

State of New Hampshire



PERSONNEL APPEALS BOARD

25 Capitol Street
Concord, New Hampshire 03301
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Appeal of Denis J. O'Connell

Docket #2001-T-6

Department of Revenue Administration

November 14, 2001

The New Hampshire Personnel Appeals Board (Rule, Johnson and Bonafide) met on June 6, 2001, and July 15, 2001, under the authority of RSA 21-I:58 and Chapters Per-A 100-200 of the Code of Administrative Rules (Rules of the Personnel Appeals Board) to hear the appeal of Denis O'Connell, a former employee of the Department of Revenue Administration. The appellant, who was represented at the hearing by Attorney Eleanor MacLellan, was appealing his termination from employment as a Systems Development Specialist IV. Attorney Mark J. Bennett appeared on behalf of the State.

On January 3, 2001, the Board conducted a pre-hearing conference and heard oral argument on the State's Motion to Dismiss. In order to allow the appellant to complete discovery depositions and to explore possibilities of a settlement with the Department, the Board took the State's Motion under advisement and agreed to schedule the matter for a hearing on February 28, 2001.

By letter dated February 27, 2001, Attorney MacLellan advised the Board that the parties had reached an understanding on the basic terms of a settlement to resolve the matter, so that no hearing would be necessary. However, in a letter to the Board dated April 20, 2001, Attorney MacLellan wrote that the parties were unable to settle the case, and she asked the Board to schedule the matter for a hearing on June 6, 2001, a date the parties agreed to be available for that purpose. The Board granted that request.

The Board had scheduled one day to hear Mr. O'Connell's appeal, but the parties were unable to complete their presentations in the time allotted. A tentatively scheduled second hearing day was found to conflict with the Board's schedule, and one or both of the parties were unavailable on alternative dates initially offered by the Board, including July 25th, August 1st, and August 8th. The parties ultimately agreed to complete the hearing on August 15, 2001.

The record of the hearing in this matter consists of pleadings submitted by the parties prior to the hearing, 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 Exhibits

1. IS Vacation Schedule
2. Memo dated March 31, 1995 from Peter Croteau to All AIS Employees
3. Memo dated September 20, 2000 from Chris Hensel to M&R Redesign Project Lead Users
4. Supplemental Job Description for Systems Development Specialist IV
5. Leave Slip dated 9/27/2000 submitted by Denis J. O'Connell for annual leave from 10/6/2000 through 10/19/2000
6. Leave Slip dated 9/27/2000 submitted by Denis J. O'Connell for annual leave on 10/20/2000
7. Memo dated October 2, 2000 from Irene Koffink to Denis O'Connell concerning his leave request
8. October 18, 2000 letter from Irene Koffink to Denis O'Connell
9. October 31, 2000 letter of resignation signed by Denis O'Connell
10. November 1, 2000 letter from Mark J. Bennett to Denis J. O'Connell with attached transcript of a pre-disciplinary hearing convened on October 27, 2000
11. Memo dated October 18, 2000 from Theresa Morrill to Irene Koffink
12. Memo dated October 16, 2000 from David King to Irene Koffink

13. Memo dated October 16,2000 from Dick Nadeau to Irene Koffink

Appellant's Exhibits - admitted as a single exhibit and identified here as follows:

- A. Vacation Schedule
- B. Schedule Irene referred to in July 14 meeting
- C. October 2,2000 memo denying leave request
- D. Irene's memo re: users stopped tests 9/27
- E. October 18,2000 letter
- F. October 27,2000 response from O'Connell
- G. Application for Leave slips
- H. October 30,2000 letter
- I. October 1,2000 e-mail disabling computer
- J. Resignation letter
- K. Chris' notes
- L. November 29,2000 memorandum Morrill to Koffink
- M. November 2,2000 memorandum Koffink to Morrill
- N. October 18 2000 memorandum Morrill to Koffink
- O. December 17,2000 letter Koffink to Arnold
- P. E-mail re: testing
- Q. Documentation of damages

The following persons gave sworn testimony:

Stanley Arnold
Irene Koffink
Theresa Morrill
Richard Nadeau
David King
Denis O'Connell

Position of the Pal-ties

The appellant argued that the Department of Revenue Administration violated the Rules of the Division of Personnel when it dismissed him for willful insubordination, refusal to accept job assignment, and absence from work for three or more consecutive working days without appropriate notice or adequate reason. Mr. O'Connell's original notice of appeal dated November 6, 2000, requested an order from the Board directing the State to accept his resignation in lieu of dismissal. Mr. O'Connell filed an amended notice of appeal dated November 15, 2000, in which he asked the Board to reinstate him with back pay, or, in the alternative, to grant his original request for acceptance of his resignation.

The State argued that although it had taken the appropriate steps to dismiss the appellant from his position, the department received from the appellant a request to resign in lieu of termination. According to the State, the resignation was freely given by the appellant, and the State processed his separation from State service as a resignation with an effective date of October 6, 2000, as he had requested. Therefore, the State argued, Mr. O'Connell had no further basis for appeal and the case should be dismissed as a matter outside the Board's jurisdiction.

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)]

At the close of the hearing, both parties presented Requests for Findings of Fact and Conclusions of Law. In accordance with Per-A 207.11 (b), "Submission by either party of requests for

findings of fact or rulings of law shall not preclude the board from making findings independent of those requests."

Appellant's Requests for Findings of Fact and Rulings of Law

The following numbered requests are granted: 1, 3, 4, 5, 7, 9, 10, 19, 20, 25, 28, 30, 32, 37, 39, 49, 50, 51, and 54

The following requests are granted as amended:

Request #2 is granted after amending it to read, "paid annual leave."

Request #6 is granted after amending it to read, "paid vacation time."

The following requests are granted in part:

Requests #8 and 18 are granted in part. It was Ms. Morrill's opinion that others were able to cover Mr. O'Connell's absence and, as she testified, "I assumed he would go anyway because he'd made plans."

Requests # 11, 12, 13, 26, 27, 40 and 41 are granted in part. Ms. Koffink's understanding of how much delay there may or may not have been in implementation was influenced by her perception of Mr. O'Connell's plans to leave on October 6, 2000, with or without the Department's approval.

Requests # 15, 16 are granted only to the extent that Mr. Nadeau and Mr. Trott were scheduled to be at work and were familiar with the project.

Request #31 is granted in part. Ms. Koffink clarified that the appellant would not be permitted to take vacation time until after his portion of the project was out of the critical path.

Request #38 is granted in part, in that Commissioner Arnold and Ms. Koffink did not discuss the precise circumstances of David King's leave until after Mr. O'Connell's leave request had been denied.

Request #40 is granted in part. Although Ms. Morrill told Mr. O'Connell that he could not request paid leave until the leave had been accrued, Mr. Nadeau corrected that

information. It was Mr. O'Connell who elected to wait until the leave had been accrued before submitting a leave slip.

Requests #44, 45 and 46 are granted but are not dispositive of the appeal. Ms. Koffink also knew that Mr. O'Connell had received more accurate information about requests for leave from Mr. Nadeau and that it would be possible for Mr. O'Connell to postpone his trip.

The following requests are neither granted nor denied:

Requests #61, 62, and 63 are neither granted nor denied. Although the State offered no objection to the calculations, the appellant offered neither payroll nor payment records to support his requests.

Request #53 is vague and overly broad and is therefore neither granted nor denied.

The following requests are denied:

Request #14 and 17 are denied. Implementation and the status of work in the critical path for the M&R Redesign was due, at least in part, to the appellant's late application for leave and his refusal to advise the agency whether or not he would report for work on October 6th as scheduled.

Requests # 21, 22, 23, and 24 are denied. Accommodation of an employee's request for annual leave would be required only when the employee's request is reasonable. The State admittedly did not oblige Mr. O'Connell's request, nor were they required to do so.

Requests #29, 33, 34, 35, and 36 are denied.

Request #42 is denied. Per 1202.02 (a) states, "Written leave requests from an employee shall be accepted by the appointing authority at reasonable times." Article X, Section 10.3 (a) of the Collective Bargaining Agreement effective July 1, 1999, states, "The employer agrees to accept properly executed leave applications within six (6) months of the first day of the period of leave being requested."

Request #43 is denied. Mr. Nadeau, another supervisor, advised the appellant that if he wanted to take leave in the fall, he could and should make the request as quickly as possible, whether or not he had actually accrued the leave.

Request #47 is denied. Ms. Koffink and Mr. King both testified that when his leave was approved, his part of the project was not in the critical path.

Request #48 is denied. The Board is not persuaded that the appellant's termination was unjust.

Request #52 is denied. Mr. O'Connell neither requested permission to offer a resignation in lieu of termination, nor was his resignation offered with any reference to being allowed to resign in lieu of termination. Accordingly, no certification was required. Mr. O'Connell was not barred from appealing his termination because he was, in fact, terminated from his employment.

Requests #55, 56, 57, 58, 59, and 60 are denied. The appellant infers that accommodating a request means granting a request regardless of the circumstances under which the request is made.

State's Requests for Findings of Fact

The following requests are granted: #1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 24, 25, 26, 27, 28, 29

The following requests are granted as amended:

Request #7 is granted after amending it to read, "vacation leave slip."

Request #21 is granted after amending it to read, "The reason given by Ms. Koffink for the denial..."

State's Requests for Conclusions of Law

The following requests are granted: 1, 2, 3, 4, 5, 6, 7, 8, 9.

Decision and Order

Decision and Order

Having considered all the evidence, the Board voted unanimously to DENY Mr. O'Connell's appeal.

At the time that the appellant spoke to Ms. Koffink in July 2000, about his plans to take a vacation in either October or November 2000, he knew that his continued employment was in jeopardy. He was aware of the fact that Ms. Koffink was unhappy with his performance over-all. He also knew that his estimate of when the Department would implement the M&R Redesign project differed from the estimates that Ms. Koffink developed from information provided by various project supervisors.

Mr. O'Connell knew that the implementation had been postponed before, and it was reasonable to believe that it could be again. The longer the appellant waited to submit his request for leave, the greater the risk that the requested leave would conflict with the project's critical path. The appellant had received conflicting information from his immediate supervisor Ms. Morrill and from his friend Mr. Nadeau, another department supervisor, about when he could submit a request for leave. Ms. Morrill recommended that the appellant get confirmation from Ms. Koffink that his leave was actually approved before finalizing his plans for the trip. Mr. Nadeau recommended that the appellant submit his leave request immediately, and that the appellant spend no money on the trip until he had formal approval for leave.

Mr. O'Connell did not discuss the matter again with Ms. Koffink before making his travel arrangements, and he elected to wait until September 27th, less than ten days before he expected to begin his leave, before submitting his request for leave. After July 14th, the appellant never again spoke with Ms. Koffink about taking leave until Ms. Koffink told him that his leave request had been denied.

The appellant suggested that it would have been more "efficient" for the agency to simply approve the leave once it realized that the he intended to talte the trip, with or without the agency's approval. The Board does not agree.

The Personnel Rules and the Collective Bargaining Agreement both define the circumstances in which an employee must request approval for leave. In both cases, the regulations require an employee to seek and obtain written approval for leave; otherwise, the employee is subject to disciplinary action ranging from a written warning for absence without approved leave to termination for absences of three or more consecutive working days without adequate notice or excuse. In this case, the Board found that the appellant's very deliberate decision to wait until September 27th to submit his request for leave was not an adequate excuse.

The Board also found that the appellant's request did not provide adequate notice, since he was fully aware of the difficulties with the M&R project on the day that his leave request was submitted. When confronted with the denial of his request for leave, the appellant refused to answer Ms. Koffink's questions about whether or not he would appear for work on October 6th as scheduled, and the agency prudently removed his access to the programming until it was able to determine whether or not he would actually report for duty. The Board found that the agency was acting within its discretion in denying his request for leave, and that the agency had the authority to terminate his employment for willful insubordination, refusal to accept a job assignment, and absence from work for three or more consecutive working days without appropriate notice or adequate reason.

After the appellant's return in late October, the agency scheduled a meeting at which the appellant was provided an opportunity to refute the allegations supporting his termination. The appellant failed to persuade Commissioner Arnold that he should not be dismissed, and Commissioner Arnold advised him that formal written notice of termination would be forwarded to the appellant by certified mail. Knowing that the letter of termination was forthcoming, the appellant submitted a letter of resignation, aslting the Department to make his resignation

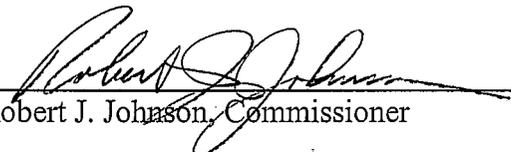
effective October 6th, the date that his unapproved absence began. The resignation appears to have been offered as a resignation in lieu of termination, which the agency had no obligation to accept. Nevertheless, the agency processed the separation as a resignation although it did not conform to the requirements of Per 1001.08 (e). The Board voted to DENY the State's Motion to Dismiss and decided the case on the merits.

Although the Board voted to DENY Mr. O'Connell's appeal, the Board also voted to grant his request for alternative relief. Specifically, the Department of Revenue Administration shall treat the appellant's separation from service as a resignation.

THE PERSONNEL APPEALS BOARD



Lisa A. Rule, Acting Chairperson



Robert J. Johnson, Commissioner

Philip P. Bonafide, Commissioner

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THE STATE OF NEW HAMPSHIRE
PERSONNEL APPEAL'S BOARD
APPEAL OF DENIS J. O'CONNELL
Docket No. 2001-T-6
(DEPARTMENT OF REVENUE ADMINISTRATION-DRA)

DRA'S REQUESTS FOR FINDINGS OF FACT
AND CONCLUSIONS OF LAW

NOW COMES the respondent New Hampshire Department of Revenue Administration and respectfully requests this Board to make the following Findings of Fact and Conclusions of Law together with such others as the evidence may reasonably support:

A. REQUESTS FOR FINDINGS OF FACT

1. Denis J. O'Connell ("Appellant^u) was employed by the DRA as a Systems:Development Specialist IV from approximately September 20, 1999 until approximately October.27, 2000.

2. DRA permitted the Appellant to complete his one year probationary period.

3. DRA regarded Appellant's work as acceptable, although areas for improvement may have been present.

4. The appellant was not terminated for his work performapce.

5. In July of 2000, Appellant had a discussion with his Division Director, Irene Koffink, regarding his desire to take vacation leave in the fall, possibly in October, after the conclusion.of his probationary period.

6. Appellant was advised that he may not complete his probationary period, or that it may be extended, and that any vacation planing was at his own risk.

7. No October vacation leave was approved by Ms. Koffink at the July meeting.

8. In October of 2000, Appellant was performing his duties and had programming assignments in a 'critical path' of the Meals and Rentals Tax ("M&R") computer information system redesign program.

9. The M&R redesign and integration into the Tax Information Management System ("TIMS") was a significant project necessary to the efficient and effective operation of the DRA and for carrying out its statutory obligations.

10. The Appellant made vacation plans for the period from October 6 - October 20, 2000.

11. The Appellant mentioned his vacation plans to his immediate supervisor, Theresa Morrill, Program Analyst, in the fall of 2000 and had indicated the desired vacation weeks on the Information Systems ("IS") Division vacation planning calendar. The weeks indicated were in October, or November, in the alternative.

12. Appellant indicated to Ms. Morrill that his vacation plans may conflict with the M&R redesign implementation,

scheduled at the time of Appellant's vacation for October 27,
or so.

13. Ms. Morrill advised the Appellant, but not Ms. Koffink, several times from approximately May through September 2000 to speak directly with Ms. Koffink to make sure his vacation plans were acceptable and to get them approved.

14. During the summer of 2000, Appellant discussed his vacation plans with Richard Nadeau, Lead Analyst, but not Appellant's direct supervisor, although in a supervisory position.

15. Mr. Nadeau advised the Appellant that he could and should submit a leave slip as soon as possible and prior to committing any funds to his vacation plan in order to make sure it was approved.

16. Despite the admonitions of Mr. Nadeau and Ms. Morrill, Appellant declined to submit a leave request or discuss his vacation plans further with Ms. Koffink.

17. Appellant took no action to clarify the status of his leave request despite Mr. Nadeau telling him that his own request for leave in August 2000 made in July 2000 had been denied because he had been involved in an important part of the M&R design project in August and it became unreasonable for him to be absent at that critical time.

18. The Appellant finally submitted applications for vacation leave to Ms. Morrill on September 27, 2000 seeking leave from October 6-19, 2000, plus a second slip seeking leave for Friday, October 20. Ms. Morrill recommended approval of both slips.

19. Ms. Koffink denied both applications on September 29, 2000, and met with the Appellant regarding the denial on that day.

20. Ms. Koffink met with the Appellant on October 2, 2000, to confirm the leave request denial orally and in writing, and the reasons therefore.

21. The reason for the denial was that the Appellant was working on programming a subsystem which was in the critical path for the implementation of the M&R redesign project then scheduled for October 27, 2000, and that Appellant's absence for 11 days prior to this time would be a setback for the project which could delay its implementation and interfere with the efficient operation of the DRA.

22. Appellant was informed of the leave denial and the reasons therefore by a memo which also warned him that if he went on vacation he would be absent without official leave in violation of Per 1201.05, a copy of which was appended to the memo, and that he would be subject to disciplinary action, including possible termination of employment.

23. Despite these notices, Appellant left work early on October 4, 2000, called in sick on October 5 and did not report for work from October 6 - October 20, 2000.

24. Ms. Koffink temporarily re-assigned the Appellant from programming to system redesign documentation on or about October 2, 2000 because she did not know whether he would take the unauthorized leave or not and needed to take the precaution to protect the computer system. Had Appellant reported for work on October 6, as directed, he would have been reassigned to programming because that was what he was needed to do.

25. Ms. Koffink wrote Appellant a letter which she sent certified mail to his home on October 18. This letter advised him that he was considered to be absent without official leave since failing to report for work on October 6, 2000. The letter recited the history of her meetings with the Appellant and his representative, Dick Nadeau, on September 29, and October 2, and that he had been warned at the October 2 meeting she had with him that he would be subject to termination for willful insubordination and refusal to accept work assignments should he absent himself from work during the period from October 6, through October 20, 2000. He had indicated at the October 2 meeting that he understood, and that he had understood this at the earlier meeting on September 29. The letter recited his actions on October 4 and 5, and requested a meeting pursuant to

Per 1001.08(c) on October 23, 2000 at 1:00 p.m. When Appellant received the letter he contacted Assistant Commissioner B. Reid and the meeting was ultimately rescheduled for, and held on, October 27, 2000, at 9:00 a.m. at the Department's Hearings Bureau in the State House Annex, outside of DRA's main offices, as he had requested.

26. At that meeting the Appellant was presented with the evidence Ms. Koffink and Commissioner Arnold were considering, and advised again that his dismissal was being considered. Appellant replied to that evidence, explained it, attempted to refute it, and presented a letter setting forth his position on various matters involving the Department. At the conclusion of the meeting Commissioner Arnold determined to dismiss the Appellant pursuant to Per 1001.08 and 1201.05, and notified him that a dismissal letter would be forthcoming.

27. A dismissal letter was sent to the Appellant on October 30, 2000.

28. The Appellant would have been permitted to take his annual leave once his work assignment was outside the "critical path" of the M&R redesign project.

29. It was anticipated that the Appellant could take his annual leave as early as November at the time he requested it on September 27, 2000.

B. REQUESTS FOR CONCLUSIONS OF LAW

1. The DRA has complied with Per 1203.08 regarding the granting of Annual Leave.

2. The Appellant's actions constitute violations of Per 1001.08(a), \ 'Dismissal^N, authorizing dismissal without prior warning.

3. The Appellant violated Per 1001.08(a)(6), in that he refused to accept job assignments.

4. The Appellant violated Per 1001.08(a)(9), in that he was willfully insubordinate.

5. The Appellant violated Per 1001.08(a)(11), in that he was absent for a period of 3 or more consecutive work days without proper notification or adequate reason.

6. The Appellant violated Per 1201.05, in that he was absent from October 6 - October 20, 2000 without authorized leave for which he is subject to termination in the reasonable discretion of the appointing authority pursuant to Per 1201.05(b).

7. Under the facts of this case, the Appellant's dismissal was warranted and lawful.

8. Under the facts of this case, dismissal is an effective means of disciplinary action and is reasonable and properly within the discretion of the appointing authority.

9. DRA has complied with Per 1001.08(c) and (d) regarding pre-dismissal meetings and notice of dismissal.

Respectfully Submitted,



August 14th, 2001

Mark J. Bennett, Esq.
New Hampshire Department
of Revenue Administration
Hearings Bureau
25 Capitol Street, Room 202A
Concord, NH 03301
Tel: (603) 271-1304

CERTIFICATE OF SERVICE

I hereby certify that I gave in hand a true copy of the foregoing Requests to Eleanor MacLellan, Esq., counsel for the Appellant this 15th day of August, 2001.



Mark J. Bennett, Esq.

THE STATE OF NEW HAMPSHIRE

PERSONNEL APPEALS BOARD
APPEAL OF DENIS J. O'CONNELL
No. 2001-T-6

DENIS O'CONNELL'S FINDINGS OF FACT AND RULINGS OF LAW

BACKGROUND FACTS

1. In the Spring of 2000, Mr. O'Connell spoke with his supervisor, Terri Morrill, about his desire to take a trip to the Ukraine in the Fall, and his concern about getting sufficient advance approval of the time off so that he could make the necessary plans and financial commitments.
2. Ms. Morrill told Mr. O'Connell that he could not request the annual leave until he had accumulated the time, but that he should talk to the department director about his plans.
3. On July 14, 2000, Mr. O'Connell met with department director, Irene Koffink, to inform her of his desire to take a trip to the Ukraine in the Fall to visit family, and explain his concern about getting the time off and the necessity for making advanced travel arrangements.
4. Ms. Koffink consulted the implementation schedule and reported that there was no conflict with the dates because his part of the project was scheduled to finish testing in September.
5. The July 11, 2000, implementation schedule shows that Mr. O'Connell's work would have been completed by October 6 - 21, 2000, which was the time he informed Ms. Koffink he wanted to take his vacation.
6. Mr. O'Connell became eligible to take vacation time, and had accumulated the time on September 26, 2000.
7. On September 27, 2000, Mr. O'Connell submitted his annual leave request.
8. Terri Morrill recommended approval of the request because others were able to cover Mr. O'Connell's work during his two-week absence.
9. On September 27, 2000, Ms. Koffink was aware that user testing had stopped due to the number of errors in the program.

10. On October 2, 2000, Ms. Koffink wrote a denial of Mr. O'Connell's request, stating that Mr. O'Connell was in the critical path for an October 27, 2000, implementation date and his absence would delay implementation.
11. By October 2, 2000, Ms. Koffink was aware that the October 27, 2000, implementation date was no longer realistic, and implementation would realistically occur months later.
12. By at least October 2, 2000, Ms. Koffink had reassigned Mr. O'Connell to duties that had nothing to do with implementation of the program and, consequently, Mr. O'Connell's work was not in the critical path.
13. By at least October 2, 2000, other people in the department were doing the coding work that Mr. O'Connell previously had been assigned to do.
14. Ms. Koffink knew that the information contained in her October 2, 2000, denial was incorrect.

ALLOWING MR. O'CONNELL TO GO ON VACATION WOULD NOT HAVE UNREASONABLY DISRUPTED IMPLEMENTATION OF THE PROGRAM

15. From the beginning of 2000, Dick Nadeau and Ron Trott were available to, and did, help with coding and correcting errors in the M&R program, which was the same work Mr. O'Connell was assigned to do, because their parts of the program had already been completed.
16. Terri Morrill knew that Dick Nadeau and Ron Trott were available to help with coding and mistake correction during the two weeks that Mr. O'Connell would have been absent.
17. Mr. O'Connell's absence for a two-week vacation in early October, 2000, would not have delayed the October 27, 2000, implementation date because it was already delayed for months, and others were available to cover his work during his 10-day absence.
18. Based on these considerations, Ms. Morrill recommended that Ms. Koffink approve the vacation request.

VIOLATION OF Per 1203.08 (b)

19. Per 1203.08(b) provides that the appointing authority shall make every reasonable effort to accommodate an employee's request for vacation time.

20. Ms. Morrill testified that Ms. Koffink did not talk with them about any effort to accommodate Mr. O'Connell's request.
21. Ms. Koffink took no action to try to accommodate Mr. O'Connell's request for annual leave after Mr. O'Connell met with her on July 14, 2000, or at any subsequent time, despite her obligation to do so pursuant to Per 1203.08(b).
22. It was the appointing authority's responsibility to work with the employee to reasonably accommodate the vacation request, not the employee's responsibility. Per 1203.08.
23. The appointing authority took no steps to accommodate the employee's request to take vacation at a particular time.
24. The Department of Revenue Administration violated Per 1203.08(b).

VIOLATION OF Per 1203.08(a)

25. Per 1203.08(a) provides that annual leave shall be granted at such times as, in the opinion of the appointing authority, shall least interfere with the efficient operation of the agency.
26. Granting Mr. O'Connell's leave request would have resulted in a 10-day loss of his labor at a point where the implementation date had been delayed by months and others were available to cover Mr. O'Connell's work.
27. Denial of Mr. O'Connell's leave request, reassignment of him to non-implementation tasks, and termination of him reduced the number of people available to work on implementation.
28. Ms. Koffink admitted that termination of Mr. O'Connell delayed significantly the implementation of the program.
29. Because Ms. Koffink's denial of Mr. O'Connell's leave request interfered more with the efficient operation of the agency than granting of the request would have, the agency violated Per 1203.08 by denying Mr. O'Connell's leave request and terminating him.

VIOLATION OF Per 1203.08(c) AND (d)

30. Per 1203.08(c) and (d) mandate that the employee "shall be afforded the opportunity to take at least one full work week of annual leave per calendar year" (c) and the agency "shall make every effort to grant each employee 2 consecutive weeks of annual leave within each calendar year." (d).

31. In her October 2, 2000, denial of Mr. O'Connell's leave request, Ms. KoBnk made it clear that Mr. O'Connell would not be permitted to take any vacation time until after implementation of the project.
32. Implementation occurred in February, 2001.
33. Mr. O'Connell was denied the opportunity to take any vacation time from September, 1999, to February 12, 2001.
34. Ms. Koffink, and the agency, violated Per 1203.08(c) and (d).

MS. KOFFINK CREATED UNTRUTHFUL DOCUMENTS IN AN EFFORT TO SUPPORT HER DECISION TO DENY MR. O'CONNELL'S VACATION REQUEST

35. In letters dated October 2, 18, and 31, 2000, Ms. Koffink knowingly misrepresented that the implementation date was October 27, 2000.
36. In letters dated October 2, 18, and 31, 2000, Ms. KoBnk knowingly misrepresented that Mr. O'Connell could not go on vacation because the work he was doing was in the "critical path" for an October 27, 2000, implementation date.
37. Commissioner Arnold testified that Ms. Koffink told him that she had denied a vacation request for another supervisor because his work was in the critical path.
38. commissioner Arnold testified that Ms. KoBnk did not tell him that she had approved David King's annual leave request and that he was gone while his work was in the critical path.
39. Commissioner Arnold testified that had he known that Ms. Koffink had approved a request for another employee whose work was in the critical path, he would have asked more questions to determine if she was applying a consistent process of trying to make every effort to allow employees to take vacation when they requested it.
40. Ms. Koffink did not tell Commissioner Arnold that Mr. O'Connell's supervisor had told him he could not submit his annual leave request until he had accumulated the leave or that this was the reason the request was submitted on September 27, 2000, for a vacation October 6, 2000.
41. Ms. KoBnk did not tell Commissioner Arnold that the new implementation date was no longer October 27, 2000, but rather some several months into the future.

MS. KOFFINK REFUSED TO CONSIDER MITIGATING FACTS THAT SHOULD HAVE BEEN CONSIDERED UNDER Per 1203.08

42. There is no State or DRA policy setting forth when an employee may submit a vacation leave request.
43. Mr. O'Connell had every reason to believe that his supervisor gave him correct information about when he could submit his annual leave request.
44. As of September 29, 2000, Ms. Koffink knew that Terri Morrill had incorrectly informed Mr. O'Connell that he could not turn in his annual leave request until he had accumulated the leave time.
45. Ms. Koffink refused to give any consideration to the fact that Mr. O'Connell submitted his request pursuant to his supervisor's direction.
46. Ms. Koffink refused to give any consideration to the fact that, acting in reliance on her statements, Mr. O'Connell had purchased airline tickets and made other financial commitments to take a trip to a foreign country for purposes of visiting family.
47. Ms. Koffink refused to give any consideration to the fact that she had approved leave for a supervisor despite the fact that his work was in the critical path and refused leave for Mr. O'Connell, who she removed from the critical path.
48. Given these mitigating facts, the personnel action was unjust in light of the facts in evidence pursuant to Per A 207.12.

MR. O'CONNELL DID NOT WAIVE HIS RIGHT TO APPEAL

49. On October 27, 2000, Commissioner Arnold terminated Mr. O'Connell, which he confirmed in an October 31, 2000, letter to Mr. O'Connell.
50. The only reason Mr. O'Connell wrote a resignation letter on October 31, 2000, was because he had been terminated.
51. Per 1001.08 states that a resignation may only be effective to bar an appeal if "(3) The employee certifies in writing the employee's understanding that a resignation given in lieu of dismissal for cause may not be resolved through the settlement of disputes, pursuant to Per 202, or by appeal to the board pursuant to the provisions of RSA 21-I:58. . . ."
52. Because Mr. O'Connell's resignation letter did not contain the certification required by Per 1001.08, he is not barred from appealing his termination.

LEGAL STANDARD

53. When an agency violates an administrative rule, the employee shall be reinstated without loss of pay or benefits. Appeal of *Boulay*, 142 N.H. 626 (N.H. 1998).
54. The court will overturn an agency decision "when there is an error of law, or when the order is unjust or unreasonable." *Id.*, Appeal of Kevin *Young*, No. 99-147, March 29, 2001.

LEGAL CONCLUSIONS

55. Because DRA made no effort to accommodate Mr. O'Connell's request for vacation time, it violated the administrative rule that requires it to "make every reasonable effort" to do so. Per 1203.08.
56. Commissioner Arnold testified that he fired Mr. O'Connell because Mr. O'Connell made no effort to work with the agency to reschedule his vacation. Commissioner Arnold did not apply the rule properly when he fired Mr. O'Connell because he ignored the fact that it was the agency's responsibility to make every reasonable effort to accommodate the employee's request.
57. Because the agency's denial of the leave request interfered more with the efficient operation of the agency than granting the request would have, the agency violated Per 1203.08.
58. Because the agency denied Mr. O'Connell any leave during the 2000 calendar year, it violated Per 1203.08(c) and (d).
59. In light of the fact that Mr. O'Connell's supervisor gave him incorrect information about when to submit the leave request and Ms. Koffink had approved leave for another employee while her work was in the critical path and Ms. Koffink removed Mr. O'Connell from doing work in any critical path, the disciplinary action was unjust in light of the facts in evidence pursuant to Per A 207.12(b)(4).
60. Because the agency violated the personnel rules, Mr. O'Connell must be reinstated. Appeal of Kevin *Young*, No. 99-147, March 29, 2001; Appeal of *Boulay*, 142 N.H. 626 (N.H. 1998).

MR. O'CONNELL'S DAMAGES

61. Mr. O'Connell has incurred lost wages for the period from October 23, 2000, to August 17, 2001, (43 weeks) @ \$847.12 per week, which totals \$36,426.16.

- 62: Mr. O'Connell has paid out-of-pocket COBRA payments totaling \$5,184.52.
- 63: Mr. O'Connell's lost wages and out-of-pocket expenses total \$41,650.65.

Respectfully submitted,
DENIS J. O'CONNELL
By His Attorneys
SULLOWAY & HOLLIS, P.L.L.C.

Date: August 15, 2001

By ~~/s/ Eleanor H. MacLellan~~
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CERTIFICATE

I hereby certify that a true copy hereof was delivered this day to Mark J. Bennett, Esq.

Date: August 15, 2001

By ~~/s/ Eleanor H. MacLellan~~
Eleanor H. MacLellan