

State of New Hampshire



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

APPEAL OF RICHARD WILLIAMS
Department of Transportation
Docket #94-D-3

September 14, 1994

The New Hampshire Personnel Appeals Board (McNicholas, Johnson and Rule) met Wednesday, August 24, 1994, to hear the appeal of Richard Williams, an employee of the Department of Transportation, regarding a March 25, 1993 letter of warning issued to him for excessive, unscheduled absences. Mr. Williams was represented at the hearing by Thomas Hardiman, SEA Director of Field Operations. The Department of Transportation was represented by Kathryn Bradley, Assistant Attorney General, Transportation Bureau.

The Board heard the appeal on offers of proof made by the representatives of the parties. The record consists of the audio tape recording of the hearing as well as the documentary evidence submitted by the parties at or before the time of hearing.

On behalf of the Department of Transportation, Ms. Bradley argued that Mr. Williams had received a first letter of warning for excessive, unscheduled sick absences in November of 1992. She said that a second letter was issued on March 24, 1993, when Mr. Williams exhausted his available sick leave and the Department determined that Mr. Williams had failed to take the necessary corrective action by using less sick leave. Ms. Bradley noted that Personnel Director Virginia Lamberton had upheld the warning after a meeting with her in July, 1993, under the procedures for informal settlement of disputes. Ms. Bradley argued that after being issued a second warning, Mr. Williams' attendance at work had improved and his leave usage had declined, demonstrating that the letter was justified and was having a beneficial effect on the employee.

Ms. Bradley argued that determining when an employee's use of leave became "excessive" varied from agency to agency, and could even vary between work units in the same department. She said the record reflected that Mr. Williams had used 105 hours of sick leave in a period of less than six months, and that his use of almost an entire year's accrual of sick leave in a period spanning less than half that time had placed an enormous burden on the work unit. Ms. Bradley stated that the Department of Transportation believed that each and every sick leave absence was legitimate. She also stated that when Mr. Williams had been asked to provide

certification from a licensed health care practitioner that his leave was medically necessary, he had done so.

Mr. Hardiman argued that an employee may not be disciplined for being sick. Mr. Hardiman said that if the Department of Transportation ever doubted Mr. Williams' need for, or use of, sick leave, it had available to it a variety of remedies, including the authority to request verification of the employee's need for sick leave from the employee's licensed health care practitioner. He also argued that the Department could have ordered an independent evaluation by a physician of the agency's choosing to assess the employee's need for leave. Mr. Hardiman asked the Board to make note of John Scott's letter of March 4, 1993 to the appellant which stated, "This memo will confirm for the record our discussion relative to sick leave. It is no longer necessary for you to obtain/attach to leave slips a doctor's note, in the event you are absent due to sickness."

After hearing the offers of proof made by the parties, and reviewing the documents submitted as evidence in this matter, the Board made the following findings of fact:

1. Mr. Williams is employed as a Human Resources Coordinator in the Department of Transportation.
2. On or about October 19, 1992, Mr. Williams received a letter of warning from John Scott, Human Resources Administrator, for "Excessive Unscheduled (Sick) Absences".
3. The October, 1992 warning stated, "While there is **no question** in my mind that in each and every case you have a legitimate reason, in some cases requiring doctor's attention (and I have recommended and approved each and every absence on that basis), there is likewise no question in my mind that the cumulative effect of these absences is disruptive and puts an unreasonable burden on your colleagues in the Bureau and others in the organization who look to you for service."
4. On or about March 25, 1993, Mr. Williams received a second letter of warning from John Scott, Human Resources Administrator, for "Excessive Unscheduled. (Sick) Absences".
5. In the March 25, 1993 warning, Mr. Scott stated, in part, "You have had four periods of absence, each of which exceeded one working day. As of the close of business on March 24, 1993, the total hours in the five and one half month period was 105".
6. Mr. Williams has not been disciplined for falsifying requests for sick leave or for being absent without approved leave.

Mr. Hardiman argued that an employee may not be disciplined for "Excessive Unscheduled (Sick) Absences". The Board does not agree. The Board can conceive of circumstances in which an employee could be disciplined for such "excessive" use of leave if the agency could demonstrate that the employee's medical problems necessitating such leave were within the employee's control (i.e., failing to adhere to an approved course of treatment which would otherwise alleviate the need for medical leave). However, there is little more than a vague

reference in the March 25, 1993 letter from Mr. Scott addressing the employee's ability to limit his absences by taking "...control of [his] health rather than continuing to let it control [him]" (See March 25, 1993 letter of warning, page 2.)

It is clear from the text of warning itself that in spite of the alleged burden upon other staff in the bureau, all of the appellant's requests for other leave had also been approved. While the tone of the warning and the Personnel Director's Informal Settlement Decision dated August 9, 1993, allude to choices the appellant needed to make to stay healthy, they do not paint a complete enough picture for the Board to find that the appellant could have controlled how often he was ill and unable to be at work.

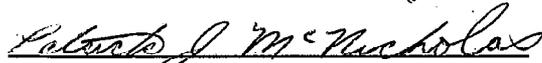
The Board is not without sympathy for agencies which find themselves short-staffed because of frequent use of sick leave. However, the Personnel Rules and the Collective Bargaining Agreement both provide means by which an agency can control use of sick leave for anything other than actual medical disability. For instance, both the Rules and the Agreement allow an employee to request the use of sick leave to attend medical or dental appointments. However, there is no requirement that such leave be granted simply because it has been requested. If Mr. Williams' use of leave was deemed excessive, it was within the Department's control to deny requests for medical leave which was not of an emergency nature. Neither the Rules nor the Collective Bargaining Agreement require agencies to allow employees who have exhausted their sick leave to supplement it with annual leave, bonus leave or compensatory time. Similarly, neither the Rules nor the Collective Bargaining Agreement require an appointing authority to grant the use of other paid leave to cover absences due to illness as a means of assuring that an employee will be compensated for a two-day holiday when the employee would not otherwise have been on pay status the scheduled day before and the scheduled day after a holiday.

The Personnel Rules also provide a mechanism for addressing employee health problems which affect the ability of an agency to carry out the tasks assigned to it. Per 1002.01 (a) of the Rules allows an appointing authority to remove an employee for non-disciplinary reasons when the employee is medically unable to perform the required duties and responsibilities of the position to which appointed. Since there appears to be no dispute over the legitimacy of Mr. Williams' repeated illnesses and/or injuries and the resulting absences from work, the agency could have undertaken the assessment described in Per 1002.01 (a)(1) as a preliminary step toward determining whether or not Mr. Williams was medically able to fulfill the responsibilities of his position, up to and including his ability to maintain a regular, full-time schedule. Had a medical assessment disclosed that Mr. Williams could not perform his assigned duties for medical reasons, the Department could have alleviated some of its difficulties by transferring or demoting him to a less critical area of the Department's operations.

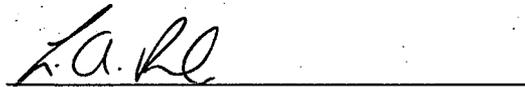
On the record before it, in light of the Department's concessions that all of Mr. Williams' absences were legitimate uses of sick leave, that all his requests for leave had been approved, and that the Department approved additional leave, both paid and unpaid, for the absences in question, the Board found that the Department of Transportation exceeded its authority in issuing a letter of warning for "excessive unscheduled (sick) absences".

Accordingly, the Board voted unanimously to grant Mr. Williams' appeal.

THE PERSONNEL APPEALS BOARD


Patrick J. McNicholas, Chairman


Robert J. Johnson, Commissioner


Lisa A. Rule, Commissioner

cc: Virginia A. Lamberton, Director of Personnel
Thomas F. Hardiman, SEA Director of Field Operations
Kathryn Bradley, Assistant Attorney General, Transportation Bureau
Charles O'Leary, Commissioner, Department of Transportation