

THE STATE OF NEW HAMPSHIRE

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DIV. OF PERSONNEL

SUPREME COURT

AUG 27 1 38 PM '91

In Case No. 90-310 Appeal of Patricia Abernathy.....

the court upon August 23, 1991..... made the following order:

Since the court has been informed that Patricia Ahernathy has been reinstated with back pay. the appeal is dismissed as moot.

Distribution:  
Michael Reynolds, Esquire  
Robert Dunn, Esquire  
Personnel Appeals Board  
File

Ralph H. Wood,

Clerk

State of New Hampshire



PERSONNEL APPEALS BOARD  
State House Annex  
Concord, New Hampshire 03301  
Telephone (603) 271-3261

Appeal of Patricia Abernathy - Dept. of Safety  
Appellant's Motion for Reconsideration  
Docket #89-D-8

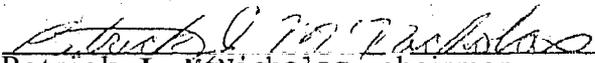
June 8, 1990

The New Hampshire Personnel Appeals Board (McNicholas, Cushman and Bennett) met Wednesday, May 16, 1990, to consider Appellant's Motion for Reconsideration of the Board's February 1, 1990 decision denying her appeal of an indefinite suspension without pay. The board also considered the State's Objection to Motion for Rehearing in the instant appeal.

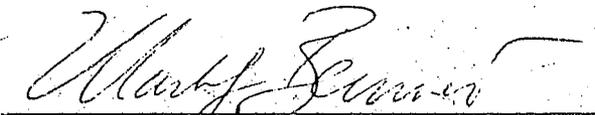
The Board unanimously voted to deny the Motion for Reconsideration, finding that it fails to specify grounds upon which relief should be granted. The Motion presents no grounds and raises no issues which were not fairly raised or considered within the scope of the hearing on the merits.

In so ruling, the Board affirms its decision of February 1, 1990, to uphold the indefinite suspension without pay pending the outcome of criminal proceedings against the appellant.

THE PERSONNEL APPEALS BOARD

  
Patrick J. McNicholas, chairman

George R. Cushman, Jr.

  
Mark J. Bennett

cc: Robert E. Dunn, Jr., Assistant Attorney General  
Dennis T. Martino, SEA Representative  
Virginia A. Vogel, Director of Personnel  
Civil Bureau, Attorney General's Office

# State of New Hampshire



## PERSONNEL APPEALS BOARD

State House Annex  
Concord, New Hampshire 03301  
Telephone (603) 271-3261

### APPEAL OF PATRICIA ABERNATHY

Department of Safety  
Docket #89-D-8

Dated: February 1, 1990

The New Hampshire Personnel Appeals Board (Commissioners McNicholas, Cushman and Bennett) met Wednesday, December 12, 1989, to consider Patricia Abernathy's appeal of a suspension without pay from her position in the Department of Safety. Assistant Attorney General Robert E. Dunn, Jr., represented the Department of Safety, Division of Motor Vehicles. Dennis Martino, SEA Representative, appeared on behalf of the appellant. The appellant was present for the hearing.

The Board first asked if either party had reason to object to the participation of any member of the Board. Neither party objected.

Assistant Attorney General Dunn asked that the Board first address the scope of the hearing. Appellant had originally been notified by letter dated September 6, 1989, that she was being suspended for four (4) weeks without pay under the provisions of Per 308.01(a). An appeal of that suspension was timely filed by Appellant's representative, the State Employees' Association, by letter to the Board dated September 14, 1989. An October 3, 1989 letter to Appellant notified her that the suspension was being extended indefinitely under the provisions of Per 308.01(b). No appeal of that order was filed.

Attorney Dunn argued that the letters of September 6th and October 3rd were two separate orders, and that while the September 6th notification of a four week suspension without pay was properly before the Board, Appellant had forfeited any right to appeal the indefinite suspension, having failed to either file a subsequent appeal or notify the Board of her desire that the two matters be consolidated. Attorney Dunn contended that a suspension under the provisions of Per 308.01(a) could be ordered by the Appointing Authority, while a suspension under Per 308.01(b) required approval by the Director of Personnel, thus defining them as two separate and distinct actions.

Mr. Martino argued that in the appellant's view, there was only one suspension from which an appeal could have arisen. He contended that the letter of October 3rd simply modified the original suspension, extending it from a four week suspension to an indefinite suspension.

Chairman McNicholas ruled that the Board's Order of Notice made reference only to the September 6th suspension, but that the Board would take testimony and receive evidence on both matters. The Chairman also said the Board would accept that the State had not waived its right to argue procedural reservations on the issue of whether or not there were two separate suspensions.

Assistant Safety Commissioner Douglas Patch testified that he had learned on September 6th of Ms. Abernathy's arrest at the Department of Safety Building on the evening of September 5th. Ms. Abernathy was working the 4:00 p.m. to midnight shift on the evening of her arrest. Assistant Commissioner Patch said the charges against Ms. Abernathy were to have been Class A or B felony related to the manufacture of a controlled drug. After discussing the arrest with the Commissioner of Safety and Director of Motor Vehicles William Turner, it was decided to suspend Ms. Abernathy without pay for a period of four weeks. Patch further testified that when he gave the September 6th letter of suspension, Ms. Abernathy expressed disbelief at the suspension, and denied that there were any drugs in her home.

The Department of Safety requested that the Board receive into evidence a copy of an article from the Laconia Evening Citizen and a copy of the police report detailing the circumstances leading up to Ms. Abernathy's arrest. Mr. Martino objected to the submission of any materials which might later be used in criminal proceedings. Mr. Martino also questioned how the Department of Safety had come into possession of the police report, since Appellant had not yet had a probable cause hearing. The Board accepted the evidence and noted Mr. Martino's objection to admission of same.

Mr. Patch then testified that the Department of Safety had received the police report in the Department of Safety on September 13, 1989. Both the newspaper account and police report substantiated that in addition to marijuana plants, large amounts of drug paraphernalia had been found on the premises in the Abernathy house. He said it was at that point that the decision was made to suspend Ms. Abernathy indefinitely pending the outcome of criminal proceedings. The only other alternative, he argued, would have been to terminate Ms. Abernathy's employment immediately.

Mr. Patch explained that Ms. Abernathy was employed as the night supervisor in the registration section of the Division of Motor Vehicles, which is housed in the Department of Safety Building along with five other divisions of the department. According to Mr. Patch, Ms. Abernathy's duties include ringing in receipts received during the day in amounts of \$2,000 - \$3,000 per day. Mr. Patch enumerated the Department's concerns regarding keeping Ms. Abernathy on staff after her arrest, including her having access to all motor vehicle registrations, access to cash, access to information concerning other drug related cases, access to the State Police Laboratories, and access to the State Police communications center.

Mr. Patch admitted that the vehicle registration information to which Ms. Abernathy had access was a matter of public record and was open to inspection upon request. He also admitted that Ms. Abernathy would have limited access to both the State Police labs and communications center, noting that there was always at least one uniformed officer present. When questioned by the Board concerning the quality of Ms. Abernathy's work prior to her arrest and suspension, Mr. Patch said there was no apparent problem.

Mr. Martino asked that the Department of Employment Security ruling on Ms. Abernathy's request for Unemployment Compensation be admitted as an exhibit. The Board noted, with concurrence by the parties, that the Board was not bound by the findings of the DES Tribunal, and would give the information provided therein the weight it deemed appropriate in its deliberations.

In his closing argument, Mr. Martino contended that indefinite suspension exceeded the authority granted the Appointing Authority by Per 308.01. He reiterated his strong objection to the admission of materials into evidence which would eventually be used in Ms. Abernathy's court case. He concluded that the suspension was based solely upon allegations made by the Belknap County Sheriff's Office, and was not related to any action by Ms. Abernathy at her place of work. He argued there had been no violation of the Personnel rules, and that an indefinite suspension for the grounds cited was a clear violation of discretion on the part of the Appointing Authority.

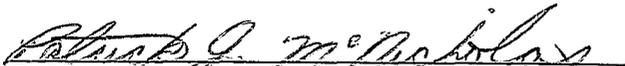
Attorney Dunn argued that Per 308.01 (b) is predicated upon the Appointing Authority's discretion in imposing, with the approval of the Director of Personnel, an indefinite suspension without pay "...pending the investigation or trial of any charges against him." He further contended that the Rules of the Division of Personnel are very explicit in stating that an employee could be suspended without pay "...for disciplinary reasons or other cause" (Emphasis added). Mr. Dunn thus argued that the suspension need not be based upon the limited offenses listed in Per 308.

Given the record before it, the Board concluded that the Department of Safety had exercised its discretion judiciously in suspending Ms. Abernathy without pay pending the outcome of a trial on criminal charges related to the manufacture of a controlled drug. The Board found that the Appointing Authority did not have to depend upon the list of offenses found in Per 308, but rather could, and did, use discretion in weighing the seriousness of the charges in determining whether or not to suspend the appellant pending the outcome of the criminal proceedings.

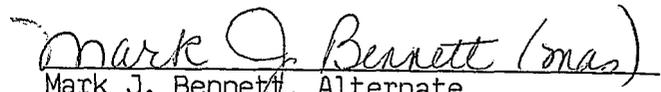
The Board found that Appellant should have filed a second appeal of the indefinite suspension without pay, determining it to be a second and separate action. However, the Board noted that the wording of the second letter of suspension could lead one to believe that the second suspension was merely an extension of the first action, and therefore required no further filing. Therefore, the Board voted to allow both actions to be appealed and considered simultaneously.

Based upon the foregoing, the Board voted to uphold the September 6th suspension without pay, and the October 3rd indefinite suspension pending the outcome of criminal proceedings against the appellant. Accordingly, Ms. Abernathy's appeal is denied,

THE PERSONNEL APPEALS BOARD

  
Patrick J. McNicholas, Chairman

  
George R. Cushman, Jr., Member

  
Mark J. Bennett, Alternate

cc: Dennis Martino, Representative  
State Employees' Association

Robert E. Dunn, Jr., Assistant Attorney General

Virginia A. Vogel  
Director of Personnel