State of New Hampshire

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

Ruling on Motion for Reconsideration
89-D-3 and 89-T-2
Appeal of Margaret O'Brien

At its meeting of June 21, 1989, the Personnel Appeals Board, Commissioners McNicholas, Cushman and Scott sitting, considered the Motion for Reconsideration filed by SEA General Counsel Michael C. Reynolds on behalf of Margaret O'Brien, a former employee of the Department of Education.

Appellant raises three issues for the Board's consideration, to which the Board responds as follows:

1. "[N]either the findings nor the evidence supported a conclusion relative to Ms. O'Brien's state of mind so that ultimate finding of 'insubordination' could be substantiated." (Appellant's Motion for Reconsideration, June 5, 1989)

   The record before the Board supports the conclusion that Appellant was notified both verbally (October 24, 1988) and in writing (November 1, 1988) that she was required to be in her office unless her pre-approved inventory dictated otherwise. She was further informed that when official or personal circumstances required a change in schedule, she was to notify Mr. Lebrun or Mr. Perkins of such change. .The record further discloses that on three separate occasions subsequent to November 1, 1988, appellant was absent from her office and did not provide notification of such absence.

   The Board stated, in its decision of May 22, 1989, "Accordingly, failure to comply with the explicit instructions of her superiors constitutes willful insubordination." The ultimate decision of the Board rested upon its conclusion that Appellant knowingly and willfully failed to adhere to the legitimate directives of her supervisors, having been duly warned that "Any deviation from these instructions will be considered willful insubordination." (Agency Exhibit L)

2. We believe the record and the appointing authority's own testimony support the conclusion that, even if immediate discharge would be permissible the Board should exercise it's [sic] discretion and overturn the discharge." (Appellant's Motion for Reconsideration, June 5, 1989)

"Discretion" is defined, in part, as "power of free decision or latitude of choice within certain legal bounds". The Board did exercise its discretion in determining that discharge, under the optional discharge provisions of the Rules of the Division of Personnel was an appropriate course of action and should not be overturned.

3. "The Board's apparent ruling that if it finds the appointing authority's actions permissible, those actions must be upheld, is erroneous. RSA 21-I:58." (Appellant's Motion for Reconsideration, June 5, 1989)

The Board has declined to rule on those incidents which were not relied upon by the appointing authority in its decision to terminate Appellant's employment. The Board has not given any indication that it must uphold an appointing authority's actions if such actions are deemed "permissible". On the contrary, the Board's decision of May 22, 1989 ruled that Appellant's actions were willful, were in violation of a direct and legitimate order of her supervisors, and were sufficiently serious to warrant her discharge under the optional discharge provisions of the Rules of the Division of Personnel.

THE PERSONNEL APPEALS BOARD

cc: Michael C. Reynolds, General Counsel
State Employees' Association

Bruce A. Archambault, Director
Division of Vocational Rehabilitation

Virginia A. Vogel
Director of Personnel

Claire Gregory, A.G. Office

DATED: June 21, 1989

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APPEAL OF MARGARET O'BRIEN
#89-T-2

On Wednesday, April 26, 1989, the Personnel Appeals Board (Commissioners McNicholas and Scott) heard the termination appeal of Margaret O'Brien, a former employee of the Division of Vocational Rehabilitation, Department of Education. The Division of Vocational Rehabilitation was represented by its director Bruce A. Archambault. Ms O'Brien was represented by SEA General Counsel Michael C. Reynolds.

By letter dated December 30, 1988, the Director of the Division of Vocational Rehabilitation discharged Appellant from her position as the VR Supervisor for the Nashua office. The Director cited Per 308.03(2), which deals with "optional discharge", and claimed that Appellant was being discharged for "willful insubordination" and "willful falsification of claims for annual and/or sick leave".

Appellant apparently has a history of lateness and failure to submit leave slips. She was given a letter of warning on February 19, 1987, for such actions.

Appellant was also given a letter of warning, contemporaneously with the letter of termination, for absenteeism without prior approval. The Board in an early order deferred consideration of the letter of warning. The Board notes that the appointing authority cites many of the same incidents in both the letter of warning and the letter of termination.

A. "Facts.

Appellant's current round of difficulties apparently started on April 25, 1988. Appellant did not arrive at the Nashua office until about 9:45 a.m., though she usually began work at 8:30 a.m. There was no evidence that she notified anyone in either the Nashua office or the Concord office that she would be late. As a result of her lateness, she missed a meeting that had been scheduled with Kenneth Young, the Job Placement Coordinator from the Concord office.

Appellant and Mr. Young did talk about the missed meeting afterwards, but apparently not about the lateness. In any case, no further mention was made of this incident of lateness, at least until late October, as will be discussed below.

Appellant could not account for the full period of lateness and admitted she may have done some personal business during that time. Nevertheless, her time report (Agency Exhibit E) did not reflect any annual leave or compensatory time.

The next series of incidents occurred in late October. Appellant's twenty-two-year-old daughter was taking an extended trip to China, and Appellant applied for two half-days off; the morning of Monday, October 17, and the afternoon of Tuesday, October 18. Her stated reason for not taking the remainder of those days off was her desire to attend scheduled meetings.

The Monday meeting was with her supervisor, Donald Lebrun. See Agency Exhibit F. Mr. Lebrun was at the Nashua office at 1:00 p.m., the scheduled time for the meeting. He left at 2:15 p.m., without speaking with Appellant, who was not present and who apparently had not notified the Nashua office where she was.

Appellant did not attend work on Monday, October 17, Tuesday, October 18, or Wednesday, October 19. She told the appointing authority that she had not been at work because her daughter was going to China See Agency Exhibit M at page 3. She offered no elaboration, and the appointing authority did not demand further details.

After this period of absence, Appellant filled out a leave slip to account for her time away from the job. Although she indicated on her time record that she was sick, she did not indicate the type of leave on her Application for Leave. See Agency Exhibit M. The Director instructed her to correct her time record, and to complete the Application, and required her to choose between annual leave or floating holiday.

Appellant now claims that she was unable to attend because of an anxiety attack brought on by her daughter's impending departure to China. At no time prior to her discharge did she raise this as an explanation for her behavior, however, despite several opportunities to do so; and she acquiesced in the modification of her attendance records without protest.

The appointing authority submitted an exhibit which suggested that Appellant may have left work early on Friday, October 21. See Agency Exhibit J. The appointing authority apparently does not rely upon this alleged incident in either the letter of termination or the letter of warning. Accordingly, the Board need not rule on it.

On October 24, 1988, Mr. Lebrun arrived, apparently unannounced, at the

Nashua office. See Agency Exhibit K. That exhibit also suggests that Appellant may have arrived late for work that day. Again, the appointing authority does not seem to rely on the alleged incident, and the Board will not rule on it.

When Appellant did arrive, however, Mr. Lebrun discussed the matter of her attendance habits with her. He instructed her not to pick up the mail in the Concord office because her presence was needed in the Nashua office. It had apparently been her practice to pick up the mail in Concord (where she lived) and take it to Nashua on her way to work. He also instructed her to notify him, or others in the Concord office, when she was going to be out of the Nashua office during her assigned hours.

This admonition was reiterated in a letter from the Director dated November 1, 1988. That letter states in pertinent part:

> This memorandum is a follow-up to Mr. Lebrun's meeting with you on October 24, 1988. His narrative summary of what transpired during that meeting indicates to me that you were directed to notify him when circumstances required you to be out of your office on personal business or when official business requires that you deviate from your pre-approved itinerary.
>
> * * *
>
> I must direct that you are required to be in your office except when your pre-approved itinerary dictates otherwise. When official business or personal circumstances require you to change your schedule, you will call Mr. Lebrun or Mr. Perkins and seek approval for change. If they cannot be reached you will notify my office of such change.
>
> Any deviation from these instructions will be considered willful insubordination.

Agency Exhibit L (emphasis added). From this letter stem the charges of willful insubordination.

The letter of termination indicates three incidents upon which the appointing authority relies in claiming a willful violation of the November 1 directive.

The first incident occurred on November 21, 1988, when Administrator Perkins arrived at the Nashua office at about 4:00 p.m. and noticed that Appellant was not in the office. Agency Exhibit N. Apparently both parties agree that Appellant had left the office without notifying anyone in Concord. Appellant testified that she was in Manchester picking up files.

The second incident occurred on December 9, 1988, when Training Officer Paul Leather called the Nashua office and was told that Appellant was not

there. Apparently both parties agree that Appellant had left the office without notifying anyone in Concord. Appellant testified that she was in Massachusetts babysitting her grandson.

The third incident occurred on December 12, 1988, though the letter of termination apparently erroneously suggests that it occurred on December 16. Compare Agency Exhibit P with Agency Exhibit R. It seems Administrator Perkins received a leave slip requesting approval for annual leave for 8:30 to 10:00 on December 12, several days after the fact. Apparently both parties agree that Appellant did not notify anyone in Concord that she was going to be away from the office, nor did she seek prior approval.

A final incident was discussed at the hearing, and appears in Agency Exhibit Q. On December 19, Appellant apparently waited until 12:10 to notify Concord that she needed time to repair her car. When questioned about the incident, Appellant indicated that her records showed she was out sick that day. She could not explain the discrepancy. Again, the appointing authority apparently does not rely on this incident, and, accordingly, neither does the Board.

B. Willful falsification of claims.

Per 308.03(2)(e) authorizes an appointing authority to discharge an employee for "willful falsification of claims for annual and/or sick leave." This is listed as an "optional discharge" so that, depending on the seriousness of the violation, immediate discharge may be allowed. The appointing authority bases its allegation of willful falsification on two incidents.

The first allegation concerns the April 25 absence. This allegation cannot sustain the charge since the record does not indicate any leave slip was ever filed. Accordingly, this would constitute, under the facts before the Board, "absenteeism without approved leave" under Per 308.03(3)(b).

The second allegation concerns the event in October at the time of Appellant's daughter's trip to China. Appellant submitted her Application for Leave without indicating what type of leave, now claiming she was uncertain as to how to proceed. Appellant claims that her mental health precluded her from being at work. The Board noted above that Appellant had ample opportunity to bring all the facts to the attention of the appointing authority and chose not to do so. Nevertheless, under the facts presented, the Board does not find that her actions constitute the willful falsification of claims which was sufficiently serious to warrant immediate discharge. Moreover, the Board notes that Appellant was not immediately discharged.

C. Willful insubordination.

Per 308.03(2)(b) authorizes an appointing authority to discharge an employee for "willful insubordination." This is listed as an "optional discharge" so that, depending on the seriousness of the violation, immediate discharge may be allowed. The appointing authority bases its allegations of willful insubordination on three incidents.

The Board will first consider the instructions of October 24 and the November 1 directive. The Board finds that, given the events that led up to these specific orders, the appointing authority could reasonably require Appellant to check in with the Concord office prior to any absence from the work station. The Board also finds that Appellant was adequately warned that she should do so.

Ordinarily, failure to notify the appointing authority of absence from the work place would amount to either lateness, absenteeism without approved leave, lack of cooperation, or unsatisfactory work, depending on the reason for the absence and the nature of the work. In this case, however, Appellant was repeatedly warned that her presence was required in the office, and that her superiors needed to be kept better informed of her whereabouts before she left the office. Accordingly, failure to comply with the explicit instructions of her superiors constitutes willful insubordination.

Appellant has not claimed that she did not have the opportunity to notify the Concord office of her absences after November 1. Based on the evidence presented, the Board therefore finds Appellant's failure to notify her superiors on the dates discussed above willful.

Finally, the Board finds these repeated and unexcused incidents sufficiently serious to allow immediate discharge under the terms of Per 308.03(2)(b).

D. Collateral Estoppel

At the beginning of the hearing, Appellant notified the Board that she had had a hearing several days earlier at the Department of Employment Security. Appellant argued that if she won at DES, she should automatically win before the Board.

The Board asked if both partie would voluntarily agree to be bound by the decision of DES. Both parties refused.

A week after the close of evidence, Appellant supplied the Board with a decision from DES which apparently supports Appellant's position. While Appellant did not explicitly request that the Board admit the decision as evidence, nor did she renew her request that the Board consider the DES decision binding, the Board will comment on the request as initially made.

The Board denies the request that it admit the findings reached by DES or that it defer in any way to DES. Prior to the decision neither party considered the decision mutually binding. Accordingly, the Board considers it binding on neither party.

The Board is not convinced that the standards to be applied by the DES Appeals Tribunal are identical to standards applied by the Board. Accordingly, there is good reason for both parties, and the Board, to reject any conclusion that the DES decision mutually binds the parties.

The Board is charged by the Legislature with the duty to grant hearings and make decisions in disciplinary cases. The Board intends to carry out that mandate.

THE PERSONNEL APPEALS BOARD

Patrick J. McNicholas, Chairman

Peter C. Scott, Alternate

DATED: May 22, 1989

cc: Bruce A. Archambault, Director
Division of Vocational Rehabilitation

John MacDonald, Commissioner
Department of Education

Michael C. Reynolds, General Counsel
State Employees' Association of N.H., Inc.