

State of New Hampshire



PERSONNEL APPEALS BOARD

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Concord, New Hampshire 03301
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APPEAL OF MICHELLE LEWIS New Hampshire Public Utilities Commission Docket #94-T-31

March 8, 1995

The New Hampshire Personnel Appeals Board (McNicholas, Bennett and Johnson) met Wednesday, January 25, 1995, to hear the appeal of Michelle Lewis, a former permanent employee of the Public Utilities Commission (P.U.C.). Ms. Lewis, who was represented at the hearing by SEA General Counsel Michael Reynolds, was appealing her September 9, 1993 termination from employment for allegedly failing to return promptly from an approved leave of absence without pay. Amy Ignatious, General Counsel, appeared on behalf of the P.U.C.

At the time of her termination from employment, Ms. Lewis was assigned to the Management Information Systems department of the Public Utilities Commission and was supervised by John Klun, MIS Director. Ms. Lewis' responsibilities included cataloging library materials, reviewing daily newspapers for articles relating to utilities regulation, posting information to an electronic bulletin board, and relieving the switchboard operator during lunch breaks and rest periods.¹

Ms. Lewis testified that Mr. Klun knew she was under a great deal of personal pressure in the months immediately preceding her termination. She testified that she has a nineteen year old daughter who has been "chronically, critically ill since birth" and that about the time of her termination, on the advice of her daughter's physician, she was "on stand-by". She testified that she had used E-mail (electronic mail) to notify Mr. Klun and Pearl Gazaway, the PUC's business administrator, of her situation so that someone would be able to locate her if the physician called and she happened to be away from her work station.

On Friday, August 20, 1993, Ms. Lewis was called into Mr. Klun's office to receive a written warning for uncooperative and disruptive behavior arising out of incidents which allegedly occurred between Ms. Lewis and co-workers on August 10 and 11, 1993. Also present at the meeting was Ms. Gazaway. Ms. Lewis testified that when she walked into the office that day and saw both Mr. Klun and Ms. Gazaway looking so serious, she assumed the worst and believed they must have received word that her daughter had died. Ms. Lewis testified that she asked what was wrong, and was informed that the purpose of the meeting was to issue her a letter of warning. She testified that she read the letter and got the gist of it, but that she was already "emotionally broken".

¹ In the summer of 1993, Ms. Lewis was working at the switchboard when two separate bomb threats were called in. Ms. Lewis testified that she knew the caller's voice, and therefore became involved in the investigation and court case. On August 2, 1993, she requested and received permission to be relieved of any switchboard duties until after the court date.

Ms. Lewis testified that she returned to her work area and began to weep. She said she was unable to calm down and to concentrate on her work, and that later, when Ms. Gazaway came to see her and discovered how upset she was, she made arrangements for Ms. Lewis to go home. Ms. Lewis' sick leave request, submitted and approved to cover the period of absence, listed "catastrophic stress [in the] workplace" as the reason for her incapacitation. Ms. Lewis called in sick on Monday, August 23, 1993 and Tuesday, August 24, 1993. On August 25, 1993, Ms. Lewis wrote to PUC Chairman Doug Patch, stating that she had spoken with Ms. Gazaway that morning to discuss her absence and what procedures she needed to follow regarding her "illness". Ms. Lewis requested permission to use all her available paid leave before requesting unpaid leave, and indicated that she understood Ms. Gazaway would forward a leave slip for Ms. Lewis to complete and sign. She also attached a copy of a note dated August 24, 1993, signed by Dr. Edward Rowan, which stated:

"It is medically necessary that Ms. Lewis not return to work until after September 7. I will reassess her status before that date."

On August 30, 1993, Commissioner Patch wrote to Ms. Lewis, approving her request for permission to use all her paid leave, and approving her request for unpaid leave through September 7, 1993. The letter informed Ms. Lewis that on September 8, 1993, she was expected to return to duty with full clearance from Dr. Rowan, and that failure to report promptly to work at the conclusion of her approved leave on September 8, 1993, would result in her termination from employment.

One of the two leave slips which Ms. Lewis returned to the Commission, dated August 31, 1993, contained a statement signed by Dr. Rowan, dated August 31, 1993, which certified that Michelle Lewis "...was incapacitated from 8/13/93 to 9/7/93 inclusive and during such time due to stress." Ms. Lewis testified that when she failed to return from leave and requested additional time off, her supervisors must have known that she was ill. She said she had submitted sick leave slips during the prior two years which indicated she was seeing Dr. Rowan, and they must have been aware of her illness, as well as the reason that she was under such stress during the summer of 1993.

Ms. Lewis did not report to work as expected on September 8, 1993. Instead, her SEA Field Representative, Margo Hurley, wrote to the Chairman of the Commission, returning Ms. Lewis' building security card, and forwarding Ms. Lewis' request for a leave of absence without pay for the period September 8, 1993 through December 8, 1993. Ms. Hurley wrote that Ms. Lewis' physicians did not want her to return to work at that time. However, no physician's or health care provider's assessment was attached to support that request. Ms. Hurley's letter stated that Ms. Lewis suffered stress if the Commission communicated directly with her, and therefore asked that any future communication from the Commission to Ms. Lewis should be directed to the State Employees' Association. Ms. Hurley also asked if arrangements could be made for Ms. Lewis to clean out her desk.

The following afternoon, September 9, 1993, when Ms. Lewis still had not reported for work, or submitted any documentation supporting her request for a leave of absence beyond September 7, 1993, Chairman Patch wrote to her, advising her that she was being terminated from her employment for failure to report back to work promptly at the conclusion of an approved leave. Mr. Patch's letter also stated:

"Your self-report of 'catastrophic stress in the workplace' in light of your employment history and in the absence of any medical documentation to support that assessment are

insufficient justification to alter this decision to terminate your employment."

At the hearing, Mr. Reynolds argued that the Commission exceeded its authority in terminating Ms. Lewis' employment, contending that Per 1001.08 (b)(11) was never meant to apply to employees who were unable to return to work at the conclusion of an approved medical leave. Mr. Reynolds suggested that a more appropriate interpretation of the rule would be that after sufficient warning, an agency could dismiss an employee who refused to return from an extended personal leave. Mr. Reynolds argued that the agency knew that Ms. Lewis was medically unable to return to work, and that since the PUC perceived Ms. Lewis as a person with an on-going disability, the agency had an affirmative obligation to assess and accommodate her limitations.

The evidence does not support the conclusion that Ms. Lewis was a disabled person, that the Commission perceived her to be a disabled person, or that she suggested at any time prior to her termination that she was a disabled person entitled to a reasonable accommodation. Dr. Rowan certified that Ms. Lewis was under his care and unable to work until after September 7, 1993. However, the record contains no evidence that Ms. Lewis continued to be ill and unable to work after September 7, 1993, or that she could return to work only if the agency made accommodations for her.

The agency was under no obligation to seek an independent evaluation of Ms. Lewis' medical status, or to undertake the procedures for removal of Ms. Lewis from her position for non-disciplinary reasons [Per 1002.011. There are no facts in evidence to support a finding that the Commission believed Ms. Lewis was medically unable to perform the required duties and responsibilities of her position, that they believed her to have a medical condition which created a hazard for her co-workers or clients of the agency, or that the agency believed a medical condition existed whereby Ms. Lewis' presence in the workplace would be deleterious to her own health. Ms. Lewis had already been warned that she had exhausted all her available leave, that the Rules provided for termination of an employee who failed to return to work from an approved leave, and that the Commission would take such action if she did not return on September 8, 1993.

Ms. Lewis failed to report to work, or to provide further information from her physician to certify that she continued to need sick leave, paid or otherwise. The Public Utilities Commission was under no obligation to consider itself "on notice" of the appellant's possible medical condition simply because it received a letter from union field staff asserting that a medical condition existed which necessitated Ms. Lewis' continued leave. Neither the appellant nor her representative offered a reasonable explanation for neglecting to submit any documentation to support that assertion, if there was such documentation, or that Ms. Lewis had instructions from her physicians to avoid any personal contact with the agency.

Mr. Reynolds failed to persuade the Board that application of Per 1001.08(b)(11) of the Rules of the Division of Personnel is limited to only those instances involving a failure to return from an approved annual leave or unpaid personal leave. The Rule makes no such distinction. Mr. Reynolds also failed to persuade the Board that the termination was improper, even if it was permissible. Ms. Lewis had ample warning that the Commission intended to terminate her employment if she failed to report for work on September 8, 1993. She had clear notice that she had exhausted all her available leave, and knew that unpaid leave was being approved on the basis of her physician's certification that she was ill.

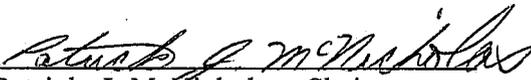
While the Board believes that the PUC could have, and should have at least extended the

courtesy of contacting Ms. Hurley to advise her that her letter alone was insufficient to stay the termination, it was not legally required to do so. Similarly, while the Board might have reached a different conclusion from that reached by the Commission, or might have elected to issue additional warnings prior to terminating the appellant's employment, the Board will not substitute its judgement for that of the appointing authority.

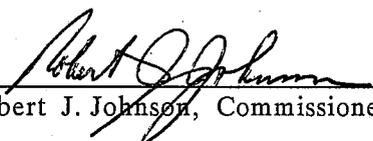
Finally, even if the appellant had persuaded the Board that her termination was illegal or unjust (which she has not), there would be no reasonable remedy available to her. When asked if she would return to work at the PUC if she prevailed in her appeal, Ms. Lewis said she would not. Upon further questioning, Ms. Lewis said she would have gone back to work as soon as she was able if she had been granted the unpaid leave she had requested. However, there are no facts in evidence to suggest when, if ever, she might have felt ready to return to work. When asked if she would consider returning to the job if the Board ordered the agency to make every accommodation or alteration to the job that Ms. Lewis believed to be necessary, she said that she would consider returning. However, there are no facts in evidence which would suggest that Ms. Lewis was ever entitled to any accommodation or modification of the job duties.

On all the evidence, the Board voted unanimously to deny Ms. Lewis' appeal, finding that the Public Utilities Commission acted within its discretion in terminating her employment for failing to report back to work promptly at the conclusion of an approved leave.

THE PERSONNEL APPEALS BOARD


Patrick J. McNicholas, Chairman


Mark J. Bennett, Commissioner


Robert J. Johnson, Commissioner

- cc: Virginia A. Lamberton, Director of Personnel
- Amy Ignatious, General Counsel, Public Utilities Commission
- Michael C. Reynolds, SEA General Counsel

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APPEAL OF MICHELLE LEWIS New Hampshire Public Utilities Commission

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Response to Appellant's March 28, 1995 Motion for Reconsideration

April 26, 1995

By letter dated March 28, 1995, SEA General Counsel Michael Reynolds requested reconsideration of the Board's March 8, 1995 decision, denying the appeal of Michelle Lewis, a former employee of the New Hampshire Public Utilities Commission (P.U.C.). The Board denied her appeal, finding that the P.U.C. acted within its discretion in terminating her employment for failing to report back to work promptly at the conclusion of an approved leave.

The arguments concerning the correct interpretation and application of Per 1001.08 (b)(11) which were raised by Mr. Reynolds in his Motion for Reconsideration were also raised at the hearing on the merits of Ms. Lewis' appeal. Those arguments were considered carefully by the Board, and answered in the Board's March 8, 1995 decision to uphold Ms. Lewis' termination from employment. The appellant has failed to offer new evidence or argument in her Motion for Reconsideration which could persuade the Board that its decision in this regard was either unlawful or unreasonable.

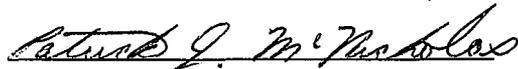
The Board is also not persuaded to reconsider the instant appeal on the basis of the appellant's belief that the Board's March 8, 1995 order is unclear with regard to the Board's authority to overturn a technically permissible termination. The appellant argued that RSA 21-I:58, I allows the Board to weigh the equitable considerations of a case and overturn an agency's decision if it is unfair, even if it is technically permissible.

In its March 8, 1995 decision, the Board found that Ms. Lewis' termination was neither illegal nor unjust. As such, what the Board might do prospectively, in a case where the termination might be technically permissible but fundamentally unfair, has no bearing on the propriety of its decision in this instance.

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Accordingly, the Board voted unanimously to deny the appellant's Motion for Reconsideration and to affirm its March 8, 1995 decision denying Ms. Lewis' appeal.

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cc: Virginia A. Lamberton, Director of Personnel
Amy Ignatious, General Counsel, Public Utilities Commission
Michael C. Reynolds, SEA General Counsel