

# State of New Hampshire

WPPID996



## PERSONNEL APPEALS BOARD

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

APPEAL OF JOHN O'CONNOR  
Response to Appellant's Motion for Reconsideration and Rehearing  
Department of Corrections  
Docket #92-T-25

October 8, 1992

The New Hampshire Personnel Appeals Board (McNicholas, Johnson and Bennett) met Wednesday, October 7, 1992, to consider the Motion for Reconsideration and Rehearing filed by Attorney Reynolds in the above-captioned appeal.

The Board reviewed the Motion in conjunction with its September 14, 1992 decision and voted unanimously to deny the Motion for Reconsideration and Rehearing. In so doing, the Board also voted to affirm its September 14, 1992, decision denying Mr. O'Connor's appeal. Generally, each of the arguments raised by the appellant in support of his motion for reconsideration and rehearing were already raised by the parties and addressed by the Board in its decision on the merits of Mr. O'Connor's appeal.

Attorney Reynolds argued the Board had made factual errors in finding the appellant actually had been cleared to return to light duty, stating his return was "...contingent upon Mr. O'Connor's problems resolving by that date [April 26, 1992]." Specifically, Attorney Reynolds said the Board appeared to "...ignore the emergency room instructions to treat with an orthopedic physician if the pain did not resolve", as well as instructions not to "...drive or work on Darvocet". Attorney Reynolds also claimed the appellant "...was taking Darvocet during the entire period in question".

The Board's finding that the appellant was cleared to return to duty is clearly supported by the evidence, including but not limited to Appellant's Exhibit A (pages 1 - 2) and State's Exhibit 3. Appellant's Exhibit A - page 2, dated April 24, 1992, stated the appellant should be much better in two to three days, otherwise he should see an orthopedist. There were no directions to return for a follow-up visit unless he was suffering from new or increased pain. State's Exhibit 3 is consistent with Appellant's A, indicating the appellant was released for modified work two days after his fall, and for full-duty in four days. Mr. O'Connor was not scheduled to work again until April 28, 1992, and the Department would have had no reason to suspect his

condition was any different from that reported on Appellant's A-2 or State's 3, unless the appellant had provided the department with pertinent information about his health and his ability to return to work. The Department would have had no reason to believe the appellant would not return to work as scheduled on April 28, April 29 and April 30. He neither reported to work nor notified the department he would not be reporting to work as scheduled. Accordingly, the Board found and continues to find that on April 28, 29 and 30, 1992, the appellant was absent without notice or adequate excuse.

The appellant's claim he "...was taking Darvocet during the entire time in question" has no bearing on the propriety of his discharge. Even if that claim had been substantiated, which it was not, the appellant offered no reasonable explanation why the Department of Corrections should have known that simply on the basis of the documentation supplied. Again, both Appellant's A and State's 3 suggested the appellant would be returning to full duty not later than April 28, 1992. It was the appellant's burden to provide notice to the contrary, as well as any documentation which the Department might have required him to produce in support of that claim.

The appellant argued, "There is no legitimate requirement under the personnel rules that an employee give notice to his supervisor in particular.. .". "...DOC punishing Mr. O'Connor for giving notice the way he did, and the Board's upholding of that punishment, amounts to deprivation of due process and equal protection under both the State of New Hampshire and United States Constitutions." [See Appellant's Motion, page 2]

Mr. O'Connor was not disciplined for failing to notify his immediate supervisor. Mr. O'Connor was disciplined for failing to notify anyone at the Department of Corrections on April 28, 29 and 30, 1992, that he would not be reporting to work. As the Board noted in its order of September 14, 1992, Mr. O'Connor did not notify his supervisor, the Operations Sergeant or the Bureau Administrator. The simple fact is Mr. O'Connor provided no notice to anyone in the Department of Corrections during the three days in question.

The appellant argued, "No finding has been or could be made, however, that Mr. O'Connor could have worked a full shift (as DOC admitted it intended to order Mr. O'Connor to do) even in light duty." Again, the appellant was not discharged for failing to return to work full-time. The appellant failed to report to work at all, nor did he provide notice he would not be reporting to work. What ultimately would have occurred had the appellant reported for duty is purely speculative and has no bearing on the propriety of the termination. The offense cited is absence for three consecutive working days without adequate notice or excuse on April 28, 29 and 30, 1992.

The appellant argued:

"The Workers' Compensation Commission, given the proper misinformation from a supervisor, would deny almost any workers' compensation claim; by the Board's reasoning that employee could then be terminated without recourse when he ran out of sick time (especially if the misinformation were never discovered), regardless of the final outcome of the employee's workers' compensation appeal."

This employee was not terminated without recourse when he ran out of sick time. He was terminated for willful insubordination and absenteeism without notice for a period of three or more consecutive days.

The appellant argued, "...it remains accurate that the State should not terminate an employee for absence without approved leave, absence without notice or excuse, or insubordination, when the personnel department of the employer undeniably knows the employee's absence is being claimed as a workers' compensation absence and the employer does not and would not terminate the employee if the claim had been accepted from the date of injury."

The Department of Corrections made no representations it would not have terminated this employee had his Workers' Compensation claim been accepted. The record reflects Mr. O'Connor had been absent for a substantial period of time as a result of a non-work related injury in 1991, that his available leave was exhausted, that he had claimed a compensable injury as a result of a fall at work on April 24, 1992, and that he would be able to report back for full duty on April 28, 1992. Mr. O'Connor did not notify his department he would not be reporting to work as scheduled on April 28, 29 or 30, 1992. Mr. O'Connor did not advise his department he was seeking additional medical treatment on April 28, 29 or 30, 1992. Mr. O'Connor did not advise his department he was taking medication which would prohibit his working on April 28, 29 or 30, 1992.

The appellant argued there was no evidence, either documentary or testimonial, to support the Board's finding that Dr. Lambrukos' "professional judgment" was that Mr. O'Connor "did not require the use of sick time." As set forth in Per 1204.07 (b), the certificate from a licensed health care practitioner, which Mr. O'Connor was required to produce, "...shall contain a statement that in the practitioner's professional judgment sick leave is necessary." Instead of providing such certificate, Dr. Lambrukos stated in his note dated 4/30/92 "John O'Connor under my care for left leg. OK for sit down [light] duty job at this point in time". On 5/8/92, Dr. Lambrukos wrote a note stating, "John O'Connor under my care for left leg SX. No unrestricted work yet. For recheck 1 week." Therefore, based on the evidence, since both notes indicated the appellant was fit for light duty, his professional opinion was that the appellant did not require the use of sick leave.

The appellant argued, "The Board errs in imposing upon an employee the obligation to have 'questioned the Department's authority to demand his presence' at a meeting during off-duty hours, or to 'arrange an alternative time and date to meet' on off duty hours. The burden is on the State not to give such illegal order in the first place." The State and its employees have long recognized management's right to "call back" an employee, without prior notice, during non-duty hours [Collective Bargaining Agreement, Article 7.31]. Therefore, the appellant's assertion the State illegally ordered him to report for a meeting "during off-duty hours" is without merit. The appellant knowingly refused direct and legitimate orders of the agency when he refused to meet with agency representatives to address his availability for work. The Board found, and continues to find, that his refusal constituted an act of willful insubordination for which the rules authorize immediate discharge without prior warning.

The appellant argued the Department of Corrections waived any right to terminate the employee for absence without notice or adequate excuse because it twice offered him the opportunity to return to work. Per 1001.08(b) states:

'In cases such as, but not necessarily limited to, the following, the seriousness of the offense may vary. Therefore, in some instances immediate discharge without warning may be warranted while in other cases one written warning prior to discharge may be warranted.

Inasmuch as the record supports a finding that the appellant was absent for a period of three consecutive working days without proper notification or adequate reason [Per 1001.08(b)(9)] and was willfully insubordinate [Per 1001.08(b)(8)], and having found the appellant had committed more than one of the offenses listed in Per 1001.08(b), the employee was properly discharged from his employment.

THE PERSONNEL APPEALS BOARD

  
Patrick J. McNicholas, Chairman

  
Robert J. Johnson

  
Mark J. Bennett

cc: Virginia A. Vogel, Director of Personnel  
Michael C. Reynolds, SEA General Counsel  
Michael K. Brown, Esq., Commissioner's Office, Dept. of Corrections

# State of New Hampshire

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APPEAL OF JOHN O'CONNOR  
Department of Corrections  
Docket #92-T-25

September 14, 1992

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The New Hampshire Personnel Appeals Board (McNicholas, Johnson and Bennett) met Wednesday, August 12, 1992 and Wednesday, August 19, 1992, to hear the termination appeal of John O'Connor, a former Correctional Officer at New Hampshire State Prison. Mr. O'Connor was discharged by letter dated May 13, 1992, for willful insubordination, absence for a period of three or more consecutive working days without notice, absence without approved leave and lack of cooperation. Michael C. Reynolds, SEA General Counsel, appeared on behalf of the appellant. Michael K. Brown, Esq., appeared on behalf of the Department of Corrections (hereinafter "DOC").

First, Mr. Reynolds argued the appellant could not be disciplined for any offenses related to absenteeism (absence without approved leave or absence without notice or adequate excuse) because his attendance was directly related to injuries sustained in a fall at work. He further suggested the filing of a notice of accidental injury and subsequent request for workers' compensation automatically guaranteed the appellant approved leave status for the period(s) of absence.

Mr. Reynolds argued the offense of uncooperative behavior, even if proven, may not give rise to termination without at least two prior warnings. He also argued that in order to discharge an employee for willful insubordination, the department must prove the employee intentionally engaged in insubordinate behavior and knowingly disobeyed a legitimate order of the agency. He contended the agency's orders to report for work were not legitimate, lawful orders because the appellant had filed a request for workers' compensation. Accordingly, he argued the Board must consider the termination invalid.

The Board agrees with the appellant to the extent that in most instances, a single instance of lack of cooperation would not be deemed an offense for which an employee could be discharged without prior warning. On the other hand, the Board did not find inclusion of a charge of lack of cooperation in the letter of termination a reason to reverse the termination decision itself. Before addressing the propriety of discharge in this instance, the Board must consider the remaining charges against the appellant.



Instead, Mr. O'Connor told the department his physician did not want him working at all. Several days later, the appellant wrote to Warden Cunningham requesting approval for leave. His letter dated May 5, 1992, stated the following:

"I am formly [sic] requesting a leave of absence without pay until Workman's Comp. accepts my application for services. I fell in the H Building Control Room on 4/24/92 at 2:30 a.m. and did not receive medical attention until 6:00 a.m. the same morning. I do not have any time on the books to hold me over until Workmans' Comp. can file their papers."  
(State's Exhibit 7)

On May 8, 1992, Mr. O'Connor turned in his time and attendance sheet to the Department and submitted the April 30, 1992 note from Dr. Lambrukos releasing him for light duty. Nonetheless, he insisted his physician did not want him working in any capacity at that time. Both Sergeant Kench and Ms. Lunderville, Administrator of the Bureau of Security, told the appellant he would need another note from his physician to support that claim, otherwise he was to report to work that evening to the Hancock Building Control Room.

Mr. O'Connor saw Dr. Lambrukos as scheduled that afternoon and returned with a second note from Dr. Lambrukos which read:

"John O'Connor under my care for left leg Rx. No unrestricted work yet. For recheck 1 week. JHL" (State's Exhibit 5 and 6)

Again, when he returned to the Department Mr. O'Connor insisted his physician had told him verbally he should not be working, even though the note appeared to authorize him to work in a restricted capacity. Ms. Lunderville told him the note was unacceptable and called Dr. Lambrukos' Office for clarification. Ms. Lunderville was unable to speak with the physician. On the strength of the May 8, 1992 note from Dr. Lambrukos in conjunction with the two prior clearances for duty, she ordered the appellant to report to work that evening. Instead of reporting for work, Mr. O'Connor called in sick to his Platoon Commander, Captain Cassavaugh. During his conversation with Capt. Cassavaugh, Mr. O'Connor said his doctor was very upset the Department of Corrections had telephoned his office for information, that he would not return the department's calls and that he would take legal action if the Department of Corrections attempted to contact his office again. Mr. O'Connor also told Capt. Cassavaugh his physician did not want him returning to work in any capacity at that time. Capt. Cassavaugh reported that information to Ms. Lunderville in a hand-written note which she saw on Monday, May 11, 1992.  
(State's Exhibit 6)

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On Monday, May 11, Ms. Lunderville telephoned Dr. Lambrukos' to try to verify the information received from Mr. O'Connor. She spoke with the receptionist at Dr. Lambrukos' office and left a message for the doctor. The receptionist called back advising Ms. Lunderville Dr. Lambrukos had, in fact, released the appellant for light duty status and had not threatened to take legal action if the department contacted him for information.

Sgt. Kench called the appellant at his home on May 11th and told him to meet with Ms. Lunderville in her office that day at 1:00 p.m. Mr. O'Connor said he had other plans. Ms. Lunderville then spoke directly with Mr. O'Connor, ordering him to report to her office any time that day. Mr. O'Connor again refused, saying he had plans. Ms. Lunderville then ordered the appellant to report to work that evening. Instead, Mr. O'Connor called in sick.

Mr. O'Connor was discharged from his position by letter dated May 13, 1992, signed by Warden Michael J. Cunningham, for absence without approved leave, absence for a period of three or more consecutive work days without notice to his department or adequate excuse, willful insubordination and lack of cooperation. His appeal was filed with the Board by letter dated May 22, 1992.

Mr. Reynolds argued the appellant had been wrongfully denied Workers' Compensation and that if he were successful in appealing that denial, his absence would have to be approved retroactively, effectively invalidating the termination. Mr. Reynolds cited Per 1201.07(a) of the Rules of the Division of Personnel to support his position that a workers' compensation request stays any adverse personnel action.

"Employees receiving workers' compensation who are not working for the state on a reduced earning capacity basis shall be considered to be absent pursuant to Per 1204 [Sick Leave]." See: Per 1201.07(a)

The appellant was not "receiving workers' compensation" when he failed to appear for duty as scheduled on April 28, 29 or 30, 1992, and therefore was not "...considered to be absent pursuant to Per 1204" in an approved leave status. All the evidence supports a finding that as early as April 26, 1992, the appellant could have returned to work in a restricted duty capacity and intentionally withheld information from his physician from the Department of Corrections until they demanded the information from him. The appellant failed to offer any credible evidence Dr. Lambrukos or any other licensed health care practitioner had advised him against working.

Mr. Reynolds argued the agency had an affirmative obligation to send the appellant for an independent medical assessment if they believed his use of "sick leave", paid or unpaid, was improper. On the contrary, the Board was

not persuaded the agency had any reason to seek an independent medical assessment, nor did they have any obligation to do so when the appellant had already supplied assessments releasing him for duty.

Per 1204.07 states the following:

"(a) The appointing authority shall have the option to require the employee to furnish a certificate from an attending physician or other licensed health care practitioner when, for reasonable cause, the appointing authority believes that the employee's use of sick leave does not conform to the reasons and requirements for sick leave use set forth in this part.

"(b) Such certificate shall contain a statement that in the practitioner's professional judgment sick leave is necessary.

"(c) The appointing authority, at state expense, shall have the option to have an independent physician examine an employee when, in the opinion of the appointing authority, the employee is not entitled to sick leave. The time related to such examination shall not be charged to the employee's sick leave."

The Department of Corrections knew the appellant had sought and obtained medical attention at the time of his injury. When the appellant advised the agency his physician would not release him for work, the Department ordered him to "...furnish a certificate from an attending physician or other licensed health care practitioner..." supporting his claim he was unable to work [Per 1204.07(a)]. Had the Department considered the certificate to be deficient, it could have invoked the provisions of Per 1204.07(c), requiring an independent assessment and bearing the cost of that examination. In this instance, however, the practitioner's professional judgment was that the employee could return to work and did not require the use of sick leave. The Department would have had no reason to dispute that assessment and undertake an independent examination pursuant to Per 1204.07 (c).

On the issue of automatic leave approval upon filing a claim for workers' compensation by an employee, the Board considered the appellant's position unreasonable and unsupported by the Rules.. Mr. O'Connor was not discharged from employment because he injured himself. He was discharged for being absent for three consecutive working days without adequate notice or excuse.

Mr. O'Connor knew full well the only information available to his Department about his medical condition between April 24, 1992 and April 30, 1992, was the

Concord Hospital Work Injury Tracking report which cleared him for return to duty without restriction on April 28, 1992. He withheld information about being cleared for light duty by Dr. Lambrukos between the dates of April 30, 1992 and May 8, 1992. Except for his calls to Capt. Cassavaugh on May 8 and May 11, 1992 when he called in sick, the appellant initiated no contact with his supervisors at the prison.

Even if the Department of Labor were to reverse the Workers' Compensation Commission decision and retroactively compensate Mr. O'Connor for lost wages, he still would not be relieved of responsibility for notifying the department of his absences on April 28, 29 and 30, 1992, or any scheduled work day thereafter until his claim had been approved. The mere act of filing a "First Report" does not relieve the employee of his obligation to provide his employer reasonable notice of his absence.

As early as April 24, 1992, Mr. O'Connor was in possession of a written release for light duty effective April 26, 1992, and for full duty effective April 28, 1992. On April 30, 1992, Mr. O'Connor was in possession of a second written statement in which his physician reported he could return to light duty. He did not make that statement available to his supervisor, the Operations Sergeant or the Administrator of the Bureau of Security until May 8, 1992, a full week after being advised he could be terminated from employment.

Mr. Reynolds argued the appellant could not be discharged for willful insubordination unless the Department of Corrections could prove Mr. O'Connor knowingly refused to comply with a direct, legitimate order of a superior. He further suggested the Department of Corrections must prove the appellant intended to engage in insubordinate behavior. He argued the appellant had refused to return to work based on his belief his physician did not want him working, or would not have wanted him to work had the physician understood the nature of the appellant's job assignments. That argument is unsupported by the record.

Mr. O'Connor failed to produce credible evidence that his doctor instructed him not to work, or had left the decision up to the appellant whether or not he was fit for duty. Mr. O'Connor did not make a request for leave until at least May 5, 1992, after being cleared by his physician for light duty. He called in sick rather than reporting for light duty on May 8, 1992, and refused to meet with the Bureau Administrator regarding a "light duty" assignment on May 11th. Mr. O'Connor took it upon himself to determine there were no available or acceptable light duty assignments.

Mr. Reynolds argued the Department of Corrections went beyond its legal authority in ordering Mr. O'Connor to report for a meeting in Ms. Lunderville's office during non-working hours, and that he could not be disciplined for refusing to meet with her as directed. Finally, Mr. Reynolds argued the termination had to be considered invalid because two of the cited offenses (lack of cooperation and absence without approved leave) were not offenses for which an employee could be terminated without prior warning.

The appellant argued he had not been willfully insubordinate and had never willfully disobeyed a legitimate order of a superior. The Board disagrees. The appellant was ordered by Sgt. Kench to report to the Department of Corrections on May 11, 1992, to meet with Ms. Lunderville. He refused. Ms. Lunderville herself ordered the appellant to meet with her on May 11th. He refused. Neither the appellant nor the Department's witnesses suggested the appellant questioned the Department's authority to demand his presence at such a meeting, or that he attempted to arrange an alternate time and date to meet if he believed he could not be ordered to appear on anything other than his regularly scheduled shift.

When ordered to report for work on May 8th, having supplied the Department with written clearance from his physician for light duty, he failed to report. Instead, he called in sick claiming he had been instructed by his physician not to work in any capacity. When ordered to report for work on May 11th, having supplied the Department with another clearance for return to restricted duty, he again called in sick and claimed his physician did not want him to work in any capacity.

On the evidence, the Board found Mr. O'Connor was absent for three consecutive work days, April 28, 29 and 30, 1992, without notice or adequate excuse. The Board further found the appellant willfully misrepresented the instructions of his physician in order to avoid reporting to duty as ordered. The Board further found the appellant knowingly disobeyed a legitimate order to report for light duty, having decided himself there were no acceptable, light-duty, "8 hour a day, sit down" jobs. When directed to meet with the Administrator of the Bureau of Security to address the discrepancy between what he claimed his physician would allow him to do and his physician's written clearance for duty, he refused. The Board found these actions constituted willful insubordination.

Per 1001.08 (b) of the Rules of the Division of Personnel provides the following:

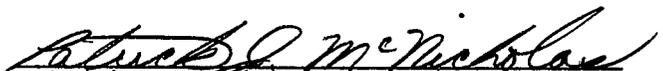
"In cases such as, but not necessarily limited to, the following, the seriousness of the offense may vary. Therefore, in some instances immediate discharge without warning may be warranted while in other cases one written warning prior to discharge may be warranted."

Per 1001.08(d) also provides that:

"An appointing authority shall be authorized to dismiss an employee who commits more than one of the offenses listed in Per 1001.08(b) during the previous 2 years."

The Board found Mr. O'Connor was both willfully insubordinate and had been absent for a period of three or more consecutive working days without proper notice or adequate excuse, two of the offenses listed in Per 1001.08(b)(7) for which an employee may be discharged immediately without prior warning. Therefore, the Board voted to deny his appeal.

THE PERSONNEL APPEALS BOARD

  
Patrick J. McNicholas, Chairman

  
Mark J. Bennett

  
Robert J. Johnson

cc: Virginia A. Vogel, Director of Personnel  
Michael C. Reynolds, General Counsel, State Employees' Association  
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