

RECEIVED

OFFICE OF THE CLERK

THE STATE OF NEW HAMPSHIRE

JUL 8 3 35 PM '92

SUPREME COURT

92-088 Appeal of David Wheeler

1991-T-016

In Case No. .... July 8, 1992

the court upon ..... made the following order:

Appeal withdrawn.

Distribution:

- Personnel Appeals Board
- Jeffrey Spencer, Esquire
- Michael C. Reynolds, Esquire
- Donna R. Craig, Supreme Court
- File

Howard J. Zibel

Clerk

# State of New Hampshire

WPPID875



## PERSONNEL APPEALS BOARD

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

APPEAL OF DAVID WHEELER  
Docket #91-T-16  
Response to Appellant's Motion for Reconsideration

January 16, 1992

The New Hampshire Personnel Appeals Board (McNicholas, Johnson and Bennett) met Wednesday, January 8, 1992, to consider the appellant's Motion for Reconsideration of the Board's December 5, 1991 reinstatement order in the appeal of David Wheeler.

The appellant requested that the Board reconsider only that portion of its order relating to retroactive pay, accrued leave and retirement credit, arguing that "...[t]here is no provision for a contingency such as working six months without any unauthorized use of time" as a condition for receipt of back pay and benefits. The appellant contended that the statute clearly requires reinstatement without loss of pay if an employee is discharged in violation of the Personnel Rules.

The pertinent statutory provision of RSA 21-I:58,I is as follows:

"...If the personnel appeals board finds that the action complained of was taken by the appointing authority for any reason related to politics, religion, age, sex, race, color, ethnic background, marital status, or handicapping condition, or was taken in violation of a statute or of rules adopted by the director, the employee shall be reinstated to the employee's former position or a position of like seniority, status, and pay. The employee shall be reinstated without loss of pay, provided that the sum shall be equal to the salary loss suffered during the period of denied compensation less any amount of compensation earned or benefits received from any other source during the period. 'Any other source' shall not include compensation earned from continued casual employment during the period if the employee held the position of casual employment prior to the period, except to the extent that the number of hours worked in such casual employment increases during the period. In all cases, the personnel appeals board may reinstate an employee or otherwise change or modify any order of the appointing authority, or make such other order as it may deem just."

APPEAL OF DAVID WHEELER  
Docket #91-T-16  
Response to Appellant's Motion for Reconsideration  
page 2

RSA 21-I:46 charges the Board with hearing appeals as provided by RSA 21-I:57 and 58, and appeals arising out of the application of rules adopted by the Director of Personnel. The Board is charged with finding the facts in each case, and in making such order as it may deem just in all cases. Having reviewed the record in this matter in conjunction with its December 5, 1991 decision and the appellant's Motion for Reconsideration, the Board voted unanimously to affirm its earlier order. The appellant has failed to offer a persuasive rationale for finding that the December 5, 1991 order for conditional reinstatement was either unlawful or unreasonable.

The appellant did not dispute D.O.T.'s charges concerning his attendance and leave record, although he did ask the Board to find that many of his absences were medically related. In that regard, the Board found the following:

"On July 20, 1989, DOT wrote to the appellant, informing him that because of his numerous absences and his habit of using leave as soon as any kind of leave was earned, he would not be granted approval for further leave without pay unless that leave was for 'verifiable medically related causes' and that he would be required to provide a physician's certification for any future sick leave requests." (See: Appeal of David Wheeler, P.A.B. Decision, December 5, 1991, page 3)

Department of Transportation Exhibit #4 provided a general accounting of the appellant's leave usage for the several fiscal years prior to the appellant's dismissal. During the fiscal year beginning July 1, 1989 and ending June 30, 1990, the appellant was absent from work 582 hours, or roughly 29% of all available working hours. Of those absences, 348 hours were listed as sick without pay. In spite of being cautioned in July that he would not be granted further leave without pay except of "verifiable medically related causes" the appellant chose to take unauthorized leave after having received a formal written denial of his request for leave during the Thanksgiving holiday. The appellant's attendance record did not improve in fiscal year 1991. In the first nine months of that fiscal year, between July 1, 1990 and March 19, 1991, the appellant was absent from work a total of 613 hours (483 of which were sick without pay) or roughly 41% of all working hours during that period.

In its decision on the merits of Mr. Wheeler's appeal, the Board found that:

"...for whatever reason, throughout his employment with the Department of Transportation the appellant's use of leave was such that he rarely, if ever, had any substantial balance of accrued leave of any kind. Consequently when the appellant's various medical emergencies arose he did not have sufficient accrued leave available for the full periods of absence." (See: Appeal of David Wheeler, P.A.B. Decision, December 5, 1991, page 2)

APPEAL OF DAVID WHEELER

Docket #91-T-16

Response to Appellant's Motion for Reconsideration

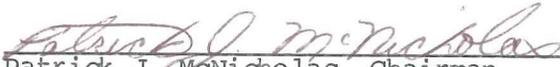
page 3

As noted in the Board's December 5, 1991 order, the appellant could have been discharged for absenteeism without approved leave. The appellant offered only hearsay evidence that his last extended leave was approved. He did not offer any documentary evidence of a written request for extended medical leave of absence without pay, nor did he offer documentary or testimonial evidence that such leave was approved as required by the Rules of the Division of Personnel. However, the Department of Transportation failed to offer any competent testimony or evidence to the contrary. Therefore, the Board's decision to reinstate the appellant was predicated more upon the Department of Transportation's failure to meet its burden of production than upon the appellant's ability to meet his burden of proof.

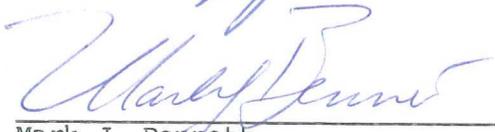
The Board made no finding in its December 5, 1991 decision that the discharge was effected "in violation" of the Personnel Rules. Rather, the Board found the discharge to have been technically deficient, and that the deficiency was substantial enough to warrant the appellant's conditional reinstatement.

In light of Mr. Wheeler's demonstrated inability to adhere to a regular schedule of work, the Board considers it equitable to require that the appellant demonstrate both a willingness and an ability to report for duty as scheduled for a reasonable period of time without incident of unauthorized leave taking before requiring the Department of Transportation to reinstate any leave or to make payment of any lost wages or benefits. Accordingly, the Board voted to deny the appellant's Motion for Reconsideration.

THE PERSONNEL APPEALS BOARD

  
Patrick J. McNicholas, Chairman

  
Robert J. Johnson

  
Mark J. Bennett

cc: Virginia A. Vogel, Director of Personnel  
Charles O'Leary, Commissioner, Department of Transportation  
Michael C. Reynolds, SEA General Counsel