

The State of New Hampshire

Supreme Court

No. 2000-753 Appeal of Kathleen Clairmont

TO THE CLERK OF NH PERSONNEL APPEALS BOARD #00-T-8

I hereby certify that the Supreme Court has issued the following order in the above-entitled action:

January 22, 2001. *The court upon January 9, 2001, made the following order:*

Appeal from administrative agency is declined. See Rule 10(1).

*This appeal and any documents that were **filed** in this matter were provided to each justice. All justices who were not **disqualified** from participating in this appeal read the materials in preparation for a conference at which this appeal was discussed.*

*Under Supreme Court Rule 10, the supreme court may in its discretion decline to accept an appeal from **an** administrative agency. No appeal, however, **is** declined except by unanimous vote of the court with at least three justices participating.*

*At the conference on this case, **no** justice voted to accept this appeal. Accordingly, the appeal was **declined**. If any justice believed this appeal should have been accepted, this case would have been scheduled for **briefing**.*

*Brock, C.J., and **Broderick**, Nadeau, Dalianis, and Duggan, JJ., concurred.*

*Date of clerk's notice of **decision**: January 22, 2001*

February 26, 2001

Attest: *Carol A. Belmain*
Carol A. Belmain, Deputy Clerk

State of New Hampshire



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

APPEAL OF KATHLEEN CLAIRMONT

Docket #00-T-8

Department of Safety, Division of State Police

Decision on Appellant's Motion for Reconsideration and State's Objection

October 25, 2000

On September 15, 2000, the Personnel Appeals Board issued its decision denying Ms. Clairmont's appeal. The appellant timely filed a Motion for Reconsideration, dated October 12, 2000, arguing that the Board's decision ignored evidence and argument supporting Ms. Clairmont's rights to protection under the provisions of the Family and Medical Leave Act. On October 18, 2000, the Department of Safety filed its Objection to that Motion.

RSA 541:4 provides that motions for rehearing "shall set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable." In accordance with RSA 541:3, the Board "may grant such rehearing if in its opinion good reason for the rehearing is stated in the motion."

As the State notes in its Objection, the arguments offered by the appellant in support of the Motion for Reconsideration are largely a restatement of the evidence and arguments presented in the hearing on the merits of the appeal. Further, although Attorney Kirkland's name was omitted from the list of witnesses who testified in Ms. Clairmont's three-day hearing on the merits of her

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appeal, such omission is not an indication that the Board ignored her testimony, nor does it provide a basis upon which to conclude that the Board's decision is unlawful or unreasonable.

Attorney Kirkland offered extensive testimony on the rights and obligations of employees and employers under the provisions of the Family and Medical Leave Act, and she offered her legal opinion that Ms. Clairmont's medical condition entitled her to protection under the Family and Medical Leave Act. However, the fact remains that the State's independent medical examiner and Ms. Clairmont's own physician and psychologist, all of whom were aware of her medical condition(s) and course(s) of treatment, cleared her for return to full duty without restriction or limitation. The appellant failed to offer evidence of any change in her condition that would impose upon the Department of Safety a requirement or an obligation to request additional medical assessments. Further, as the evidence reflects, shortly before Ms. Clairmont's termination from employment Lt. Fortier discussed Ms. Clairmont's tardiness with Dr. Leo Shea, informing him that the appellant would be disciplined if she continued to report late for duty. There is no evidence that Dr. Shea provided additional medical information, that he suggested a further assessment, or that he suggested that Ms. Clairmont was otherwise unable to return to full duty without restriction or limitation. Instead, Dr. Shea told Lt. Fortier, "Do what you have to do."

As the State notes in its Objection, the appellant failed to timely file appeals of any of the three warnings issued to her prior to her fourth, and final warning for continued lateness. As such, the Board has no jurisdiction to rule on the propriety of those warnings. If the appellant believed that any of those warnings violated her rights under the provisions of the Family and Medical Leave Act, she had a right to appeal them to the Personnel Appeals Board within fifteen calendar days of the date that they were issued. Having failed to do so, those warnings stand as a valid basis for termination under the provisions of Per 1001.08 of the Rules of the Division of Personnel.

Having considered the arguments in support of, and in opposition to, the Board's September 15, 2000 decision denying Ms. Clairmont's appeal, the Board voted unanimously to deny the Motion for Reconsideration and to affirm its decision denying Ms. Clairmont's appeal.

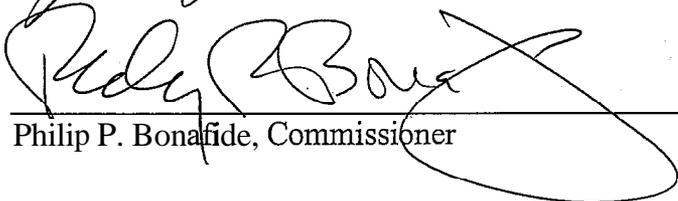
THE PERSONNEL APPEALS BOARD



Lisa A. Rule, Acting Chairperson



James J. Barry, Commissioner



Philip P. Bonafide, Commissioner

cc: Thomas F. Manning, Director of Personnel, 25 Capitol St., Concord, NH 03301
Atty. Sheri J. Kelloway, Department of Safety, 10 Hazen Dr., Concord, NH 03305
Atty. James W. Donchess, Donchess & Notinger, PC, 60 Main St., Nashua, NH 03060

State of New Hampshire



PERSONNEL APPEALS BOARD

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Concord, New Hampshire 03301
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Appeal of Kathleen Clairnoit

Docket #00-T-8

Department of Safety, Division of State Police

September 15, 2000

The New Hampshire Personnel Appeals Board (Rule, Barry & Bonafide) met on Wednesday, March 29, 2000, Wednesday, April 5, 2000 and Wednesday, May 5, 2000, under the authority of RSA 21-I:58, to hear the appeal of Kathleen Clairmont, a former employee of the Division of State Police. Ms. Clairmont was represented at the hearing by Attorney James Donchess. Attorney Sheri J. Kelloway appeared on behalf of the Department of Safety.

The record of the hearing in this matter consists of pleadings and memoranda submitted by the parties, notices and orders issued by the Board, the audio tape recording of the hearing on the merits and documents admitted into evidence as follows:

State's Exhibit

- 1-a. January 6, 1999 notice of suspension without pay from Col. John Barthelmes to Tr. Kathleen Clairmont
- 1-b. June 17, 1999 letter of warning to Tr. Kathleen Clairmont with supporting documentation including:
 - June 17, 1999 memo from Jeff Kellett to Lt. Wayne Fortier
 - June 17, 1999 memo from Tr. Kathleen Clairmont to Col. John Barthelmes
 - Summary of a June 15, 1999 meeting between Tr. Clairmont and Lt. Fortier
 - June 14, 1999 letter from Lt. Fortier to Tr. Clairmont
 - February 15, 1999 memo from Sgt. Peter Hamilton to Tr. Clairmont

- February 8, 1999 memo from Tr. Clairmont to Col. Barthelmes
- 1-c. December 1, 1999 letter of warning from Lt. Fortier to Tr. Clairmont
- November 17, 1999 memo from Lt. Fortier to Col. Gary Sloper
- November 1, 1999 memo from Sgt. James Kelly, Jr. to All Troop C Personnel
- October 28, 1999 memo from Maj. Kevin O'Brien to All Troopers and Units
- October 29, 1999 Fall 1999 In-Service Training Agenda
- November 10, 1999 Radio Log
- November 5, 1999 Troop C Schedule
- November 11, 1999 Radio Log
- November 5 - 11, 1999 Weekly Duty Log
- October 25, 1999 notes of a meeting between Lt. Wayne Fortier, Tr. Kevin Oxford and
Tr. Kathleen Clairmont
- 1-d. January 14, 2000 letter of dismissal from Col. Sloper to Tr. Clairmont
- Undated handwritten memo from Atty. James Donchess to Col. Sloper
- January 7, 2000 notice of intent to dismiss from Col. Sloper to Tr. Clairmont
- January 7, 2000 Status Report
- January 6, 2000 letter from Sgt. Kelly to Col. Sloper
- January 5, 2000 letter from Tr. Clairmont to Col. Sloper, Lt. Fortier, Sgt. Kelly and Sgt.
Riesenberg
- January 3, 2000 letter from Tr. Clairmont to Col. Sloper, Lt. Fortier, Sgt. Kelly and Sgt.
Riesenberg
- December 28, 1999 letter fi-om Tr. Clairmont to Col. Sloper, Lt. Fortier, Sgt. Kelly and
Sgt. Riesenberg
- December 27, 1999 letter fi-om Tr. Clairmont to Col. Sloper, Lt. Fortier, Sgt. Kelly and
Sgt. Riesenberg
- December 26, 1999 letter from Tr. Clairmont to Col. Sloper, Lt. Fortier, Sgt. Kelly and
Sgt. Riesenberg
- December 25, 1999 letter from Tr. Clairmont to Col. Sloper, Lt. Fortier, Sgt. Kelly and
Sgt. Riesenberg
- December 24, 1999 letter fi-om Tr. Clairmont to Col. Sloper, Lt. Fortier, Sgt. Kelly and
Sgt. Riesenberg

- December 23, 1999 letter from Tr. Clairmont to Col. Sloper, Lt. Fortier, Sgt. Kelly and
Sgt. Riesenberg
- December 27, 1999 meeting notes from Lt. Fortier
- December 9, 1999 meeting notes from Lt. Fortier
- December 8, 1999 meeting notes from Lt. Fortier
- November 12, 1999 meeting notes from Lt. Fortier
- November 11, 1999 meeting notes from Lt. Fortier
- November 3, 1999 meeting notes from Lt. Fortier
- 1-e. Report prepared by FTO. Kevin Oxford containing:
Summary of Late and Sick Days
Section 1 Notes, pages 1 - 19
Section 2 Dispatch Logs, pages 20 - 29
Section 3 DOR (Narrative Section), pages 30 - 54
- 1-f. Report prepared by FTO David Griffin
2. Documents related to FMLA including:
February 3, 1999 Personnel Memorandum
November 10, 1999 certification of attendance by Tr. Clairmont at FMLA and Sexual
Harassment Training
April 12, 1999 Notification of FMLA
March 30, 1999 letter from Tr. Clairmont to Col. Barthelmes
March 25, 1999 letter to the file from Claude Ouellette
March 18, 1999 letter from Sgt. Hamilton to Tr. Clainnont
Note from Dr. Amy Schneider dated February 24, 1999
Note from Dr. Amy Schneider dated February 12, 1999
Leave accrual summary for Tr. Clairmont for FY 99 dated February 7, 1999
3. Report and summary of qualifications submitted by Dr. Albert Drukteinis dated April 19,
1999
4. Correspondence including:
September 17, 1999 letter from Dr. Leo Shea
July 18, 1999 letter from Dr. Amy Schneider
June 15, letter from Dr. Leo Shea

- May 20, 1999 letter from Dr. Leo Shea
May 14, 1999 letter from Dr. Leo Shea
5. Leave summaries for Tr. Clairmont for calendar years 2000, 1999 and 1998

Appellant's Exhibits

- A. Fiscal Year 1998 Absentee Calendar for Tr. Clairmont
B. Fiscal Year 1997 Absentee Calendar for Tr. Clairmont
C. Fiscal Year 1996 Absentee Calendar for Tr. Clairmont
D. Application for leave dated 12/22/99 signed by Kathleen Clairmont, certified by Dr. Amy Schneider on 12/23/99 for the period of 12/17/99 through 12/19/99
E. Résumé of Dr. Leo Shea
F. Performance Review dated May 1996
G. Performance Review dated May 1997
H. Performance Review dated June 1998
I. Letters from Kathleen Clairmont's personnel file

At the hearing, the following persons gave sworn testimony:

Lt. Wayne Fortier
Col. Gary Sloper
Tr. Kevin Oxford
Sgt. David Griffin
Dr. Leo Shea
Kathleen Clairmont

Summary

On January 14, 2000, Trooper Kathleen Clairmont was dismissed from her employment with the New Hampshire Department of Safety, Division of State Police, under the provisions of Per 1001.08 (b) (1) of the Rules of the Division of Personnel: "An appointing authority shall be authorized to dismiss an employee pursuant to Per 1001.03 by issuance of a third written warning for the same offense within a period of 5 years." The State asserted that Ms. Clairmont

had received multiple written warnings, the last of which resulted in her termination, on January 6, 1999, June 17, 1999, December 1, 1999 and January 14, 2000. The State argued that it could have dismissed Ms. Clairmont as early as December 1, 1999, when the third warning was issued.

The appellant argued that the warnings issued by the Department of Safety were issued in violation of the Family and Medical Leave Act, therefore rendering the termination itself unlawful. The appellant argued that Ms. Clairmont suffers from a serious medical condition for which she was entitled to leave under the Family and Medical Leave Act, and that she could not be disciplined for the use of intermittent leave related to her serious medical condition.

A review of the events leading up to Ms. Clairmont's termination from employment follows:

On January 6, 1999, Ms. Clairmont received from former State Police Colonel John Barthelmes a notice of disciplinary suspension without pay for three working days. The disciplinary suspension, which also served as a letter of warning, was imposed by the Division of State Police following an internal investigation (IA-98-083) of Ms. Clairmont's handling of, and conduct surrounding, an ALS hearing during the previous summer. Specifically, the appellant was charged with violation of the Division's policies regarding Division Reports (1.4.13), Reporting for Assignments (1.4.3), Courtesy and Comportment (1.11.1), Personal Behavior (1.11.2), and Integrity (1.4.8). The suspension was imposed to take effect on Tuesday, January 19, 1999.

Ms. Clairmont was assigned to Communications at State Police Headquarters effective January 23, 1999, and reported late for duty on January 28, 1999, February 1, 1999, February 8, 1999 and February 9, 1999. In a memorandum to Ms. Clairmont dated 2/15/99, Sgt. Peter Hamilton summarized the dates that the appellant had reported late for duty. He indicated in the memorandum that he had met with Ms. Clairmont on January 25, 1999, at which time they had discussed the requirement for reporting to duty, and for contacting the unit if she was unable to report as scheduled. He indicated that they met again on January 29, 1999, when he advised her that she was required to be at work, ready for duty at the time listed on the schedule. He also informed her that whenever she would not be reporting as scheduled, she needed to contact the Duty Communications Supervisor with the reason for her tardiness and the estimated time of her

arrival. They met for a third and fourth time on February 1, 1999 and February 2, 1999 to discuss Ms. Clairmont's responsibilities for reporting for duty and notifying her supervisor of absences or anticipated late report. They met again on February 8, 1999, at which time Sgt. Hamilton directed her to call the unit, by phone, on any occasion when she would be unable to report for duty as scheduled. He noted that throughout the period, she had failed to provide the required notification, and he instructed her to provide a written report, via Interdepartmental Correspondence, summarizing the reason for each time she was tardy as well as the reason why she had failed to call in to advise her supervisor that she would be late. He also instructed her to provide with her response any medical certificate if applicable.

Ms. Clairmont responded by memorandum dated February 8, 1999.¹ Although she acknowledged her late arrivals, she gave no reason for reporting late to duty. Subsequently, Ms. Clairmont was absent from work between February 9, 1999 and February 21, 1999.

Ms. Clairmont made visits to Dr. Leo Shea, a psychologist, on February 3, 1999 and February 11, 1999. Ms. Clairmont provided a note signed by her primary care physician, Dr. Amy Schneider, excusing Ms. Clairmont from work from February 9, 1999 through February 21, 1999. The note provides no indication of the reason(s) for leave, stating simply "No work 2/9/99 -- 2/21/99."

Ms. Clairmont was absent again between February 24, 1999 and February 28, 1999. Ms. Clairmont provided a second note signed by Dr. Schneider, dated February 24, 1999, that stated, "No work until 3/1/99." Again, the note provided no indication of the reason for leave.

On March 25, 1999, Ms. Clairmont received a March 18, 1999 memorandum from her supervisor, Sgt. Hamilton, informing her that he had received a telephone call on March 18, 1999, from the Department's Human Resources Office about the appellant's FMLA forms. He advised Ms. Clairmont that unless she submitted the appropriate documentation for medical

¹ The memorandum from Ms. Clairmont, dated February 8, 1999, makes reference to a late arrival on February 9, 1999. Therefore, it is reasonable to conclude that the date on the memorandum is inaccurate, and should bear a date after February 15, 1999, the date of Sgt. Hamilton's memorandum.

leave under the FMLA, she could be charged with annual leave rather than the requested sick leave for the period of 2/19/99 - 2/24/99 and 2/24/99 - 2/28/99. That afternoon, Ms. Clairmont went to Mr. Ouellette's office and told him that according to her attorney, she did not need to submit the FMLA forms, nor did she have to explain why she had been out sick.

In a memo dated March 30, 1999, addressed to Col. Barthelmes, under the subject "FMLA Letter," Ms. Clairmont wrote, "This correspondence is in regard to the letter I received stating that I am going to be charged with Annual Leave should I not fill out a Family Medical Leave Act form by Mr. Ouellette [to cover absences from February 9 - February 21, 1999, and from February 24 - March 1, 1999]." Although Ms. Clairmont's physician had provided notes indicating "no work," there was nothing to document the nature of the illness or injury for which the appellant had requested the use of sick leave. In that same memorandum, Ms. Clairmont wrote, "I do not believe that the F.M.L.A. paperwork pertains to my situation and I do not wish to choose this option."

By letter dated April 12, 1999, Human Resources Administrator Ouellette advised Ms. Clairmont that although the employee had failed to provide the appropriate notification and certification for use of FMLA qualified sick leave, Ms. Clairmont's absence from February 10, 1999 through March 2, 1999 had been designated by the employer as Employee and Event Qualified FMLA Leave.

The Department of Safety directed Ms. Clairmont to submit to an evaluation to determine her fitness for duty. In a report dated April 19, 1999, Dr. Drukteinis provided to the Department of Safety an Independent Medical Evaluation of Ms. Clairmont's fitness for duty with the New Hampshire Division of State Police. Dr. Drukteinis wrote, "Ms. Clairmont does continue to take antidepressant medications as prescribed by her family doctor." Dr. Drukteinis referred to Ms. Clairmont's self reports of difficulty sleeping; however, his report made no mention of insomnia as a serious medical condition associated with her depression, nor did it suggest the need for Ms. Clairmont to use leave for any absences that might be associated with insomnia or depression.

In a memo from Lt. Wayne Fortier, dated June 14, 1999, Ms. Clairmont was ordered back to her temporary duty assignment in Criminal Records. She had been absent on some form of leave, including sick leave, annual leave, bonus leave or floating holidays, through most of the months of April and May, 1999. According to Lt. Fortier's memo, as of June 14th, Ms. Clairmont had used all of her accrued leave. He advised her that if she were unable to perform her assigned duties due to illness, she would need to file a request for leave without pay.

Lt. Fortier met with Ms. Clairmont on June 15, 1999, to hand-deliver the June 14, 1999 memo ordering her back to work. During his meeting with Ms. Clairmont, Lt. Fortier discussed his conversation with Dr. Shea, the appellant's psychologist, but indicated that the Division was still waiting for her to sign a release authorizing Dr. Leo Shea "...to provide written documentation of his diagnosis, prognosis, and recommended course of treatment of her to Colonel Barthelmes." He also indicated that the Division also needed a release of information from Dr. Schneider so that the Division could contact her about Ms. Clairmont's medical condition. Lt. Fortier advised the appellant that if she failed to comply with the Division's request for a release of written documentation, the Division would initiate procedures to terminate her employment. Lt. Fortier informed the appellant that whereas she had exhausted all accumulated leave, any absence would result in disciplinary action up to and including dismissal from service; however, if she could not physically work, she would have to request leave of absence without pay. Ms. Clairmont indicated that she would not be requesting a leave of absence. At the end of the meeting, Ms. Clairmont agreed to provide authorization for a release of medical records.

The Division received a letter from Dr. Shea, dated June 15, 1999, concerning Ms. Clairmont's condition. He wrote that Ms. Clairmont was suffering from clinical depression and would be unable to resume her duties as a "road trooper" at that time. He discussed counseling and medication, but made no reference to insomnia, nor did he indicate that Ms. Clairmont required leave on a continuing or intermittent basis from her assignment at headquarters.

The Division issued her a written warning dated June 17, 1999, for continued tardiness. Ms. Clairmont did not appeal the warning.

After securing the appropriate releases, the department obtained additional information from Ms. Clairmont's primary care physician, Dr. Amy Schneider. By letter dated July 17, 1999, Dr. Schneider reported, "Kathleen Clairmont is able to return to her full work duties with no limitations." Approximately two months later, by letter dated September 17, 1999, Ms. Clairmont's psychologist, Dr. Leo Shea, also reported that Ms. Clairmont could return to "her usual, full time law enforcement duties." He recommended that the return to duty be "conditional, based upon successfully completing a brief FTO or Supervisor-based retraining period, perhaps 30-45 days in length." Dr. Shea recommended that Ms. Clairmont train with an officer who was senior to her, and that she be reassigned to another troop station so that she could make "a fresh start." Neither Dr. Schneider's letter nor the letter from Dr. Shea made any reference to Ms. Clairmont's depression, nor did either letter refer to insomnia, either as a serious medical condition that would require the taking of leave by Ms. Clairmont on either a continuing or an intermittent basis, or as a condition related to her earlier diagnosis of depression..

By letter dated September 17, 1999, Dr. Shea informed State Police Colonel John Barthelmes that it was his "professional opinion that Tpr. Clairmont can return to her usual, full time law enforcement duties." He also wrote,

"I respectfully recommend: that her return to duty is conditional, based upon successfully completing a brief FTO- or Supervisor-based retraining period, perhaps 30 - 45 days in length; that the FTO or Supervisor selected be someone with more seniority than she; and that she be reassigned from Troop D to another Troop (to best permit a 'fresh start'). It is my understanding that you may wish to hold a meeting with Tpr Clairmont, myself, and relevant others prior to implementing her return to duty. I would be pleased to participate in such a meeting, if you so choose."

Ms. Clairmont was subsequently assigned to Troop C in Keene for a period of refresher training with a Field Training Officer.

Ms. Clairmont's work schedule entailed reporting to the Troop station 30 minutes after the beginning of the Field Training Officer's scheduled start time. On October 22, 1999, the fifth

day at Troop C, Ms. Clairmont was 20 minutes late reporting for duty. She indicated that she had underestimated traffic congestion. She also said that while she would not be angry with Officer Oxford, she was upset with "what the Division was doing to her." Among Ms. Clairmont's complaints was the fact that during the period of retraining, before being returned to "solo status," Ms. Clairmont was not considered "on duty" when she signed on from her cruiser at her residence in Northfield, NH. However, she was paid 30 minutes of travel time.

On October 24, 1999, Ms. Clairmont was 41 minutes late. She called in and said that she had overslept. On October 25, 1999, Mr. Clairnont was late reporting to duty for the third time in four days. Although she was only a few minutes late, she was reminded of the importance of reporting for duty as scheduled and was informed by Lt. Fortier that another late report would result in a written warning for tardiness. On October 31, 1999, Ms. Clairnont called in sick, indicating that she was suffering from a "stomach bug." On November 1, 1999, Ms. Clairmont was out sick. The reason was not logged by the dispatcher. The appellant was out sick again on November 2nd but she did not call the troop station. When the dispatcher called her, she simply indicated that she had taken some medication and had fallen asleep.

On November 5, 1999, Ms. Clairmont was out sick and told the Troop C dispatcher that she had eaten "pizza [that] did not settle well with [her]." On November 9, 1999, Ms. Clairmont was out sick and gave no report of the reason for her absence.

On November 10, 1999, Ms. Clairmont attended training on Sexual Harassment and the Family and Medical Leave Act. Ms. Clairmont was several minutes late for the training itself. During the workshop, Ms. Clairnont complained to a co-worker about the Division designating leave as FMLA leave when employees did not request such designation. She indicated that FMLA should not apply in her case.

On November 11, 1999, Ms. Clairnont met with Lt. Fortier about her tardiness, including her late arrival for the Sexual Harassment and FMLA training. Ms. Clairnont said, "There is no excuse sir, it is my fault." On November 13, 1999, Ms. Clairmont was late and offered no excuse. On November 14, 1999, Ms. Clairmont was 8 minutes late in reporting for duty. In that

instance, she told her FTO, "You probably already know that I have insomnia and my medication is very strong."

Although the appellant now argues that she had properly asserted her rights under the provisions of the Family and Medical Leave Act, the evidence reflects that Ms. Clairmont repeatedly refused requests from her supervisor and from the Department's Human Resources Administrator to provide the medical certification to verify her eligibility for protection under the Act.

While the Department was aware that Ms. Clairmont had been diagnosed with clinical depression, she had refused to provide the Department with certification from her physician of a serious medical condition as required by the Family and Medical Leave Act. She also had asserted repeatedly that the provisions of the FMLA did not apply in her case.

When the Department of Safety ordered Ms. Clairmont to submit to an independent medical examination, the examiner certified her as eligible to work on a full-time basis. Documentation subsequently received from Ms. Clairmont's own health care providers confirmed that the appellant was able to work on a full-time basis without restriction.

None of the medical information provided by Ms. Clairmont's physician or her psychologist referred to insomnia as "a serious medical condition," nor did they link insomnia to her diagnosis of depression. During discussions between Lt. Fortier and Dr. Shea about Ms. Clairmont's tardiness, Dr. Shea never indicated that Ms. Clairmont was medically unable to report to work on time.

The evidence further reflects that Ms. Clairmont objected to any designation by her employer that her leave was FMLA qualified, complained during in-service training regarding the provisions of the FMLA that her absences should not be treated as FMLA leave, and stated that the provisions of the FMLA should not apply to her.

As such, the evidence does not support a claim that Ms. Clairmont had requested leave or otherwise asserted or availed herself of any FMLA rights.

Accordingly, the Board found that Ms. Clairmont's absences were not protected by the provisions of the Family and Medical Leave Act.

Prior to receiving notice of the Division's intent to terminate Ms. Clairmont's employment, Ms. Clairmont received three written warnings for failure to report to duty, including the first warning that advised her of a disciplinary suspension on charges including failure to report to a duty assignment. Whereas none of those warnings was appealed, each stands as a valid basis for subsequent disciplinary action, pursuant to Per 1001.03 of the Rules of the Division of Personnel, up to and including termination from employment. Ms. Clairmont's fourth and final warning, dated January 14, 2000, was a sufficient basis for termination under the provisions of Per 1001.08 of the Rules of the Division of Personnel for continued lateness.

At the close of the hearing, both the State and the appellant submitted to the Board requests for findings of fact and rulings of law. On the evidence and argument, the Board made findings of fact and rulings of law as follows:

State's Requests for Findings of Fact

#1 - #14 are granted.

State's Requests for Rulings of Law

#15 - #18 are granted.

#19 - #20 are granted in part. The evidence reflects that the Appellee's actions relative to the Appellant's termination from employment comport with the Professional Standards of Conduct and the Personnel Rules.

Appellant's Requests for Findings of Fact

#1 is granted.

#2 is granted in part. None of the evidence reflects a diagnosis of "depression/insomnia."

#3 is granted in part. The evidence reflects that Dr. Shea was treating Ms. Clairmont for clinical depression. Dr. Amy Schneider was treating Ms. Clairmont for a sleep disorder and depression.

(Appellant's D)

#4 is granted, but is not dispositive of the appeal.

#5 is granted in part. Ms. Clairmont attributed her absences to a number of factors including such reasons as traffic congestion, road conditions, and upset stomach.

#6 is granted in part. Ms. Clairmont in effect asked to be relieved of any requirement to maintain regularly scheduled hours, provided that she worked the equivalent of an 8-hour day.

#7 is granted in part. Ms. Clairmont's June 17, 1999 letter refers only to insomnia.

#8 is granted to the extent that a warning was issued for "failure to meet the work standard and unauthorized absences from work."

#9 is granted in part. Dr. Shea had suggested a meeting between himself, Ms. Clairmont, and various members of the Division of State Police. Both Ms. Clairmont and Dr. Shea believed such a meeting would be scheduled. Ms. Clairmont later informed Dr. Shea that she had been advised that the Division did not believe such a meeting was necessary.

#10 is denied.

#11 is denied. The reports indicated that Ms. Clairmont performed some duties well, but there were concerns about other duties, as well as concerns about her tardiness and her absences.

#12 is granted.

#13 is granted in part. Ms. Clairmont claimed a number of different reasons for tardiness or absence, including lack of motivation, traffic congestion, road conditions, a stomach bug, a pizza that "did not settle well with her," and not being "a morning person."

#14 - #15 are granted.

#16 is granted in part. In a number of instances, Ms. Clairmont gave no excuse for her absence.

#17 - #25 are granted.

#26 is granted in part. Ms. Clairmont was entitled to leave for certain periods of absence under the Family and Medical Leave Act, provided that the absence was a qualifying absence and she properly asserted her rights to such leave.

#27 is granted.

#28 is granted in part. Ms. Clairmont was entitled to leave for certain periods of absence under the Family and Medical Leave Act, provided that she properly asserted or availed herself of those rights to such leave.

#29 is granted.

#30 is denied, as not all of Ms. Clairmont's absences were reported as resulting from a serious medical condition.

#31 is denied.

#32 is denied.

For the reasons set forth above, the Board voted unanimously to deny Ms. Clairmont's appeal. In so doing, the Board voted to uphold the decision of the Division of State Police, Department of Safety, terminating Ms. Clairmont's employment as a State Trooper.

THE PERSONNEL APPEALS BOARD



Lisa Rule, Acting Chair



James J. Barry, Commissioner



Philip Bonafide, Commissioner

cc: Thomas F. Manning, Director of Personnel
Atty. James Donchess, NH Troopers Association
Atty. Sheri Kelloway, Department of Safety