

# State of New Hampshire



**PERSONNEL APPEALS BOARD**  
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Concord, New Hampshire 03301  
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***APPEAL OF RHODORA NAGINE***  
***DEPARTMENT OF SAFETY - DIVISION OF MOTOR VEHICLES***  
***Docket #98-T-23***

***October 28, 1998***

The New Hampshire Personnel Appeals Board (Bennett, Johnson and Wood) met on Wednesday, September 9, 1998, under the authority of RSA 21-I:58, to hear the appeal of Rhodora Nagine, a former employee of the Department of Safety, Division of Motor Vehicles. Ms. Nagine was represented at the hearing by SEA General Counsel Michael Reynolds. Attorney Sheri J. Kelloway-Martin appeared on behalf of the State. Ms. Nagine was appealing her termination from employment as a Counter Clerk III, effective April 15, 1998, for allegedly being absent for three or more consecutive working days without proper notification or adequate reason [Per 1001.08 (b), Rules of the Division of Personnel].

The record of the hearing in this matter consists of the pleadings submitted by the parties, notices and orders issued by the Board, the audio tape recording of the hearing on the merits, and documents admitted into evidence as follows:

**State's Exhibits**

1. Photocopy of a telephone message for Mr. Garlow from Ms. Nagine taken by Ms. Dumais at 8:12 a.m. on March 30, 1998
2. April 8, 1998, letter from Arthur S. Garlow to Rhodora Nagine advising her of the Department's intent to dismiss her from State service

3. April 15, 1998, letter from Arthur S. Garlow, Virginia C. Beecher and Richard M. Flynn to Rhodora Nagine advising her of her dismissal from State service

**Appellant's Exhibits**

- A. March 10, 1997, Counseling Memo (revised) from Virginia C. Beecher to Rhodora Nagine
- B. Photocopy of a telephone bill covering calls between 3/16/98 to 4/15/98
- C. Photocopy of an intra-department communication dated March 30, 1998, from Rhodora Nagine to Claude Ouellette titled "FMLA Request"
- D. "Certification of Physician or Practitioner" signed by Dr. Douglas W. Keene, dated 4/9/98
- E. Prescription receipt dated 4/4/98
- F. April 16, 1998, letter from Susan Anderson to Ms. Nagine

The following persons gave sworn testimony at the hearing:

Linda Dumais, Secretary, Division of Motor Vehicles  
Arthur S. Garlow, Assistant Director, Division of Motor Vehicles  
Jean Chellis, SEA Field Representative  
Kimberly Wood, a friend of the appellant  
Rhodora Nagine, Appellant

**Findings of Fact and Rulings of Law**

At the conclusion of the hearing, the State submitted "Appellee's Proposed Findings of Fact and Rulings of Law." In consideration of the evidence and argument, the Board unanimously ruled as follows:

Findings #1 and #2 are granted.

Finding #3 is granted in part and denied in part, as inconsistent with the entirety of the evidence as presented.

Finding #4 is granted.

Finding #5, sentences 1-3 are granted. The remainder is denied.

Findings #6, #7 and #8 are granted.

Rulings of Law #9, #10, #11 and #12 are granted.

Ruling of Law #13 is overly broad and therefore does not warrant a response.

### **Background**

At the time of termination, Ms. Nagine had worked for the Department of Safety, Division of Motor Vehicles, for approximately ten years. Throughout most of the period, she was assigned to the Division's substation in Keene, New Hampshire. In 1995, in response to a growing number of absences, the Department began to counsel Ms. Nagine about her poor attendance, a problem that continued throughout the remainder of her employment with the Department. In March, 1997, the Department issued a counseling memo to the appellant, requiring her to have her use of sick leave certified by a physician or other licensed health care practitioner. She also was required to make her medical appointments outside of regular business hours.

By December, 1997, Ms. Nagine's poor attendance and frequent, unexpected absences had contributed to a staffing problem at the Keene substation.<sup>1</sup> The Department decided that the only way to "absorb" the effect of her absenteeism was to transfer her to a larger office where there would be additional staff to provide coverage if she were to be absent. Ms. Nagine was ordered to report for work at the central office in Concord, effective December 9, 1997.

The State argued that between March 30, 1998, and April 9, 1998, Ms. Nagine was absent without proper notification or adequate reason, and therefore was subject to termination under the provisions of [former] Per 1001.08(b) (9) - absence for a period of 3 or more consecutive work days without proper notification or adequate reason. The State argued that although the offense in question fell under the "Optional Dismissal" provisions, Ms. Nagine's history of absenteeism, her failure to take corrective action outlined in five prior written warnings, and her

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<sup>1</sup> There were only 3 staff positions at the Keene office. Therefore, whenever one employee was scheduled to be out of the office and Ms. Nagine was unexpectedly absent, it left only 1 full-time employee to staff the facility for the entire work day.

failure to appear for a scheduled "intent to dismiss" meeting to refute the allegations supporting her dismissal, persuaded the Department that no further warning would be effective.

The appellant argued that she gave the Department of Safety reasonable and adequate notice in conformance with the Rules of the Division of Personnel, and that her need for leave was well documented. The appellant argued that the Department knew that she had multiple sclerosis.<sup>2</sup> She alleged that the real reason for her transfer from Keene to the Concord office was to make it more difficult for her to perform her job. The appellant argued when she called Mr. Garlow's office on the morning of March 30, 1998, she gave sufficient notice of her extended absence by explaining that she had been hurt in an automobile accident and would be requesting approval for FMLA leave.

### **Decision and Order**

After considering the evidence and argument, the Board voted unanimously to DENY Ms. Nagine's appeal and to uphold the State's decision to terminate her employment for being absent for a period of three or more consecutive working days without adequate notice or excuse.

There is no dispute that prior to March 30, 1998, Ms. Nagine routinely provided notice of her absences, including requests for sick or emergency annual leave, by telephoning Mr. Garlow and speaking directly with him, or by leaving a message with staff in his office whenever he was unavailable. Linda Dumais, Mr. Garlow's secretary, testified that she had taken 20 to 30 such messages from Ms. Nagine. She also testified that none of the other employees were required to call Mr. Garlow directly, and she understood the importance of taking messages that were accurate and complete.

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<sup>2</sup> There was no evidence that the appellant was entitled to a reasonable accommodation, or that the Department failed to provide such accommodation of one were required. Further, the appellant stated specifically that she was not claiming violation of the ADA in her defense.

Ms. Nagine testified that during her conversation with Ms. Dumais on the morning of March 30, 1998, she explained that her medical condition had deteriorated and she did not know when she might be able to return to work. She testified that she also told Ms. Dumais that she would be requesting FMLA leave, and told Ms. Dumais to have Mr. Garlow call her if he had any questions.

Ms. Dumais testified that the entire conversation she had with Ms. Nagine on the morning of March 30, 1998, was summarized in the telephone message that she left for Mr. Garlow (State's 1 ) She did not recall any discussion of Ms. Nagine's medical condition other than that reported on her telephone message, and she did not recall any mention of an impending request for leave under the provisions of the Family and Medical Leave Act. She also had no recollection of Ms. Nagine suggesting that Mr. Garlow could call her if he had questions, or of her leaving a telephone number where she could be reached if he chose to do so.

Counsel for the appellant suggested that because Ms. Dumais had "no independent memory" of the conversation with Ms. Nagine on March 30<sup>th</sup>, her testimony should be given little weight. On the contrary, the Board found Ms. Dumais to be a very credible witness. She testified without contradiction that her messages were complete and accurate, and there had never been complaints from Ms. Nagine or anyone else that the information in her messages was insufficient. The fact that she had "no independent memory" of the call more readily suggests that there was nothing unusual or noteworthy about it, and nothing that would differentiate it from the other 20 or 30 such calls she had taken.

On April 6, 1998, after Ms. Nagine had been absent for three full days without notice, Mr. Garlow tried to telephone her at the phone number the agency had on file for her. When he called, he found that her telephone had been disconnected. On Wednesday, April 8, 1998, after Ms. Nagine had been absent without notice for one full week, Mr. Garlow sent her a letter via certified mail advising her that the Department intended to terminate her employment, and had scheduled a meeting at 8:30 a.m. on April 15, 1998, when she would have an opportunity to

refute the evidence supporting her dismissal. The letter advised her that she could have a representative present with her at the meeting. Mr. Garlow's letter also was delivered to her in hand by a Trooper on April 9, 1998.

On April 9, 1998, between 10:00 a.m. and 11:00 a.m., Mr. Garlow received a message to call Ms. Nagine. The number Ms. Nagine left with her message was different from the one on file in the department. When Mr. Garlow returned her call, Ms. Nagine told him that she was "in therapy" and did not know when she would be returning to work. Mr. Garlow informed her that he had already issued an "Intent to Dismiss" letter because of her no-show/no-call status. Ms. Nagine said that she had called someone in the department about her absence, but when asked with whom she had spoken, she did not respond.

The evidence reflects that Ms. Nagine called the Safety business office on April 7, 1998, at 12:34 p.m. and asked them to fax a blank FMLA "Certification of Physician" to her doctor's office. That form was completed and returned to the business office by fax on April 9, 1998, at 1:00 p.m. Ms. Nagine testified that she believed her physician had already forwarded the completed form at an earlier date, and did not learn until April 7, 1998, that the department had not received it. She offered no evidence of having discussed the matter with her physician prior to April 9, 1998. Ms. Nagine also testified that she had faxed a separate FMLA leave request form from Mailboxes, Etc., in Keene, to the Department of Safety on March 30, 1998. Again, the business office had no record of receiving such a transmittal, nor did Ms. Nagine have any evidence, such as a receipt or a copy of a transmittal letter to corroborate her claim that such a request had been sent prior to her receipt of the "Intent to Dismiss" letter.

There is no credible evidence to support Ms. Nagine's claim that she gave appropriate notice of her absence to her supervisors in the Division of Motor Vehicles, nor is there credible evidence to support her assertion that the Department was aware of her medical condition, her need for extended leave, or her inability to report for work. In order to accept Ms. Nagine's version of events, the Board would have to ignore all the credible evidence offered by the Department of Safety and its witnesses.

Having carefully considered all the testimony, evidence and oral arguments, the Board voted unanimously to DENY Ms. Nagine's appeal.

THE PERSONNEL APPEALS BOARD



Mark J. Bennett, Chairman



Robert J. Johnson, Commissioner



Patrick H. Wood, Commissioner

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