

State of New Hampshire



PERSONNEL APPEALS BOARD

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Appeal of Stanley Nock, Jr.

Docket #2003-T-1

Department of Transportation

February 5, 2003

The New Hampshire Personnel Appeals Board (Rule, Johnson and Bonafide) met on Wednesday, October 30, 2002, under the authority of RSA 21-I:58 and Chapters Per-A 100-200, to hear the appeal of Stanley Nock, a former employee of the Department of Transportation. Mr. Nock, who was represented at the hearing by SEA General Counsel Michael Reynolds, was appealing his July 8, 2002 termination from employment for allegedly being absent for three or more consecutive work days without proper notification or adequate reason, and for absence without authorized leave. Attorney Ned Lucas 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 audio tape recording of the hearing on the merits of the appeal, and documents admitted into evidence as follows:

State's Exhibits¹

4. March 29, 2000 letter from Edward S. Welch to Stanley Nock, Jr., Re: Work Release from Incarceration
5. July 8, 2002 letter from Edward S. Welch to Stanley Nock, Jr., Re: Letter of Dismissal

¹ State's Exhibits 1, 2, 3, and 6, marked and admitted into evidence, were subsequently stricken from the records by agreement of the parties.

7. June 25, 2002 letter from Douglas A. Gosling to Stanley Nock, Jr., Re: Notice of Pre-disciplinary Meeting
8. June 25, 2002 letter from Gilbert Rogers to Stanley Nock, Jr., denying the request for leave without pay
9. Evaluations of Stanley Nock's performance dated January 14, 2002 and February 22, 2002; and handwritten letters from Gene Popien to Stanley Nock dated January 18, 2002 and February 22, 2002

Appellant's Exhibits

- A. June 20, 2002 Request from Stanley Nock, Jr., for leave without pay from June 18 through June 24, 2002
- B. Physician's Orders dated June 30, 2002 from Wentworth-Douglas Hospital for Stanley Nock

The following persons gave sworn testimony:

Edward S. Welch	Victoria Heyl
Douglas A. Gosling	Brian Nock
Gene Popien	Barry White
Robert R. Spinney	Stanley Nock, Jr.
Mary Kate Rocky	

Summary

Between May 1994 and June 2002, Mr. Nock was employed by the Department of Transportation as a Gate Operator on the Memorial Bridge in Portsmouth, New Hampshire, under the supervision of Robert Spinney, Bridge Construction Supervisor, and Gene Popien, Senior Bridge Construction Superintendent. Outside of normal office hours and on the bridge itself, the appellant's immediate supervisor was his uncle, Barry White.

In April 2000, the Department of Transportation approved a work release agreement in order to allow the appellant to continue working after being sentenced to a period of eight months of

incarceration.² In a letter dated March 29, 2000, Edward Welch, Administrator of the Bureau of Bridge Maintenance, outlined the terms of the "Work Release from Incarceration" (State's Exhibit 4) that would be effective for a period of up to eight months, beginning on April 3, 2000. The agreement, signed by Administrator Welch, included the following provisions:

- "1. You will regularly report to work for your normal work schedule.
- "2. You will continue to adhere to all Administrative Rules and Policies.
- "3. Use of leave time will not be approved without written permission from the Department of Corrections in addition to Department authorization.
- "4. Leave without pay will only be granted in accordance with Per 1205.02 of the Administrative Rules of the Division of Personnel."

Mr. Welch also informed the appellant that, "The Bureau must be able to depend on your presence on the job. Your timely communication with [Bridge Superintendent] Don Stevens is imperative should situations change regarding your status of incarceration."

Between March 2000 and January 2002, the appellant's job performance was deemed satisfactory, although there were concerns about his dependability, arising largely out of his extensive use of leave. On January 18, 2002, Mr. Popien wrote to the appellant, informing him that the Department was concerned with the rate at which the appellant was using his accrued sick and annual leave and the amount of accrued leave remaining to the appellant's credit. In that letter, Mr. Popien indicated that the appellant had used all but four hours of his sick leave and seven hours of annual leave. Mr. Popien wrote, "I have reviewed records of your leave usage and have found no major injuries or illnesses which would have significantly diminished your balances. For at least the last seven months you have been using your leave faster than you have been accumulating it. If this pattern continues you will very shortly be in a position where you may need to request leave without pay. This is a situation I recommend you avoid. With your current balances so low, I feel you are in a compromised situation if for some reason you need time off from work. Additionally, your high usage of leave has made me feel you cannot be depended upon to be available for your scheduled shifts."

The parties offered no evidence concerning the nature of the conviction or sentence that resulted in the appellant's incarceration in 2000.

In February 2002, the appellant was convicted as a habitual offender for motor vehicle violations and was sentenced to eleven months of electronically monitored house arrest and twenty days of incarceration in the Strafford County House of Corrections. The appellant assumed he would be eligible for work release after a brief period of incarceration, and obtained the court's approval to delay his actual incarceration until June 11, 2002, when he would be starting a previously scheduled week off from work.

On February 22, 2002, unaware of the appellant's conviction or the court's order for incarceration and electronically monitored house arrest, Mr. Popien wrote to the appellant, indicating that, "Since your last evaluation on January 28, 2002 you have not used any sick or annual leave. This is a very good start at increasing your leave balances. Furthermore, in the few instances when you needed some time off you accomplished this by modifying your shift times with other gate tenders. I commend you for the initiative you have taken to increase your leave balances, and I encourage you to continue in this."

Between February and June 2002, the appellant provided no notice to Mr. Popien, Mr. Spinney or Mr. Welch of his conviction or his impending incarceration. The appellant also failed to notify the Bureau Administrator or Bridge Superintendent that his ability to report for work on June 17, 2002, after his scheduled days off, would be dependent upon the Department's approval of a work release agreement and continued authorization for work release by the Strafford County Corrections Department.

The appellant was incarcerated as scheduled in June 2002. After completing the standard initial intake procedures, Strafford County Corrections Department Program Manager Victoria Heyl attempted to contact the Department of Transportation to obtain work release approval for him from the Department of Transportation. Unable to reach the Bureau Administrator or Bridge Superintendent, Ms. Heyl took the appellant's suggestion to make arrangements for reporting the appellant's work attendance with Barry White, the Bridge Operator. Ms. Heyl did not realize that Mr. White was the appellant's uncle.

Mr. White signed an agreement with the Strafford County Corrections Department to report any instances that the appellant failed to report for work as scheduled. Mr. White did not inform the Department of Transportation that the appellant had been incarcerated, that his ability to report as scheduled would be dependent upon continuing approval by the Strafford County Corrections Department for work release, or that he had signed an agreement with the Strafford County Corrections Department to monitor the appellant's attendance at work.

The appellant returned to work on Monday, June 17, 2002, working from 6 a.m. until noon. He also worked the overnight shift that Monday, reporting for work at midnight and leaving the bridge around 11:30 a.m. on Tuesday, June 18, 2002. The appellant was scheduled to report to the bridge again at midnight on June 18th to begin his next scheduled shift.

Some time before 5:30 p.m. on June 18th, staff at the County House of Corrections discovered contraband in the appellant's cell³ and transferred him to D-block. Although the appellant received no official notification at that time about the status of his work release, Ms. Heyl indicated that work release privileges normally would be suspended until after a disciplinary hearing. Between 5:30 and 6:00 p.m., the appellant called his brother Brian and asked him to notify bridge personnel that the appellant was not feeling well and would not be reporting for his scheduled shift. That same day, the appellant complained to Mary Kate Rocky, the R.N. assigned to the Strafford County House of Corrections, that he had a toothache. Ms. Rocky suspected that the appellant had an abscessed tooth and gave him pain medication. She did not make or attempt to make an appointment for the appellant to see a physician or obtain prescription medication.

On June 19, 2002, Mr. White informed the Bureau Administrator that the appellant had called in sick. He also advised Mr. Welch that the appellant was incarcerated at the Strafford County House of Corrections. Once he realized that the appellant had been incarcerated, Mr. Welch contacted Robert Spinney, asking him to get word to the appellant that if he was on an approved work release, he could apply for sick leave.

³ The contraband discovered in the cell was a package of Little Debbie's snacks.

As of June 18, 2002, the appellant had one and one half hours of annual leave and twenty hours of sick leave available to him. When the appellant requested sick leave, the Department had suspicions about whether he really was sick or whether the Department of Corrections would release him to work. Under the terms of his work release agreement in 2000, use of leave time would not be approved "without written permission from the Department of Corrections in addition to Department authorization." No such authorization was provided.

When informed that any request for sick leave would need to be accompanied by documentation supporting the request, the appellant chose instead to request leave without pay. The appellant's letter dated June 20, 2002 requesting leave without pay was faxed from the Department of Corrections to the Department of Transportation. In that letter, which the Department received on June 21, 2002,⁴ the appellant wrote, "Mr. Robert Spinney has advised me to inform you that I am temporarily unable to report through the work release program. I will be able to return to work on July 1, 2002" (Appellant's A).

By letter dated June 25, 2002, Assistant Commissioner Gilbert Rogers denied the appellant's request for leave without pay for the period of June 19, 2002⁵ through June 24, 2002, and a return to work date of July 1, 2002. In that letter, Assistant Commissioner Rogers wrote:

"Under the Department's original agreement with you regarding your work release from incarceration, formalized in writing on March 29, 2000, it was agreed that you would regularly report to work for your normal work schedule. It was further agreed that use of leave time would not be approved without written permission from the Department of Corrections in addition to department authorization, and leave without pay only granted in accordance with Per 1205.02 of the Administrative Rules of the Division of Personnel.

"You have an available leave balance of 13 ½ hours that is inadequate to cover this period of absence; nor has it been shown that you have received written authorization from the Department of Corrections for such leave. Your incarceration/inability to report

⁴ The appellant's faxed request for leave was delayed because his fax privileges at the House of Corrections had been revoked.

⁵ The appellant's schedule required him to report for work at midnight on June 18, 2002.

to work through your work release program does not constitute adequate reason to approve leave without pay."

In a separate letter dated June 25, 2002, Douglas Gosling, Assistant Administrator of the Bureau of Bridge Maintenance, informed the appellant that he had scheduled a pre-disciplinary meeting for Monday, July 1, 2002 at the Portsmouth Bridge Maintenance Office. He informed the appellant that the purpose of the meeting would be to discuss reasons supporting disciplinary action against the appellant, up to and including his dismissal from employment, as a result of the appellant's absence from work between midnight on June 18, 2002 through June 24, 2002. The letter also informed the appellant that he would be presented with evidence supporting disciplinary action and would be given an opportunity to refute that evidence.

On June 30, 2002, the evening before the pre-disciplinary meeting, the appellant sought medical treatment at Wentworth-Douglass Hospital. He was given prescriptions for antibiotics and pain medication to treat a dental abscess and was instructed to arrange for further treatment with a dental professional.

The appellant testified that he did not believe the agency would actually dismiss him for being absent. At the July 1, 2002 meeting, once that prospect became clear, the appellant commented that he should have brought a representative with him. His comment was not viewed or treated as a request for representation.

On July 8, 2002, the Department of Transportation issued a notice of termination to the appellant. That notice informed him that he was being dismissed under the provisions of Per 1001.08 (a)(11) and Per 1201.05 for being absent for three or more consecutive work days without proper notification or adequate reason, for being absent without approved leave.

Having 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. Between February 2002 and June 2002, the appellant provided no notice to the appointing authority that he had been convicted in February 2002 as a habitual offender, that he was scheduled to be incarcerated in June 2002, or that his ability to report to work for any period following June 17, 2002, would be subject to approval for work release from the Strafford County Department of Corrections.
2. Having received no notice from the appellant that his ability to report for duty for some period of time would be contingent upon approval for work release, the Department of Transportation had no opportunity to establish or review with the appellant terms under which he might be allowed to continue his employment under an approved work release from incarceration.
3. Under the terms of a work release from incarceration in 2000, the appellant was permitted to use leave only when such leave was approved by both the Department of Corrections and the Department of Transportation.
4. The appellant neither requested nor received approval from the Strafford County House of Corrections to take leave between June 18 and June 24, 2002.
5. Between June 18 and June 24, 2002, the Strafford County House of Corrections did not release the appellant for work.
6. By letter dated June 25, 2002, the appointing authority requested that the appellant attend a pre-disciplinary meeting on Monday, July 1, 2002, pursuant to Per 1001.08. The appellant attended the meeting as scheduled, reviewed the appointing authority's evidence, and had an opportunity to refute that evidence.
7. The appellant commented that he would have asked for representation had he believed that the agency was actually considering termination; he made no such request, however, and made no objection to the meeting continuing without a representative present.
8. The appellant asked to be notified as soon as a decision had been made whether or not he was to be dismissed. Written notice was provided by letter dated July 8, 2002 of his dismissal.

Rulings of Law

- A. An employee may be required by the Employer to furnish the Employer with a certificate from the attending physician or other licensed health care practitioner when, for reasonable cause, the Employer believes that the employee's use of sick leave does not conform to the reasons and requirements for sick leave use set forth in this Agreement. Such certificate shall contain a statement that in the practitioner's professional judgment sick leave is necessary. In addition, the Employer may, at state expense, have an independent physician examine one of his/her employees who, in the opinion of the Employer, may not be entitled to sick leave. The time related to such examination shall not be charged to the employee's leave." [CBA Article XI, Section 11.4.]
- B. "...An appointing authority shall be authorized to talte the most severe form of discipline by immediately dismissing an einployee without warning for ... Absence for a period of 3 or more consecutive work days without proper notification or adequate reason..." [Per 1001.08 (a)(11)]
- C. "No appointing authority shall dismiss a classified employee under this rule until the appointing authority: (1) Offers to meet with the employee to discuss whatever evidence the appointing authority believes supports the decision to dismiss the einployee; (2) Offers to provide the einployee with an opportunity to refute the evidence presented by the appointing authority...[and] (3) Documents in writing the nature and extent of the offense." [Per 1001.08 (c)]
- D. "An employee shall be entitled to Association representation at an investigative interview or meeting if requested by the employee when that employee reasonably believes that the interview or meeting may result in disciplinary action against him/her. The Association representative's role at an investigative interview or meeting is to consult with the employee. The Employer is free to insist upon hearing the employee's own account of the matter(s) under investigation. The Parties agree that in all cases the principles of 'Weingarten' and 'Garrity' and other applicable case law shall be observed. The provisions of this article shall apply to both full and part-time employees. 'Disciplinary action' means action resulting in a written warning, the withholding of an annual increment, a suspension, a demotion or a dismissal, as stated in the Administrative Rules of the Division of Personnel." [CBA – Article XII, Section 12.8.]

E. "The personnel appeals board shall hear and decide appeals as provided by RSA 21-I:57 and 21-I:58 and appeals of decisions arising out of application of the rules adopted by the director of personnel except those related to: ...The refusal of an appointing authority to grant a leave of absence without pay. [RSA 21-I:46, I (b)]

Attorney Reynolds argued that the appellant's illness and not the conditions of his incarceration prevented him from reporting for work as scheduled on the night of June 18th. He argued that the appellant notified his supervisor that he was ill, providing appropriate notice and adequate reason for his absence. Attorney Reynolds argued that even if the appellant's available balance of leave was insufficient for the period of absence, the agency could have granted his request for leave without pay. By failing to do so, he argued, the agency abused its discretion.

Attorney Reynolds argued that the Department of Transportation violated the Collective Bargaining Agreement by failing to grant the appellant's request for sick leave unless he produced certification from a physician or health care provider. He argued that the only time an agency can force an employee "to get a doctor's note" is when the agency believes there has been a violation of the contract's sick leave provisions. He argued that the agency never told the appellant that they believed he had misrepresented the reason for requesting leave or that the request itself was made inappropriately.

Attorney Reynolds argued that the agency violated the Rules by dismissing the appellant instead of employing progressive discipline. He argued that there was no evidence of prior discipline in terms of dependability, lateness or low leave balances, and no opportunity prior to the dismissal for the appellant to respond to the allegation that he had misrepresented the reason for his inability to report for work on the night of June 18th. He also argued that the agency violated the Personnel Rules by failing to disclose the specific evidence being used to support the appellant's termination.

Finally, Attorney Reynolds argued, the Department violated the appellant's rights by refusing to allow him union representation at the pre-disciplinary meeting. He argued that the agency had a legal obligation to stop the meeting the minute that the appellant said he wanted a representative.

Burden of Proof.

"In all cases, the burden of proof shall be upon the party making the appeal. The appointing authority shall have the burden of production." [Per-A 207.01]

Standard of Review

"In disciplinary appeals, including termination, disciplinary demotion, suspension without pay, withholding of an employee's annual increment or issuance of a written warning, the board shall determine if the appellant proves by a preponderance of the evidence that:

- (1) The disciplinary action was unlawful;
- (2) The appointing authority violated the rules of the division of personnel by imposing the disciplinary action under appeal;
- (3) The disciplinary action was unwarranted by the alleged conduct or failure to meet the work standard in light of the facts in evidence; or
- (4) The disciplinary action was unjust in light of the facts in evidence. [Per-A 207.12(b)]

Decision and Order

According to the CBA, "An employee may be required by the Employer to furnish the Employer with a certificate from the attending physician or other licensed health care practitioner when, for reasonable cause, the Employer believes that the employee's use of sick leave does not conform to the reasons and requirements for sick leave use set forth in this Agreement..." Once the agency discovered that the appellant was in jail, it reasonably questioned whether or not his request for sick leave conformed to the reasons and requirements of the contract.

The appellant testified that he could not get medical documentation from a physician and couldn't ask the nurse to write a note for him without getting something from the court. It is the finding of this Board that the evidence presented supports the Employer's position that the appellant's incarceration, not his physical condition, was the primary reason that he failed to report for work the night of June 18th or any other night up to and including June 24, 2002.

Agencies are granted broad discretion in determining when to grant or deny an employee's request for leave without pay. In this case, the appellant failed to provide any advance notice to the appointing authority about his work release arrangements with the Strafford County House of Corrections. The appellant requested leave without pay only after he realized he would be unable to comply with the agency's requirement for him to certify his need for sick leave, either paid or unpaid. Under the circumstances, the Board found that the agency did not act irresponsibly and did not engage in an unsustainable exercise of discretion when it decided to deny the appellant's after-the-fact request for leave without pay without proof that leave was justified and had been approved by Strafford County House of Corrections.

The appellant had clear notice by letter dated June 25, 2002, that the July 1, 2002 meeting would include a discussion of the appellant's absence from work and the possibility of discipline, up to and including termination from employment. Even after the meeting was under way, the appellant did not ask for a representative. When the appellant realized that disinnisal was a distinct possibility, he commented that he would have gotten someone to represent him if he'd known. The appellant failed to persuade the Board that his comment should have been deemed tantamount to a request for representation or that the agency violated his rights under the Collective Bargaining Agreement by continuing the meeting after the appellant made that comment.

The appellant also failed to persuade the Board that the agency failed to disclose the evidence upon which it based its decision to dismiss, or that it violated the appellant's rights to due process. The appellant was informed of the allegations supporting his termination and was given an opportunity to respond. The appellant asltd for an explanation of the difference between counseling and discipline, since his employment history included instances of each. The appointing authority answered the appellant's questions and outlined the types of offenses that could lead to immediate disinnisal without prior warning.

On all the evidence and argument offered by the parties, the Board voted unanimously to DENY the instant appeal, upholding the State's decision to dismiss Mr. Stanley Nockt, Jr., for violation of Per 1001.08 of the Rules of the Division of Personnel. The agency produced sufficient

evidence to persuade the Board that the appellant was absent from work between June 18 and June 24, 2002 without appropriate notice, adequate reason, or authorized leave.

Given the appellant's apparent decision to not inform the appointing authority of his incarceration or any possible effect that it would have upon his availability for work, the appellant failed to persuade the Board that there was good reason for not advising the appointing authority of his incarceration or possible restrictions on his availability for work. The appellant failed to persuade the Board that his termination from employment was unlawful, that it violated the Rules of the Division of Personnel, that it was unwarranted, or that it was unfair in light of the facts in evidence.

THE PERSONNEL APPEALS BOARD



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Robert J. Johnson, Commissioner



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