

State of New Hampshire



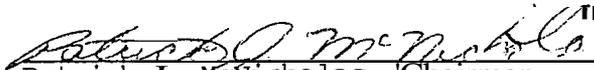
PERSONNEL APPEALS BOARD

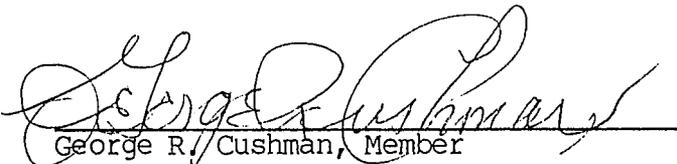
State House Annex
Concord, New Hampshire 03301
Telephone (603) 271-3261

Personnel Appeals Board Ruling
In the Matter of:
Gregory Barrett and the N.H. Department of Transportation
Draft Agreement

At its meeting of June 21, 1989, the Personnel Appeals Board (Commissioners McNicholas and Cushman) reviewed the draft settlement agreement executed May 29, 1989 by Attorney Walls on behalf of the Department of Transportation and Attorney Reynolds on behalf of the appellant. The Board will accept the filing of the agreement as a withdrawal of any and all appeals by Mr. Barrett pending before the Personnel Appeals Board, provided that the parties clearly understand that the Board shall not be bound by either acceptance or rejection of the agreement by the Public Employees Labor Relations Board.

THE PERSONNEL APPEALS BOARD


Patrick J. McNicholas, Chairman


George R. Cushman, Member

(Commissioner Scott did not participate)

cc: Michael J. Walls, Assistant Attorney General
Michael C. Reynolds, SEA General Counsel
Virginia A. Vogel, Director of Personnel

DATED: June 21, 1989

State of New Hampshire



PERSONNEL APPEALS BOARD

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APEAL OF GREGORY BARRETT Request to Defer Action on Appeal Pending Settlement Agreement Between the Parties

May 22, 1989

The Personnel Appeals Board, at its meeting of May 10, 1989, reviewed its docket of appeals. That docket includes Mr. Barrett's appeal of several actions taken by the Department of Transportation in response to the Board's order of October 5, 1988, concerning Mr. Barrett's termination from employment.

By letter dated April 4, 1989, SEA General Counsel Michael Reynolds requested that the Board defer any further action on this matter until receipt of a settlement agreement between the appellant and the Department of Transportation which the Board would then be asked to review and approve. In Attorney Reynolds April 4 letter, he indicated that the language of the agreement should be finalized and forwarded to the Board within ten days (or by April 14, 1989).

The Board has not received further notice of action in this appeal from either the appellant or the Department of Transportation. If the Board does not receive a copy of the agreement within ten days of the date of this order, the Board will assume that no agreement has been reached and that the matter should be scheduled for further review by the Board.

THE PERSONNEL APPEALS BOARD

Handwritten signature of George R. Cushman, Jr. in cursive script.

George R. Cushman, Jr., Member

Handwritten signature of Patrick J. McNicholas in cursive script.

Patrick J. McNicholas, Chairman

cc: Michael C. Reynolds
SEA General Counsel

Michael J. Walls
Assistant Attorney General

Virginia A. Vogel
Director of Personnel

State of New Hampshire

PERSONNEL APPEALS BOARD
Edward J. Haseltine, Chairman
Gerald Allard
Loretta Platt



EXECUTIVE SECRETARY
Mary Ann Steele

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APPEAL OF GREGORY BARRETT October 5, 1988

On Wednesday, September 14, 1988, the Personnel Appeals Board, consisting of Commissioners Cushman and Platt, heard the termination appeal of Gregory Barrett, an employee of the Department Transportation. Mr. Barrett was discharged from State service by letter dated January 15, 1988, 1) for lack of qualification for his position of Highway Maintainer II, due to loss of his license for DWI, 2) for violation of a posted rule, and 3) for lack of cooperation. Mr. Barrett was represented at the hearing by SEA General Counsel Michael C. Reynolds. Attorney Richard Nusbaum represented the Department of Transportation (hereinafter "DOT").

At the outset of the hearing, Mr. Reynolds made a motion to exclude any witnesses or exhibits not timely disclosed by DOT pursuant to the Rules of the Personnel Appeals Board. After hearing arguments on that motion, the Board ruled that DOT had violated Per-A 202.08(b) and therefore voted to exercise the provisions of Per-A 202.08(c), ordering the exclusion of all witnesses except the appointing authority and all exhibits not timely disclosed. The Board then allowed the parties a brief recess to agree upon which witness would represent the appointing authority at DOT. The parties concurred that Mr. Frank Lindh, one of the appellant's witnesses, should testify on behalf of DOT, but that his testimony would be limited to only those issues raised by the appellant or by the Board.

Mr. Nusbaum then made a motion to allow the order of presentation to be reversed, with the appellant presenting his direct case first. Mr. Reynolds concurred. Absent an objection from the appellant, the Board granted the motion.

The appellant argued that his notification of termination by receipt of a third letter of warning on January 15, 1988, was illegal because the two prior warnings were invalid, neither having informed the appellant that failure to take corrective action would result in his discharge from employment. The appellant also argued that DOT had an established practice of allowing employees whose licenses had been revoked to remain in the employ of the agency, provided that those employees only drove state vehicles in the "yard". The appellant alleged that his SEA Field Representative, Ann Spear, had worked out an accommodation with Richard Pucci, DOT Administrator, to rescind the notice of intent to terminate the appellant's employment effective December 24, 1987 if the appellant could demonstrate that he was making a good faith effort to effect restoration of his license. Finally, the appellant argued that "Rule 12" of the DOT's posted procedures in the Traffic Division, which was cited as the basis for appellant's termination, lists disciplinary measures to include suspension, but does not warn of automatic discharge.

Mr. Nusbaum contended that the appellant had made no attempt to restore his license in a timely fashion, that he had attempted to hide the fact that his license had been revoked for a period of 90 days due to a DWI conviction, and that he had continued to drive state vehicles even after notice of revocation. DOT further alleged that Mr. Barrett's behavior had ranged from initial lack of cooperation to outright insubordination as evidenced by his refusal to take steps necessary to restore his license.

In its order of notice dated August 25, 1988, the Personnel Appeals Board granted appellant's Motion to Consolidate, ruling that it would consider the letter notifying Mr. Barrett of his termination, and the prior letters of warning which precipitated his discharge. The Board, in its order of August 25, 1988, had already addressed the timeliness of Mr. Barrett's appeals.

After reviewing the evidence presented, the Board found that Per 308.03 (4)(b) of the Rules of the Division of Personnel states, "If the appointing authority feels oral warnings have been, are, or would be ineffective or insufficient in view of the attitude of the employee and/or the nature of the offense, a written warning shall be prepared. Warnings must indicate that unless corrective action is taken the employee will be subject to discharge." Per 308.03(f) as cited by the appointing authority in its October 26, 1987 letter of warning to Mr. Barrett charges him with "lack of cooperation". Further, the appointing authority cited Mr. Barrett's rights to appeal pursuant to Per 308.03(4)(d). Therefore, the Board ruled that DOT was required to comply with the provisions of Per 308.03(4)(b), warning the employee that failure to take corrective action would result in his discharge. The October 26, 1987 letter of warning failed to provide the cautionary language set forth in Per 308.03 (4)(b). After review of the record, the Board ordered that the letter of October 26, 1987 be reissued for lack of cooperation and include the statement that failure to take corrective action will result in the employee's discharge.

On November 24, 1987, Mr. Barrett was issued a warning for operating a State vehicle after revocation of license. In his letter to the appellant, Mr. Lindh cited Per 308.03(c)(a)c., Mandatory Discharge, Violation of a posted or published rule that, in itself, warned of automatic discharge." Rule 12 of the Traffic Division's work Rules does not warn of automatic discharge and therefore can not be considered as a basis for mandatory discharge. Further, Mr. Lindh's other letter of that date to Mr. Barrett, which does not purport to be a letter of warning, informed the appellant that he had been allowed 30 days from the date of the November 24th letter, or until December 24, 1987, to restore his license or he would be subject to immediate discharge on that date. The official letter of warning does not inform Mr. Barrett that failure to take corrective action will result in his discharge. The letter notifying the appellant of the intent to terminate his employment apprises him of no rights to appeal. were the cautionary language described above the only technical fault with the letter, the Board could order that the letter be issued to comply with the Rules. DOT, however, has

APPEAL OF GREGORY BARRETT

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cited violation of a posted or published rule which, in itself, warns of automatic discharge. The Board found that the cited "Rule 12" does not make such a representation. Therefore, the Board voted to order that the official letter of warning issued November 24, 1987 be removed from the appellant's personnel file.

For the record, the Board notes that the effective date of Mr. Barrett's termination was January 18, 1988, not December 24, 1987, which Mr. Lindh gave for the last possible date for the appellant to show proof of restoration of his license. The Board found, in essence, that the Department of Transportation's actions in this case lent credence to the appellant's statement that he believed his SEA Field Representative and the appointing authority had reached some accommodation which would prevent his immediate termination.

The final letter issued to Mr. Barrett, dated January 15, 1988, stated, "Termination is based upon the following conditions, each of which independently and/or accumulatively constitutes grounds for termination." That letter from Mr. Fletcher then referred to failure by the appellant to restore his license by December 24, 1987, and reiterated the claims of the November 24, 1987 letter that Mr. Barrett had operated a state motor vehicle without a license. Again, DOT cited "Rule 12, dated May 14, 1984. Now a violation of the Code of Administrative Rules, Per 308.03 (c)(1)c."

Per 308.03(4)c. states, "Employees who receive 2 written warnings for the same offense may be discharged by receipt of a final written notice of subsequent violation for that offense. Employees who receive 4 written warnings for various offenses may be discharged upon receipt of a 5th written warning for any type of offense." The Board did not find evidence of a "subsequent violation for that offense" or a second written warning "for the same offense." Furthermore, based on the evidence presented, the Board found no offense which would support the immediate automatic termination of Mr. Barrett. Therefore, the Board found that Mr. Barrett was improperly discharged from his employment.

Following the hearing of September 14, 1988, the Personnel Appeals Board received a letter from Mr. Richard Pucci dated September 14, 1988, requesting that the Board stay its decision until DOT could produce a transcript of the hearing. Mr. Pucci indicated that the "deal" which he allegedly made with the appellant's SEA Field Representative, Ann Spear, had never occurred and that he never would have made such an accommodation with the appellant concerning the reinstatement of his license which might stay his pending termination. The Board issued an order subsequent to receipt of that letter allowing DOT until noon on Monday, September 26, 1988, to produce a transcript and file whatever response it deemed appropriate. No response was filed.

Based upon the record before it, the Board found that the appellant himself never purported to have spoken with Mr. Pucci, nor to having made any "deal" with Mr. Pucci. He did profess to a belief that his SEA Field Representative, Ms. Spear, had arranged for additional time in which he could secure reinstatement of his license. Therefore, the Board found that the appellant himself made no misrepresentation of his understanding of the circumstances surrounding the anticipated December 24, 1987 termination. DOT's failure to effect the termination on that date lends credence to his belief that DOT had reached some accommodation with his representative.

Based upon the foregoing, the Board voted to issue the following order pursuant to the provisions of RSA 21-I:58 I which reads in part, "In all cases, the personnel appeals board may reinstate an employee or otherwise change or modify any order of the appointing authority, or make such other order as it may deem just."

- 1) DOT shall reissue the October 26, 1987 letter of warning to Mr. Barrett for lack of cooperation. That letter shall contain the statement that failure to take corrective action will result in the employee's discharge from employment. That letter, as reissued, shall remain in the appellant's personnel file and shall not expire as a basis for possible discharge until October 26, 1989.
- 2) DOT shall remove from Mr. Barrett's file both the letter of warning dated November 24, 1987, and the letter of termination dated January 15, 1988, and shall replace said letters with a notice of suspension without pay pursuant to Per 308.01 of the Rules of the Division of Personnel for failure to possess a valid license as required in his position with the Department of Transportation, and for lack of cooperation in failing to notify his employer of his license suspension and to regain his license as soon as possible. Said suspension, effective January 18, 1988, per order of the Board shall be for six months. This notice of suspension shall remain in Mr. Barrett's file and shall not expire as a basis for termination until November 24, 1989.
- 3) Upon review of the record, the Board noted Mr. Barrett's absence from the State from July until September, 1988 (Appellant's Request for Continuance). The Board therefore ordered that Mr. Barrett be reinstated to his former position effective September 15, 1988. This period of leave (due to suspension and leave of absence without pay) shall not be counted toward any accumulation of benefits or leave accrual.

In ordering this relief, the Board notes that the parties appear to have a lengthy history of disagreement. The Board cautions both parties that the Rules of the Division of Personnel and the provisions of the Collective Bargaining Agreement govern the actions of both parties and that they must comply with those requirements. The Board expects tht the parties will make

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efforts to insure that the appellant's reinstatement is smoothly and expeditiously effectuated. The appellant is also cautioned that nothing in this order shall be construed as to bar the Department of Transportation from taking further disciplinary action when such action complies with provisions of the Rules of the Division of Personnel.

FOR THE PERSONNEL APPEALS BOARD



MARY ANN STEELE
Executive Secretary

cc: Michael C. Reynolds, SEA General Counsel
Richard Nusbaum, Esq., Dept. of Transportation
William S. Fletcher, Department of Transportation
Virginia A. Vogel, Director of Personnel