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THE SUPREME COURT OF NEW HAMPSHIRE

Personnel Appeals Board
No. 99-173

APPEAL OF KURK FLYNN
(New Hampshire Personnel Appeals Board)

November 20, 2000

Michael C. Reynolds, general counsel, State Employees' Association of New Hampshire, Inc., of Concord, by brief and orally, for the petitioner.

Philip T. McLaughlin, attorney general (Douglas N. Jones, assistant attorney general, on the brief and orally), for the State.

NADEAU, J. The petitioner, Kurk Flynn, is a Fire Fighter I employed by the department of the adjutant general (department), an agency of the State of New Hampshire. He appeals a decision of the personnel appeals board (board) upholding the department's decision to adjust his seniority date for two days spent on involuntary disciplinary suspension. We reverse.

The facts are undisputed. The petitioner was disciplined for reasons not disclosed in the record, and was placed on a two-day suspension without pay. Following the suspension, the department adjusted the petitioner's seniority date forward to reflect the two days of suspension. The petitioner appealed to the board. See RSA 21-I:58 (1988 & Supp. 1999).

Based upon the pleadings, the board ruled that the department had properly adjusted the petitioner's seniority date pursuant to New Hampshire Administrative Rules, Per 701.01. The

petitioner's motion to reconsider was denied, and this appeal followed. See RSA 21-I:58, II; RSA 541:6.

The only rule cited by the parties as applicable to the calculation of seniority dates for State employees is Per 701.01, which states in part:

Seniority Based on Full Time Employment.

. . . .

(b) Full-time employment shall be calculated on the basis of years, months, and days of service, except that any days, months, or years of leave without pay for personal or educational purposes shall not be counted toward seniority.

N.H. Admin. Rules, Per 701.01.

"We will overturn an agency decision when there is an error of law, or when the order is unjust or unreasonable" Appeal of Boulay, 142 N.H. 626, 627-28, 706 A.2d 678, 679 (1998); see RSA 541:13 (1997). In construing rules, as in construing statutes, "where possible, we ascribe the plain and ordinary meanings to words used." Milette v. N.H. Retirement System, 141 N.H. 342, 345, 683 A.2d 531, 532-33 (1996) (quotation omitted); cf. 1 K. Davis & R. Pierce, Administrative Law Treatise § 6.10, at 281-82 (3d ed. 1994); 2 Am. Jur. 2d Administrative Law § 527 (1994). "While deference is accorded to an agency's interpretation of its regulations, that deference is not total." Appeal of Morin, 140 N.H. 515, 518, 669 A.2d 207, 209 (1995).

We conclude that it is unreasonable to categorize an involuntary, unpaid suspension as leave without pay for "personal" purposes. No reasonable person would anticipate that such a suspension would be so classified. Unlike "educational leave," which is defined in New Hampshire Administrative Rules, Per 102.27, "personal leave" is undefined. The only helpful reference to personal leave that we find in the rules is the definition of "annual leave," which means "time off for vacation or other personal business." N.H. Admin. Rules, Per 102.04.

The rule adjusting seniority time for "personal or educational purposes" focuses upon time devoted to the employee's purposes. In addition, a disciplinary suspension without pay is not leave. It is involuntary absence from work for the employer's purposes. See N.H. Admin. Rules, Per 102.60. Thus, we find the board's interpretation of the rule unreasonable. Accordingly, we reverse.

Reversed.

HORTON, BRODERICK, and DALIANIS, JJ., concurred; GROFF, J.,
superior court justice, specially assigned under RSA 490:3,
concurred.

State of New Hampshire



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APPEAL OF KURK FLYNN

DOCKET #99-O-3

Response to Appellant's Request for Reconsideration

March 3, 1999

On January 20, 1999, the Personnel Appeals Board convened to review a timely filed Motion to Reconsider the Board's January 6, 1999, decision denying Mr. Flynn's appeal. No objection was filed to this motion. Accordingly, the Board is free to take up the Motion to Reconsider, but is not bound to grant it.

The Motion sets forth grounds upon which the Board, upon review, determines to have been previously raised, reviewed and decided with respect to this matter. Accordingly, the Board finds no basis upon which the Motion to Reconsider should be granted, and voted to DENY the Motion.

THE PERSONNEL APPEALS BOARD

Handwritten signature of Mark J. Bennett in cursive.

Mark J. Bennett, Chairman

Handwritten signature of Lisa A. Rule in cursive.

Lisa A. Rule, Commissioner

Handwritten signature of James J. Barry in cursive.

James J. Barry, Commissioner

cc: Virginia A. Lamberton, Director of Personnel, 25 Capitol St., Concord, NH 03301
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Appeal of Kurk Flynn

Docket #99-O-3

Pease Air National Guard Base

January 6, 1999

By letter dated December 3, 1998, SEA Field Representative Jean Chellis requested a hearing on behalf of Kurk Flynn, an employee of the Adjutant General's Office assigned to the Pease Air National Guard Base. Mr. Flynn, who is employed as a State Fire Fighter I, is appealing the adjustment of his seniority date as a result of a two-day disciplinary suspension without pay.¹ Attached to his notice of appeal was a December 2, 1998, letter from Linda Goss, Human Resources Assistant, and an April 15, 1994, memo from William Weaver to all payroll personnel, explaining the various circumstances under which employees' seniority dates are to be adjusted.

In the appellant's notice of appeal, Ms. Chellis argued that adjusting Mr. Flynn's seniority date violated Per 701.01(b) of the Rules of the Division of Personnel. She argued that although the rule permits adjustments to an employee's seniority for periods of unpaid leave taken for "personal or educational purposes," the rule makes no provision for adjustments when the employee's unpaid leave status is the result of a disciplinary suspension.

The Board can not imagine a more "personal" reason for an unpaid leave than conduct resulting in a disciplinary suspension. Furthermore, the Board believes it would be patently unfair to allow Mr. Flynn to retain his original seniority date after his having been suspended without pay, while requiring the agency to advance the seniority date of those persons taking approved, unpaid leave for other reasons.

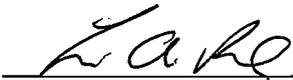
¹ Mr. Flynn did not appeal the suspension itself,

Based on the appellant's pleadings, the Board voted to DENY the appeal, finding that the State acted properly in adjusting Mr. Flynn's seniority date to reflect the unpaid absence created by his two-day disciplinary suspension.

THE PERSONNEL APPEALS BOARD


Mark J. Bennett, Chairman

Mark J. Bennett, Chairman



Lisa A. Rule, Commissioner


James J. Barry, Commissioner

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