

State of New Hampshire



PERSONNEL APPEALS BOARD

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

APPEAL OF BRUCE GOLDSMITH Department of Transportation Docket #95 -T-2

March 8, 1995

The New Hampshire Personnel Appeals Board (McNicholas, Bennett and Johnson) met Wednesday, November 9, 1994, to hear the termination appeal of Bruce Goldsmith, a former employee of the Department of Transportation. Mr. Goldsmith, who was represented by SEA Legal Intern Andrea Lehtonen, was appealing his July 11, 1994 termination from employment as a Bridge Maintainer, for being absent for three or more consecutive working days without adequate reason or proper notification. The Department of Transportation was represented at the hearing by Attorney Kathryn Bradley of the Department of Justice, Transportation Bureau.

Mr. Goldsmith had requested a day of annual leave for June 21, 1994. Neither his supervisor nor his bureau administrator were aware of the fact that he had requested the leave to attend a sentencing hearing on four counts of harassment to which he had pleaded guilty on an earlier date. Since the pre-sentencing investigator had recommended probation, counselling and payment of a fine, Mr. Goldsmith was confident that he would be released and could return to work the following day. Instead of adopting the recommendations of the pre-sentencing investigator, the judge ordered Mr. Goldsmith's immediate incarceration.

Mr. Goldsmith did not return to work on June 22, 1994, nor did he speak with his employer on or after that date to inform the Department that he had been incarcerated. He did speak with his mother, and later called the patrol foreman to find out how much leave he had on the books. The patrol foreman notified Paul Spinney, the appellant's immediate supervisor, that Mr. Goldsmith had been sentenced to 60 days in jail.

Mr. Goldsmith's absence was considered unauthorized leave without pay from June 22, 1994 until his date of termination from employment. He was notified by letter dated June 28, 1994, signed by Bureau Administrator Harvey Goodwin, that a meeting had been scheduled on July 5, 1994, at 8:30 a.m. in the Bridge Maintenance office to discuss his possible termination for being absent for three or more days without adequate reason or proper notification. Mr. Goldsmith, who was still incarcerated, neither attended the meeting, contacted Mr. Goodwin, nor sent a representative to appear on his behalf. By letter dated July 11, 1994, Mr. Goldsmith was notified that the Department of Transportation had terminated his employment, effective that date, for the offense of being absent for three or more consecutive days without adequate reason or notification. Apart from having an appeal filed on his behalf, Mr. Goldsmith did not attempt to contact the Department of Transportation following his release from jail on July 31, 1994. Mr. Goldsmith said that after his release, he discovered that his position was still vacant. When asked if he had re-applied for the job, he said he didn't know if he could. When

asked if he had attempted to contact Mr. Goodwin about the job after his release, he said he hadn't been able to because he had been "kind of tied up around the house".

The Department of Transportation argued that Mr. Goldsmith had been aware for more than two months of the pending harassment charge, as well as the possibility that he could be incarcerated as a result of his conviction. The State argued that Mr. Goldsmith took none of the steps a reasonable person would take to preserve his employment, and had made no meaningful attempt to keep his employer abreast of his circumstances, either before or during his period of incarceration.

Ms. Bradley argued that Mr. Goldsmith's handwritten letter to Harvey Goodwin, received at the Bureau of Bridge Maintenance on June 29, 1994, was not considered a request for leave of absence without pay, and that even if the Department were to have construed it as such, the authority to either grant or deny a leave of absence is entirely discretionary. She also argued that the State had no obligation to hold Mr. Goldsmith's job for him while he was in jail, particularly in light of the circumstances. Ms. Bradley asked the Board to find that the Department of Transportation had satisfied its legal requirements for scheduling a meeting at which Mr. Goldsmith or his representative could refute or respond to the evidence supporting the decision to discharge him from his employment. She argued that neither Mr. Spinney nor Mr. Goodwin could be expected to read Mr. Goldsmith's mind, and could not be expected to know that he was having legal difficulties, needed leave or was requesting a leave of absence. She suggested that the Department of Transportation should not be made to bear the burden of Mr. Goldsmith's mistakes, and asked the Board to uphold the Department's decision, terminating Mr. Goldsmith's employment.

Ms. Lehtonen argued that the Department of Transportation failed to follow proper procedures in terminating Mr. Goldsmith's employment. She argued that although Mr. Goldsmith did not provide the kind of notice DOT wanted, he did provide notice to his supervisor through his mother and his patrol foreman that he was in jail and would need leave. She also argued that Mr. Goldsmith's letter to Mr. Goodwin should have been considered a sufficient written request for leave without pay. She asked the Board to find that the Department had acted in bad faith, and that its decision to terminate Mr. Goldsmith's employment was illegal. She requested that the Board order his immediate reinstatement.

In consideration of the record before it, the Board ruled as follows on the Appellant's Request for Findings of Fact and Rulings of Law:

#1 is denied. While it is undisputed that Mr. Goldsmith was incarcerated at the Grafton County House of Corrections and was therefore unable to report to work on June 22, 1994, the evidence will not support a finding that he provided proper notice of his absence.

#2 is neither granted nor denied. The Department did give the appellant very little notice and could have made a more apparent showing of good faith by suggesting that Mr. Goldsmith send a representative to the meeting. However, Mr. Goldsmith also failed to make a meaningful attempt to address the underlying facts of his termination, admitting that he did not read the notice of the July 8th meeting carefully, believing it was actually his notice of termination.

#3 is granted.

#4 is denied. There is no evidence that Mr. Goldsmith made a meaningful effort to explain the circumstances of his incarceration, or that the Department of Transportation was under any

obligation to ignore the fact of Mr. Goldsmith's arrest, conviction and incarceration when deciding whether or not to authorize a leave of absence without pay.

#5 is neither granted nor denied. There are no facts in evidence concerning Mr. Goldsmith's experience in relationship to the Department's staffing needs.

#6 is neither granted nor denied. (See below)

The record reflects that when Mr. Goldsmith went to court on June 21, 1994, he was reasonably certain that he would not be incarcerated and would be able to report to work the following day. In the Board's opinion, Mr. Goldsmith's failure to report for work as scheduled due to his incarceration is an adequate excuse for being absent for three or more consecutive work days. Therefore, the propriety of Mr. Goldsmith's termination turns on the issue of proper notice.

The Board agrees that Mr. Goldsmith made no meaningful effort to contact his employer regarding approval for his absence, apart from his June 27, 1993 letter to Mr. Goodwin. However, the Board also does not believe that the Department made a good faith effort to allow Mr. Goldsmith an opportunity to understand and refute the evidence against him. The Department notified Mr. Goldsmith by letter dated June 28, 1994, that the meeting to discuss his termination had been scheduled for 8:30 a.m., July 5, 1994. The Department knew Mr. Goldsmith would be unable to attend the meeting, and did not suggest he could have a representative present. Furthermore, the Department must have suspected that on such short notice, immediately after a holiday, Mr. Goldsmith could have difficulty securing representation, even if he believed that he could send a representative to the meeting. While the Board is not persuaded that the Department of Transportation dismissed Mr. Goldsmith in violation of a rule or law, or that the Department was under any obligation to grant Mr. Goldsmith approval for a leave of absence without pay during the period of incarceration, the manner in which the termination was accomplished raises a substantial appearance of bad faith on the department's part.

In his June 28, 1994 letter to Mr. Goldsmith, Bureau Administrator Goodwin stated:

"Upon reviewing your past performance evaluations and the circumstances surrounding this incident, I do not feel that I could approve such a request for a leave of absence without pay for the purpose of imprisonment. Accordingly I am recommending that your employment with New Hampshire Department of Transportation be terminated."

The letter certainly implies that the evidence which Mr. Goldsmith would have needed to refute involved his past performance evaluations and the circumstances surrounding "this incident". It is unclear whether the incident to which the letter referred involved Mr. Goldsmith's conviction on charges of harassment or his failure to report his situation to his employer and request leave. It is equally unclear what a review of Mr. Goldsmith's performance evaluations revealed which persuaded the Department not to consider granting a leave without pay. These are precisely the kinds of questions which the parties should have been able to address at a meeting between the employee and the employer prior to termination. Given the Department's failure to provide a reasonable opportunity to discuss these issues, the Board believes the termination must be over-turned.

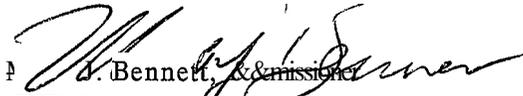
RSA 21-I:58 provides, in part, that "...In all cases, the personnel appeals board may reinstate an employee or otherwise change or modify any order of the appointing authority, or make such other order as it may deem just." In consideration of the evidence offered by the parties, the

Board hereby directs the Department of Transportation to reinstate Mr. Goldsmith to his position of Bridgeman. In light of Mr. Goldsmith's failure to take any of the steps which he reasonably or prudently might have taken to avoid termination, or later to seek reinstatement to his position, Mr. Goldsmith shall not be eligible for any back-pay, seniority credit, retirement credit or accrual of leave from the date of his termination to the date of his actual reinstatement.

Reinstatement shall occur at the convenience of the Department, but not later than 60 days from the date of this order. Mr. Goldsmith's absence from the date of termination to the date of reinstatement shall be treated as an unpaid personal leave. The letter of termination shall be deemed a letter of warning under the Optional Discharge provisions of the Rule for being absent for a period of three or more consecutive working days without proper notification. The letter of warning shall remain in effect for a period of twenty-four months from the date of this decision, and any subsequent offense of this nature occurring within that period may be grounds for immediate termination without further warning.¹ Should Mr. Goldsmith fail to report to duty as scheduled, he shall be subject to termination for failure to report promptly back to work at the conclusion of an approved leave.

THE PERSONNEL APPEALS BOARD


Patrick J. McNicholas, Chairman


J. Bennett, Commissioner


Robert J. Johnson, Commissioner

cc: Virginia A. Lamberton, Director of Personnel
Andrea Lehtonen, SEA Legal Intern
Kathryn Bradley, Esq., Transportation Bureau, Department of Justice

¹ Per 1001.08 (b) of the Rules of the Division of Personnel provides for immediate discharge without warning in some instances:

"In cases such as, but not necessarily limited to, the following, the seriousness of the offense may vary. Therefore, in some instances immediate discharge without warning may be warranted while in other cases one written warning prior to discharge may be warranted."

State of New Hampshire



PERSONNEL APPEALS BOARD

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

Appeal of Bruce Goldsmith

Docket #95-T-2

Department of Transportation

Response to State of N.H., D.O.T. Motion for Rehearing

April 26, 1995

On March 28, 1995, the New Hampshire Personnel Appeals Board received the State's March 28, 1995 Motion for Rehearing in the above-captioned appeal. Attorney Kathryn Bradley argued on behalf of the State that the Board's March 8, 1995 decision reinstating Mr. Goldsmith may have been unreasonable in light of the evidence in the record. The Board voted to deny Ms. Bradley's Motion for Rehearing for the reasons set forth below:

1. Implication of bad faith on the part of the agency

Ms. Bradley argued that it was unfair to characterize the scheduling of the meeting with Mr. Goldsmith while he was incarcerated as being made in bad faith. She argued that if the Board is allowed to "second guess" an agency's decision about how and when to schedule pre-termination meetings with employees, it will impede the discretion of the appointing authority in making a decision to terminate.

While the Board might agree with Ms. Bradley's assertion under other circumstances, the facts in evidence support the Board's conclusion that the Department knew Mr. Goldsmith would be unable to attend the meeting and made no suggestion that if he was unable to attend he could send a representative in his place. The record certainly suggests that the Department of Transportation scheduled the meeting solely for the purpose of satisfying the technical requirements of Per 1001.08 (f)(1), without regard for the purpose of the rule in providing "...the employee an opportunity ...refute the evidence presented by the appointing authority..."

2. Performance issues versus leave usage as criteria for granting unpaid leave

Ms. Bradley asserted that NH DOT's decision not to grant unpaid leave to the appellant was a leave issue, not a performance issue. However, that is not what the notice of termination said. The letter states, "Upon reviewing your past performance evaluations and the circumstances surrounding this incident, I do not feel that I could approve such a request for a leave of absence without pay for the purpose of imprisonment." Since the Department did not give Mr. Goldsmith a meaningful opportunity to discuss the termination, the language of the letter of warning must be taken at face value.

3. The sufficiency of the June 28, 1994 letter

Ms. Bradley argued that the Department of Transportation could have been more clear in presenting the facts in its June 28th letter, but that because Mr. Goldsmith admitted that he failed to read the letter carefully and believed it was actually his notice of termination, any

issues arising from the letter's clarity were moot. The Board does not agree. The appellant's inattention does not relieve the agency of its own obligations to afford the employee a reasonable opportunity to refute the evidence upon which the agency intended to rely in terminating his employment.

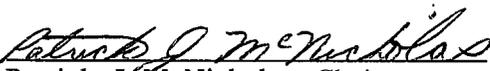
4. Circumstances surrounding DOT's denial of approved, unpaid leave

Ms. Bradley argued that the termination arose solely from Mr. Goldsmith's violation of Per 1001.08 (b)(9) - absence for a period of three or more consecutive working days without proper notice or adequate reason. She argued that DOT intentionally did not raise the issue of Mr. Goldsmith's criminal conviction during the hearing on the merits, but needed to address the issue in its Motion for Rehearing because there was an apparent "...lack of clarity in the Board's collective mind as to what Mr. Goodwin meant in his June 28, 1994 letter". She stated, "...[I]t [was] somewhat unreasonable in NH DOT's opinion for Mr. Goldsmith to say nothing to his supervisor during the period from April 19, 1994 to June 21, 1994" about his legal difficulties and the possibility that he might have to serve jail time.

While the Board agrees that Mr. Goldsmith failed to apprise his employer of his circumstances and the possible ramifications of his conviction, these were issues which the State was obliged to identify as considerations in deciding to terminate his employment under the optional discharge provisions. The appellant should have had an opportunity to address that issue prior to his actual termination from employment.

The Board voted unanimously to deny Ms. Bradley's request that the Board reconsider its decision to overturn Mr. Goldsmith's termination. The Board also voted to deny Ms. Bradley's request for a brief hearing on the points raised in the motion, as well as her request for suspension of the Board's March 8, 1995 decision pending additional consideration. The Board voted to affirm its March 8, 1995 decision, reinstating Mr. Goldsmith without back-pay, seniority credit, retirement credit or accrual of leave.

THE PERSONNEL APPEALS BOARD


Patrick J. McNicholas, Chairman


Mark J. Bennett, Commissioner


Robert L. Johnson, Commissioner

cc: Virginia A. Lamberton, Director of Personnel
Andrea Lehtonen, SEA Legal Intern
Kathryn Bradley, Esq., Transportation Bureau, Department of Justice