

# State of New Hampshire



## PERSONNEL APPEALS BOARD

25 Capitol Street  
Concord, New Hampshire 03301  
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### APPEAL OF JAMES SERAIVA

Docket #92-T-31

Department of Transportation

October 24, 1994

On January 17, 1994, the Personnel Appeals Board received a Motion filed by SEA General Counsel on behalf of James Seraiva, requesting reconsideration/rehearing of the Board's December 28, 1993 decision denying Mr. Seraiva's appeal of his termination from employment prior to completion of his probationary period.

Upon review of the motion in light of the Board's decision on the evidence presented, the Board found that the appellant failed to raise any new evidence or argument not already offered by the appellant in his hearing on the merits or considered by the Board in reaching its decision.

Accordingly, the Board voted to deny the Motion and affirm its decision denying Mr. Seraiva's appeal.

THE PERSONNEL APPEALS BOARD

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Mark J. Bennett, Acting Chairman

Handwritten signature of Lisa A. Rule in cursive.

Lisa A. Rule, Commissioner

Handwritten signature of Karen S. McGinley in cursive.

Karen McGinley, Commissioner

cc: Virginia A. Lamberton, Director of Personnel  
Michael C. Reynolds, SEA General Hospital  
Jeffrey Spencer, Assistant Attorney General, Transportation Bureau

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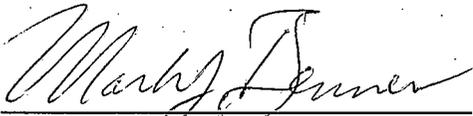
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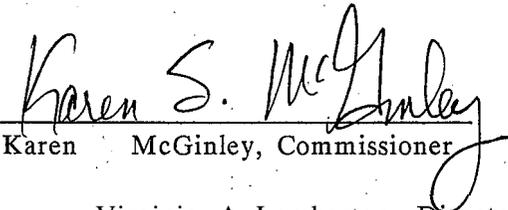
THE PERSONNEL APPEALS BOARD



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# State of New Hampshire



**PERSONNEL APPEALS BOARD**  
State House Annex  
Concord, New Hampshire 03301  
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## Appeal of James Seraiva

(Department of Transportation)

Docket No. 92-T-31

Mr. James Seraiva was employed by the Department of Transportation as a Highway Maintainer until he was terminated on June 4, 1992, effective June 19, 1992, for poor attendance, lack of dependability and an alleged inability to work cooperatively with other crew members. See letter of termination. In his June 18, 1992, appeal letter, Seraiva contended that the termination was arbitrary, capricious, illegal and/or made in bad faith. He contended that his probationary period was extended in February, 1992, in violation of former Per 302.23, that this demonstrates the aforementioned impropriety of his termination, and that in light of the improper extension, Seraiva became a permanent employee who was not terminated appropriately under the rules due to that status. He further contended that he was not evaluated in accordance with former Per 310.07 rendering the termination illegal, that he did not miss the 22 days of work alleged during his first eight months of employment and that any absences he took were legitimate and were approved nonetheless. He contends that the termination was

also in retaliation for asserting various undescribed legal rights and taking precautions to do his job properly.

The parties were both represented by counsel: M. Reynolds, Esquire, for the appellant, J. Spencer, Esquire, for the state. The parties stipulated that Seraiva was hired under the so-called "old" personnel rules and terminated after April 27, 1992, the effective date of the current formulation thereof.

As a preliminary matter the Board was asked to determine whether Seraiva was a probationary employee or had attained permanent status.

On this point, the appellant argued that he was hired on September 1, 1991, actually commencing to work on September 3. The six month period was extended by 9 days 1½ hours on account of absences. The agency could request an extension at the end five months or sooner. The agency did do this, but as contended by the appellant, not in a timely manner because the extension was not approved until February 12, 1992, after he gained permanent status.

The state pointed out that the probationary period was intended to guarantee meaningful observation of work performance, that any interruption of service is not to be counted toward the probationary period, that Seraiva served five months of time excluding absences, and that the Director of Personnel checked the timeliness of the request and deemed it to be in compliance with the rules.

The Director of **Personnel's** testimony on the point was that **DOT's** Richard Williams, the **Human** Resources Coordinator, personally presented the written request to her for approval on February 4, **1992**, when she did indeed approve it. It looked late on its face, but upon inquiry about absences, Ms. **Lamberton** satisfied herself that it was indeed timely due to the extension provisions of Per 302.23. **State's** Exhibit 4. She contended that the various late date stamps on the document showing its transmittal back to DOT are irrelevant. It appears to be date stamped February 4, **1992**, at the Division of Personnel.

On review of the evidence and Per 302.23, the Board determines that Mr. Seraiva's probationary period was properly and timely extended by DOT and the Division of Personnel. Accordingly, he was a probationary employee at the time of termination. The evidence will be reviewed in light of this finding under the standards applicable to terminations within the probationary period.

The Board received the testimony of several additional witnesses on the merits of the appeal, plus nine **state's** exhibits and two exhibits offered by the appellant. Mr. Seraiva testified extensively about his absences and the other basis for his termination. Examples follow, and may be followed by the reader graphically by referring to the marked-up calendar which is **state's** exhibit one.

Seraiva says he started work on September **3**, 1991, with plans requiring some leave already set. The "furlough program" permitting employees leave to save the state money was to run and

Seraiva says his District Engineer, Ken Kyle, told him to take the time because it was unpaid and **didn't** cost the state money. He took September 6 off and **doesn't** remember the reason. Leave on this day, like most others, was on leave which was recommended by a supervisor and approved. Testimony of state witnesses was that this practice was followed after the fact of the leave to account for the absence and minimize bureaucratic entanglements from the office. Nonetheless, it is a fact to Seraiva's benefit. Seraiva tells us that if he knew they would "use it against him," referring to the absences, he would not have taken time off. He also says he **didn't** always know whether his leave slips were approved or not, but he **didn't** seem unduly concerned about it one way or another.

In February, Kyle and Joel Powers advised Seraiva that his probationary period was being considered for extension. A disagreement or altercation with Powers occurred at a meeting around this time, but Seraiva felt the extension had to do with the "**T-rate.**" This is a differential rate that Seraiva and the union correctly felt he should receive, but that had not been paid him, allegedly due to some misunderstanding on **Powers'** part. Truck driving (T rate) assignments and overtime stopped. Powers, who was in charge of overtime assignments, was claimed to be "gunning him down." Seraiva was sent home from overtime on February 7, because he had been told to apply salt around the gas pumps, Seraiva radioed some reports and Powers allegedly became angry and told him **he'd** best not have an opinion or **he'd** be fired.

This sort of point and counterpoint continued on the issue of painting fire hydrant markers for the town of New Hampton, where Powers is involved with the Water and Sewer Department, on state time. Seraiva allegedly took some abandoned antennas found along 1-93 by another employee, and the like. Seraiva had many reasons why his conduct or involvement in an incident is justified by the implicitly improper or unfair conduct of others. Seraiva allowed the possibility that Powers may have told him that taking time off could affect his becoming a permanent employee.

On cross examination, **Seraiva's** somewhat mercurial account of the incidents continued. He testified that Powers was lying in order to get rid of him and that he had gotten along well with Powers until the T-rate incident which made Powers look bad in front of Ken Kyle, who was present and corrected the pay issue. In **Seraiva's** opinion, Kyle had told him to take all the unpaid time he wanted.

In review of State's 1, 2, and 5, this latter being **Seraiva's** own notes, there were a number of days of leave used, but they should be put in perspective. September 6 had no reason given. September 26 was for a long standing family reunion. October 15 was without a reason. October 23 was taken in order to finish a paid house painting job. November 8 was for longstanding hunting plans. November 25 and 26 were due to illness from food poisoning from Thanksgiving, a holiday actually occurring later that same week. December 9 had no reason.

Hereafter, a head injury at work caused excused absences on January 7, 21, and 22. An eye accident at work, allegedly the result of using improper eye protection, resulted in excused absences on January 30 and 31. February 7, a Friday, Seraiva allegedly went home due to a toothache, but Seraiva claimed he was sent home by Powers due to the above-referenced radio incident. He took a floating holiday on March 10 (paid) and was absent for three paid hours on March 20. A dentist appointment on April 10 and 24, accounted for absences in April, as did one on May 5. May 22 was due to flu. A doctor's appointment accounted for June 5. A work injury took the next two weeks.

Some of these absences seem excusable, some work related, some prior commitments one might expect a new employee to have previously contracted, and some unwarranted. Nonetheless, almost all were recommended for approval, and all were approved by a supervisor. We consider the **numerous** absences important, but not dispositive. While Seraiva was absent a lot and in some ways lacked dependability, we are disinclined to sustain his termination solely on this ground. The other allegations relate to an "inability to work cooperatively with other crew **members**." We next examine the evidence in light of this consideration.<sup>1</sup>

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<sup>1</sup> We note that Seraiva's probationary period was extended for attendance reasons. State's 4. As of February 4, 1992, and given that he was using unpaid leave, we find this acceptable and not inconsistent with our treatment of the extension, supra. By February, attendance and the reasons for absences were sufficient considerations to warrant an extension of the probationary period on the evidence before us. This is, in our view, entirely consistent with the purposes of the probationary period set forth

Joel Powers is a Highway Patrolman and was **Seraiva's** boss. John Comeau was **Powers'** assistant. Powers testified that Seraiva was assigned to work with Comeau and another worker named Alan 90 to 95 percent of the time.<sup>2</sup> Yet Powers had regular contact with Seraiva and observations of him and his work, as well as reports through his staff. Powers warned Seraiva that he needed to be concerned about his obligations to D.O.T. when he was asked about leave to complete a paid house painting job. Seraiva was not very interested in **Powers'** counselling. One particular incident ended with Seraiva walking out without the underlying job attentiveness issue being worked out, and without Powers telling Seraiva his leave application was to be approved. Seraiva nonetheless called in on the day for which he had requested a "furlough." A similar debate occurred about a hunting trip to Pittsburgh November 7. Here, Seraiva said Kyle had approved leave, which was not confirmed when Powers talked to Kyle, although the leave was taken. These incidents are not discussed to reconsider the leave issue, but to examine the issue of attitude, and whether Seraiva met the

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in Per 601.07(a)

<sup>2</sup> In his testimony Powers flushes out some of the problems with Seraiva's leave usage. It was excessive, it was indicative of poor planning and an inability to set priorities, it followed certain sporting weekends as the **season's** changed, **i.e.** ice fishing, after bow hunting and muzzle loading hunting. Powers felt that the sports contributed to health related absences. The house painting incident stood alone. This had to be completed so Seraiva could get paid. Powers testified that Seraiva swore him to secrecy in April and confided that some of his dental absences were for alcohol counselling. This is unconfirmed, seems to deal with later absences, and on the record before us, is not taken one way or the other in terms of excusing or justifying absences.

applicable work standard. They suggest problems that are not of an unanticipated type, but which are of a type that management has a right to expect will be corrected during a probationary period, or the employee may be unacceptable.

Other examples of this dynamic occur in the testimony. The radio incident is one such. Powers says he was surveilling the plowing route in the snow trying to decide manpower requirements. Seraiva came on and dominated the radio frequency in use wanting to know if he was to stay or go. An argument ensued when Powers returned. Seraiva did not want to wait for his decision.

Powers testified that early on it looked as if Seraiva had good skills. However, Seraiva argued with other crew members who resultingly did not wish to work with him, which caused assigned tasks not to be completed. For example, Seraiva and another worker were assigned mowing related work where a contractor had used an over the guard rail mower leaving a swath that needed to be cleaned up by collecting and chipping the materials in it. Seraiva refused to do this work doing other brush work instead. On another occasion at the shop, a crew was replacing snowplow frames and called out to Seraiva, who was passing by, to assist with a portion of the procedure, but he refused. Powers does not assess **Seraiva's** work habits highly overall.<sup>3</sup>

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<sup>3</sup> Interestingly, Powers employed Seraiva to cut wood at his own home as Seraiva needed the money. This kindness was repaid by a bill for unpaid uniform fees. Seraiva favored uniforms but did not pay for them.

On a second day of hearing, June 9, 1993, John Comeau testified in accord with Joel Powers and he shed a bit more detail on the guardrail, antenna and ramp incidents telling us that Seraiva left before Comeau one night but returned a few minutes later to take the ramp that Powers had found and said Comeau could have. While no one accused Seraiva of stealing the **ramp**, some more discord in the work place seems to have resulted.

James Seraiva was a probationary employee ostensibly terminated pursuant to Per **601.07(e)** and Per 1001.02. The first cited section prescribes that dismissals during the initial probationary (non-promotional) period be effected in accordance with the second cited. Per 1001.02 provides that the appointing authority may dismiss an employee who "...fails to meet the work standard provided the dismissal is not:

- 1) arbitrary
- 2) illegal
- 3) capricious, or
- 4) made in bad faith."

A meeting must be held with the employee in advance of dismissal, said meeting to conform to the requirements of Per **1001.02(b)**, and the dismissal letter must conform to Per **1001.02(c)**. We are satisfied that Per **1001.02(b)** and (c) have been complied with after the requisite meeting on June 2, 1992. These procedural prerequisites have not been the thrust of the appellant's allegations of error in any case. Rather the appellant argues first that he was a permanent employee for the various reasons already disposed of above.

Second, in his letter of appeal, he argues that he was not provided with an evaluation one month prior to the expiration of his probationary period. This is a potentially telling **argument**. Per 601.07 does not require an evaluation and was the effective section pertinent to probationary appointments at the time of dismissal. An appointing authority is required to notify a probationary employee whether or not the employee shall receive a permanent appointment. Per. **601.06(f)**. See, Appellant's Exhibit 1. Per **801.07(a)**, however, does require such an evaluation. Such an evaluation should comply with Per **801.02**, Minimum Requirements For All Evaluations. This section requires certain information and a certain format. Per 801.02, passim. Note limited exception in Per **801.02(d)**, for probationary employees being dismissed. The instructions set forth on **Appellant's** 1 clearly suggest that that form is intended to satisfy this requirement. The "evaluation" utilized here does not formally meet all of the requirements, but does seem to satisfy the spirit of the rule in terms of its content, particularly in light of Mr. Powers' several meetings and discussions with Mr. Seraiva during which he attempting to counsel him and improve his conduct to the applicable standard. This minor formal flaw was probably occasioned by the recency of the adoption of the current personnel rules to **Seraiva's** dismissal. While this flaw must be corrected prospectively, it is, on all the evidence, de **minimis** here. Seraiva had adequate notice of deficiencies in his performance, what was needed to correct it, and what his

employers expected. Any technical error here is harmless on the facts presented.

Turning to **Seraiva's** remaining **arguments**, one is factual and already dealt with above, that being the absences. The other is some alleged retaliation resulting from the "**T rate**" and safety glasses incidents. On the record we find the argument of retaliation unsupported by the evidence, and that Seraiva has not met his burden on this point.

Returning to Per 1001.02, we do not, on the evidence, find **Seraiva's** dismissal to be arbitrary, as sufficient articulable reasons exist therefore. They are supported by evidence and Seraiva has not carried his burden of persuasion with his explanation. The dismissal was not capricious or made in bad faith for the same reasons. In short, Seraiva failed to meet the work standard because he was unable to work sufficiently and cooperatively with other crew members and did not respond to his supervisor's counselling. His relations with his peers were not conducive to effecting the **department's** business. Seraiva was similarly discharged legally. Per **1001.02(a)(2)**.

Accordingly, the Board finds that the Department of Transportation acted reasonably and lawfully in discharging Mr. Seraiva during his probationary period for failing to meet the applicable work standard.

So ordered.

Date: 12/28/93

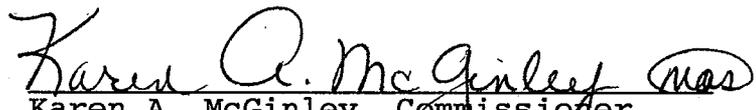
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