

NOTE: In response to a request from the Appellant to seal the record or remove this document from the Personnel Appeals Board's web page, the Board has elected to redact portions of the decision and order in this appeal.

PERSONNEL APPEALS BOARD

By: 
Patrick H. Wood, Chair
November 14, 2013

Appeal of Michelle Walsh

Docket #2006-T-022

Department of Health and Human Services, Division of Family Assistance

January 31, 2007

The New Hampshire Personnel Appeals Board (Bonafide, Johnson and Casey) met in public session on Wednesday, September 27, 2006, under the authority of RSA 21-I:58 and Chapters Per-A 100-200 of the NH Code of Administrative Rules, to hear the appeal of Michelle Walsh, a former employee of the NH Department of Health and Human Services, Division of Family Services. Ms. Walsh, who appeared *pro se*, was appealing her May 17, 2006 termination from employment as a Family Services Specialist, for allegedly failing to meet the work standard and for excessive unscheduled absences during her initial probationary period. Thomas Walsh, Ms. Walsh's husband, assisted the appellant in her presentation at the hearing. Attorney John Martin appeared on behalf of the State.

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

Exhibits offered by the Appellant and by the State have been redacted, as they include certain medical information.

At the hearing on the merits of the appeal, the following persons gave sworn testimony:

Karen Hutchins, Director of the Bureau of Human Resources, Health and Human Services

Robin Magee, Supervisor VI, Healthy Kids/Department of Health and Human Services

Michelle Walsh, Appellant

Position of the Parties:

Attorney Martin argued that Ms. Walsh, who was dismissed from her position on May 17, 2006, was a probationary employee at the time of dismissal and was subject to termination without prior warning for any failure to meet the work standard. Attorney Martin argued that Ms. Walsh had an extensive history of absenteeism, and although the Department made every effort to work with her, Ms. Walsh continued to be absent from work, first using accrued leave, then using leave without pay. Attorney Martin argued that the department worked with the Appellant to improve her attendance, but those efforts were unsuccessful, and the Appellant's excessive absenteeism began to have a significant impact on the agency's ability to serve its clients.

Attorney Martin argued that although the Department would have been authorized to dismiss Ms. Walsh at any time prior to the conclusion of her probationary period for failure to meet the work standard, the Department elected instead to counsel the appellant in December and February, and issued her a written warning on April 27, 2006, advising her that she would be subject to dismissal unless she improved her performance. She was instructed to arrive for work on time, report to work on a regular and consistent basis, and minimize her use of unplanned leave, unauthorized leave and leave without pay. Attorney Martin argued that the appellant failed to improve her attendance, and was not entitled to leave under the provisions of the Family and Medical Leave Act.

Ms. Walsh argued that there were legitimate reasons for all of her absences, including illness, injuries and family emergencies. She argued that the Department of Health and Human Services was legally obligated to accommodate her absences under the provisions of the Family and Medical Leave Act, and that her

termination was actually effected in retaliation for her having filed a workers compensation claim and a complaint with the EEOC. Ms. Walsh argued that other employees in the department were permitted to use leave when they became ill or disabled, and that she should have been afforded equivalent accommodations.

Background information included in the original decision has been redacted, as it includes certain medical information.

Findings of Fact and Rulings of Law:

After carefully reviewing the documentary evidence and considering the testimony and argument offered by both parties, the Board made the following findings of fact and rulings of law:

Findings of Fact have been redacted, as they include certain medical information.

Rulings of Law

- A. At all relevant times, Ms. Walsh was an initial probationary employee subject to dismissal without warning for failure to meet the work standard, provided that her termination was not arbitrary, illegal, capricious or made in bad faith. (Per 1001.02, NH Code of Administrative Rules)
- B. Although the Department of Health and Human Services could have dismissed Ms. Walsh without prior warning under the provisions of Per 1001.02, the department first provided both written counseling and an official written warning to the Appellant advising her that she would be dismissed from her employment unless her attendance improved.
- C. Chronic absenteeism constitutes failure to meet the work standard as described in Chapter Per 1000 of the NH Code of Administrative Rules.
- D. In order to qualify for leave under the provisions of the Family and Medical Leave Act, an employee must have worked at least one year for an employer, and must have worked a minimum of 1250 hours in the 12 months preceding the requested leave.
- E. In order to qualify for a reasonable accommodation, Ms. Walsh must have provided evidence of a qualifying disability that substantially affected one or more major life activities. The combination of

maladies and emergencies that Ms. Walsh listed, including back pain, sinus infections, colds, sick children and transportation problems did not constitute a qualifying disability.

- F. Reasonable attendance at work is an essential job function. Even if the Appellant were entitled to a reasonable accommodation, it would not be reasonable to require the employer to simply grant every request for leave, or overlook the Appellant's failure to comply with anything as simple as the notice requirements of the corrective action plan outlined in her April 17, 2006 written warning.

Decision and Order

The Board understands that absenteeism is sometimes the unfortunate result of legitimate problems and circumstances beyond an employee's control. Nevertheless, the employer is entitled to expect regular attendance in order to provide acceptable levels of staffing sufficient to carry out the agency's duties and responsibilities to the clients they serve.

After considering all the evidence and argument offered by the parties, the Board voted unanimously to DENY Ms. Walsh's appeal and to affirm the Department of Health and Human Services' decision to terminate Ms. Walsh's employment as a probationary employee for failure to meet work standards. Ms. Walsh noted that she had not worked since the date of termination, and that she continued to apply for State jobs. The Board noted that if Ms. Walsh could provide evidence that she had been able to hold a job and report to work regularly, there is nothing that would preclude her reapplying for employment with the Department of Health and Human Services.

THE PERSONNEL APPEALS BOARD

/s/

Philip Bonafide, Chair

/s/

Robert Johnson, Commissioner

/s/

Joseph Casey, Commissioner