

State of New Hampshire



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

Appeal of Patricia Knight

Docket #2006-T-021

Department of Transportation

January 31, 2007

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The New Hampshire Personnel Appeals Board (Bonafide, Johnson and Casey) met in public session on Wednesday, January 17, 2007, 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 Patricia Knight, a former employee of the Department of Transportation. Ms. Knight, who was represented at the hearing by SEA General Counsel Michael Reynolds, was appealing her May 12, 2006 termination from employment as a Toll Attendant upon her receipt of a third written warning for the same offense within a period of five years. Assistant Attorney General Lynmarie Cusack appeared on behalf of the State.

The record of the hearing in this matter consists of pleadings submitted by the parties, notices issued by the Board, and documents admitted into evidence' as follows:

Joint Stipulation 1, signed by attorneys for the parties

State's Exhibit 1 (138 pages from the appellant's personnel records)

Appellant's Exhibit A (26 pages of personnel and medical records)

The parties asked that the Board also take into consideration the provisions of RSA 281 concerning the Appellant's rights under the workers Compensation Act. The Board also reviewed pertinent sections of the NH Code of Administrative Rules adopted by the

Department of Labor relative to Workers Compensation, particularly as related to temporary alternative duty assignments.

The following persons gave sworn testimony:

Harvey Goodwin, Administrator, Bureau of Turnpikes
Jonathan Hanson, Assistant Administrator, Bureau of Turnpikes
Alexis Martin, Program Specialist III, Department of Transportation
Clinton Courtway, friend of the Appellant
Patricia Knight, Appellant

Position of the parties:

Assistant Attorney General Cusack argued that in order to prevail in her appeal, the Appellant must prove that her termination from employment was unlawful, that it violated the rules of the Division of Personnel, that it was unwarranted by the facts in evidence, or that it was unjust. Ms. Cusack argued that the Appellant could not meet that burden, as the facts supported the discipline taken. She argued that there were three distinct reasons for termination: a third written warning for the same offense within a period of five years, unauthorized absence for 3 or more consecutive work days, and refusal to accept a duty assignment.

Attorney Reynolds argued that while the Appellant had the burden of persuasion and State had burden of production, the State also had the burden of proving all the operative facts underlying the decision to dismiss the Appellant. Attorney Reynolds argued that the Department of Transportation did not understand its obligations under the Workers Compensation Act, particularly in that the Department could not simply put the burden on its insurance carrier to assist the Appellant in returning to work following a workplace injury. Attorney Reynolds argued that the Department of Transportation could not prove enough facts to support any of the charges against the Appellant, and that overall, under the provisions of RSA 21-I:58, I, termination was unjust and should not have occurred.

Findings:

The parties entered the following joint stipulation of facts:

1. On March 14, 1997, Ms. Knight was hired as a part-time Toll Attendant I with the NH Department of Transportation (DOT).
2. On March 21, 2003, Ms. Knight became a full-time Toll Attendant I with DOT.
3. Ms. Knight sustained both right and left carpal tunnel syndrome (CTS) which were both accepted as work-related injuries from her DOT job, with official dates of injury of August 1, 2005 and August 22, 2005 respectively.
4. Ms. Knight was taken out of work by her treating physician on August 1, 2005, because of the CTS, and began receiving total temporary disability workers' compensation benefits.
5. On November 16, 2005, Dr. Tran, a treating physiatrist, released Ms. Knight to Temporary Alternative Duty (TAD) with a four-hour per day, five day per week work capacity, three-pound lifting capacity, and a fifteen-minute driving limitation.
6. Ms. Knight was terminated from employment on May 12, 2006.

After carefully considering the evidence and argument offered by the parties, the Board found that there were few material facts in dispute. The Board made additional findings as follows:

7. On December 7, 2005, Elaine Belisle-LaPointe spoke to Ms. Knight by telephone. Ms. Belisle-LaPointe informed Ms. Knight that the Department had received approval for a Temporary Alternative Duty (TAD) assignment for Ms. Knight, and that Ms. Knight would be expected to return to work at the Hampton Toll Plaza on December 9, 2007.
8. Ms. Knight responded that she did not believe her doctor would allow her to return to work because of back pain that she was suffering from a reportedly non-work related injury.

9. By letter dated December 7, 2005, (State's Exhibit 1, page 11) Alexis Martin, Workers Compensation Specialist for the Department of Transportation informed Ms. Knight that:
 - a. On November 16, 2005, the Department of Transportation had received a modified work release from Ms. Knight's treating physician, immediately releasing Ms. Knight to Temporary Alternative Duty at the Hampton Toll Office;
 - b. In a telephone conversation between Ms. Knight and Station Supervisor Elaine Belisle-LaPointe on December 7, 2005, Ms. Knight was instructed to report to work in the Temporary Alternative Duty assignment on December 9, 2005;
 - c. Ms. Knight had refused that assignment; and
 - d. Ms. Martin would be notifying Ms. Knight's appointing authority that Ms. Knight had refused the Temporary Alternative Duty assignment.
10. Ms. Knight did not report for work as scheduled on December 9, 2005.
11. By letter dated December 9, 2005, Ms. Knight's attorney wrote to Ms. Martin challenging the appropriateness of the Temporary Alternative Duty assignment, questioning whether or not the Department was actually offering Ms. Knight a permanent assignment within her medical restrictions, whether or not the department intended to comply with Ms. Knight's medical restrictions, and whether or not the employer or workers' compensation carrier was willing to provide Ms. Knight with transportation to and from the workplace since Ms. Knight could only drive occasionally.
12. By letter dated December 13, 2005, Assistant Bureau Administrator Hanson informed Ms. Knight that she had been absent from work for 3 or more consecutive workdays without proper notification or adequate reason, and was subject to dismissal. Mr. Hanson advised Ms. Knight that she needed to contact Mr. Hanson and have "medical provider documentation faxed to [him] by 3:00 p.m. on December 19, 2005," or face disciplinary action up to and including termination from employment.

13. On December 19,2005, Ms. Knight faxed a letter to Mr. Hanson telling him that she disagreed that she had been absent without proper notification or adequate reason. She wrote, "DOT has received adequate notification of my medical condition, limitations, etc. Why has nobody responded to the questions and information provided thru my attorney last week? You have received clear notice that I am permanently disabled from my toll attendant job. Now it is workers comp Ins. Company's responsibility to work with me in vocational rehabilitation, to get me a new job or career I can medically do. TAD is not supposed to replace VR. If you have a permanent position for me, please let me know. Otherwise, have Liberty Mutual contact me about VR."
14. Neither Ms. Knight's December 19,2005 fax nor her attorney's December 9, 2005 letter qualify as "medical provider documentation" as Mr. Hanson had requested, nor do they substantiate Ms. Knight's claim that she was permanently disabled from her job as a Toll Attendant or that she was entitled to vocational rehabilitation services at the time.
15. While Ms. Knight's December 19,2005 fax to Mr. Hanson did not use the phrase "refuse a job assignment," Ms. Knight's instructions to the Department to direct Liberty Mutual to contact her about vocational rehabilitation services unless the department had a permanent position for her constitutes refusal to accept the temporary alternative duty assignment that had been offered, and for which Ms. Knight had received clearance from her medical providers.
16. By letter dated December 21,2005, Stella Bancroft, RN (Nurse Case Manager for Liberty Mutual, the State's Workers' Compensation Administrator) wrote to Seacoast Area Physiatry asking for information about Ms. Knight's ability to return to work in a light duty capacity outlined in the TAD description. Ms. Knight's doctor replied on January 4,2006 that Ms. Knight would be unable to empty trash, had a maximum lifting limit of 3 pounds, and could not engage in repetitive use of either arm, but could work 4 hours a day, 5 days a week.
17. In a letter dated December 22,2005 addressed to Attorney Reynolds, Frances Buczynski, DOT Administrator of Human Resources, indicated that:

- a. Ms. Knight's medical records showed she had been released for modified work duties in a part-time capacity;
- b. A Temporary Alternative Duty assignment was appropriate, as Ms. Knight had not yet reached maximum medical improvement;
- c. The Department had every intention of complying with the medical restrictions imposed by Ms. Knight's medical providers;
- d. Although driving was not one of Ms. Knight's work responsibilities, she had been cleared for "occasional" driving; and
- e. The Department was not under any obligation to provide any employee with transportation to and from work.
- f. Ms. Buczynski wrote, "The Department has offered Ms. Knight meaningful work, which she has declined. From our perspective, it appears that Ms. Knight has refused to accept work for which she had been medically cleared and that she has been absent for a period of three or more consecutive workdays without proper notification or adequate reason." [State's Exhibit 1, page 18]

18. By letter dated April 7, 2006, Bureau Administrator Harvey Goodwin notified the appellant that a predisciplinary meeting had been scheduled for April 19, 2006, to discuss possible disciplinary action up to, and including, dismissing Ms. Knight from her employment for failure to meet any work standard, unauthorized absences from work and refusal to accept a job assignment.
19. As late as April 13, 2006, Ms. Knight's medical providers continued to authorize her release to light duty four hours per day, five days per week in the Temporary Alternative Duty assignment created by the Department of Transportation
20. On April 18, 2006, Ms. Knight responded to Mr. Goodwin's letter by fax, informing him that she would need transportation to attend the April 19th predisciplinary meeting, or the meeting could be conducted by telephone. In her fax, Ms. Knight wrote: "I have always been willing to do work within my medical restrictions but, the last time DOT communicated with me on this, they proposed many tasks that were obviously beyond my limitations. I think it is reasonable for DOT to tell me what the job and all its tasks would be before I

show up. Furthermore, as you can see, I cannot drive for more than 15 minutes. It will take me over an hour ½ to get to work. No transportation was provided or offered by anyone. I have communicated regularly about my medical limitations. I'm also sending you a recent copy of my medical form. If you provide me with a job that spells out all work within all my medical limitations, and somebody can provide me with some reasonable transportation, I will come to work..." [State's Exhibit 1, page 72]

21. The Independent Medical Assessment performed by Dr. Boucher on April 18, 2006, concluded that, "There is no objective reason for any physical restrictions at this time other than those imposed by the examinee's stature."
22. In a letter dated April 24, 2006 addressed to Mr. Goodwin, Attorney Reynolds wrote:
 - a. "It does seem that a good faith effort would require the employer or the carrier to more specifically describe to the doctor and to Ms. Knight the actual planned tasks."
 - b. "I know that, in writing, DOT has said essentially, getting to work is your problem, not ours. However, in our phone discussion last week, you and Mr. Hanson seemed certain that Ms. Knight had been offered transportation and had declined it.... When you thought that was the reality, you put some relevance on it. Now, I believe, we all realize Ms. Knight has never been offered transportation. It seemed relevant when you thought Ms. Knight had lied to us when she said no such offer had been made. I do think it is relevant now. The driving limitation realistically means that Ms. Knight needs a ride to work. As I believe Ms. Knight has affirmed, if she were to be provided transportation every day, and were provided with a position that truly complies with all her limitations (keeping in mind that they are maximums, the need for frequent changes, etc.), she would attempt it."
23. Ms. Knight was notified by letter dated May 12, 2006, that she was being dismissed from her employment for three separate offenses:
 - a. Refusal to accept a job assignment;

- b. Absence for a period of three or more consecutive work days without proper notification or adequate reason; and
 - c. Receipt of a third written warning for the same offense within a five year period of time.
24. Although Ms. Knight's performance evaluations during her tenure as a Toll Attendant I were rated as "meeting expectations" overall, there were concerns raised about her performance, including issues related to absenteeism, unsatisfactory leave tracking, and inappropriate communications with co-workers and motorists.
25. On August 6, 2004 and April 8, 2005, Ms. Knight received written warnings for "failure to meet any work standard." Ms. Knight did not appeal either warning to the Board. The May 12, 2006 letter of termination issued to Ms. Knight was also listed as a written warning for "failure to meet any work standard" as evidenced by her continued unauthorized absences from work.

Rulings of Law

- A. Former Per 1001.08 (a)(6) (eff. 4/21/98 – 10/18/2006) provides for the immediate dismissal of an employee without prior warning for refusing to accept a job assignment.
- B. Former Per 1001.08 (a)(11) (eff. 4/21/98 – 10/18/2006) provides for the immediate dismissal of an employee without prior warning for being absent for a period of 3 or more consecutive workdays without proper notification or adequate reason.
- C. "Failure to meet any work standard" is one of several offenses for which an appointing authority is authorized to discipline an employee by issuance of a written warning. [Per 1001.03 (a)(1), eff. 4/21/98 – 10/18/2006] An employee who receives three or more warnings for failure to meet any work standard within a five-year period of time is subject to dismissal under the provisions of Per 1001.08 (b).
- D. Ms. Knight received written warnings for "failure to meet any work standard" on August 6, 2004 and April 8, 2005. Absent any evidence that either warning was

appealed to this Board, those warnings remain a part of the appellant's personnel file and are valid as a basis for further discipline as described by Chapter Per 1000 of the NH Code of Administrative Rules. Ms. Knight received a third written⁵ warning on May 12, 2006, for failure to meet any work standard based on her continued, unauthorized absences from work.

- E. The Appellant failed to provide any evidence that the employer had an obligation under the provisions of RSA 281-A to provide her with transportation to and from work if she was unable to drive, and the Board found nothing in the law or the Department of Labor's Administrative Rules, Chapter Lab 500, to support that position in light of the facts in evidence.
- F. Although the Appellant argued that she was entitled to vocational rehabilitation services under the provisions of RSA 281-A, and should not have been required to report for an approved Temporary Alternative Duty assignment, the Board found nothing in the law or corresponding administrative rules, Chapter Lab 500, to support that position in light of the facts in evidence.
- G. Lab 504.04 (b) describes temporary alternative work as "limited and transitional in nature." According to the rule, "...transitional means the duty elements are variable as the employee's work capacity increases." Lab 504.04 (g) states, "The employer shall offer a position as approved by the treating physician and the employee shall demonstrate a reasonable effort to comply."
- H. In light of the treating physician's clearance for Ms. Knight to return to work under the terms of the Temporary Alternative Duty assignment, it was clearly unreasonable and contrary to the apparent intent of Lab 504 for Ms. Knight to demand that the Department of Transportation "...provide [her] with a job that spells out all work within all [her] medical limitations" before she would return to work or make any reasonable effort to comply.
- I. Lab 504.04 (f) states, "The employer shall provide the treating physician with the appropriate outline of the present position with an essential task analysis as soon as possible after the injury occurs if lost time or restrictions are involved. The employer and employee shall have a joint responsibility to obtain needed medical

information that will enable the employee to gradually increase their duties to bring the employee back to their original position."

- J. RSA 21-I:58, I states, in pertinent part: "If the personnel appeals board finds that the action complained of was taken by the appointing authority for any reason related to politics, religion, age, sex, race, color, ethnic background, marital status, or disabling condition, or on account of the person's sexual orientation, or was taken in violation of a statute or of rules adopted by the director, the employee shall be reinstated to the employee's former position or a position of like seniority, status, and pay... 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."

Decision and Order

The facts in evidence and the Rules of the Division of Personnel support the Department of Transportation's decision to dismiss the Appellant for refusing a job assignment and remaining out of work for three or more consecutive workdays (August 2005 to May 2006) without proper notice or adequate reason after she was cleared medically return to a temporary alternative duty assignment.

Although the Appellant argued that the Department of Transportation had an obligation to further investigate her claims that she was medically unable to work, and personally discuss her medical restrictions with the various medical providers, the Board found that the Department acted in good faith on the information that it received. The evidence reflects that the Department of Transportation, through its Workers Compensation Agent and Liberty Mutual, took the necessary steps to determine which duties the Appellant could be expected to perform. The resulting Temporary Alternative Duty assignment clearly limited the number of hours the Appellant could work, restricted the amount of weight she could lift or carry, required her to be able to change positions frequently, and prohibited any repetitive arm movements. The Department reasonably relied on those restrictions, as the Appellant's medical providers had developed them based on their

professional assessment of her. If the Appellant believed that the information was inaccurate or incomplete, she had an obligation under the provisions of Lab 504.04 (f) to assist in obtaining appropriate documentation. Otherwise, the Appellant should have made a good faith effort to return to work. The Appellant's refusal to report for work that had been authorized by her treating physician(s) did not impose any obligations upon the Department to seek out information that would support the Appellant's refusal or contradict the medical providers' assessments.

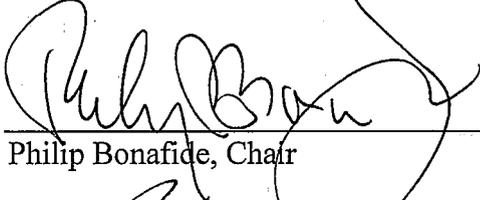
There was no evidence offered to support the Appellant's position that she should be excused from working unless the Department of Transportation and/or Liberty Mutual provided her with transportation to and from work. The Appellant's job did not require her to drive as part of her regular duty assignments. As such, it was not the employer's responsibility or the insurance agent's responsibility to arrange for what the Appellant described as "reasonable transportation" to commute to and from work.

Former Per 1001.08 (c) provides that an appointing authority may not dismiss an employee until the appointing authority offers to meet with the employee to discuss whatever evidence the appointing authority believes supports the decision to dismiss the employee, and offers an opportunity for the employee to refute that evidence. In his closing, Attorney Reynolds argued that the Appellant was entitled to reinstatement as a matter of law, because in dismissing the Appellant, the Department of Transportation failed to disclose that Mr. Goodwin had spoken with Alexis Martin about a conversation Ms. Martin had with Stella Bancroft, a nurse case manager for Liberty Mutual, about Ms. Knight's driving restrictions. The Board does not agree. The Department's position on its obligations to provide transportation was clearly outlined in the letter from Ms. Buczynski to Attorney Reynolds. Whether or not Ms. Knight was able to drive to work was clearly discussed at the meeting. Mr. Hanson believed that Ms. Knight had been offered transportation to and from work, and told Ms. Knight to be truthful with her attorney about the offer. Attorney Reynolds wrote to Mr. Goodwin on April 24, 2006, advising him that no one had offered transportation to the Appellant. Mr. Goodwin's conclusions about the transportation issue are reflected in the May 12, 2006 letter of

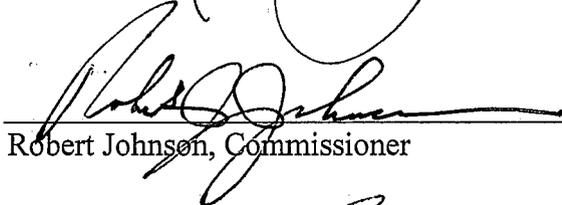
termination in which he stated, "Attorney Reynolds continued to question the issue of transportation, but again, failed to provide medical documentation of [Ms. Knight's] inability to drive." [State's Exhibit 1, page 4] Mr. Goodwin wrote, "I have considered information from you and Attorney Reynolds, submitted to refute the evidence I presented. After considering the information you provided, I have decided to dismiss you from employment effective on May 12, 2006."

On a preponderance of the evidence, the Board found that the Department of Transportation was authorized to dismiss the Appellant without prior warning for refusal to accept a job assignment and absence for a period of three or more consecutive workdays without proper notification or adequate reason. Accordingly, the Board voted unanimously to DENY the appeal and uphold Ms. Knight's termination from employment.

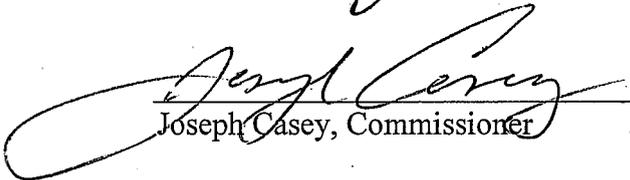
THE PERSONNEL APPEALS BOARD



Philip Bonafide, Chair



Robert Johnson, Commissioner



Joseph Casey, Commissioner

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State of New Hampshire



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Appeal of Patricia Knight

Docket #2006-T-021

Department of Transportation

*Decision on Appellant's Motion for Reconsideration/Rehearing
and on State's Objection to Motion for Reconsideration/Rehearing*

May 18,2007

On February 23,2007, the Personnel Appeals Board received the Appellant's Motion for Reconsideration of the Board's January 31,2007 decision denying the appeal of Patricia Knight. The State's Objection was received by letter dated April 2,2005.'

Per-A 208.03 (b) of the Board's rules provides that a motion for reconsideration and rehearing "...shall set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable" and that "A motion for rehearing in a case subject to appeal under RSA 541 shall be granted if it demonstrates that the board's decision is unlawful, unjust or unreasonable." [Per-A 208.03 (e)]

In reviewing the Motion, the Board found that the arguments raised by the Appellant in support of the request for reconsideration are essentially the same arguments raised by the Appellant in pleadings submitted prior to the hearing as well and in arguments offered during the hearing on the merits of the appeal. While it is clear that the Appellant disagrees with the Board's findings and rulings, that disagreement does not provide good cause to conclude that the Board's findings and rulings are unlawful or unreasonable.

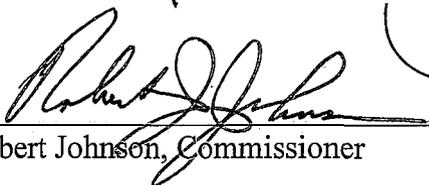
¹ Through apparent error, a copy of the Appellant's Motion was not provided to the State. Upon discovery that the Appellant had filed such a Motion, the State provided an immediate response and Objection.

Having reviewed the Appellant's arguments in support of the Motion for Reconsideration/Rehearing, as well as the arguments raised by the State in its Objection, the Board found that the Appellant has not shown good cause why the Board should now reconsider its decision and reverse or modify its January 31, 2007 decision DENYING Ms. Knight's appeal. Accordingly, the Board voted unanimously to DENY Ms. Knight's Motion for Reconsideration/Rehearing.

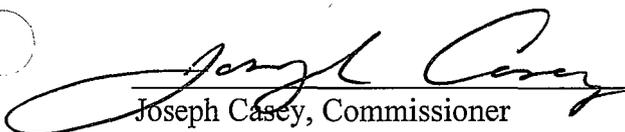
THE PERSONNEL APPEALS BOARD



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