

State of New Hampshire



PERSONNEL APPEALS BOARD
25 Capitol Street
Concord, New Hampshire 03301
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Appeal of Frances McLean

Docket #2002-D-16

Department of Transportation

July 17, 2002

The New Hampshire Personnel Appeals Board (Rule, Johnson and Urban) met on Wednesday, June 19, 2002, under the authority of RSA 21-I:58 and Chapters Per-A 100-200 of the NH Code of Administrative Rules, Rules of the Personnel Appeals Board, to hear the appeal of Frances "Chris" McLean, an employee of the Department of Transportation. Ms. McLean, an employee of the Turnpikes Division, was appealing a written warning issued to her for failing to meet work standards by treating toll customers discourteously. The appellant denied the allegations, and argued that the agency withheld from her the name of the motorist who made the most recent complaint as well as specific details of other complaints allegedly received about her performance. The appellant was represented at the hearing by her friend Mr. William Henderson. Assistant Attorney General Margaret Fulton appeared on behalf of the Department of Transportation. Neither party objected to the composition of the Board scheduled to hear and decide the appeal.

Originally the matter was scheduled for a hearing on May 22, 2002, on the merits of the appeal. However, with the appellant's consent, the Board granted the State's May 15, 2002 Petition to Postpone Hearing on the Merits. The matter was rescheduled with the parties' agreement. Without objection, the appeal was heard on offers of proof by the representatives of the parties.

The record of the hearing in this matter consists of documents submitted by the parties prior to the hearing, notices and orders issued by the Board, the audio tape recording of the hearing on

the merits of the appeal, and a single exhibit admitted at the hearing identified as State's Exhibit 1, the October 21, 2001 letter received by the Bureau of Turnpikes, complaining of Ms. McLean's conduct. Attached to the Appellant's April 29, 2002 letter of appeal were the following:

1. November 16, 2001 memo from F.C. McLean to Mary Burns & Albert Alinsky concerning "Complaint from 'Unknown Motorist'"
2. March 25, 2002 memo from Frances C. McLean to Harvey S. Goodwin titled "Reply to Letter of Warning"
3. April 16, 2002 letter from Harvey S. Goodwin to Frances McLean denying her Step 1 Informal Settlement Request of her March 14, 2002 written warning
4. March 14, 2002 Letter of Warning issued to Frances C. McLean by Harvey S. Goodwill

On June 6, 2002, the appellant also submitted to the Board a copy of the October 21, 2001 complaint filed with the Bureau of Turnpikes. That copy bore a number of hand-written notes.¹

Although both parties offered additional exhibits into evidence, the Board declined to admit them as neither party had complied with Per-A 206.14 of the NH Code of Administrative Rules (Rules of the Personnel Appeals Board) which required them to disclose in advance of the hearing a list of those exhibits they intended to offer at the hearing on the merits of the appeal.

Assistant Attorney General Fulton argued that the burden was upon the appellant to prove that the warning was unwarranted or unfair. She argued that the behavior described in the October 2001 complaint was consistent with prior complaints about the appellant's behavior with toll patrons. In this case, she argued, the appellant had been counseled about her performance over a substantial period of time and had been advised repeatedly that she needed to treat customers with more courtesy and respect. She argued that the appellant had been informed of complaints

¹ Notes at the top of the first page appear to have been written by Mr. Almsy. They say, "Mike, Please meet with Chris and get her side of this. Thanks, Al," and "let's discuss when you have her written statement." Other notes appearing on the first and second page of the complaint letter appear to have been written by someone else. Those notes identify errors in grammar and spelling in the letter and highlight what appear to be areas of discussion that the appellant raised in the course of her appeal.

as they were received by the Department and had been permitted to respond. In each instance, she argued, the appellant took no responsibility for creating or contributing to a problem and simply blamed the motorists instead. She argued that the agency had the right to use the written warning as the least severe form of discipline to correct the employee's unsatisfactory work performance or conduct.

Mr. Henderson argued that all the evidence offered by the State in support of the warning was merely circumstantial and that the burden should have been on the motorist making the complaint and on the State to prove that the appellant was rude and discourteous. He argued that the State's practice of withholding the names of individuals who complained about DOT employees placed an unfair burden on the employees and made it virtually impossible for them to defend themselves. He also argued that in reviewing the appellant's response to the complaint, the State gave too little consideration to the appellant's theory that the complaint appeared to come from a "disgruntled motorist" who was expressing her anger at having to pay the toll twice a day.

Mr. Henderson argued that the State's continuing practice of taking the motorist's word over that of the toll attendant placed an unfair burden on the employee. He argued that anyone making a legitimate or valid complaint should be willing to be identified. Instead, he argued, the State "protects and hides" those people making complaints. Mr. Henderson argued that the appellant was an 18 year employee of the State who has always done her job to the best of her ability. He admitted that complaints about the appellant have come in, but she has answered each of them. He argued that it was never the appellant's intent to be rude or to confront the motorist, but to assist the motorist in making the toll collection system work. He asked the Board to note that the toll attendants have a right to expect motorists to meet them half way, and it was unfair to discipline an employee when it may be the motorist who has failed to use reasonable care to reach the booth and hand the toll to the attendant.

Mr. Henderson argued that the appellant had been denied the right to confront her accuser. He argued that the State violated the appellant's privacy by disclosing her name and reference to her work history to the motorist making the complaint about her. He argued that the information

provided by the State about Ms. McLean may even have prejudiced the motorist against the appellant.

The State made the following, uncontroverted offers of proof:

1. Ms. McLean has worked for the Department of Transportation as a Toll Attendant since 1984.
2. Between her date of hire and the present, the appellant has been assigned to four different toll stations.
3. During her tenure as a Toll Attendant, the Department has received a minimum of 15 formal complaints about the appellant's interactions with toll patrons.
4. The Department of Transportation has received more complaints about Ms. McLean during the course of her employment than it has received about any other of the approximately 300 Toll Attendants who work for the Department.
5. The appellant's 1999, 2000 and 2001 annual performance evaluations cited her as below expectations in communicating with the public.
6. The appellant was counseled by her supervisors in March 1999 and November 1999 to stop treating motorists in a rude or discourteous manner.
7. The appellant was counseled again in January 2000 for failure to receive tolls in a courteous manner.
8. The appellant has always offered an explanation for complaints received, but in each case has insisted that the motorist was at fault.
9. In October 2001, the Department of Transportation received both a verbal and a written complaint from a female patron of the Merrimack Tolls who complained that the appellant had treated her rudely and discourteously on five separate occasions. The motorist claimed that the appellant refused to reach out of the toll booth to receive her toll payment.
10. After discussing the complaint with the motorist, reviewing her written complaint, and considering the appellant's written and verbal response to the complaint, the appellant's supervisors determined that the complaint was valid and was consistent with previous complaints about the appellant's conduct.

11. The Department issued the appellant a written warning for failure to meet the work standard, citing her "continued lack of helpfulness in collecting tolls and discourteous remarks to toll users...."
12. The individual who made the most recent complaint about the appellant asked that her identity be withheld from the appellant because she was concerned that the appellant would in some fashion retaliate against her.
13. The Department of Transportation withheld from the appellant the name of the individual making the most recent complaint, although the Department has released the names of some persons making complaints in the past.

The appellant made the following uncontroverted offers of proof

1. The Department of Transportation has sometimes refused to disclose the name of persons making complaints about the appellant, as was the case with the complaint received in October 2001.
2. Whenever the Department has apprised the appellant of a complaint, the appellant has provided a written explanation of the incident giving rise to the complaint.
3. Some drivers fail to use reasonable care to reach the toll booth and often do not come to a complete stop at the booth, making it difficult at times for Toll Attendants to reach the vehicle and receive the toll.
4. Toll Supervisors Burns and Alinsky disclosed the appellant's name to the woman who made the formal complaint about the appellant in October 2001, but refused to disclose the name of the complainant to the appellant.
5. Although the appellant's 1999, 2000 and 2001 annual performance evaluations rated her below expectations in the area of communicating with the public, the appellant's overall performance in each of those reviews was rated as meeting expectations.

Rulings of Law

- A. "An appointing authority shall be authorized to use the written warning as the least severe form of discipline to correct an employee's unsatisfactory work performance or misconduct for offenses including, but not limited to: (1) Failure to meet any work standard." [Per 1001.03 (a) (1), NH Code of Administrative Rules]

Standard of Review – Per-A 207.12 (b), NH Code of Administrative Rules

"In disciplinary appeals, including termination, disciplinary demotion, suspension without pay, withholding of an employee's annual increment or issuance of a written warning, the board shall determine if the appellant proves by a preponderance of the evidence that:

“(1) The disciplinary action was unlawful;

“(2) The appointing authority violated the rules of the division of personnel by imposing the disciplinary action under appeal;

“(3) The disciplinary action was unwarranted by the alleged conduct or failure to meet the work standard in light of the facts in evidence; or

“(4) The disciplinary action was unjust in light of the facts in evidence.”

Decision and Order

Having considered the evidence and the parties arguments and offers of proof, the Board voted to DENY the appeal, finding that the agency was justified in issuing the appellant a written warning as the least severe form of discipline to correct her unsatisfactory work performance.

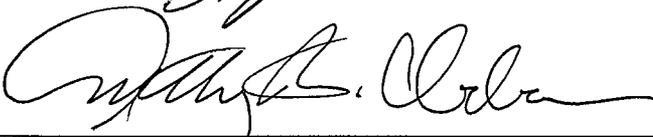
THE PERSONNEL APPEALS BOARD



Lisa A. Rule, Acting Chairperson



Robert J. Johnson, Commissioner



Anthony B. Urban, Commissioner

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