. Mr. Kelly was appealing his February 4, 1998, termination from employment as a Highway Maintainer I on charges of willful insubordination arising out of his continued late arrival for work, refusal to stay at work when requested, and failure to comply with proper procedures concerning attendance and leave.

Assistant Attorney General Kathryn Bradley appeared for the State. Michael Reynolds, SEA General Counsel, appeared for the appellant. Mr. Kelly failed to appear for the hearing as scheduled. Therefore, as the appellant was not available to be called to testify, the Board permitted the parties to proceed on offers of proof.

State's Offers of Proof

Mr. Janelle would testify that on October 23, 1997, Mr. Kelly left the worksite for lunch, returning after 1:00 p.m. When he did return, he announced that he was taking the rest of the afternoon off, even though he had not requested or received approval for leave. Mr. Janelle would testify that over the next five to six weeks, Mr. Kelly repeatedly failed to appear for work as scheduled, and failed to call or notify supervisory personnel of the reason(s) for his absence. Mr. Janelle would testify that Mr. Kelly was absent without approval or proper

notification on the following dates: October 27, 1997, October 29, 1997, October 30, 1997, November 3, 1997, November 10, 1997, November 12 - 14, 1997, and November 18 - 19, 1997. Mr. Janelle would testify that Mr. Kelly received approval for, a leave of absence without pay for the period of November 20, 1997 through December 10, 1997, and that on his first day back at work, Mr. Kelly arrived late. Mr. Janelle and Pamela Mitchell, Assistant District Engineer, would testify that they counseled Mr. Kelly about his attendance, and warned him that the Department would not tolerate his being absent without approval or proper notification. On December 11, 1997, Mr. Kelly received an Optional Dismissal Letter of Warning for absence for a period of three or more consecutive working days without proper notification or adequate reason. Mr. Janelle would testify that Mr. Kelly's shift normally ended at 3:30 p.m. However, on December 23, 1997, because there was a snowstorm in progress, the crew was expected to stay to plow. Mr. Kelly, who had asked to leave work at 4:00 p.m., was permitted to take an hour off, but was expected back at 5:00 p.m. He did not report back to work.

Mr. Janelle would testify that on January 14, 1998, Mr. Kelly was absent without prior approval for two hours while he went to court. Ms. Mitchell would testify that on Friday, January 16, 1998, she warned Mr. Kelly that he was expected to work overtime during snowstorms. However, that afternoon at 3:30 p.m., Mr. Kelly told his foreman that he was going home, and that he would not come in to work during the weekend.

At a pre-disciplinary meeting with HR Administrator Frances Buczynski, District Engineer Hiram Morrill, Assistant District Engineer Pamela Mitchell and Patrol Foreman Richard Janelle, Mr. Kelly stated that he was suffering from stress and was under a doctor's care. He produced a note from a physician recommending elimination of Mr. Kelly's over-time assignments as a way to reduce the stress. Prior to the January 22nd meeting, Mr. Kelly had not claimed that was suffering from stress or that he was unable to work over-time hours. Ms. Mitchell would testify that during the two month period preceding his termination, Mr. Kelly had worked roughly 20 hours of over-time, whereas each of the other members of the crew had worked between 120 and 157 ½ hours of over-time.

Appellant's Offers of Proof

Mr. Kelly would testify that on September 15, 1997, he and his supervisor, Mr. Janelle, had a physical altercation. He filed charges of criminal assault against Mr. Janelle, who then filed assault charges against Mr. Kelly. Mr. Kelly would testify that prior to his December 11, 1997, written warning, he had good performance evaluations. Mr. Kelly also would testify that although he did not appeal the December 11, 1997, written warning, he did not agree with it and did not believe the conduct cited was sufficient for a warning under the Optional Dismissal provisions of the Personnel Rules.

Mr. Kelly would testify that on December 23, 1997, he did have permission to leave work. He was unable to return to work because he felt ill. He also would testify that the employer never asked him to have a physician or licensed health care practitioner certify his absences due to illness, nor did they arrange for him to have him examined by a physician of their choosing.

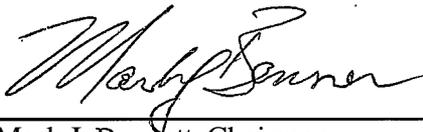
Mr. Kelly would testify that Mr. Janelle knew where Mr. Kelly was on January 14, 1998, since the absence was for a court appearance involving the physical altercation between Mr. Janelle and himself. He also would testify that he was never directly ordered to stay to work overtime, and that his physician didn't want him working overtime..

Mr. Kelley would testify that Assistant District Engineer Pamela Mitchell knew that Mr. Kelly was taking medication for stress. He would testify that he was leaving the workplace because he reasonably believed he was ill. He argued that the Department could not have disciplined him for refusing to work overtime when, in fact, he was leaving the work place because he was ill.

Ms. Bradley argued that when the Department issued its December 11, 1997, Optional Dismissal Warning to Mr. Kelly, it was perfectly clear that failure to take corrective action would result in his immediate dismissal. Mr. Reynolds argued that none of the appellant's alleged offenses rose to the level of an allowable immediate termination, and that the termination was unjust under the circumstances.

On the offers of proof by the representatives of the parties, it appears there is a sufficient basis to support the agency's action. The parties agree that Mr. Kelly had due notice of the scheduled hearing. Although his own representative had listed Mr. Kelly as a witness, the appellant failed to appear as scheduled. The appellant failed to notify the Board, the department or his own counsel that he would not attend the hearing. Therefore, it appears that Mr. Kelly abandoned his appeal. Accordingly, the Board voted unanimously to deny his appeal. Upon receipt of a properly filed Motion for Rehearing, the Board will reconsider its decision and, for good cause shown, may grant a further hearing to receive evidence on the merits of Mr. Kelly's appeal.

THE PERSONNEL APPEALS BOARD



Mark J. Bennett, Chairman



Robert J. Johnson, Commissioner



James J. Barry, Commissioner

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