

# State of New Hampshire



## PERSONNEL APPEALS BOARD

25 Capitol Street  
Concord, New Hampshire 03301  
Telephone (603)271-3261

### Appeal of Terri Gazaway-Barnard Docket #95 -D-9 Department of Safety

#### Decision on Appellee's Motion for Rehearing and Appellant's Objection

March 21, 1996

On December 15, 1995, the New Hampshire Personnel Appeals Board received from the Department of Safety a Motion for Rehearing pertaining to the Board's November 15, 1995, decision in the above-captioned appeal. The Appellant's Objection to that Motion was received on December 19, 1995.

After considering the merits of the Motion and Objection in light of the Board's November 15, 1995, decision in this matter, the Board voted unanimously to deny the Motion for Rehearing. However, well-pled the Department's Motion may be, it offers neither evidence nor argument which had not already been offered for consideration by the Board as part of the hearing on the merits of Ms. Gazaway-Barnard's appeal.

Upon review of the Motion and Objection, the Board also voted unanimously to deny the Appellant's request for payment of the employee's fees and costs associated with the filing of her Objection.

THE NEW HAMPSHIRE PERSONNEL APPEALS BOARD

Handwritten signature of Mark J. Bennett in cursive script.

Mark J. Bennett, Acting Chairman

Handwritten signature of Robert J. Johnson in cursive script.

Robert J. Johnson, Commissioner

cc: Virginia A. Lamberton, Director of Personnel  
Sheri J. Kelloway-Martin, Esq., Department of Safety  
Andru H. Volinsky, Esq.

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**APPEAL OF TERRI GAZAWAY-BARNARD**  
**Department of Safety**  
**Docket #95-D-9**

**November 15, 1995**

The New Hampshire Personnel Appeals Board (Bennett and Johnson) met Wednesday, September 27, 1995, under the authority of RSA 21-I:58, to hear Terri Gazaway-Barnard's appeal of a June 6, 1995, letter of warning issued to her for allegedly failing to comply with her employer's demand for production of a medical assessment. Ms. Gazaway-Barnard was represented at the hearing by Attorney Andru Volinsky. Attorney Sheri J. Kelloway-Martin appeared on behalf of the Department of Safety, Division of Motor Vehicles. The appeal was made on offers of proof. The record in this matter consists of the pleadings filed by the parties prior to the hearing, the audio tape recording of the hearing, Appellant's Exhibit 1<sup>1</sup>, and the Employee's Requested Findings of Fact and Rulings of Law.

By letter dated May 30, 1995<sup>2</sup>, Assistant Commissioner Dunn wrote to Ms. Gazaway-Barnard's attorney, Andru Volinsky, advising him that the Department of Safety believed that Ms. Gazaway-Barnard was medically unable to perform the required duties and responsibilities of her position. Mr. Dunn instructed Mr. Volinsky to advise his client that she would be required to provide the employer with a report from her licensed health care practitioner detailing Ms. Gazaway-Barnard's general state of health and the specific nature of any relevant injury, illness, disability or condition which might affect her ability to perform all the bona *fide* occupational duties of her position. Her attorney was informed that Ms. Gazaway-Barnard was to provide that report by June 2, 1995. Attached to the letter were the appellant's class specification and supplemental job description. The letter also described Ms. Gazaway-Barnard's work schedule, work location and work environment. Mr. Dunn's letter concluded with cautionary language advising Mr. Volinsky that Ms. Gazaway-Barnard could be subject

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<sup>1</sup> May 30, 1995 letter, with attachments, from Robert E. Dunn to Andru Volinsky, Esq., which was entered into the record without objection from the Department of Safety.

<sup>2</sup> The State asserted that the letter to Attorney Volinsky was forwarded by facsimile transmission on May 30, 1995. Appellant's Exhibit 1 indicates that it was not forwarded until the afternoon of May 31, 1995.

to disciplinary action if she failed to provide the assessment by the end of the day on June 2, 1995.

Mr. Dunn's letter stated:

"Per 1002.02 (b) requires that Ms. **Barnard** provide us with the name and address of her licensed health care practitioner and a signed statement authorizing the release of assessment information from the licensed health care practitioner to the appointing authority. In order to expedite this assessment, however, please have Ms. **Barnard** forward that release to the practitioner directly, with a copy to us.

"Per 1002.02 (c) requires us to supply certain information to the practitioner. Once again, in order to expedite this procedure, please forward the following directly, to the practitioner with the records release..."

Mr. Dunn's letter concluded with the following warning:

"Pursuant to Per 1002.01 (d), failure to comply with the request' for a medical assessment may result in disciplinary action as provided in Per 1001. Because Ms. **Barnard** currently is on leave with pay, please provide us with the requested assessment by the end of the day on Friday, June 2, 1995."

Attorney Volinsky wrote to Mr. Dunn on June 2, 1995, sending the letter by facsimile transmission just before 5:00 p.m., after the Department of Safety had closed for business. In his letter, Mr. Volinsky asserted that the assessment could not be completed by the June 2nd deadline, and that Mr. Volinsky believed that the appellant's therapist would need additional information before a thorough assessment could be completed.

On June 6, 1995, Mr. Dunn issued a written warning to Ms. Gazaway-Barnard. The warning stated, in part:

"Pursuant to Per 1002.02(d) and Per 1001.03, this is a written warning for failure to comply with the request for a medical assessment. By letter dated May **30**, 1995, and faxed to your attorney on the same day, I instructed you to provide a written medical assessment pursuant to Per 1002.02, and I set a deadline of June 2, 1995. You did not comply, and the reasons for such noncompliance as laid out in Mr. Volinsky's June 2

letter (i.e., 'limited lead time and other commitments in [his] practice') are insufficient."

In his June 21, 1995, appeal to this Board, Attorney Volinsky argued that the June 6, 1995, warning was improper. He asserted that the appellant was not allowed sufficient time in which to produce the required medical information, and that the appointing authority had failed to supply all the information necessary to assist Ms. Gazaway-Barnard's therapist to understand the issue. He also argued that because Mr. Dunn was not the appellant's supervisor, he did not have the authority to issue her a warning.

Per 101.07 of the Rules of the Division of Personnel defines "Appointing Authority" as "...the officer, director, board, commission, or person designated in writing having the power to make appointments in the state classified service in a particular agency." In oral argument before the Board at the September 27, 1995, hearing, and in her July 31, 1995, written response to the appellant's allegations, Ms. Kelloway-Martin asserted that Assistant Commissioner Dunn is a higher level supervisor in the chain of command, subordinate only to the Commissioner. She argued that during the absence of the appellant's supervisor, Mr. Dunn did have the authority to issue a written warning to the appellant. The Board agrees. If Mr. Dunn would be authorized to make appointments in the State classified service in the absence of the Commissioner, it is only reasonable to conclude that in the Commissioner's absence, he would also be authorized to issue written warnings.

In his May 30, 1995, letter to Mr. Volinsky, Mr. Dunn wrote that the appellant was "unable to concentrate on [her] work assignments due to an apparent preoccupation with other matters." He also asserted that the appellant appeared "to be in severe emotional pain" which was affecting her ability "to fulfill her duties and responsibilities within [the] bureau." The additional information which Mr. Dunn sent to Mr. Volinsky to be forwarded to the therapist satisfied all the requirements of Per 1002.02. If there were concerns about the adequacy or sufficiency of job-specific information provided for use by Ms. Gazaway-Barnard's therapist, they appear to have been raised by her attorney and not her therapist, and should not have contributed to any delay in completing the assessment.

Ms. Kelloway-Martin asserted that the warning was both reasonable and proper. She asserted that because the appellant had been placed on paid administrative leave, the agency had an urgent need to establish whether or not she was medically able to return to work and perform her job assignments. She argued that Mr. Dunn had established a limited but reasonable amount of time in which to have a medical assessment completed, and that if Mr. Volinsky had

provided the job-specific information to the therapist in a timely fashion, the assessment could have been returned to the employer by the June 2nd deadline. She also argued that the agency did not have to consider Mr. Volinsky's scheduling problems when it issued the warning to Ms. Gazaway-Barnard on June 6, 1995, for failing to provide the assessment. The Board does not agree.

Per 1002.02 (c) requires the appointing authority to supply certain information to the employee's licensed health care practitioner, thereby making the appointing authority responsible for assuring that information is relayed in a timely fashion. In this instance, where Ms. Gazaway-Barnard had retained counsel to represent her during the agency's earlier attempt to obtain a medical assessment, Mr. Dunn elected to continue communicating directly with the appellant's attorney rather than with the employee herself. Having done so, Mr. Dunn built an additional step into both the delivery of information to the health care provider, and return of information from the health care provider to the employer. Expecting information to be forwarded to, and returned from, the therapist under those circumstances within a period of two days was clearly unreasonable.

Further, having elected to communicate with Mr. Volinsky rather than Ms. Gazaway-Barnard, some consideration should have been given to Mr. Volinsky's schedule and that of the therapist<sup>3</sup> in determining what constituted a reasonable amount of time in which to expect the medical assessment to have been completed and returned. While the Board understands the agency's interest in a timely resolution to the question of the appellant's fitness for duty, it was the agency's decision to put her on paid status rather than requiring her to be absent without pay. Consequently, any problem arising out of the compensation issue was within the agency's authority to correct by placing the appellant on unpaid leave. In the Board's opinion, the alleged urgency of the compensation issue provides a poor rationale for establishing an unreasonable, unrealistic deadline for submission of the assessment. Similarly, the Board finds it surprising that the agency would communicate with Mr. Volinsky, rely upon Mr. Volinsky to transmit information from the appointing authority to the appellant's therapist, and then insist that Mr. Volinsky's scheduling constraints could not be taken into consideration when it was issuing the appellant a warning for failure to timely file a medical assessment.

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The record reflects that Mr. Dunn had no direct contact with the therapist prior to his issuing the letter of warning, and he therefore could not know if the practitioner was available to complete the assessment prior to June 2, 1995.

Ms. Kelloway-Martin argued that the appellant had an affirmative obligation to notify her employer before the close of business on June 2, 1995, if the assessment could not be completed, and having failed to do so, the employer was justified in issuing the warning. The Board does not agree. First, the record reflects that Mr. Volinsky did attempt to contact the Department of Safety before 5:00 p.m. on the afternoon of June 2, 1995, but that the Department of Safety offices had already closed. Furthermore, the May 30, 1995, letter states:

"Pursuant to Per 1002.01 (d), failure to comply with the request for a medical assessment may result in disciplinary action as provided in Per 1001. Because Ms. Barnard currently is on leave with pay, please provide us with the requested assessment by the end of the day on Friday, June 2, 1995."

It does not advise the appellant that failure to submit the assessment by June 2, 1995, will result in disciplinary action, only that "failure to comply with the request for a medical assessment may result in disciplinary action." If the appointing authority intended to make June 2, 1995, the absolute deadline for submission of the assessment<sup>4</sup>, or if it intended to discipline the employee for failing to provide some form of written notice by the end of the day on June 2, 1995, the May 30, 1995, letter from Assistant Commissioner Dunn to Attorney Volinsky should have clearly set forth those conditions. Having failed to do so, the appointing authority unreasonably expected the appellant to understand what corrective action she must have taken in order to avoid disciplinary action. [See, Appeal of Elaine Fugere, 134 NH 322 (1991)]

Furthermore, Per 1002.02(d), the rule which the State cited in establishing its authority to issue a written warning in this case, specifically delineates the information which an appointing authority may demand from an employee if that employee wishes to avoid disciplinary action. Per 1002.02(d), the rule which Ms. Gazaway-Barnard allegedly violated, states:

"The appointing authority shall inform the employee in writing that failure to comply with the request for a medical assessment described in Per 1002.02 (b)(2) may result in disciplinary action as provided in PART Per 1001."

The Personnel Rules authorize an appointing authority to discipline an employee who refuses, or fails, to provide the name and address of the employee's licensed health care provider, and an authorization for release of medical information from the provider to the employer. Mr.

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The Board has already determined that a June 2, 1995, deadline was unreasonable.

Dunn's letter to Mr. Volinsky did not warn of disciplinary action if the employee failed to provide that information. Instead, it warned of discipline if Ms. Gazaway-Barnard failed to produce the assessment itself.

Per 1002.02 recognizes that the employee controls the flow of information to the employer about the health care provider and the authorization for release of information, but has no control over the timeliness or sufficiency of information which the health care provider releases to the employer. For that reason, the rule permits an appointing authority to arrange for an independent assessment, at the employer's expense, when an assessment requested pursuant to Per 1002.02 (a)(1) is unresponsive.

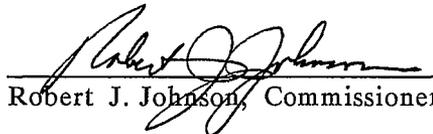
Having considered the evidence and oral argument, the Board found that the agency's actions in this instance were unreasonable. Accordingly, the Board voted unanimously to grant Ms. Gazaway-Barnard's appeal. In so doing, the Board ruled as follows on the Employee's Requested Findings of Fact and Rulings of Law:

- A. Findings of Fact: 1 - 16 are granted.
- B. Conclusions of Law: 17, 18 and 20 are granted. 19 is denied.

FOR THE PERSONNEL APPEALS BOARD



Mark J. Bennett, Acting Chairman



Robert J. Johnson, Commissioner

cc: Virginia A. Lamberton, Director of Personnel  
Sheri J. Kelloway-Martin, Esq., Litigation Office, Department of Safety  
Andru H. Volinsky, Esq., Shaheen, Capiello, Stein & Gordon, P.A.