

State of New Hampshire



PERSONNEL APPEALS BOARD

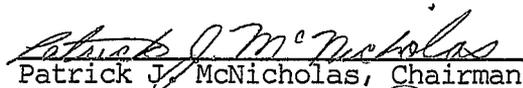
State House Annex
Concord, New Hampshire 03301
Telephone (603)271-3261

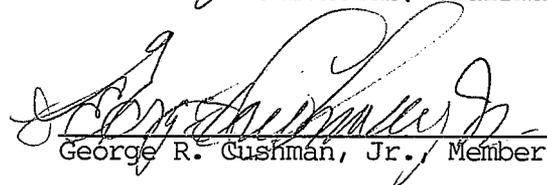
APPEAL OF STEVEN M. MILLER Department of Transportation

At its meeting of March 29, 1989, the Personnel Appeals Board, Commissioners Cushman and McNicholas sitting, reviewed the Motion to Dismiss filed on March 21, 1989 by Assistant Attorney General Michael J. Walls on behalf of the Department of Transportation in the above noted appeal. The Board also reviewed Attorney Peter Marsh's letter of March 22, 1989 advising the Board that he had no objection to such dismissal.

In consideration of the foregoing, Commissioners Cushman and McNicholas voted to grant the motion, dismissing this appeal.

THE PERSONNEL APPEALS BOARD


Patrick J. McNicholas, Chairman


George R. Cushman, Jr., Member

DATED: March 29, 1989

cc: Peter K. Marsh, Esquire
Carrigain Commons
244 North Main Street
Concord, New Hampshire 03301

Assistant Attorney General Michael J. Walls
Transportation and Construction Bureau
Office of the Attorney General

Virginia A. Vogel
Director of Personnel

Wallace Stickney, Commissioner
Department of Transportation

State of New Hampshire



PERSONNEL APPEALS BOARD

State House Annex
Concord, New Hampshire 03301
Telephone (603) 271-3261

APPEAL OF STEVEN M. MILLER

January 27, 1989

On December 13, 1988, the Personnel Appeals Board, Commissioners Cushman, Brickett and Platt sitting, conducted a pre-hearing conference in the above-captioned matter. Mr. Miller was appealing his discharge from employment at the Department of Transportation. He was represented at the hearing by Attorney Peter Marsh. Assistant Attorney General Michael Walls appeared on behalf of the Department of Transportation (hereinafter "the State").

At that conference, the Board discussed the nature of the appeal, scheduling, and any pending issues. Counsel for the appellant was ordered to file an amended notice of appeal, specifying the grounds for his appeal and the relief sought. The State was then to file its response. The parties indicated that they did not expect any disputes concerning discovery and that the hearing would take at least an hour. The Board agreed to rule on the appellant's Motion for Summary Judgment which Attorney Marsh made orally at the pre-hearing conference prior to scheduling a hearing on the merits.

As one ground for appeal, the appellant argued that he was illegally discharged because he did not receive two prior letters of warning for unsatisfactory work prior to discharge. The parties stipulated that the appellant was a permanent employee of the Department of Transportation in the position of Welder/Mechanic when he was discharged on September 9, 1988 pursuant to Per 308.03(4)(j).¹ His letter of discharge quotes from a doctor's report that he had "occasional grand mal seizures, thus far incompletely controlled on his current anticonvulsant medication. I am unable to report that the patient is very unlikely to have further seizures..."

¹ Per 308.03(4)(j) provides as follows: "At the discretion of the appointing authorities, permanent employees who are of such physical condition as to make it impossible for them to satisfactorily perform their work assignments can be discharged for unsatisfactory work. Opportunity shall be given, however, if possible, for transfer or demotion in lieu of discharge to a type of employment the employee can perform."

The appellant contested whether his physical condition was such as to make it impossible for him to satisfactorily perform his work assignments. The employee further contended, however, that regardless of whether he was physically able to satisfactorily perform his work assignments, he could not be discharged pursuant to Per 308.03(4) until after he had received at least two prior written warnings. See Per 308.03(4)(e).²

For purposes of ruling on this motion only, the Board assumed that the employee was of such physical condition as to make it impossible for him to satisfactorily perform his work assignments and that he was discharged for unsatisfactory work pursuant to Per 308.03(4)(j). The issue decided was whether the employee could properly have been so discharged absent prior written warnings.

The employee noted that Per 308.03(3) defines "other offenses" to include "unsatisfactory work." Per 308.03(4) states how "other offenses" shall be handled. This procedure includes subsection (4)e., which states, "Employees who receive 2 written warnings for the same offense may be discharged by receipt of a final written notice of subsequent violation for that offense. Employees who receive 4 written warnings for various offenses may be discharged upon receipt of a 5th written warning for any type of offense." Because the employee was discharged for "unsatisfactory work" under subsection (4)(j)., the employee concluded that he was discharged for an "other offense." Therefore, the employee argued he could not properly have been discharged because he had not received the prior written warnings required under subsection (4)(e).

The Board does not agree. First, a review of Per 308.03(4) reveals that only subsections a through h relate to the procedures for handling "other offenses." Subsections i and k on their face clearly do not relate solely to how "other offenses" were to be handled. Thus, the placement of subsection (j) in Per 308.03(4) does not necessarily require its application solely to "other offenses" as defined in Per 308.03(3).

Second, it would serve no purpose to require prior warnings in situations that fall within the scope of subsection (j). The main purpose of warnings is to point out the specific nature of the offense to the employee in order to permit the employee to take corrective action in the future. See Per 308.03(4) (a). and (b). Subsection (j)., however, by its own terms applies to employees who are of such physical condition "as to make it impossible for them to satisfactorily perform their work assignments..." (emphasis added). Because it is impossible for the employee to satisfactorily perform his or her work assignments, the employee could not take corrective action after receipt of a warning about

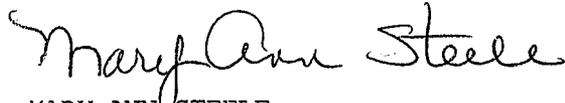
² It is not disputed that he did not receive such letters.

Appeal of Stephen Miller
January 27, 1989
Page 3

his or her unsatisfactory work. Thus, it would serve no purpose to require that such an employee receive two prior written warnings for unsatisfactory work before discharge. The Board is reluctant to construe a rule as requiring the doing of useless acts.

The Board holds that an employee may be discharged, in appropriate circumstances, pursuant to Per. 308.03 (4) (j) without compliance by the appointing authority with Per 308.03 (4) (e). Therefore, the employee's motion for summary judgment is denied.

FOR THE PERSONNEL APPEALS BOARD



MARY ANN STEELE
Executive Secretary

cc: Peter Marsh, Esq.

Michael C. Walls, Assistant Attorney General

Commissioner Wallace Stickney
Department of Transportation

Virginia A. Vogel
Director of Personnel