

State of New Hampshire



PERSONNEL APPEALS BOARD

State House Annex

Concord, New Hampshire 03301

Telephone (603) 271-3261

WPPID638

APPEAL OF EUGENE PAQUIN Department of Transportation Docket #90-T-14

December 6, 1990

The New Hampshire Personnel Appeals Board (McNicholas, Johnson and Bennett) met Wednesday, November 7, 1990, to hear the termination appeal of Eugene Paquin, a former employee of the Department of Transportation (hereinafter "DOT"). Mr. Paquin was represented at the hearing by SEA General Counsel Michael C. Reynolds. Karen A. Levchuk, Assistant Attorney General, represented the Department of Transportation. Those offering sworn testimony included Joan Bickford, James Colburn, Clarence Nelson, Dory Graham, Tammy Reynolds and the appellant, Eugene Paquin.

Following the hearing on the merits, upon the request of the Department of Transportation, the parties were allowed additional time in which to submit closing arguments. The Board established November 21, 1990, as the last date by which such arguments could be submitted. Both parties submitted such closing arguments at the close of business on the date required.

The appellant contends that DOT's decision to discharge him for being absent for three or more consecutive days without notice or adequate excuse was improper, and that "Ms [Tammy] Reynolds' last call to the appointing authority was clearly intended to put the employer on notice that Mr. Paquin would be out of work from that point forward".

The appellant also argues that "...since adequate excuse was given although perhaps not given as quickly as would have been desired, at least in substantial part due to the employer's faulty understanding of the workers' compensation laws and due to an apparent lack of any desire to fully investigate Mr. Paquin's claim that he was suffering a recurrence of his previous work injury, this was not an optional immediate discharge". The Board does not agree.

After due consideration of the record in this matter, the Board unanimously voted to uphold the Department's decision to discharge Mr. Paquin under the Optional Discharge Provisions of Per 308.03 (2) d.

Mr. Paquin was absent from work at DOT for a period of approximately three and one-half years beginning in 1986, due to a work related injury. On December 1, 1989, his treating physician approved his return to work on a full-time basis. As early as February, 1989, his physician was reporting "...the patient has shown poor compliance with any suggestions or programs we had made for him."

Appellant argues that his failure to be "compliant" was the result of reluctance to undergo surgery. The record, however, does not support such a finding. On the contrary, the various medical reports submitted as evidence, and incorporated into the record of the hearing, support a finding that **Mr.** Paquin's treatment throughout the period of his disability was difficult to manage because of his continuing failure to abide by his physicians' recommendations, to keep or to be on time for scheduled appointments, or to follow through on any treatment plans devised for Mr. Paquin by his physicians,

Mr. Paquin was initially injured on March 12, 1986, and was hospitalized for observation on the orders of the treating physician. Dr. Melkonian's discharge summary completed following that period of hospitalization included the notation that, "On 3/13, the patient intentionally left the hospital because he said that he had to talk with his girlfriend. Apparently, he left his Philadelphia collar when doing this. He returned early the following morning. I explained very carefully at that time that this was a major mistake with the fracture of his back in spine [sic], he compromised his therapy, and this could cause him problems in the future. We discussed this in long detail." Paquin was scheduled for a follow-up visit on 3/31/86 and was listed in the physician's records as a no-show.

Although this information has no direct bearing on Mr. Paquin's eventual discharge for being absent for an extended period of time without approved leave, and failing to properly notify his employer of his absence in a timely fashion, it does illustrate a pattern of behavior which continued throughout the period of his absence due to disability, his eventual return to work, and the circumstances leading to his discharge.

Surgery was recommended by Dr. Sachs on December 31, 1986, with a notation that surgery would be scheduled following a cervical myelogram, which was performed in mid-February, 1987. In the physician's report of that date, he indicated that the appellant would be sent for a second opinion from Dr. Martin Craig from the University of Vermont, and if the recommendation for surgery were confirmed, scheduling would follow.

In August 17, 1986, his physician reported, "We last saw Eugene in February, at which point we had recommended an anterior cervical discectomy and

interbody fusion at C5-67, and the patient wanted to think about this. . . The patient was somewhat reluctant to undergo surgery at that time, but states that now, with his persistent pain and problems and his weakness, he is ready to undergo surgery. He realizes that he cannot continue the way he is, and would like to have something done definitively. He therefore returns, with a request to undergo surgery."

The record indicates there was an intervening period of physical therapy and testing, but there is little evidence of follow-up on the issue of surgery until February 8, 1989, when Dr. Sachs reported that he had not been seen since August, 1987. "We note that the patient was seen in August and we talked about cervical discectomy at that time,. . . He had a second opinion by Dr. Martin Craig at the University of Vermont with concurrence for our recommendations. The patient then never followed up with us and never followed through for surgery and was really lost to follow up somewhere. Therefore, the patient has shown poor compliance with any suggestions or programs we had made for him."

March 1, 1989, following an appointment with the appellant, Dr. Sachs reported, "As we had suggested in the past, [Paquin] has remained noncompliant and will take no responsibility for his care, health, or well being. The patient did not follow through with our recommendations for conservative management or for the physical capacity assessment evaluation or for the B200 evaluation or for the work tolerance program. He missed his appointments and states that he really knows nothing about that and does not understand. He wants surgery. The patient, therefore, has been noncompliant with our recommendations." "I have no ability to determine a permanent impairment status on this individual since he has not followed through with recommendations. I now consider him noncompliant and have put him on a follow up basis only prn if he is to follow through with recommendations."

Following a physical capacity evaluation by Dr. Sachs on March 13, 1989, he reported "conservative management over a long period of time" had not resolved his medical problems... At this time, patient demonstrates decreased cervical range of motion and stated increased numbness of his hands during the end ranges of his range of motion. We will attempt a program that will help with strengthening and increase his spine and cervical motions to see if we can increase patient's functional capabilities and decrease his symptoms. The patient understands these goals and is willing to participate in the program."

Paquin was to participate in a work tolerance program and attended fifteen sessions. He was scheduled to finish the program on May 1, 1989 but cancelled the program, stating he "felt fine". It was noted he could be released for work with certain limitations.

Paquin was again listed as a "no-show" on follow-up appointments. On August 8, 1989, his physician again reported, "We have noted on numerous occasions that this patient is poorly compliant with any recommendations that we have given him and he again confirmed that with a no-show appointment and a change

in his appointment status from June 29, 1989 so he has dragged out another 2/1/2 months of time since we last evaluated him." "...I have recommended a referral to Dr. Gary Woods for his carpal tunnel syndrome. We do not need to see him in our office except on a prn basis and we will not be scheduling him for another follow up appointment. I think that this patient should return to work and start functioning at the capabilities that he has been tested out for and has demonstrated through the NH Center for back care." He did not appear for the scheduled appointment on August 31, 1989.

Paquin did see Dr. Woods on October 5, 1989. Dr. Woods noted, "At this juncture, it is difficult to delineate exactly the intensity of each component of the patient's symptoms. In view of the fact that he has very strong calluses throughout his hands and fissures with grime, he clearly is not limited to any significant degree. There is no hard neurologic changes today to suggest a severe involvement of the median nerve, either right or left." Dr. Woods concluded that he would try Paquin on some anti-inflammatories, put him in a wrist splint (left side only) and review him "in a couple of weeks". When examined by Dr. Woods on October 18, 1989, Woods reported Paquin had told him he was actively seeking other employment, with Dr. Woods' concurrence. Woods also indicated he would see Paquin again in six weeks, but noted that Paquin was "really not very limited at all in terms of his functional capacity due to his hands and the very limited electrical indicators for carpal tunnel coupled with no real hard neurologic changes evident."

The Board does not question the seriousness of the appellant's medical complaints. The Board does note, however, Mr. Paquin failed to document any meaningful attempt he may have made to participate in his own treatment plan, to adhere to the recommendations of numerous practitioners and specialists, to keep many of his appointments, or to complete programs of treatment or therapy. With that assessment of Mr. Paquin's disregard for his physicians' orders, the Board is hard pressed to accept that after more than three and one half years of ignoring his physicians' advice and orders, he felt compelled to remain absent from work without excuse or adequate notice on the advice of a physical therapist.

The Board finds it equally implausible that Mr. Paquin could have believed that the therapist's recommendation dated 4/4/90 would provide sufficient excuse for him to remain out of work indefinitely when he failed to personally contact his employer, failed to submit any recognizable claim of injury or work-related aggravation of an existing condition under the Workers' Compensation statutes, and supplied no documentation of illness or injury until several weeks after the effective date of his termination.

Mr. Paquin argues that he did provide "adequate excuse" for his lengthy absence and failure to personally contact his employer. As the record reflects, Mr Paquin returned to work on December 1, 1989, reporting to work 40 minutes late the first day, and failing to report to work at all on December 2, 1989. The record of Mr. Paquin's appeal confirms the following absences:

Friday, December 1, 1989 40 minutes late
Monday, December 4, 1989 No show
Monday, December 11, 1989 10 minutes late

Douglas Graham wrote to Mr. Paquin on December 11, 1989, indicating that lateness or failure to report to work would not be tolerated. He attached a copy of a December 8, 1989 letter from Clarence Nelson to James S. Colburn outlining Mr. Paquin's absences and DOT's proposed course of action and possible discipline to be imposed if he did not comply. He was reminded to report to work not later than 7:00 a.m.

Tuesday, December 12, 1989 Called in at 7:00 a.m., claiming he might have a frozen septic system
Thursday, December 14, 1989 5 minutes late
Friday, December 15, 1989 15 minutes late
Wednesday, December 26, 1989 Call received from Tammy at 8:40 a.m. to say Paquin would not be in. No specific leave was requested. Paquin submitted a sick leave request on returning to duty, noting "flu" as the reason for absence.
Monday, January 8, 1990 Woman called in at 7:10 a.m. indicating Paquin would be late. His alarm did not go off. He did not report at all.
Tuesday, January 9, 1990 6:55 a.m. "Gene's girlfriend" called in saying that he has asked her the night before to report that if he did not report for work by 7:00 a.m. he would not be in, that his neck was bothering him.
Wednesday, January 10, 1990 Request submitted for 16 hours sick leave citing "stiff neck" as the reason for the absence.
Wednesday, January 24, 1990 9:10 a.m. call from Paquin requesting sick leave. Slip submitted 1/25/90 citing "stiff neck".
Thursday, February 1, 1990 7:22 a.m. call from Paquin requesting sick leave. Slip submitted 2/2/90 listing "flu" as reason for absence.
Monday, February 26, 1990 7:55 a.m. call from "Tammy" requesting sick leave for Paquin.
Tuesday, February 27, 1990 6:50 a.m. call, possibly from Paquin's son, reporting Paquin was sick. No sick leave slip admitted into evidence.

March 12, 1990 - James S. Colburn wrote to Paquin (receipt acknowledged by Paquin on 3/20/90) advising Paquin that information from Workmen's compensation to DOT gave Paquin a "clean bill of health" and could perform

all the duties assigned. The letter informed him that his leave was generally being taken with little or no notice and that any further requests for sick leave must be submitted with a statement from a health care practitioner stating that use of sick leave was necessary, and that any other leave taken without prior approval would be considered unauthorized leave.

Tuesday, March 13, 1990

7:33 a.m. call from Paquin, indicating trouble finding a babysitter - no indication of how long he might be out or late.

Wednesday, March 14, 1990

Paquin did not report to work and did not call in.

March 20, 1990 Graham and Nelson met with Paquin to discuss his leave. Graham wrote Paquin a follow-up letter reminding Paquin that "the use of unauthorized leave can be a matter of further action, up to and including dismissal."

Monday, April 2, 1990

8:50 a.m. call from "Tammy" indicating Paquin was going to therapy that day.

Tuesday, April 3, 1990

9:10 a.m. call from "Tammy" - Paquin would be out the rest of the week with a pinched nerve, and would be going to therapy that day.

Monday, April 9, 1990

9:00 a.m. call from Paquin - to tell Clarence that he would not be in that day and might not be in for the rest of the week.

Monday, April 16, 1990

11:45 a.m. call from Tammy saying Paquin would be out all week.

None of the documents indicate that a call was received from either the appellant or his friend during the week of April 23, 1990, or that DOT had any way of knowing why Paquin was absent on April 23rd or any day thereafter. Even if the Board were to construe the calls from Tammy on April 3, at 9:10 a.m. from Paquin, April 9, 1990 at 9:00 a.m. and from Tammy April 16, 1990 at 11:45 as sufficient notice for each week in question, there was no contact with DOT concerning Mr. Paquin's absence for the week beginning April 23, 1990. As such, the Board concurs with the Department of Transportation in finding that Mr. Paquin was absent for a period of six consecutive work days without notification to his department, and without adequate excuse for failure to provide such notice.

At the time of Mr. Paquin's return to work in December 1989, he was provided a copy of work rules for the Traffic Bureau dated October 2, 1989. Item #6 provides that "If you are ill and unable to report for work, please advise the Traffic Maintenance Supervisor or his designee within 30 minutes of your scheduled report time for work. Employees shall call every day that they are out, unless it is an injury of extended duration, such as a broken leg..." In

Mr. Paquin's case, the weekly telephone calls from his girlfriend on April 2, 1990, April 9, 1990 and April 16, 1990, did not conform to the reporting provision listed above. The Department of Transportation would have had no reason to conclude that Paquin might have suffered "an injury of extended duration".

The appellant has argued that DOT "...was put on clear notice that **Mr.** Paquin was claiming a recurrence of his March 6, 1986 work injury". The record will not support such a conclusion. Item #14 of the October 2, 1989 directive to all bureau employees stated, "Employees who sustain an injury on the job will report the injury to their immediate supervisor and the Bureau's Worker's Compensation Agent. The Traffic Maintenance Supervisor will also be notified of any and all injuries. It is vital that an injury, no matter how small, be reported and the proper reports completed in a timely manner. This will serve as a source of protection to the employee should something serious develop in the future as a result of an injury that occurred on the job."

The issue of disability and workers' compensation had already been raised by the Department of Transportation in James Colburn's March 12, 1990 memo to Paquin which stated,

"I have been reviewing your attendance record and am concerned about the amount of times you are absent from work. Since returning on December 1, 1989 you have been out 9 days, and late for work 6 times. Even though this is 'without pay', it does not reflect well on your work habits or interest in your job. I have also noticed that your sick slips contain a reference to recurring neck and back problems. Although I can't attest to your condition, I was advised by the Worker's Compensation Board that you had 'a clean bill of health' and could perform all duties required of you."

Attached to the March 12, 1990 memo from Colburn to Paquin was yet another copy of the October 2, 1989 bureau work policies.

While the Board would not find such statement to constitute a direct inquiry into the appellant's medical condition, it certainly should have put Paquin on notice that DOT had not considered any of his absences for complaints of a "stiff neck" to be related to his prior Workers' Compensation claim. The record does not indicate that Paquin made any contact with a health care professional between December 1989 when he returned to work and April 1990 when he saw Dr. Fox.

Additionally, according to the testimony, **Mr.** Paquin was not injured on the job. He was at home bending over to tie his shoes when the aggravation of his old injury occurred. He had not previously complained of any work related injury or suggested that he had suffered a recurrence of his earlier injury. He provided no information about his absence to DOT until well after the effective date of his discharge for absenteeism for a period of three or more consecutive days without proper notice or adequate excuse.

Mr. Paquin's argument that he did not provide personal notice because he had no phone and found it easier to ask his girlfriend to call in for him is without merit. When Paquin returned to work, he was provided a copy of the October 2, 1989 "BUREAU OF TRAFFIC WORK POLICY" memo from James Colburn to All Traffic Bureau Employees. That memo included the clear instruction that the employee was to advise the Traffic Maintenance Supervisor or his designee within 30 minutes of his scheduled report time for work in the event of absence due to illness or injury, and to call daily in the event of such absences. *Mr.* Paquin was clearly advised by memo dated March 12, 1990 and March 21, 1990, that his use of unapproved or unauthorized leave would result in disciplinary action, up to and including discharge.

On April 24, 1990, *Mr.* Paquin was issued a formal letter of warning for absenteeism without approved leave, and without any substantiation from a physician or licensed health care practitioner indicating that the appellant was either injured or ill and therefore unable to return to work. *Mr.* Colburn's letter specifically stated, "Unless you can provide me with certification of injury or disability, I must assume that you are capable of performing your functions as a pavement marking foreman. You are expected to return to work immediately." Although the appellant offered evidence that having failed to pick up his mail in a timely fashion, he did not receive the letter of warning until April 30th, he gave no plausible excuse for failing to contact DOT at that time to explain his absence, to provide the required certification of injury or illness, or even to request additional time in which to provide such certification.

The appellant referred to the "approved" leave status *Mr.* Paquin would have enjoyed had the Department of Transportation properly accepted and processed his claim. Again, the Board is without evidence of a report of injury or claim of recurrence of an earlier injury, except for that provided by *Ms.* Reynolds' reports that Paquin was going to therapy or was suffering a stiff neck. The parties agree that *Mr.* Paquin did not suffer injury on the job, and that any injury from which he may have been suffering occurred on April 2, 1990. The appellant insists, however, that a telephone call from his girlfriend to DOT staff should have constituted sufficient notice for DOT to begin processing a Workers' Compensation Claim. In consideration of the record before it, the Board does not agree.

The Department of Transportation's letter of termination, dated May 1, 1990, states, "I regret that I must terminate your employment, but I can no longer tolerate your failure to report to work or to provide justification for your absences". The appellant's contention that notice was given and was adequate is unsupported by the record.

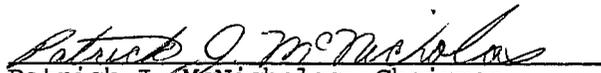
First, the Department of Transportation can not be held accountable for *Mr.* Paquin's failure to retrieve certified mail. Secondly, by his own admission, *Mr.* Paquin had at least two days prior to the Department's mailing his letter of termination, to provide personal notice to the Department of the circumstances behind his absence. The Department's letter specifically stated:

"Unless you can provide me with certification of injury or disability, I must assume that you are capable of performing your functions as a pavement marking foreman. You are expected to return to work immediately." (Emphasis added)

"Any further failure to report to work without prior approval or documentation from a physician will be considered willful insubordination, giving rise to termination under Per 308.03."

The Board finds that Mr. Paquin had ample warning that the Department did not intend to continue his employment without immediate verification of his inability to return to work. While the Department may not have objected to the calls from Tammy late Monday mornings during his first three weeks of absence, her last call on April 16th reported Paquin would be out "all week". The Board does not believe anyone at DOT was informed that Paquin would be out indefinitely. Consequently, the Department did not act unreasonably in determining that from April 23, 1990 through April 27, 1990, and again on April 30, 1990, Paquin was absent without proper notice or excuse. Mr. Paquin did not contact the department. Ms. Reynolds did not contact the department. Mr. Paquin neither reported immediately for work as directed nor provided documentation from a physician.

THE PERSONNEL APPEALS BOARD


Patrick J. McNicholas, Chairman


Robert J. Johnson


Mark J. Bennett

cc: Michael C. Reynolds, SEA General Counsel
Karen Levchuk, Assistant Attorney General, Transportation Bureau
Virginia A. Vogel, Director of Personnel
Civil Bureau, Attorney General's Office

State of New Hampshire

WPPID659



PERSONNEL APPEALS BOARD

State House Annex
Concord, New Hampshire 03301
Telephone (603) 271-3261

APPEAL OF EUGENE PAQUIN

Response to Appellant's Motion for Reconsideration and Rehearing
Docket #90-T-14

January 10, 1991

By letter dated December 26, 1990, SEA General Counsel Michael C. Reynolds filed a Motion for Reconsideration and Rehearing in the matter of Eugene Paquin (Docket #90-T-14) relative to his termination from employment with the Department of Transportation. In its order of December 6, 1990, the Board denied Mr. Paquin's appeal.

The issues raised by the appellant in support of his request for reconsideration and rehearing are the same issues raised during the hearing on the merits, and in appellant's closing arguments. Mr. Paquin argues that he was medically unable to return to work, that his leave slips and telephone contacts with the Department were sufficient notice to the Department that he had suffered a recurrence of his 1986 injury, and that he was under no obligation to document the nature or extent of his disability until he was able to return to work.

Whether or not Mr. Paquin was disabled, and whether or not Mr. Paquin had any viable claims for compensation under the statutes governing Workers' Compensation are not pivotal factors in determining the appropriateness of the decision to discharge Mr. Paquin from his employment. Mr. Paquin was provided notice by the Department of Transportation that failure to return to work or, in the alternative, failure to provide certification of injury or disability, would result in his discharge from employment. Mr. Paquin did not return to work, did not provide certification of injury or disability, and in fact failed to respond in any fashion to the Department of Transportation following receipt of the April 24, 1990 letter of warning, which clearly warned of immediate discharge.

Mr. Paquin attempts to place the entire responsibility for assessing his ability or inability to return to work upon the Department of Transportation, and appears to claim protection from discharge by virtue of his disability. He also argues that nothing in the statutes, administrative rules, or Collective Bargaining Agreement require prior approval for an absence due to a work-related injury, or recurrence of a work-related injury.

APPEAL OF EUGENE PAQUIN

Response to Appellant's Motion for Reconsideration and Rehearing
Docket #90-T-14

page 2

As the letter of termination clearly stated, the Department would not tolerate the appellant's "failure to report to work or to provide justification for [his] absences." (Emphasis added.) The Department did not discharge the employee for failing to request leave, nor did the Department suggest that he must request sick leave in the event he claimed to be injured or disabled. The Department informed the appellant that he must report to work or certify his absence if he wanted to avoid termination. The appellant chose to make no response at all. The Board knows of nothing in the statutes, administrative rules, or Collective Bargaining Agreement which provides the kind of blanket exemption from reporting to which the appellant seems to feel entitled.

Throughout his request for reconsideration, the appellant highlights portions of the Board's order of December 6th, referring to what the Department of Transportation should have known, stating it "is simply unreasonable and incredible to conclude that DOT did not have 'any way of knowing why Paquin was suffering a recurrence of his original work injury...' and "to say that the department would have had no reason to so conclude is unreasonable and clearly against the weight of the evidence." The record reflects that Mr. Paquin's most recent injury resulted from his bending over to tie his shoes while at home, away from the workplace. The Board does not find it unreasonable or even slightly incredible to believe that DOT would have no way of knowing that he might have injured himself while dressing for work.

The appellant is reminded that in appeals of a disciplinary nature, the appellant bears the burden of proof. Admittedly, the Department could have reached a variety of conclusions concerning Paquin's absences, one of which would have been to assume he had re-injured himself, or intended to claim a recurrence of an old injury. The Department was not so advised, however, and the Department was not required to stay any personnel action on the assumption that Paquin might eventually claim his absence to be due to an alleged compensable injury.

The appellant's entire request for reconsideration is predicated upon the contention that DOT should have assumed or known his absence to be a recurrence of a compensable injury, and as such should have been barred from requiring him to provide certification of his disability until such time that he returned to work. The appellant concludes, "As has been previously argued, Mr. Paquin did in fact give a great deal of information about his absence, albeit most of it through someone else, (the fact that it came through a third party was never complained of by D.O.T. in the letter of termination)."

Again, the appellant chooses to ignore the plain fact that when directly ordered to either report to work or provide certification of injury or disability, the appellant initiated no contact of any kind, either in person or through a third party. In order to succeed in his appeal of his termination, Mr. Paquin bore the burden of proving that the Department illegally discharged him. On the contrary, the Board found that DOT gave the

APPEAL OF EUGENE PAQUIN

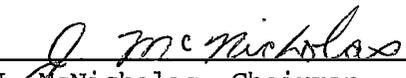
Response to Appellant's Motion for Reconsideration and Rehearing
Docket #90-T-14

page 3

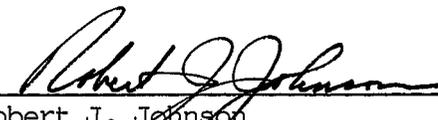
appellant good and sufficient warning that his failure to report to work or, in the alternative to certify his absence was due to injury or disability would result in his discharge. Having failed to comply, he was discharged.

Based upon the foregoing, the Board affirms its earlier order, finding that the appellant has failed to meet his burden of proof. Therefore, appellant's Motion for Reconsideration and Rehearing is denied.

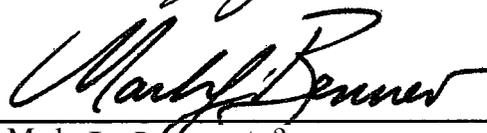
THE PERSONNEL APPEALS BOARD



Patrick J. McNicholas, Chairman



Robert J. Johnson



Mark J. Bennett

cc: Michael C. Reynolds, SEA General Counsel
Karen A. Levchuk, Assistant Attorney General, Transportation Bureau
Commissioner Charles P. O'Leary, Department of Transportation
Virginia A. Vogel, Director of Personnel
Civil Bureau, Office of the Attorney General