

# State of New Hampshire



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

## **Appeal of Jeffrey Merchant – Docket # 2011-T-013**

### **Department of Transportation**

#### **Personnel Appeals Board Decision on Appellant's Motion for Reconsideration and Rehearing and State of New Hampshire's Objection to Appellant's Motion for Reconsideration and Rehearing**

May 30, 2012

On May 18, 2012, the New Hampshire Personnel Appeals Board received the Appellant's May 17, 2012, Motion for Reconsideration and Rehearing of the Board's April 18, 2010, decision denying the Appeal of Jeffrey Merchant. The Board received the State's Objection to that Motion on May 22, 2012.

In accordance with the provisions of Per-A 208.03 (c) of the NH Code of Administrative Rules, any party requesting a rehearing is required to, "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 (d) allows the opposing party to file an objection. Finally, Per-A 208.03 (f) states, "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 or unreasonable."

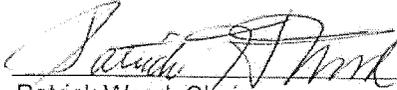
In his Motion, the Appellant reiterated those arguments offered in the hearing on the merits of the appeal, each of which was carefully reviewed and considered by the Board in reaching its decision to deny Mr. Merchant's appeal.<sup>1</sup> The Appellant also argued that because the Board has the authority to amend or modify any order of the appointing authority, the Board abused its discretion by failing to reinstate the Appellant, despite the Appellant's admitted inability to perform the essential functions of his position. While it is clear that the Appellant disagrees with the conclusions reached by the Board in upholding the agency's decision and denying the Appeal, that disagreement does not constitute good cause for reconsideration or rehearing of the Board's decision.

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<sup>1</sup> The Appellant's arguments include extensive discussion of what might have occurred if the Appellant had received additional leave donations in the form of supplemental sick leave from his co-workers after the Appellant had exhausted all of his own accrued leave, and all leave that had previously been donated to him. The process for requesting, receiving or utilizing supplemental sick leave is not included in any of the administrative rules, but instead is a benefit negotiated through the collective bargaining process for certain bargaining unit members, and does not represent an application of rules adopted by the Director of Personnel subject to appeal to this Board.

For the reasons set forth above, as well as those specific reasons articulated in the State's Objection, the Board found that the Appellant's Motion for Reconsideration and Rehearing fails to establish that the Board's decision was unlawful or unreasonable. As a result, the Board voted to DENY the Appellant's Motion for Reconsideration and Rehearing and to AFFIRM its April 18, 2012, decision denying the Appeal of Jeffrey Merchant.

FOR THE PERSONNEL APPEALS BOARD



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Patrick Wood, Chair

cc: Karen Hutchins, Director of Personnel, 25 Capitol St., Concord, NH 03301  
Kevin O'Neil, Senior Assistant Attorney General, Transportation Bureau, Department of Justice,  
33 Capitol St., Concord, NH 03301  
Attorney John Vanacore, Vanacore Law Office, 19 Washington St., Concord, NH 03301

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## **Appeal of Jeffrey Merchant – Docket # 2011-T-013** **Department of Transportation**

April 18, 2012

The New Hampshire Personnel Appeals Board (Wood, Johnson and Casey) met in public session on Wednesday, April 11, 2012, to hear the appeal of Jeffrey Merchant, a former employee of the NH Department of Transportation. Mr. Merchant, who was represented at the hearing by Attorney John Vanacore, was appealing his April 13, 2011, removal for non-disciplinary reasons from his position as a Highway Maintainer II, as a result of his being medically unable to perform the essential functions of his position. Senior Assistant Attorney General Kevin O'Neil appeared on behalf of the Department of Transportation.

The record of the hearing in this matter consists of pleadings submitted by the parties prior to the hearing on the merits of the appeal, the audio recording of the hearing on the merits of the appeal, and the following documents, admitted into evidence<sup>1</sup> without objection:

### Appellant's Exhibits

- A. Medical assessment from Sports Medicine Atlantic Orthopaedics completed by Brian D. Barry, PA-C/pic
- B. Workers' Compensation Medical Form completed by Brian Barry, dated 4-26-11
- C. Handwritten note from Jeffery Merchant to Doug DePorter requesting extended leave from 3/17/11 to 4/26/11
- D. Application for Supplemental Sick Leave from Jeffery Merchant dated 4/7/11, requesting 15 days of leave
- E. Job Description for "Flagger" from [www.occupationalinfo.org](http://www.occupationalinfo.org)
- F. Page 28 of the Collective Bargaining Agreement (Article 11.9)

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<sup>1</sup> The Board advised the parties that private medical information provided in documentation offered into evidence would be sealed and, in accordance with the privacy protections of RSA 91-A, would not be available for public inspection.

State's Exhibits

1. Class specification for Highway Maintainer II
2. Application for Supplemental Sick Leave dated 4/7/2011, from Jeffery Merchant
3. Handwritten note from Jeffery Merchant to Doug DePorter dated 4/7/11, requesting extended leave
4. Medical assessment from Sports Medicine Atlantic Orthopaedics completed by Brian D. Barry, PA-C//pic
5. April 13, 2011, letter from Douglas DePorter to Jeffery Merchant notifying him of his removal for non-disciplinary reasons

The following persons gave sworn testimony:

Douglas DePorter, District Engineer, District 6

Jeffrey Merchant, Appellant (former Highway Maintainer II)

Having carefully considered the evidence and argument offered by the parties, the Board made the following findings of fact and rulings of law:

Findings of Fact:

1. The Appellant was hired on November 29, 2004, as a Highway Maintainer II, and he held that position until April 13, 2011, when he was dismissed for non-disciplinary reasons as a result of his being medically unable to return to work and perform the essential functions of his position. (Testimony of Douglas DePorter and State's Exhibit 5)
2. As a Highway Maintainer II, the Appellant's position required him, "To operate motor trucks and light duty maintenance equipment in connection with highway maintenance, construction projects and repair projects." The "Characteristic Duties and Responsibilities" listed on the position class specification are as follow:
  - a. Operates, services, makes field adjustments and emergency repairs on trucks and other maintenance equipment.
  - b. Determines proper rate of application of salt and sand by adjusting truck speed during this type of work.
  - c. Services snow-plows, changing blades and shoes as required.
  - d. Lays bricks and concrete blocks in the repair of road-side culverts and drainage systems, constructs brick and concrete block foundations for culverts and drainage areas.
  - e. Supervises small work crews in various highway or building projects.
  - f. Operates all types of trucks and equipment, including towed and auxiliary equipment.

The class specification also indicates that the position involves, "medium to heavy work, including continuous physical exertion such as frequent bending, lifting or climbing." (State's Exhibit 1)

3. Duties as a "flagger" are assigned to Highway Maintainers. The New Hampshire Department of Transportation does not have a separate "flagger" classification of positions. (Testimony of Douglas DePorter)
4. As a result of serious medical condition, the Appellant was unable to work between March 19, 2010, and October 10, 2010. During the Appellant's twenty-nine week absence, the Appellant used all of his accrued sick and annual leave, and used ninety-nine days (approximately twenty weeks) of donated leave received through the Supplemental Sick Leave provisions of the Collective Bargaining Agreement. During that period, the Appellant also exhausted his entitlement to twelve weeks of job-protected FMLA leave. The Appellant returned to work on October 11, 2010. (State's Exhibit 5)
5. On or about March 16, 2011, the Appellant informed his supervisor that he had fallen at home on March 15, 2011, and had seriously injured his right arm. (State's Exhibits 4)
6. Effective April 5, 2011, the Appellant had again exhausted any and all available leave and he was placed in the status of "leave without pay." He was ineligible for any additional job-protected FMLA leave, as the Appellant had not worked the minimum 1250 hours prior to the absence in order to qualify. That same day, the Department of Transportation received notice that the Appellant had filed a Workers' Compensation Claim on March 25, 2011, and that the claim had been denied. (State's Exhibit 5)
7. On April 7, 2011, the Appellant completed "Part 1" of the Application for Supplemental Sick Leave, requesting fifteen days of donated leave. The attached "Part 2" of the form, reportedly completed by the Appellant's health care provider the following day, indicated that the Appellant had last been seen by the health care provider on April 5, 2011, and that the Appellant had been incapacitated from working on either a full-time or part-time basis from March 15, 2011, to the "present." The health care provider indicated that the Appellant's next appointment was scheduled for April 26, 2011. (State's Exhibit 3)
8. On April 7, 2011, the same day that the Appellant initiated the request for supplemental sick leave, the Appellant also signed a note that was delivered to District 6 Engineer Douglas DePorter, asking Mr. DePorter for, "extended leave as of 3/17/11 because of absence because of a [serious injury to his arm]." (State's Exhibit 4)
9. From time to time, when Mr. DePorter receives requests for supplemental sick leave from employees in District 6, he forwards them to the Department's human resources bureau for processing. Once the forms are sent to human resources, he has no other involvement with the program except to make a recommendation if one is requested from the Bureau of Employee Relations, and to solicit leave donations if a request is approved. (Testimony of Douglas DePorter)
10. Knowing that the Appellant had exhausted all available leave, and knowing that the Appellant would not be allowed to return to work until some time after the Appellant's medical appointment on April 26, 2011, Mr. DePorter decided to move forward with dismissal for non-disciplinary reasons. Mr. DePorter determined that: 1) the Appellant's injury was not work-related, 2) the Appellant had no FMLA leave available to him, and 3) the Appellant had exhausted all available leave, including that

which he had accrued while absent earlier on supplemental sick leave, and that which he had accrued between October, 2010, and March, 2011. Mr. DePorter concluded that even if he were to grant additional unpaid leave, there was no assurance that the Appellant would be able to return to full duty following his April 26, 2011, follow-up medical appointment. Mr. DePorter had no "light duty" positions or assignments available in the district if the Appellant could return to work on less than full duty. Mr. DePorter concluded that the crew to which the Appellant position was assigned had been short-staffed for an extended period of time, and that the Department needed to remove the Appellant from his position as a result of his being medically unable to perform the essential functions of his position. (Testimony of Douglas DePorter)

11. On April 13, 2011, Mr. DePorter called the Appellant and asked him to come to the district office to sign paperwork. The Appellant received the notice of removal for non-disciplinary reasons, and was asked to sign termination paperwork. There was no discussion about the dismissal decision. (Testimony of Jeffery Merchant).
12. At the Appellant's follow-up medical visit on April 26, 2011, Mr. Barry, the Physician's Assistant who had been treating him, indicated that Appellant could discontinue using a sling, but still should not lift anything with his right upper extremity. The Workers' Compensation Medical Form signed by Mr. Barry that same day said that the Appellant could return to work on light duty, that he was unable to "climb;" that he could "lift" occasionally (up to 33% of the time), but that he still should not be lifting at all with his right arm. (Appellant's Exhibits A and B)
13. Mr. Barry was willing to release the Appellant to full duty some time in June, 2011. (Testimony of Jeffrey Merchant)

#### Rulings of Law

- A. The leave provisions outlined in the Personnel Rules do not include any reference to donated leave or supplemental leave. As a result, the Board has no jurisdiction to rule on issues related to the Supplemental Sick Leave program that is negotiated as part of the Collective Bargaining Agreement between the State and the State Employees Association. The Appellant's allegations that the application for supplemental sick leave may have been mishandled represent a matter outside the Board's subject matter jurisdiction and would instead be a subject for a grievance, if timely filed, under the provisions of the CBA. Even if the Board had the authority to make findings with regard to that program, the language of the contract itself states, "If the request is not approved, no further action shall be taken by the parties or by the requesting employee or Employer on that request." (Appellant's Exhibit F, Article 11.9 e.)
- B. The Appellant's circumstances, specifically his inability to return to work after exhausting his accrued leave and any further entitlement to additional paid or unpaid leave under the provisions of the FMLA, satisfy the criteria for non-disciplinary removal as set forth in Per 1003.01 of the NH Code of Administrative Rules. Per 1003.01 authorizes and appointing authority to remove a full-time

employee for non-disciplinary reasons when, "(a) The employee is physically or mentally unable to perform the essential functions of the position to which appointed; (b) The employee's physical or mental condition creates a direct threat or hazard for the employee, the employee's co-workers or clients of the agency which cannot be eliminated except by removing the employee from the position; (c) The employee's presence in the workplace, because of the medical condition, is deleterious to the employee's health; or (d) The employee is a qualified individual with a disability who, with or without a reasonable accommodation, is unable to perform the essential functions of the position to which appointed."

- C. When Mr. DePorter made his decision to remove the Appellant for non-disciplinary reasons, he was in receipt of a medical assessment, as required by Per 1003.03 (b), indicating that the Appellant was unable to return to duty on either a full-time or part-time basis. He also determined, as required by Per 1003.03 (c), that the Appellant's job duties could not be amended to accommodate his injury without altering the essential functions of the position, and that there were no available positions into which the Appellant could be transferred or demoted. The notice of removal for non-disciplinary reasons issued to the Appellant on April 11, 2011, meets the requirements set forth in Per 1003.04 (a).

#### Position of the Parties

Attorney Vanacore argued that for eight years, the Appellant had been a good worker whose extended absences were the result of two significant medical issues that prevented him from working. Mr. Vanacore argued that the Appellant had applied for supplemental sick leave, and only needed a few more weeks to carry him through until his medical appointment on April 26, 2011, when he would have been released for light duty. Mr. Vanacore argued that although the Appellant was not able to lift, there were any number of jobs the Appellant could have performed that would not have required lifting or climbing. Mr. Vanacore questioned why the Department rushed to terminate the Appellant's employment when they could have let him remain out on unpaid leave and allow him to return to work as a flagger until he was cleared for full duty. Mr. Vanacore suggested that the Department of Transportation had been under significant pressure at the time to cut staff, and that to do so, the Department took advantage of the Appellant's situation to fire him rather than allowing him to remain out on leave processing his request for supplemental sick leave, as the Collective Bargaining Agreement required.

Mr. Vanacore argued that RSA 21-I:58 allows the Board to use its authority to reinstate an employee if it determines that reinstatement is just. He also argued that while RSA 21-I:58 requires reinstatement without loss of pay when an employee has been denied the right to a process mandated by the Collective Bargaining Agreement. Attorney Vanacore argued that the Appellant understood that he was not medically able to work on the date of his termination, and that a more appropriate remedy would be for

the Board to order the Appellant reinstated, effective April 13, 2011, the date of separation, but adjust the Appellant's back-pay to be effective on April 26, 2011, the date that he was cleared to return to light duty.

Senior Assistant Attorney General O'Neil argued that the decision to remove the Appellant from his position for non-disciplinary reasons was based on a business need to go forward with staff who were ready and able to perform all the essential functions of their positions. Mr. O'Neil argued that although limited light duty is available for employees who are injured on the job, there were no light duty assignments available for the Appellant, whose lengthy absences and physical limitations were the result of illness and an injury sustained at home. Mr. McNeil argued that although the Appellant asserted that he could have returned to work on April 26, 2011, and work as a flagger or drive a truck, all Highway Maintainers perform flagging and traffic control duties along with all their other responsibilities for driving trucks, operating equipment, working on roads and culverts, moving sign packages, and performing strenuous tasks associated with highway maintenance activities. Mr. O'Neil argued that the Department of Transportation was not trying to cut staff. Instead, he argued, the Department had to make a rational assessment of what staff it needed to get the job done, and concluded that the Department needed to remove the Appellant for non-disciplinary reasons when the Appellant, once again, was absent without any available leave, and he was unable to return to work and perform the essential functions of his position.

Mr. O'Neil argued that the Department of Transportation had accommodated the Appellant's needs for a significant amount of time, forcing the crew to work short-staffed for seven months. Mr. O'Neil argued that when the Appellant informed the employer on March 15 2011, that he again needed additional leave to recuperate from his injury, and that he would be unable to return to full duty for an undetermined amount of time, the Department had reached the point where it could no longer accommodate him. Mr. O'Neil argued that the Appellant's job description details the kind of heavy work that Highway Maintainers are expected to perform, and that even if the Appellant could have returned on April 26, 2011, he could not have performed the majority of tasks associated with his position classification. Mr. O'Neil argued that the form submitted by appellant and marked as State's Exhibit B indicated that even after April 26, 2011, the Appellant would only have been permitted to perform light work with no lifting. Mr. O'Neil argued that while other employees do assist one another in performing certain tasks, the Appellant, in essence, was asking the rest of the crew to do his job.

Mr. O'Neil argued that after the Appellant had been removed for non-disciplinary reasons, if he was actually ready, willing and able to return to full duty in early to mid-June, 2011, there was nothing to stop him from submitting a job application and giving the Department an opportunity to assess his ability to do the work and meet the Department's needs. Mr. O'Neil argued that while the Appellant's situation was very unfortunate, the Department of Transportation had reached the limit of what it could do to

accommodate him, and the Department needed to move forward with people who could actually do the work assigned to them.

### Decision and Order

In accordance with the provisions of Per-A 207.12 (b) of the NH Code of Administrative Rules, in order to prevail in an appeal of a disciplinary dismissal, an Appellant must prove by a preponderance of the evidence that the dismissal was unlawful, that it violated the Rules of the Division of Personnel, that it was unwarranted by the alleged conduct or failure to meet the work standard in light of the facts in evidence, or that the action was unjust in light of the facts in evidence. Since this appeal is not disciplinary in nature, Per-A 207.12 (b) provides a more appropriate set of criteria, specifically whether the Appellant could prove by a preponderance of the evidence that the rule was incorrectly interpreted and applied; the rule was invalid, or the appointing authority or the director's application of the rule was unlawful. In this case, the Appellant failed to sustain his burden under either set of criteria.

The Board found that Per 1003 of the NH Code of Administrative Rules is a properly adopted, valid rule, and that the Department of Transportation correctly interpreted and applied the provisions of Per 1003 of the Personnel Rules when it removed the Appellant for non-disciplinary reasons. The evidence reflects that the Department of Transportation complied with the requirements of Per 1003 in reaching its decision to remove the Appellant for non-disciplinary reasons after receiving information from the Appellant's health care provider indicating that the Appellant was medically unable to return to work and perform the essential functions of his position as a Highway Maintainer II. Although the Appellant insisted that the Department made a rush to judgment, and could have waited two more weeks for updated medical information, the fact remains that the Appellant had been absent for reasons unrelated to work for approximately seven months in 2010, and for another month in early 2011. The Appellant had exhausted all of his accrued leave. He had utilized ninety-nine days of leave donated by his co-workers. He had exhausted his entitlement to protection under the FMLA during 2010, and had not worked a sufficient number of hours by the time he was injured in March, 2011, to qualify for any additional FMLA protection. If the Department were to grant the Appellant another extended leave of absence, his position would have remained vacant for an undetermined amount of time, and the crew would have remained short-handed.

Although the Board has considerable sympathy for the Appellant's extremely unfortunate circumstances, and may not have made the same decision as that made by the agency, the fact remains that the agency was legally entitled to make the decision to remove the Appellant for non-disciplinary reasons. The Board respects the Appellant's position that the agency could have authorized an additional, extended leave of absence without pay, and could have waited just a little longer before terminating the Appellant's employment. However, the evidence reflects that if the agency had waited just a few more weeks as the Appellant suggested, the Appellant's health care providers still were not willing to release him for full-time

work without restriction until early- to mid-June. Thus, if the agency had waited, it would have been short-handed for at least three more months following the date of the Appellant's injury. The Board found that asking the Department to wait any longer was simply unreasonable. As such, the Board found that the decision to remove the appellant was difficult, but it was not unjust.

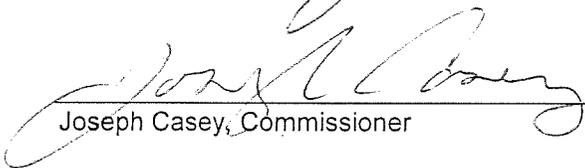
The Appellant asserted, without contradiction, that he had been a good employee for eight years before circumstances beyond his control resulted in his extended absences and his inability to return to work without restrictions before June, 2011. Those facts make this decision all the more difficult for the Board, and the Board wants to assure the Appellant that this decision does not in any way reflect negatively on the quality of the Appellant's work or his loyalty to the crew during his employment there. Because his separation was non-disciplinary, there was nothing to prohibit the Appellant from applying for re-employment with the agency any time after June, 2011, when he was again medically able to perform the essential functions of a position as a Highway Maintainer. The Board certainly would encourage him to do so now, as soon as a suitable position becomes available.

For all the reasons set forth above, the Board found that the Department of Transportation acted within its authority when it removed the Appellant from his position as a Highway Maintainer II for non-disciplinary reasons as a result of his being medically unable to perform the essential functions of his position. Therefore, the Board voted unanimously to DENY the appeal.

FOR THE PERSONNEL APPEALS BOARD

  
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Patrick Wood, Chair

  
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Robert Johnson, Commissioner

  
\_\_\_\_\_  
Joseph Casey, Commissioner

cc: Karen Hutchins, Director of Personnel, 25 Capitol St., Concord, NH 03301  
Kevin O'Neil, Senior Assistant Attorney General, Transportation Bureau, Department of Justice,  
33 Capitol St., Concord, NH 03301  
Attorney John Vanacore, Vanacore Law Office, 19 Washington St., Concord, NH 03301