

**MANDATE**

Certified and Issued as Mandate Under NH Sup. Ct. R. 24

*Michelle A. Garaway*  
Clerk/Deputy Clerk

*4/8/2008*  
Date

**THE STATE OF NEW HAMPSHIRE**

**SUPREME COURT**

**In Case No. 2008-0122, Appeal of Richard, the court on March 24, 2888, issued the following order:**

Appeal from administrative agency is declined. See Rule 10(1). State's motion for summary affirmance is, therefore, moot.

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

This matter was considered by each justice whose name appears below. If any justice who reviewed this case believed the appeal should have been accepted, this case would have been accepted and scheduled for briefing.

Declined.

Broderick, C.J., and Dalianis, Duggan, Galway and Hicks, JJ., concurred.

**Eileen Fox,  
Clerk**

Distribution:

New Hampshire Personnel Appeals Board '2007-T-022  
Michael C. Reynolds, Esquire  
Lynmarie C. Cusack, Esquire  
File

State of New Hampshire



**PERSONNEL APPEALS BOARD**

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

*Appeal of Richard Emmons*

*Docket #2007-T-022*

*Department of Transportation*

*Decision on Appellant's Motion for Reconsideration/Rehearing*

*and*

*State's Objection to Motion for Reconsideration*

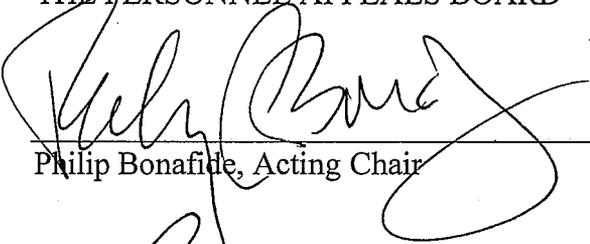
*January 23, 2008*

By letter dated November 19, 2007, SEA General Counsel Michael Reynolds requested reconsideration/rehearing of the Board's October 18, 2007 decision denying Mr. Emmons' appeal of his dismissal from employment as a Supervisor of Highway Signing for the Department of Transportation. The State's Objection to that motion was received by the Board on November 29, 2007.

In accordance with Per-A 208.03 (b) of the NH Code of Administrative Rules, "Such motion for reconsideration or rehearing shall set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable." Per-A 208.03 (e) provides that, "A motion for rehearing in a case subject to appeal under RSA 541 shall be granted if it demonstrates that the board's decision is unlawful, unjust or unreasonable."

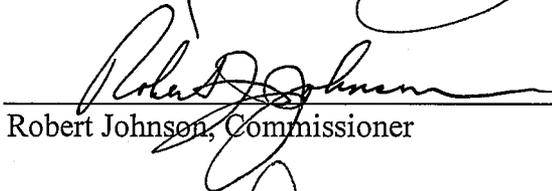
Having carefully considered the Motion and Objection, the Board found that the Appellant failed to provide evidence that demonstrates the Board's order is unlawful or unreasonable. Accordingly, and for all the reasons set forth in the State's Objection, the Board voted unanimously to DENY the Appellant's Motion.

THE PERSONNEL APPEALS BOARD



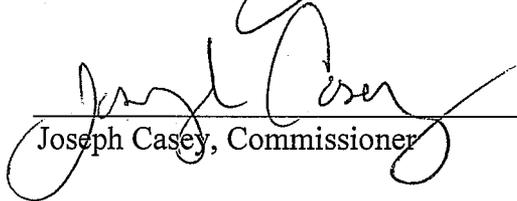
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Philip Bonafide, Acting Chair



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Robert Johnson, Commissioner



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Joseph Casey, Commissioner

cc: Karen Hutchins, Director of Personnel, 25 Capitol St., Concord, NH 03301  
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# State of New Hampshire



## **PERSONNEL APPEALS BOARD**

25 Capitol Street

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### **Appeal of Richard Emmons**

**Docket #2007-T-022**

### **Department of Transportation**

October 18,2007

The New Hampshire Personnel Appeals Board (Bonafide, Johnson and Casey) met in public session on Wednesday, September 26,2007, under the authority of RSA 21-I:58 and Chapters Per-A 100-200, to hear the appeal of Richard Emmons, a former employee of the Department of Transportation. Mr. Emmons, who was represented at the hearing by SEA General Counsel Michael Reynolds, was appealing his April 10,2007 termination from employment as a District Supervisor of Highway Signing for allegedly violating Per 1002.08 (b)(2) and (b)(3) for "(2) Loss or expiration of a license or certification or other form of permission required by the class specification or supplemental job description for the performance of the duties of a position; (3) Failure to report to the agency the loss, suspension or expiration of a license, certification or other form of permission required by the class specification." Assistant Attorney General Lynmarie Cusack appeared on behalf of the Department of Transportation.

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

### State's Exhibits

1. Fifty-three pages of bates stamped documents from the Appellant's personnel file
2. 49 CFR 383.33 re: notification of drivers' license suspensions
3. Interpretation (notification guidance from USDOT federal highway regarding CDL licenses)
4. 49 CFR 383.37 Commercial drivers' license standards
5. RSA 265:91-B and 91-A, administrative license suspension hearing requirements and statute!
6. Conditions of Bail dated 11/4/06
7. Leave Slip for 11/30/06 for the Appellant

### Appellant's Exhibits

- A. Email dated 12/18/06 from Mr. Lambert to Mr. Pike
- B. Email dated 12/18/06 from Mr. Pike to Mr. Lambert
- C. Email dated 2/9/07 from Mr. Pike to Mr. Lambert
- D. Email dated 2/9/07 from Mr. Lambert to Mr. Pike
- E. Email dated 2/9/07 from Mr. Pike to Mr. Lambert re: Appellant's MRI
- F. Email dated 3/5/07 from Mr. Pike to Mr. Lambert
- G. Acknowledgement of receipt of mail dated 3/5/07 from Mr. Lambert to Mr. Pike
- H. Email dated 3/16/07 from Mr. Pike to Mr. Lambert
- I. Letter dated 3/22/07 to Mr. Lambert
- J. Richard Emmons' performance evaluation dated 11/29/06
- K. MRI results

### Witnesses

At the State's request, without objection by the Appellant, the Board sequestered the witnesses, and the following persons gave sworn testimony:

William Lambert, State Traffic Engineer and Bureau Administrator

Loren Butman, Appellant's co-worker

Paul Emerson, Appellant's former supervisor

Brian Pike, SEA Steward (Bureau of Mechanical Services)

Richard Emmons, Appellant

After carefully considering the evidence presented by the parties, the Board made the following findings of fact and rulings of law:

Findings of Fact

1. Prior to his termination from employment, Mr. Emmons worked as the District 6 Supervisor of Highway Signing. In that capacity, as indicated in both his class specification and supplemental job description, Mr. Emmons was required to possess a valid Commercial Driver's License (CDL Class B) in order to perform his assigned duties.
2. Mr. Emmons was arrested on November 3, 2006 in Loudon, New Hampshire, for allegedly driving under the influence of alcohol or drugs. Mr. Emmons submitted to testing, and when his Breathalyzer test exceeded the legal limit, he was notified that thirty days from the date of the arrest, his driving privileges would be suspended.
3. On Monday, November 6, 2006, Mr. Emmons was on leave. He telephoned Mr. Lambert, Administrator of the Bureau of Traffic, informing him of the arrest, explaining that he would be awaiting both a court date and an ALS (Administrative License Suspension) hearing date. Mr. Emmons advised Mr. Lambert that Mr. Emmons' driver's license would be suspended effective December 4, 2006, and that he would be without a license until the ALS hearing.
4. At the time, Mr. Lambert was not familiar with State laws concerning DUI charges, Department of Safety protocols for administrative license suspensions, or ALS hearing procedures. He and Mr. Emmons agreed to meet on November 20, 2006 when Mr. Emmons was scheduled to return from leave.
5. By letter dated November 16, 2006, Mr. Lambert advised Mr. Emmons that the meeting of November 20, 2006 would be a pre-disciplinary meeting to discuss the appellant's arrest for driving while intoxicated, and the possible loss of the appellant's license. The letter advised that discipline could include dismissal from employment. Mr. Emmons was instructed to bring with him "any court documents" related to the charge. Mr. Emmons did not actually receive the pre-disciplinary notice until November 21<sup>st</sup>, a day after the meeting took place.

6. William Lambert, Richard Emmons, Brian Pike and Robert Lang, Sign Supervisor, attended the meeting.
7. By letter dated December 12,2006, Mr. Lambert provided a follow-up to the meeting of November 20<sup>th</sup>, advising Mr. Emmons, "I have not yet received any court or ALS hearings documents that I requested in your pre-disciplinary letter dated November 16,2006. This information is still required. Please provide any information regarding your case to me by Monday, December 18,2006 and keep us informed when your next court appearance is scheduled."
8. None of the documents were submitted by the December 18,2006 deadline. Instead, Brian Pike, Union Steward, sent Mr. Lambert an email indicating that Mr. Emmons intended to keep Mr. Lambert "informed of all appearances and information in following DOT Policy 404.04." Mr. Pike indicated that Mr. Emmons' ALS hearing had been scheduled for December 12<sup>th</sup>, but was postponed until February 12<sup>th</sup>. Mr. Pike indicated that Mr. Emmons' attorney had all the documents that Mr. Lambert had requested, and said, "If I may inquire, where and which policy(ies) of the DOT requires him to furnish any documentation? ... We want to adhere to all policies regarding this situation and would appreciate any help you can give in pointing us to these requirements."
9. The same day that Mr. Pike asked what authority Mr. Lambert had to require Mr. Emmons to produce documents regarding his license suspension, Mr. Emmons completed two separate requests for sick leave retroactive to November 30 and December 1,2006.
10. The first leave slip requested eight hours of sick leave taken on November 30<sup>th</sup>, on which Mr. Emmons certified the need for leave as "Dentist/Illness." Mr. Emmons testified that he could not recall whether his appointment was for a cleaning or a filling. The second sick leave request that Mr. Emmons submitted on December 18, 2006 was for eight hours of sick leave taken on December 1<sup>st</sup>, on which he again certified "Dentist" as the need for eight hours of leave taken that day.
11. Mr. Emmons was scheduled to appear in court on November 30,2006 to be arraigned on charges of driving while intoxicated and reckless operation. Mr. Emmons failed to

inform Mr. Lambert of the arraignment date, or that he was scheduled to appear in court that day.

12. Neither Mr. Pike nor Mr. Emmons informed Mr. Lambert that Mr. Emmons' license had been restored between December 13th and 12:01 a.m., January 4<sup>th</sup>.
13. By email dated January 5, 2007 at 8:25 a.m., an Administrative Secretary in the Bureau of Traffic submitted a request to the central Human Resources Office at the Department of Transportation to put Mr. Emmons out on paid FMLA leave, effective January 2, 2007. According to Mr. Emmons, he suffered a slip and fall in his driveway at home on January 1<sup>st</sup>.
14. On Friday, February 9<sup>th</sup> at 11:37 a.m., Mr. Pike emailed Mr. Lambert, advising him that Mr. Emmons' ALS hearing had again been postponed, this time from February 12 to March 19<sup>th</sup>. Approximately two hours later, Mr. Lambert replied, telling Mr. Pike that he appreciated the information, and that Mr. Emmons had not been working since the reported injury over the New Year's holiday weekend. Approximately two hours later, Mr. Pike responded, saying he was aware of Mr. Emmons' situation, and that Mr. Emmons was scheduled for an MRI.
15. On March 5<sup>th</sup>, Mr. Pike emailed Mr. Lambert saying, "This past Friday Dick Emmons left a message that his day in court was postponed due to a motion to suppress. From what I understand, the motion needs to be heard and decided first, before the hearing can proceed, he did not have the new date as of yet. Again, he asked that I email you this message to ensure that you stay informed, and that you have written notification." The message did not make it clear whether this was the actual court hearing or ALS hearing.
16. On March 13, 2007, the Manager of Employee Relations informed the Department of Transportation that Mr. Emmons' request for supplemental sick leave had been denied.
17. On March 16<sup>th</sup>, Mr. Pike emailed Mr. Lambert informing him that the hearing on the motion to suppress was scheduled for April 5<sup>th</sup>, but he did not know if the regular hearing would continue after, or if another date would be needed. The email did not indicate whether the hearing was an actual court date or the date of an ALS hearing.

18. By letter dated March 16, 2007 addressed to Mr. Emmons, the DOT Bureau of Human Resources advised Mr. Emmons that his FMLA leave would be exhausted as of March 27, 2007, and if he continued to be absent from work and exhausted all his available leave time, he would run the risk of losing his medical and dental benefits.
19. On March 22, 2007, Mr. Emmons wrote to Mr. Lambert, requesting a leave of absence without pay, as his FMLA entitlement would be exhausted on March 27, 2007. In the letter, Mr. Emmons wrote, "I would like to take a leave of absence without pay in accordance with the Personnel Rules and Collective Bargaining Agreement. This would allow me to continue physical therapy in order to determine if I will require surgery."
20. Mr. Lambert met with Mr. Emmons on March 26<sup>th</sup>, the day before Mr. Emmons' FMLA leave was due to expire. Mr. Emmons provided a copy of the results from his MRI, which had been completed more than a month earlier. When Mr. Lambert did not immediately approve the extended leave, Mr. Emmons took back the MRI results and produced a note from a Pleasant Street Family Medicine physician clearing Mr. Emmons for return to work, full duty, on March 27, 2006.
21. By letter dated March 26, 2007, Mr. Lambert advised Mr. Emmons that a pre-disciplinary meeting had been scheduled for Friday, March 30, 2007, at which time they would be discussing the reporting of his arrest for driving while intoxicated, the loss of his license, and his failure to report his loss of license. Mr. Emmons attended the meeting with Mr. Lambert, Mr. Hussey and Mr. Pike.
22. By letter dated April 10, 2007, Mr. Lambert informed Mr. Emmons that the Department had decided to dismiss him from his position as a result of the suspension of his license, and his failure to provide notice that his license had been suspended.
23. Regardless of the "must read" status of either the motor carrier regulations or DOT policies regarding license suspensions, the Appellant's job specification and supplemental job description both provide clear notice of the requirement to maintain a valid CDL. As an employee holding a CDL, it was Mr. Emmons' responsibility to maintain that license, and provide appropriate notice concerning the suspension of that license.

24. As a DOT employee and Union Steward, Mr. Pike may not be familiar with all the policies governing the conduct of DOT employees, and he may not be familiar with federal motor carrier regulations. He appeared to be sufficiently familiar with the Rules of the Division of Personnel to know that a violation of Per 1002.08 (b) (2) and/or (3) could result in an employee's immediate dismissal without prior warning.

Rulings of Law

- A. 49 CFR 283.33 (Code of Federal Regulations – Motor Carrier Safety Administration) requires each employee who holds a CDL to notify his/her current employer of any revocation or suspension of driving privileges, and to make such notification before the end of the business day following the day the employee received the notice of suspension. Whereas Mr. Emmons' driving privileges were restored for a period of time and the suspension notice rescinded, the second notice of suspension issued to Mr. Emmons on December 15, 2006, suspending his license for 171 days effective January 1, 2007 created a separate obligation to provide timely notice to his employer.
- B. Per 1002.08 (b) (2) and (3) provide for the immediate dismissal of an employee without prior warning for the loss or suspension of a license or certification or other form of permission required by the employee's class specification or supplemental job description, or for failure to report to the agency the loss, suspension or expiration of a license, certification or other form of permission required by the employee's class specification.
- C. In accordance with the requirements of Per 1002.08 (d) and (e), the appointing authority met with Mr. Emmons and provided him an opportunity to refute the evidence supporting a decision to dismiss him from his position. The agency then provided Mr. Emmons with written notice of the decision to dismiss him, and the reasons therefor.

## Decision and Order

Throughout the course of the hearing, the Appellant questioned how and when Mr. Lambert learned that the Appellant's license had been suspended, arguing that the Department could not reasonably dismiss the Appellant for failing to provide information when the Department apparently had obtained the information on its own. The Appellant also argued that Mr. Lambert failed to advise Mr. Emmons or Mr. Pike that he believed they had been evasive in their communications with him, or that Mr. Lambert had withdrawn or amended the conditions set forth in the December 12, 2006 letter in which he told Mr. Emmons that he would continue to serve as Supervisor of Highway Signing "while awaiting trial." The Board did not find any of those arguments to be persuasive.

The evidence reflects that Mr. Lambert actually had very little information about the status of the Appellant's license suspension until the Department's Human Resources office provided him with a copy of the Appellant's Driver Record Report, which was requested by B. Berry of the DOT in mid-March, 2007. The Department clearly had little choice but to obtain the information on its own when the Appellant failed to provide what had been requested of him since the previous November. In any event, the Department's ability to obtain that information in mid-March did not absolve the Appellant of his responsibility to make accurate and timely reports of his license suspension, nor did it impose a responsibility upon the employer to retain Mr. Emmons in a position requiring a CDL when his CDL had been suspended.

Although Mr. Lambert did not use the word "evasive" in his letter of dismissal, he certainly had reason to suspect that the Appellant and his representative were being less than forthcoming. He made that clear in the letter of dismissal when he wrote, "Your actions in regard to the request for leave of absence are questionable. You knew you were released to duty, but chose instead to present evidence contrary to that fact until you found out that I would not approve a leave of absence."

Mr. Lambert indicated in his December 12, 2006 letter that Mr. Emmons would continue to hold his position as Supervisor of Highway Signing; however, that assurance was made with the expectation that Mr. Emmons would provide the documentation that Mr. Lambert had requested in mid-November. Instead of providing those documents by the December 18<sup>th</sup> deadline as discussed in the December 12<sup>th</sup> letter, excuses were made as to why Mr. Emmons could not meet with Mr. Lambert on December 18<sup>th</sup>, and records were not produced for Mr. Lambert to review. Mr. Emmons would have been well advised to comply with a legitimate directive from his supervisor. In this instance, Mr. Lambert's authority to require production of any documents was questioned and it was suggested that he, Mr. Emmons, had already done more than the law required him to do.

The same day that Mr. Emmons was supposed to submit documents relative to his license suspension, he instead submitted a sick leave slip for leave taken on November 30<sup>th</sup> when he was scheduled to appear in court for his arraignment. Mr. Emmons testified that he did not remember whether or not he went to court that day, and could not recall whether the eight hours of sick leave he claimed for that day was for "a cleaning or a filling." He also submitted a sick leave slip dated December 18<sup>th</sup> to cover an absence on December 1<sup>st</sup>, again listing "Dentist" as the reason for eight hours of sick leave.

According to Department of Safety records, Mr. Emmons' license was to be suspended effective 12:01 a.m. January 4<sup>th</sup>. The following day, a request was submitted to put Mr. Emmons out on FMLA leave because Mr. Emmons had reportedly slipped and fallen at his home over the holiday weekend. He proceeded to take FMLA leave for the following twelve weeks. Given the number of coincidences, it is reasonable for Mr. Lambert to have questioned the Appellant's request for extended leave, particularly when he provided, at the same meeting, a clearance to return to full duty immediately after producing the results of an MRI that seemed to indicate he would be unable to work.

Having carefully considered the evidence and argument offered by the parties, the Board found that Department's decision to dismiss the Appellant from his position as a Supervisor of Highway Signing was lawful, reasonable and just, and was effected in

accordance with the Rules of the Division of Personnel. In short, the facts did not support the Appellant's assertion that he made timely or appropriate notification of his license suspension to his Bureau Administrator, or that the dismissal was unjust under the facts in evidence.

For all the reasons set forth above, the Board voted unanimously to DENY Mr. Emmons' appeal, affirming the Department's decision to dismiss the Appellant for violation of Per 1002.08 (b) from his position as District 6 Supervisor of Highway Signing.

THE PERSONNEL APPEALS BOARD

  
Philip Bonafide, Acting Chair

  
Robert Johnson, Commissioner

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Joseph Casey, Commissioner

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