

State of New Hampshire



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

APPEAL OF RHODORA NAGINE - Docket #98-D-1

Department of Safety

Response to Appellant's Motion for Rehearing and Appellee's Objection

Thursday, October 23, 1997

By letter dated September 22, 1997, SEA Field Representative Jean Chellis, requested that the Board reconsider its September 4, 1997, decision in the appeal of Rhodora Nagine. Attorney Sheri J. Kelloway-Martin submitted the State's Objection to that request on September 24, 1997. Having reviewed the motion and objection in conjunction with the Board's decision in this matter, the Board voted unanimously to deny the appellant's request, finding that the appellant failed to offer grounds upon which to claim that the decision was unlawful or unreasonable.

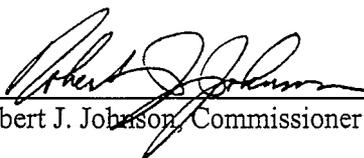
THE PERSONNEL APPEALS BOARD



Lisa A. Rule, Acting Chairman



Patrick H. Wood, Commissioner



Robert J. Johnson, Commissioner

cc: Virginia A. Lamberton, Director of Personnel
25 Capitol St., Concord, NH 03301
Sheri J. Kelloway-Martin, Litigation Office, Dept. of Safety
James H. Hayes Safety Building, Hazen Dr., Concord, NH 03305
Jean Chellis, SEA Field Representative, State Employees' Association
PO Box 3303, Concord, NH 03302-3303

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APPEAL OF RHODORA NAGINE

Docket #98-D-1

Department of Safety

September 4, 1997

The New Hampshire Personnel Appeals Board (Rule, Johnson and Wood) met on Wednesday, August 13, 1997, under the authority of RSA 21-I:58, to hear the appeal of Rhodora Nagine, an employee of the Department of Safety, who was appealing a March 10, 1997, letter of warning for allegedly leaving work early. Ms. Nagine was represented at the hearing by SEA Field Representative Jean Chellis. Sheri J. Kelloway-Martin, Esq., appeared on behalf of the Department of Safety, Division of Motor Vehicle. Over the appellant's objection, the Board heard the appeal on offers of proof by the representatives of the parties.'

Ms. Chellis argued that Ms. Nagine admitted to having left work early on several occasions, but that she had done so only, as a way to offset time previously worked, thereby eliminating the need for over-time compensation. She offered to prove through the testimony of Joan Tonkin that during the four and a half years that she was employed as a supervisor in the Keene office, including the period of February through August, 1996, she was aware that her employees were working through their breaks and lunch periods and that she permitted them to leave early as long as there was coverage for the office. Ms. Chellis said Ms. Tonkin also would testify that because employees were working extra time without documenting it, they did not need to submit a leave slip to

¹ The Board advised the parties that in keeping with its usual practice, the Board would receive documentary evidence as well as hearing the parties' oral arguments and offers of proof, and if the Board then determined that it had insufficient evidence upon which to decide the appeal, it would direct the parties to produce additional evidence, up to and including the testimony of witnesses.

account for early departures. She argued that Ms. Nagine was never asked to submit leave slips or document schedule changes because the State didn't want to recognize the extra hours worked and therefore have to admit to having violated the Fair Labor Standards Act.

Ms. Chellis argued that the appellant never received copies of the memoranda submitted by the State in support of the warning, and therefore was not aware that she needed to obtain anything other than her supervisor's approval to leave work early. She argued that all of the full-time employees in the Keene office, including the supervisor, made no secret of the fact that they were leaving work early, and that they never attempted to "fudge" records to make it appear that they had worked hours that they were actually absent. She argued that time sheets submitted by the supervisor only needed to reflect that the employees had worked a 7 ½ hour, not the actual time during which those hours were worked.

Ms. Chellis argued that the purpose of a written warning is to correct an employee's unsatisfactory work performance by describing the deficiency and advising the employee what corrective measures must be implemented to avoid further discipline. Ms. Chellis noted that the last documented instance of Ms. Nagine leaving early from work occurred in August, 1996. She argued that the Department should not be permitted to issue a warning in March, some seven months later, for conduct that had already ceased and for which no further corrective action was required. She also argued that the Department should not be permitted to discipline an employee for doing what a supervisor had permitted the employee to do.

Ms. Kelloway-Martin argued that under the provisions of the Personnel Rules and the Collective Bargaining Agreement, all full-time clerical and supervisory employees are expected to work a 37 ½ hour work week comprised of 7 ½ hour days. She argued that unless employees had approval from the appointing authority to work a flexible or alternative work schedule, they were responsible for submitting and obtaining approval for leave to cover any reductions in the standard 7 ½ hour work day. She argued that there were no alternative work schedules approved by the Division of Motor Vehicles for employees in the Keene office.

Ms. Kelloway-Martin stated that in February, a part-time employee assigned to the Keene office had complained to Virginia Beecher, Director of the Division of Motor Vehicles, that her regularly scheduled hours had been changed to cover early departures by the full-time employees. She argued that when Ms. Nagine was interviewed during the investigation, she never claimed to have been working an alternative schedule and never suggested that leaving early was a means of offsetting other time already worked. She said that the alternative work schedule defense was first claimed by the State Employees' Association during the informal settlement process after the written warning had been issued.

Ms. Kelloway-Martin noted for the record that Ms. Nagine's supervisor, who had permitted the full-time employees to leave early, also had been shortening her work day by leaving early on occasion. She indicated that the supervisor was voluntarily demoted and transferred in lieu of termination, three employees received written warnings, and one employee received a counseling memorandum.

Ms. Kelloway-Martin argued that the Personnel Rules authorize appointing authorities to use the written warning as the least severe form of discipline to correct an employee's unsatisfactory work performance. She argued that there was ample evidence that even if Ms. Nagine had worked through her lunch hour, she still could not document or account for as much as another hour on the dates in question. Ms. Kelloway-Martin argued that both the Personnel Rules and the Collective Bargaining Agreement describe breaks as paid rest periods, and that when employees work through their breaks, they are not entitled to additional compensation or time off. She argued that on the evidence, the Department might have warned the appellant for theft of service, but chose instead to limit its charge to the lesser offense of leaving work early.²

Findings of Fact

The following facts are not in dispute:

1. Ms. Nagine is employed as a Counter Clerk at the Keene Motor Vehicle Office, a substation of the Division of Motor Vehicles, Department of Safety.

² Ms. Martin noted that the office supervisor who allowed the employees to leave early had done so herself. After the investigation, she was allowed to take a demotion and transfer in lieu of dismissal.

2. Ms. Nagine's regular work schedule required her to work Monday through Friday, 8:15 a.m. to 4:45 p.m. with a one hour break for lunch.
3. Ms. Nagine had no written approval to work any schedule other than her regular 8:15 a.m. to 4:45 p.m. schedule.
4. Ms. Nagine had no written approval for a flexible schedule which would permit her to work through her lunch break to shorten the work day by one hour.
5. On twelve separate occasions during the period of January 2, 1996, through August 30, 1996, Ms. Nagine closed out her cash register at approximately 2:00 p.m., significantly earlier than the scheduled end of the work day at 4:45 p.m.
6. On those dates, Ms. Nagine had no signed leave slips documenting approval for her early departure from the office, nor did she have documentation that she had worked additional hours outside of her regular 8:15 a.m. to 4:45 p.m. schedule to justify payment for a full 7 ½ hour work day. Nonetheless, Ms. Nagine's supervisor allowed her to leave early without requiring her to account for the actual time worked.
7. On two of the twelve occasions in question, Ms. Nagine also received compensation for overtime (State's Exhibit 7)
8. Ms. Nagine's close-out entry on February 2, 1996, showed her closing out her register at 1:59 p.m., and the time sheet submitted by the supervisor indicated that Ms. Nagine also had worked fifteen minutes of over-time that day.
9. Ms. Nagine's close-out entry on June 5, 1996, showed her closing out her register at 1:58 p.m., and the time sheet submitted by the supervisor indicated that Ms. Nagine also had worked fifteen minutes of over-time that day.
10. Ms. Nagine's payroll summary for the period of January 2, 1996, through August 30, 1996, indicates that she was absent on an extended leave between February 20, 1996 and April 25, 1996.
11. Ms. Nagine's payroll summary for the period of January 2, 1996, through August 30, 1996, indicates that on 34 of the 119 dates on which she was listed as being at work, (roughly 1/3 of all days worked) her time sheets indicated she worked over-time and was entitled to payment.³
12. Ms. Nagine had no approved leave to account for early departures from work during the period of January 2, 1996 through July 30, 1996.
13. Ms. Nagine's supervisor and the other full-time employees in the Keene office also left work early from time to time.

³ Ms. Nagine's over-time authorizations range from ¼ hour to 3 hours.

14. In February, 1997, a part-time employee assigned to the Keene Office complained to her supervisors in Concord, that the full-time employees in the Keene office were leaving work early, and that her own part-time schedule had been modified to cover their absences.
15. Following receipt of the complaint, the Division of Motor Vehicles undertook an investigation.
16. The investigation disclosed that all of the full-time employees in the Keene Office had altered their work schedules without approval of the Division of Motor Vehicles, and that they were working less than the basic work week.
17. Following the investigation, all the employees involved in the time and attendance violations were disciplined. The severity of discipline imposed ranged from written warnings to a demotion in lieu of dismissal.

The Board also found as follows:

18. Time sheets submitted by supervisory personnel in the Keene Office of the DMV routinely listed over-time worked for Ms. Nagine and others.
19. Time sheets submitted by supervisory personnel in the Keene Office routinely contained notations to indicate variations in scheduling for Ms. O'Connell, a part-time employee.
20. Those notations included any changes to Ms. O'Connell's regular schedule of 10:30 a.m. to 2:30 p.m.
21. Those notations indicated whether or not Ms. O'Connell had a lunch break, as well as the length of her lunch break when one was taken.

Rulings of Law

- A. Article 6.1.1 of the Collective Bargaining Agreement and Per 1201.01 (a) of the Rules of the Division of Personnel define the basic workweek for every full-time clerical, supervisory and professional employee in the state classified service, with due allowance for authorized holidays and leaves of absence with pay as 37 ½ hours per week.

- B. Article 6.2 of the Collective Bargaining Agreement and Per 1201.02 (a) of the Rules of the Division of Personnel provide that no reduction shall be made from the basic workday for rest periods of 15 minutes in every 4 hours of working time.
- C. Per 1201.02 (c) (1) and (2) state, "Rest periods not used shall not be credited for leave time or used for work schedule adjustments. If an employee misses a rest period, that employee shall not be permitted to leave work early because the rest period was missed. An employee shall not be entitled to receive additional compensation because a rest period was missed."
- D. Article 6.5 of the Collective Bargaining Agreement states, "Nothing in the Agreement shall prevent the Employer and an employee, or group of employees, with the approval of the Parties, from mutually agreeing to flexible or alternative flexible work schedules."
- E. Article 6.3 of the Collective Bargaining Agreement states, "Every employee shall receive a lunch period of not less than one half hour nor more than one hour. Such lunch periods shall not be considered working time. However, exceptions to this provision may be made upon mutual agreement of the employee and the Employer."
- F. The Preamble to the Collective Bargaining Agreement describes the words "Employer" and "Parties" as follows: "[T]he State Employees' Association of New Hampshire, Inc., SEIU Local 1984, AFL-CIO, CLC hereinafter referred to as the 'Association', and the State of New Hampshire, hereinafter referred to as the 'Employer', collectively referred to hereinafter as the 'Parties'."
- G. Per 1001.03 (a) (2) of the Rules of the Division of Personnel provides that, "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 for offense including, but not limited to: ... Arriving late for work or leaving early."

Decision and Order

On the evidence, argument and offers of proof, the Board voted unanimously to sustain the warning, thereby denying Ms. Nagine's appeal.

First, the Board considered the appellant's argument that the warning was untimely and therefore invalid to be without merit. The evidence reflects that the Department of Safety initiated its investigation almost immediately after it had received reports of possible time

and attendance abuses in the Keene office. The written warning was issued approximately one month later. There was neither allegation nor evidence that the Department of Safety knew of the possible infractions before February, 1997, or that the department deliberately delayed the investigation and/or the disciplinary action for some improper or unlawful purpose. The Board was not persuaded that in this instance the timing of the warning had any bearing on its propriety.

Equally without merit is the appellant's argument that she should not have been disciplined for conduct that had already ceased before the warning was issued. That argument might be persuasive if Ms. Nagine had been given a specific period of time in which to correct a performance deficiency, had corrected the deficiency as required, but was disciplined anyway. That is not the case here. The early departures appear to have ceased coincidental to the discovery that a complaint had been made and an investigation into time and attendance at the Keene office was under way.

The Board does not believe that the warning should be removed because Ms. Nagine thought she was working a flexible, alternative work schedule⁴. Ms. Nagine knew that her compensation was based on a 37 ½ hour basic work week, as evidenced by her later claim that she had never worked less than 37 ½ hours per week on a flexible, alternative work schedule. Ms. Nagine was scheduled to work from 8:15 a.m. to 4:30 p.m. with a 1 hour break (unpaid) for lunch and a 15 minute paid break in the morning and in the afternoon. Assuming that Ms. Nagine did work through her scheduled 1 hour lunch period on the 12 days when she left work early, the evidence indicates that the appellant was compensated for an additional 17 ¼ hours of work that can not be documented. Even if the Board were to assume that Ms. Nagine believed she was entitled to receive compensation for working through her morning and afternoon breaks, which she was not, she received compensation for 11 ¼ hours for which there is no record of her having performed any work.

⁴ While individual employees and groups of employees can request approval for a flexible or alternative work schedule, that approval must be given by the "parties" to the Collective Bargaining Agreement. Those parties, by definition, are the State and the State Employees' Association, not the employee and immediate supervisor. The Department would be well-served by reminding its employees of the contractual requirements, and holding supervisory personnel responsible for enforcing the terms and conditions of the Agreement.

Ms. Nagine was not forced to leave work early. The State offered uncontested evidence that the appellant reported and received over-time compensation for 34 of the 119 days worked during the relevant period of time. That evidence does not support the appellant's claim that the State was attempting to avoid its responsibilities for payment of overtime worked under the Fair Labor Standards Act. The Board also did not believe that the supervisor approved the early departures by Ms. Nagine and others as an offset for time already worked as a means of limiting the State's overtime liabilities.

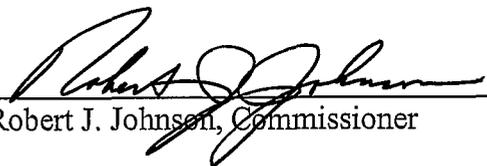
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25 Capitol St., Concord, NH 03301
Sheri J. Kelloway-Martin, Litigation Office, Dept. of Safety
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PO Box 3303, Concord, NH 03302-3303

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Appeals of Rhodora Nagirze

Docket #98-D-9, 98-D-10, 98-D-11 and 98-D-12

Department of Safety

November 5, 1998

A quorum of the New Hampshire Personnel Appeals Board (Bennett and Rule) met on Wednesday, January 28, 1998, to hear the appeals of Rhodora Nagine, an employee of the Department of Safety, Division of Motor Vehicles. Ms. Nagine was represented at the hearings by SEA Field Representative Jean Chellis. Attorney Sheri J. Kelloway-Martin appeared on behalf of the State.

Ms. Nagine was appealing letters of warning issued to her as follows:

Docket #	Date	Alleged Offense(s)
98-D-9	August 29, 1997	Arriving late for work, being absent without proper notification, and excessive unscheduled absences resulting in lack of dependability
98-D-10	December 8, 1997	Being absent without approved leave and lack of dependability
98-D-11	December 11, 1997	Being absent without approved leave and lack of dependability
98-D-12	December 18, 1997	Being absent without approved leave and lack of dependability

The Board, upon its own motion, consolidated Ms. Nagine's four pending appeals for the purposes of hearing. However, the Board advised the parties that each warning would be addressed individually in the Board's decision.

The appeal was heard on offers of proof by the representatives of the parties. The record in this matter consists of notices and orders issued by the Board, pleadings submitted by the parties, the audio tape recording of the hearing and documents admitted into evidence as follows:

State's Exhibits:

1. Performance Summaries for Rhodora Nagine dated 4/20/95 and 5/23/94
2. November 8, 1995, Counseling Memo issued to Rhodora Nagine by Virginia Beecher, Director of Motor Vehicles
3. March 10, 1997 revised 2nd Counseling Memo issued to Rhodora Nagine by Virginia C. Beecher
4. August 29, 1997, Written Warning issued to Rhodora Nagine for arriving late for work, being absent without proper notification, and for excessive unscheduled absences, resulting in lack of dependability (leave slips dated 6/16/97, 6/25/97, 6/25/97, 7/7/97, 7/24/97 attached)
5. December 8, 1997, Written Warning issued to Rhodora Nagine for being absent without approved leave and lack of dependability (leave slips dated 11/25/97, 11/25/97, 11/6/97, 10/31/97, and doctor's note dated 6/30/97 attached)
6. December 11, 1997, Written Warning issued to Rhodora Nagine for being absent without approved leave and lack of dependability (leave slips dated 12/11/97 and 12/10/97, and doctor's note dated 12/10/97 attached)
7. December 18, 1997, Written Warning issued to Rhodora Nagine for being absent without approved leave and lack of dependability (leave slips dated 12/15/97 and 12/18/97 attached)
8. Per 1001.03 of the Rules of the Division of Personnel
9. Leave record indicating absences for calendar year 1997

Appellant's Exhibits

1. Letters of Warning issued to Rhodora Nagine dated August 29, 1997, December 8, 1997, December 11, 1997, and December 18, 1997
2. April 10, 1997, letter from Dr. Theodore A. Ruel re: Rhodora Nagine
3. American Medical Association Encyclopedia of Medicine page 701
4. Handwritten "Volunteers for Subs" list
5. January 8, 1998, letter from Arthur S. Garlow to Pamela Blake, SEA Steward
6. January 16, 1998, letter from Arthur Garlow to Marshall L. Newland re: Employee Responsibilities

Ms. Kelloway-Martin argued that since 1994, the appellant had received clear notice that her performance was a problem, that those problems stemmed from her attendance, and

that failure to take corrective action would result in disciplinary action. She argued that despite repeated counseling and warning, Ms. Nagine continued to be absent without approved leave and absent without prior notice, creating a substantial burden for her co-workers who had to cover her assignments and complete her work when she was absent.

She argued that in 1997, after an investigation and discovery of significant attendance and leave abuses in the Keene substation, the Department demoted and transferred the full-time substation supervisor, and also accepted a resignation from the substation's part-time employee. At the time, that left only Ms. Nagine and another full-time employee to staff the office. She argued that when Ms. Nagine was unexpectedly absent, the other full-time employee would have to provide 100% of the coverage, without taking a break, in order to keep the office open and functioning. She argued that in the short term, the only way the Department could provide relief was to order another employee to leave his/her regular work location and travel to Keene to assist. She argued that such an arrangement was not practical in the long-term, however, and that the only reasonable solution was to transfer Ms. Nagine to a larger office that would be better able to "absorb" her frequent, unexpected absences.

Ms. Kelloway-Martin argued that after the Department transferred Ms. Nagine to the central office in Concord, her attendance continued to be a problem. She asked the Board to find that the appointing authority acted properly in issuing warnings as the least severe form of discipline to correct Ms. Nagine's unsatisfactory performance.

Ms. Chellis argued that sick leave and emergency annual leave are entitlements provided by the Collective Bargaining Agreement, and that the appellant could not be disciplined for her use of those entitlements. She further argued that the State had placed an unnecessary burden upon the appellant by transferring her from the Keene substation to the main office in Concord, that the additional travel time had exacerbated Ms. Nagine's existing medical problems by placing her under greater stress, and that the transfer itself violated the appellant's rights under the Americans with Disabilities Act.

Ms. Chellis argued that because Ms. Nagine suffers from multiple sclerosis, she was entitled to a reasonable accommodation. She argued that the agency had other options for staffing the Keene substation. She argued that the agency had exercised those options in the past by assigning other staff to work temporarily in the Keene office, and could continue to do so if necessary.

Discussion

Ms. Chellis argued that Ms. Nagine's entitlement to sick and annual leave is defined by the Collective Bargaining Agreement, not by the Personnel Rules, and that the appellant may not be disciplined for use of a contractual benefit. She argued that where a conflict exists between the Personnel Rules and the Collective Bargaining Agreement, the Agreement controls, and that there is no contractual provision allowing an employer to discipline an employee for using his or her leave.

The language upon which the appellant relied in making that argument is Per 103.02 (b) of the Rules, which states, "In the case of terms and conditions of employment which are negotiated, the provisions of the Collective Bargaining Agreements shall control." As the parties know, discipline is not negotiated. Insofar as both the Rules and the Collective Bargaining Agreement address leave, the procedures of the Agreement control with respect to how employees earn leave, how much leave they may accumulate, and the obligations of both employer and employee in handling requests for leave. However, the fact that Ms. Nagine is a "covered employee" with respect to the leave earning provisions of the "Agreement" does not exempt her from discipline under the applicable provisions of the Rules if she fails to maintain an acceptable record of attendance, and fails to meet the work standard as a result.

Reasonable Accommodation

There is no dispute that Ms. Nagine suffers from multiple sclerosis. There also is no dispute that multiple sclerosis can be disabling. However, the appellant offered no assessment from her physician or licensed health care practitioner as evidence that she is, or should be considered unable to come to work as scheduled. Quite the contrary, evidence concerning her medical condition, the April 10, 1997, note from Theodore A. Ruel, MD, indicated that Ms. Nagine had been diagnosed with multiple sclerosis and "may be subject to occasional periods of imbalance and fatigue, particularly when working in a warm environment. No restrictions are necessary regarding her work day; she should not be required, however, to regularly work beyond a regular 8 hour day." There is no evidence that the department required Ms. Nagine to work more than an 8 hour day. Furthermore, while the appellant characterized the note as evidence that her difficulties were exacerbated by the transfer from Keene to Concord, it was her lateness, lack of regular attendance and frequent unexpected absences while assigned to the Keene substation that resulted in the transfer to Concord. The appellant failed to persuade the Board that returning her to the Keene substation, removing the warnings from her file and allowing her unlimited use of leave, paid or unpaid, would be a "reasonable" accommodation, even if there were evidence to support her claim of entitlement to protection under the A.D.A.

Docket #98-D-9	August 29, 1997	Arriving late for work, being absent without proper notification, and excessive unscheduled absences resulting in lack of dependability
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In her December 17, 1997, notice of appeal, Ms. Chellis argued that Ms. Nagine, "...is not disputing the fact that she has arrived late for work on at least six separate occasions [between] March 6, 1997 [and August 29, 1997]. Ms. Nagine is however disputing that she has been out 6 days annual without advance notice. Based on the documentation Ms.

Gendreau gave us, Ms. Nagine contends that she has only been out 5 partial days without advance notice...”

[Former] Per 1001.03 (a) states, in pertinent part, "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 for offenses including, but not limited to: ... (2) Arriving late for work or leaving work early; (3) Being absent without approved leave or proper notification; (4) Excessive unscheduled absences... (9) Lack of dependability..." The evidence reflects that Ms. Nagine had been counseled repeatedly about her attendance. By her own admission, Ms. Nagine arrived late for work on at least six occasions, and was absent at least a portion of five other days without advance notice. Whether or not those absences were a result of illness has no bearing on the appellant's responsibility to provide proper and timely notification. Therefore, the Board found that the incidents of lateness and absences without notice were offenses subject to discipline under the provisions of [former] Per 1001.03 of the Rules of the Division of Personnel. Ms. Nagine failed to persuade the Board that the agency's decision to issue her a warning for those offenses was inappropriate. Accordingly, the Board voted to uphold the warning, and to DENY Ms. Nagine's appeal (Docket #98-D-9) of her August 29, 1997, written warning.

Docket #98-D-10	December 8, 1997¹	Being absent without approved leave and lack of dependability
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In the August 29, 1997, letter of warning issued to Ms. Nagine, the Department of Safety wrote:

"Your attendance continues to be an issue despite the issuance of two memos of counsel and numerous verbal reminders from your supervisor. You must take corrective action immediately. This will include arriving promptly for work so you are ready to serve customers by 8:15 a.m. You will notify your immediate

¹ Ms. Nagine did not appear for work on December 8, 9 or 10, 1997. Therefore, the actual issuance of the written warning was delayed until December 11, 1997.

supervisor of any circumstances which require you to be late or absent from work as soon as you are aware of the situation. You must continue to adhere to the requirements assigned to you in the counsel memo dated March 10, 1997. You must show up at work on a timely and regular basis. Failure to take corrective action immediately shall result in additional disciplinary action, up to and including discharge from employment.”

Despite those warnings, the appellant was absent without approved leave and without pay on October 30, November 6, November 17, and November 18, 1997. She also was absent without approved leave on November 13, and November 14, 1997, with more than 5 hours of that leave also being taken without pay. Ms. Kelloway-Martin argued that the leave was excessive, particularly in light of the fact that the listed absences were in addition to approved FMLA leave also taken by the appellant during that same period. She also argued that there was no evidence to support the appellant’s claim that her absenteeism was a product of her being "medically unable to perform [her] work assignments."

The appellant failed to offer evidence to persuade the Board that the Department of Safety acted improperly by issuing the December 8, 1997, letter of warning for being absent without approved leave and lack of dependability. The appellant failed to provide evidence that her leaves were medically necessary, or that the agency acted improperly in classifying those leaves as unauthorized or unapproved. Therefore, the Board voted to DENY Ms. Nagine's appeal (Docket #98-D-10) of the December 8, 1997, written warning.

98-D-11	December 11,1997	Being absent without approved leave and lack of dependability
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Because of her earlier attendance problems, Ms. Nagine was transferred to the Concord office effective December 8, 1997. Ms. Nagine did not report for work as scheduled on December 8th, 9th or 10th. None of the leaves were approved in advance. She claimed to have had car trouble on December 8th and 9th, and called in sick with a headache on

December 10th". After the appellant reported for work on December 11th, she was issued the December 8, 1997, written warning, and another warning dated December 11, 1997, for being absent without approved leave and lack of dependability.

In the December 16, 1997, notice of appeal, Ms. Chellis argued that having received both the December 8th and the December 11th warnings on the same day, the appellant had no meaningful opportunity to take the corrective action outlined in the earlier warning before the later warning was administered. She also argued that the Rules make no provision for disciplining employees who are absent as a result of a "medically based inability."

She wrote:

"Ms. Nagine's attendance record is greatly impacted by her medical condition. Obviously a letter of warning is not going to 'cure' Ms. Nagine's health problems, some of which qualify her for protection under the Americans with Disabilities Act. The corrective action the Department is seeking from Ms. Nagine appears impossible given the status of her health problems."

The appellant failed to provide proof that she is medically unable to work or perform the duties of her position,' or that she should be entitled to additional protection under the provisions of the Americans with Disabilities Act. However, the Board agrees with the appellant that because the December 8, 1997, and December 11, 1997, warnings were issued on the same day, the latter warning should be removed from the appellant's file.

Accordingly, the Board voted to GRANT Ms. Nagine's appeal (Docket #98-D-11) of her December 11, 1997, written warning for being absent without approved leave and for lack of dependability.

² Even if the appellant had provided evidence that she was "medically unable to perform [her] work assignments," two of the three absences had nothing to do with her health.

Docket #98-D-12	December 18,1997	Being absent without approved leave and lack of dependability
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Ms. Nagine was an hour and a quarter late for work on December 15, 1997, claiming that she had overslept. She was absent again on December 17, 1997, with a complaint of back pain. The Department of Safety issued Ms. Nagine a letter of warning dated December 18, 1997, for absence without approved leave and lack of dependability.

Ms. Chellis argued that the Department of Safety's refusal to allow Ms. Nagine to use other accrued leave on December 15th and December 17th resulted in Ms. Nagine being absent without approved leave. She argued that Per 1203.14 (b) states, "When an employee is sick but has no available sick leave, the appointing authority shall not be required to grant annual leave for such absence," and nothing in the rule prevents an employer from granting the use of other paid leave when an employee's sick leave is exhausted.

Although Ms. Chellis accurately characterized the extent of an appointing authority's discretion in applying the provisions of Per 1203.14 (b), she offered no compelling reason why having "over-slept" should have been deemed sick leave, or why Ms. Nagine should have been granted other paid leave after having demonstrated so little effort to improve her attendance. Ms. Nagine had been warned repeatedly that her attendance was unacceptable, and that failure to report for work regularly and on time would result in disciplinary action.

The appellant failed to offer evidence that she was entitled to additional protection under the Americans with Disabilities Act, or should be viewed as having a "medically based inability" to come to work as scheduled. Therefore, the Board voted to DENY Ms. Nagine's appeal (Docket #98-D-12) of the December 18, 1997, written warning for absence without approved leave and lack of dependability.

THE PERSONNEL APPEALS BOARD



Mark J. Bennett, Chairman



Lisa A. Rule, Commissioner

cc: Virginia A. Lamberton, Director of Personnel, 25 Capitol St., Concord, NH 03301
Jean Chellis, SEA Field Representative, PO Box 3303, Concord, NH 03302-3303
Sheri J. Kelloway-Martin, Dept. of Safety, 10 Hazen Dr., Concord, NH 03305