

State of New Hampshire

WPPID1047



PERSONNEL APPEALS BOARD

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APPEAL OF NORMA SCHEERER

Docket #92-T-32

Department of Environmental Services
February 16, 1993

The New Hampshire Personnel Appeals Board (McNicholas, Bennett and Johnson) met Wednesday, February 3, 1993, to hear the appeal of Norma Scheerer, a former employee of the Division of Water Resources, Department of Environmental Services. Ms. Scheerer was discharged from her position of Word Processor Operator I, effective at the close of business on June 8, 1992, by issuance of a third and final warning for excessive absenteeism. On June 22, 1992, Ms. Scheerer timely filed an appeal of her termination to the Personnel Appeals Board. The Department of Environmental Services was represented at the hearing by Human Resource Administrator John Roller. Testifying on behalf of the Department was Ken Stern, Chief Engineer, Water Resources Division. The appellant appeared pro se.

In his letter to the appellant dated April 16, 1992, Director Downing advised the appellant that between July 1, 1991 and April 16, 1992, she had been absent more than 38 days (84.25 hours sick time, 207.75 hours leave without pay). He noted she had been granted a leave of absence without pay from March 6, 1992 to March 19, 1992, and that while the appellant did return to work on March 20th, she was then absent 8 of the next 20 working days. Mr. Downing advised the appellant that "...excessive absence is not a reasonable accommodation for the medical problem you asserted to have. Your job must be filled full time; your work unit suffers when your absenteeism persists. ..."

The appellant received a second letter of warning on April 27, 1992, advising that between April 16, 1992 and April 23, 1992, she had missed an additional four days of work. That letter also reminded her of the "...shortage of clerical assistance in the division and [that] the available support we do have cannot afford to absorb your workload in addition to their own."

A final letter of warning, serving as notice of termination, was issued to the appellant on June 8, 1992. In that letter, Director Downing noted that between April 27, 1992, and June 8, 1992, the appellant was absent an

additional 19 days without approved leave. Ms. Scheerer was advised her last day of work would be June 8, 1992, and that she had fifteen days in which to initiate an appeal of her termination if she did not believe the termination was justified. A timely appeal was filed with the Board on June 22, 1992.

After the close of the hearing, the Department of Environmental Services submitted to the Board its proposed findings of fact and rulings of law. Per-A 202.04 (a) of the Rules of the Personnel Appeals Board provides that such requests may be submitted at the close of the hearing. Although Per-A 202.04 (b) also allows the Board to extend the time for submission of such requests, no good cause was shown for accepting the Department's requests after the close of the hearing. Therefore, the Board made findings of fact and rulings of law as follows:

Ms. Scheerer worked for the Water Management Bureau of the Department of Environmental Services from November 18, 1988, through June 8, 1992. Approximately six months after being hired, she recommended to the Division Director, Delbert Downing, that "designated smoking areas" be defined "...between the front desk and Vernon's office as it is, and down at the end of the hall where they do smoke". Several weeks later, on May 29, 1989, Ms. Scheerer called in sick, saying she was having an allergic reaction to cigarette smoke. Her supervisor, Mr. Stern, relayed that information to Mr. Downing in a memo dated May 29, 1989.

Mr. Stern concurred that smoking near Ms. Scheerer's work area was a possible problem, but he believed Ms. Scheerer's "allergic reactions" might be indicative of a broader problem. He advised Director Downing that Ms. Scheerer had already complained of an "allergic reaction" to working at the computer, that she was experiencing weakness, dizziness and nausea. In response, Mr. Stern had reduced her data entry duties to less than an hour a day, as well as suggesting the appellant have her vision tested. Although the test revealed that Ms. Scheerer needed new glasses, she had told Mr. Stern she couldn't afford them at that time. Mr. Stern also mentioned difficulties Ms. Scheerer had experienced communicating with a co-worker. He stated that Ms. Scheerer would sit idle at the computer rather than seek assistance, saying she "couldn't talk to" her co-worker. Mr. Stern said the communication problem eventually was resolved after he advised Ms. Scheerer her actions were unacceptable. In his May 29, 1989 memo, Mr. Stern said that he suspected Ms. Scheerer's "...general dissatisfaction with the work environment may be causing these symptoms."

It is unclear who requested assistance from the Division of Public Health Services in designating appropriate smoking and non-smoking areas. The record reflects a survey was completed prior to June 12, 1989, by the Division of Public Health. Upon review of the information provided by the Division of

Public Health, and having concluded that it was not possible to effectively segregate "designated smoking areas" from the remainder of the office, the Department of Environmental Services eliminated smoking altogether on the floor where Ms. Scheerer worked.

In June, 1990, Ms Scheerer began complaining that ceiling tiles in an office adjacent to hers had been soaked by several air conditioner malfunctions. She said they were contaminating the air in her work area and suggested it was time for the Department to ask that air quality testing be undertaken in the building.

The Department of Environmental Services had the air quality tested in the building in July, 1990. All results were in the normal range. The Department, which leases the offices for the Water Resources Division, also contacted the building owner about maintenance on the heating/air conditioning system, and additional steps which might be taken and possible costs which might be incurred for remediation in the event the air quality testing yielded unacceptable results. The owner had been performing routine maintenance on the heating and cooling systems at regular intervals.

According to Ms. Scheerer's physician:

"Ms. Scheerer was found to be sensitive to mites, cockroach and mold. She seems to have increased symptoms while at work." (See Dr. Goldman's note addressed "Dear Sir", dated May 15, 1990).

"Norma Scheerer is allergic to dust, mites and molds as well as cockroach. It would be very useful for her if sources of these materials such as heating ducts were cleaned at reasonable intervals. Since all are in dust, a relatively dust free environment is helpful." (See Dr. Goldman's note addressed to Mr. Downing, dated March 31, 1992)

Additional air quality testing was conducted by the State in May, 1992, with continuous air sampling taken at the appellant's desk to measure respirable dust, the most likely source of air borne allergens identified by Dr. Goldman, Ms. Scheerer's physician. No respirable dust was detected.

Having reviewed the grounds for appeal set forth in Ms. Scheerer's June 22, 1992 appeal in light of the testimony and evidence presented by the parties, the Board found that the Department of Environmental Services acted in good faith when it discharged Ms. Scheerer from her Word Processor Operator position. Ms. Scheerer, who testified she had suffered from allergies to dust, mold, mites, cockroaches, trees, weeds, grasses and horses, for at least ten years prior to her employment with the Department of Environmental

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Services, was allowed to take leave as needed to attend medical appointments and receive treatment for her allergies.

When Ms. Scheerer requested that designated smoking areas be established in the Bureau, and when the Division of Water Resources learned it could not completely segregate smoking from non-smoking areas, the Department eliminated all smoking on Ms. Scheerer's floor of the building. When Ms. Scheerer continued complaining of poor air quality, knowing Ms. Scheerer's physician suspected her allergic/asthmatic reactions were to dust-borne allergens, the Division undertook extensive air quality testing and initiated discussions with the building owner about improving air quality. Although the appellant complained the Division had not tested for the presence of mold spores, her physician had advised that the air borne allergens would be present in dust, and maintaining a dust-free environment would be helpful. Repeated testing revealed no respirable dust at the appellant's work area.

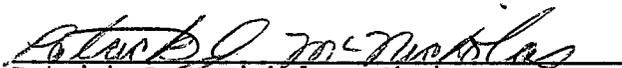
The evidence does not support a finding that being moved to another room in the offices was ever suggested by the appellant. Mr. Stern testified there was no reason to believe moving her would have any beneficial effect. In fact, Mr. Stern testified that while he could have moved Ms. Scheerer, and probably would have moved her if she had asked, he did not recall her ever asking. The Board believes Mr. Stern would have approved such a suggestion had it ever been made. Scheerer herself described Mr. Stern as "one of the nicest bosses I've ever had", an individual who "didn't care how you got your work done as long as you got it done", and one who was apt to say, "If you're sick at the computer, go do something else."

The record reflects that every time Ms. Scheerer identified a potential medical reason for her absences, the Department responded to the extent that it was able. When she complained of smoking on her floor of the building, smoking was eliminated. When she complained that working at the computer made her ill, her time at the computer was restructured and reduced significantly. When Ms. Scheerer complained of air borne allergens allegedly present in dust in her work area, the Department tested for the presence of dust and monitored routine maintenance to improve air quality if necessary. In short, the Board found that the Department of Environmental Services provided every accommodation which the appellant suggested within her work area and on her floor of the building.

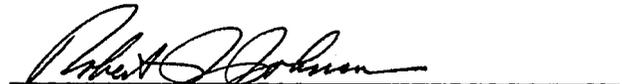
The record supports a finding that as long as Ms. Scheerer was getting most of her work done, no disciplinary action was taken. Even when Ms. Scheerer had exhausted all available leave and had fallen seriously behind in updating the computerized water users data base, the Department approved leave without pay. Finally, in April 1992, after granting the appellant a 2 week leave without pay, the Department initiated disciplinary action.

After considering the testimony and evidence presented by both parties, the Board voted unanimously to deny Ms. Scheerer's appeal. Per 1001.08(e)(1) of the Rules of the Division of Personnel provides that "An appointing authority shall be authorized to dismiss an employee pursuant to Per 1001.03 by issuance of a third written warning for the same offense within a period of 2 years." Ms. Scheerer received three written warnings within a period of 2 years for the offense of excessive absenteeism. The offense of excessive absenteeism was well documented. The Department of Environmental Services made every reasonable attempt to assist Ms. Scheerer in resolving her medical complaints and was not obligated to authorize additional paid or unpaid absences as a form of accommodation.

THE PERSONNEL APPEALS BOARD


Patrick J. McNicholas, Chairman


Mark G. Bennett


Robert J. Johnson

cc: Virginia A. Lamberton, Director of Personnel
Ms. Norma Scheerer, RR #2, Box 496, Epsom, NH 03234
John Roller, Human Resource Administrator, Dept. of Environmental Services
John Dabuliewicz, Assistant Commissioner, Dept. of Environmental Services