

# State of New Hampshire



**PERSONNEL APPEALS BOARD**  
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## **APPEAL OF BONNIE LECLAIR**

**New Hampshire Department of Safety - Division of Motor Vehicles**

Docket #96-T-24

August 21, 1996

The New Hampshire Personnel Appeals Board (Bennett, Johnson and Rule) met Wednesday, May 1, 1996, under *the* authority of RSA 21-I:58, to hear the appeal of Bonnie LeClair, a former employee of the Department of Safety. Ms. LeClair, who originally had filed her appeal *pro se*, was represented at the hearing by Attorney William Briggs. Attorney Clarence E. Bourassa appeared on behalf of the Department of Safety. Ms. LeClair was appealing her February 23, 1996, termination from employment as probationary Counter Clerk in the Rochester Office of the Division Of Motor Vehicles for allegedly failing to meet the work standard as a result of excessive absenteeism.

In her original request for a hearing to **appeal** her termination, Ms. LeClair asserted that all of her absences from work had been approved and that neither she nor her supervisors had been informed that the Division of Motor Vehicles considered her absences to be excessive. At the hearing on the merits of Ms. LeClair's appeal, Mr. Briggs argued that the appellant had requested and received approval for all her leaves. He argued that the Department of Safety had every opportunity to deny Ms. LeClair's requests for leave, but elected instead to approve them. He said that employees have a right to know the standard against which their performance is being judged, and that a termination for failing to meet a work standard which was never articulated constituted an arbitrary action on the Department's part.

Mr. Bourassa argued that as a probationary employee, Ms. LeClair had the burden of proving to her employers that she should be allowed to earn permanent status. He said that probationary employees are subject to close scrutiny, and that they have an obligation to demonstrate their suitability for the position to which they are seeking permanent appointment. Mr. Bourassa argued that the most basic requirement of any job is to come to work, and that Ms. LeClair demonstrated a lack of dependability by missing more than 90 hours of work in her first nine months of full-time employment. He argued that counseling or warning probationary employees would frustrate the very purpose of the probationary period, particularly in terms of an employee's dependability. He argued that if an employee didn't understand the importance of good attendance at work, that person should not earn permanent status.

In lieu of presenting the testimony of Ms. LeClair, her supervisor Lauren Flanders, and her administrator, Arthur Garlow, the parties agreed to present the appeal on oral argument, offers of proof and documentary evidence. The parties also jointly offered the following stipulation of facts:

1. All of Ms. LeClair's leaves were recommended and approved.
2. Ms. LeClair's leaves were requested in accordance with accepted office and departmental procedures.
3. Ms. LeClair was a good employee.

After reviewing the documentary evidence and considering the parties' oral argument and offers of proof, the Board made additional findings of fact as follows:

#### Findings of Fact

1. Ms. LeClair had been employed as a part-time Counter Clerk at the Rochester DMV substation between 1988 and her probationary, full-time appointment in May, 1995.
2. Through the course of her seven years of part-time employment, Ms. LeClair had an opportunity to see how other employees requested and received approval for leave.

3. After Ms. LeClair's termination from employment for excessive absenteeism, the Division of Motor Vehicles published written attendance and absenteeism standards. No such standards were available to Ms. LeClair prior to, or at the time of, her termination.
4. The Application for Leave forms which Ms. LeClair used to request leave provide spaces for the "Immediate Supervisor" to either recommend or not recommend the requested leave time. The forms provide spaces for the "Officer Authorized to Approve Leave" to either approve or not approve the requested leave. Finally, the forms provide spaces where the authorized officer or appointing authority may note that the use of leave was unauthorized, as well as space to approve or disapprove payment for the unauthorized use of leave. That space provides a place for a signature to be affixed for audit purposes only.
5. None of the appellant's leave requests were marked "Unauthorized Use of Leave."
6. All of the appellant's leave requests, including those which were submitted after the leave was actually taken, were recommended, approved and signed by Ms. LeClair's supervisors.
7. At no time prior to her termination from employment was Ms. LeClair advised, either orally or in writing, that her use of leave was excessive or that continued absenteeism would result in her termination from employment.

### Rulings of Law

1. Per 1001.02 (a) of the Rules of the Division of Personnel provides, "At any time during the initial probationary period an appointing authority may dismiss an employee who fails to meet the work standard provided the dismissal is not: arbitrary, illegal, capricious, or made in bad faith."
2. Per 1001.03 (a) of the Rules of the Division of Personnel provides that an appointing authority shall be authorized to use the written warning as the least severe form of discipline to correct an employee's unsatisfactory work performance for offenses including, but not limited to failing to meet the work standard, being absent without approved leave or proper notification, and excessive unscheduled absences.

3. Per 801.06 (a) of the Rules of the Division of Personnel provides that an appointing authority shall be responsible for conducting at least one evaluation per year for each full-time classified employee pursuant to RSA 21-I:42, XIII. Per 801.06(b)(2) also provides that appointing authorities shall be responsible to conduct more frequent evaluations for reasons including, but not limited to, evaluating the performance of probationary employees under Per 801.07.
4. Per 801.07 (a) states that an appointing authority shall evaluate the performance of any probationary employee at least one month prior to the expiration of the probationary period.

### Decision and Order

While there is no dispute that dependability and acceptable attendance at work are two of the most basic requirements for permanent appointment to any position, none of the evidence or offers of proof demonstrated that Ms. LeClair had any reason to believe that her record of attendance, was unacceptable. There was no evidence that Ms. LeClair was advised that her leave usage, whether scheduled or unscheduled, was excessive or that her absences constituted a failure to meet the work standard. While the Board believes that an employer should have a reasonable opportunity to monitor a probationary employee's work performance, and remove those employees who fail to meet the work standard, the Board also believes that employees should have reasonable notice of what work standards must be met in order to attain permanent status.

Chapter Per 800 defines the appointing authority's responsibility for providing regular and timely evaluations of an employee's work performance. The record reflects that Ms. LeClair was dismissed from her employment approximately three months prior to the scheduled completion of her probationary period. As such, the provisions of Per 801.07 may not appear to be entirely applicable. However, considering Chapter Per 800 in its entirety, particularly Per 801.06 (b)(2), the Board believes that employees serving their initial probationary period are entitled to some notice prior to termination that their performance, including their attendance, is unacceptable, so as to have some opportunity to meet the work standard. There is no evidence to suggest that Ms. LeClair would not have improved her attendance if she had been apprised that her absences were excessive.

LeClair would not have improved her attendance had she been apprised that her absences were excessive.

The record reflects that Ms. LeClair's work as a part-time employee with the Division of Motor Vehicles was considered acceptable enough to earn her a promotion to full-time status. After appointing her to a full-time probationary position, if the appointing authority had different expectations from those she had come to understand in the previous seven years as a part-time employee, the employer had some obligation to apprise her of those expectations.

The DMV's adoption of attendance standards after the date of Ms. LeClair's termination supports the appellant's claim that any attendance and leave standards were poorly defined at best. It would be unreasonable for the Board to find that the appellant should have known intuitively that her use of leave was excessive, or that her attendance failed to meet the work standard when all of her requests for leave were recommended by her supervisor and approved by her administrator.

After considering the evidence, oral argument and offers of proof, the Board found that Ms. LeClair should not have been dismissed for failure to meet the work standard. As a matter of practice, the Board is always reluctant to reverse an agency's decision to dismiss a probationary employee, and the Board normally gives great deference to agencies in matters such as this. However, in this case the Board found that justice and equity require that Ms. LeClair be provided another opportunity to demonstrate that she is able to meet the work standard and earn appointment to a permanent position.

The Board might agree that Ms. LeClair's attendance record was unacceptable. However, the appointing authority failed to provide the appellant any indication that by requesting, and receiving approval for leave, she was not meeting the work standard. As such, the appointing authority failed to offer the appellant a meaningful opportunity to demonstrate her ability to do so.

Accordingly, the Board voted unanimously to reinstate Ms. LeClair to her position as a Counter Clerk II. Her reinstatement shall be made without benefit of back pay or accrual of leave, and she shall be required to complete a new probationary period.

The appellant shall be reinstated within 30 days of the date of this order, at a time which is which is mutually agreeable to the appellant and the agency.

THE NEW HAMPSHIRE PERSONNEL APPEALS BOARD



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Mark J. Bennett, Acting Chairman



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Robert J. Johnson, Commissioner



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Lisa A. Rule, Commissioner

cc: Virginia A. Lamberton, Director of Personnel

Clarence E. Bourassa, Esq.

William Briggs, Esq.