

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2003-0255, Appeal of John Thyng, the court on June 8, 2004, issued the following order:

The employee, John Thyng, appeals a decision of the New Hampshire Personnel Appeals Board (board) upholding his written warnings and his dismissal from employment. He contends that his due process rights were violated and that the decision of the board was otherwise unreasonable and unlawful. We affirm.

We will affirm the board's decision unless we find an error of law or by a clear preponderance of the evidence that it is unjust or unreasonable. See RSA 541:13 (1997).

The employee challenges letters of warning that he received on December 21, 2000, and December 21, 2001. The evidence supports the board's findings that in 2000, the employee left an unlocked vehicle unattended with the engine running, and that in 2001, the employee was late for work and did not telephone his supervisors to inform them that he would be late. Accordingly, we affirm the board's denial of the appeals of those two letters of warning. We also agree with the board's ruling that it would not overturn the employee's October 2000 disciplinary suspension in light of the employee's failure to appeal that suspension to the board.

The employee also challenges his termination. On December 31, 2001, the employee was issued an unsatisfactory performance evaluation and a notice of dismissal. The termination was based upon New Hampshire Administrative Rule, Per 1001.08 (b)(2), which authorizes dismissal by issuance of a fifth written warning for different offenses within a period of five years. We agree with the State that the employee has not demonstrated any substantial violation of the applicable rules. See Colburn v. Personnel Commission, 118 N.H. 60, 63 (1978) (discharge procured in the face of substantial violation of rules is invalid); cf. McIntire v. Woodall, 140 N.H. 228, 230 (1995) (showing of actual prejudice necessary to prevail on due process claim). We find no substantial violation of New Hampshire Administrative Rule, Per 1001.08(c) -- the dismissal notice specifically listed the disciplinary actions upon which the termination was based. As the board indicated, the employer was under no obligation to revisit the conduct underlying each of the disciplinary actions. We are also not persuaded by the employee's argument that Mr. DeNutte was personally required to meet with the employee.

In Case No. 2003-0255, Appeal of John Thyng, the court on June 8, 2004, issued the following order:

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We agree with the board that the employer's knowledge and awareness of the employee's history, including awareness of warnings more than five years old, does not equate to inclusion of that history as a basis for termination. While the parties stipulated to the admission of a number of documents upon which the appointing authority "relied," it is clear that the board and the parties did not understand that stipulation as setting forth the basis for the employee's termination. The employee's counsel noted that he was not stipulating to the accuracy of the exhibits in question, but indicated that there was "no sense in going through a big authentication process." We do not read the stipulation as being inconsistent with the board's findings, which are supported by the evidence, that the employer's cognizance of the employee's history does not mean that the employer based the termination upon improper facts or failed to comply with Rule 1001.08. Cf. Appeal of Boulay, 142 N.H. 626, 628 (1998) (employer violated Rule 1001.08 by failing to provide important details of investigation into specific misconduct that formed basis for termination).

We have reviewed the employee's remaining arguments and find them to be without merit. Accordingly, we affirm.

Affirmed.

BRODERICK, C.J., and NADEAU and DALIANIS, JJ., concurred.

**Eileen Fox,
Clerk**

Distribution:

NH Personnel Appeals Board

2002-T-12, 2002-D-10, 2002-D-11, 2002-D-13

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File

Note - Signed
Original decision
transferred to
NH Supreme
Court -
Case No 2003-0255

Appeals of John Thyng, Jr.

Department of Administrative Services, Bureau of Emergency Communications

Docket #2002-T-12, #2202-D-1 #2002-D-11 and #2002-D-13

December 5, 2002

The New Hampshire Personnel Appeals Board (Wood, Johnson and Urban) met under the authority of RSA 21-I:58 and Chapters Per-A 100 – 2002 of the NH Code of Administrative Rules on June 5, June 6, June 12 and July 10, 2002¹, to hear the appeal(s) of John Thyng. Mr. Thyng, a former employee of the Bureau of Emergency Communications, was appealing his December 31, 2001 termination from employment after receiving multiple written warnings for various offenses. Mr. Thyng was represented at the hearing by Michael C. Reynolds, SEA Legal Counsel, and Barbara Klein, SEA Legal Intern. Assistant Attorney General Andrew Livernois appeared on behalf of the State. For the sake of administrative economy, the parties agreed that relevant evidence from each appeal could be considered in any of the remaining appeals. Neither party objected to the composition of the Board convened to hear the appeal(s).

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:

¹ The record of the hearing did not close until July 23, 2002 when the parties submitted written Closing Arguments. The Board also informed the parties on the final day of the hearing that in light of the amount of evidence offered by the parties and the number of cases under appeal, it was probable that a decision might not be issued within 45 days of the close of the record.

State's Exhibits (page numbers and identification as provided by the State):

- A. Performance Summary for John Thyng dated January 31, 1996 (pp. 1 – 4)
- B. Written Warning for Tardiness dated September 15, 1997 (pp. 5 – 6)
- C. Written Warning for Tardiness dated September 15, 1997 (p. 7)
- D. Written Warning for Tardiness dated September 24, 1997 (p. 8)
- E. BEC Memo from Timothy Fountain to Peter DeNutte dated November 2, 1998 (p. 9)
- F. BEC Memo from Timothy Fountain to Peter DeNutte dated December 4, 1998 (p. 10)
- G. BEC Memo from Timothy Fountain to Peter DeNutte dated January 22, 1999 (p. 11)
- H. Memo BEC153:PD, Written Warning dated August 2, 2000 (p. 12)
- I. Memo BEC162:BGC, Notice of Suspension Without Pay dated October 24, 2000 (pp. 13 – 14)
- J. Form 6 from Scott Wolfert to Robert Brown dated December 7, 2000 (p. 15)
- K. Form 6 from Scott Wolfert to Robert Brown dated December 12, 2000 (p. 16)
- L. Form 6 from Scott Wolfert to Robert Brown dated December 14, 2000 (p. 17)
- M. Written Warning dated December 21, 2000 (pp. 18 – 19)
- N. Form 6 from Scott Wolfert to Robert Brown dated December 29, 2000 (p. 20)
- O. Form 6 from Scott Wolfert to Robert Brown dated January 22, 2001 (p. 21)
- P. Written Warning for Tardiness dated January 24, 2001, with attached Form 6 dated January 22, 2001 (pp. 22 – 23)
- Q. Letter from Robert Brown to SEA Representative McCormack dated January 31, 2001 (p. 24)
- R. Form 6 from Scott Wolfert to “file” dated February 2, 2001 (p. 25)
- S. Form 6 from Scott Wolfert to “file” dated February 6, 2001 (p. 26)
- T. Form 6 from Scott Wolfert to Robert Brown dated March 7, 2001 (p. 27)
- U. Form 6 from Robert Brown to Peter DeNutte dated March 7, 2001 (p. 28)
- V. Memo BEC 233:PD, Letter of Counsel, dated November 19, 2001, with attached Memo BEC 211:RCB dated March 7, 2001 (pp. 29 - 30)
- W. Form 6 from Robert Brown to Peter DeNutte dated March 8, 2001 (p. 31)

- X. Form 6 from Robert Brown to Eric Sobel dated March 13, 2001 with attached Form 6 from John Thyng to Scott Wolfert dated March 13, 2001 ((pp 32 - 33)
- Y. Form 6 from Scott Wolfert to Robert Brown dated April 2, 2001 with attached notice of verbal counseling dated April 3, 2001 (pp. 34 - 35)
- Z. Performance Summary dated April 16, 2001 (pp. 36 – 39)
- AA. Written Warning dated June 3, 2002 (p. 40)
- BB. Form 6 from Scott Wolfert to Robert Brown dated June 13, 2001 (pp. 41 – 43)
- CC. Form 6 from Scott Wolfert to Robert Brown dated August 24, 2001 (p. 44)
- DD. Written Warning dated August 27, 2001 with attached letter to Stephen McCormack dated September 11, 2001 (p. 45 - 46)
- EE. Memo dated October 23, 2001 from Robert Brown to “file” (p. 47)
- FF. Memo to “file” from Scott Wolfert concerning verbal counseling (pp. 48 – 49)
- GG. Form 6 from Scott Wolfert to Robert Brown dated December 17, 2001 (p. 50)
- HH. Form 6 from Robert Brown to John Thyng, Jr., dated December 20, 2001 (p. 51)
- II. Written Warning dated December 21, 2001 (pp. 52 – 53)
- JJ. Form 6 from Scott Wolfert to “file” dated December 24, 2001 (p. 54)
- KK. Performance Summary for the period of 12/12/00 to 21/27/01 (pp. 55 – 58)
- LL. Memo BEC 248:RCB, Written Warning with Dismissal dated December 27, 2001 (pp. 59 – 60)
- MM. E-mail messages between John Thyng and Scott Wolfert, with hand-written notes (pp. 61 – 76)
- NN. Memo from Robert Brown and Scott Wolfert to “file” dated January 25, 2002 (pp. 77 – 80)
- OO. Memo from Scott Wolfert to “file” dated December 31, 2001 (pp. 81 – 82)

Appellant’s Exhibits

- A. State Police Daily Log Report (5 pages) for December 17, 2001
- B. Five brief memos from John Thyng’s co-workers addressed “To Whom It May Concern” regarding Mr. Thyng’s arrival at work on Monday, January 22, 2001

- C. Typed notes dated December 31, 2001 prepared by Joanna Drouin at John Thyng's pre-termination meeting
- D. Administrative Services "Approval of Increment" form dated December 6, 2001 for John Thyng

During the four days of hearing, the following persons gave sworn testimony:

Robert Brown
Bruce Cheney
Peter DeNutte

Stephen McCormack
Michael Rivard
John Thyng, Jr.

Ralph Waas
Scott Wolfert

At the hearing on the merits of the appeal(s), the Board granted the appellant's motion to sequester the witnesses.

Procedural Background

The Board convened a first pre-hearing conference with the parties on March 6, 2002. The parties agreed that the pending appeals included two written warnings and the decision to dismiss the appellant from his position. The parties also agreed that in addition to the dismissal decision and the warnings currently under appeal, there had been prior disciplinary action, including written warnings and a suspension without pay, that the appellant had either chosen not to appeal at all or had decided not to prosecute to completion. While the parties agreed that the disciplinary action had occurred and was a matter of record, they disagreed on the extent to which the Board should allow the appellant to present evidence on those issues. They also disagreed on the amount of weight that discipline should be given in determining the ultimate propriety of the agency's decision to dismiss the appellant from his employment.

The Board asked the parties to submit legal memoranda on that issue, addressing specifically the U.S. Supreme Court's decision in the case of United States Postal Service v. Gregory, (November 13, 2001). The parties agreed to meet again with the Board on April 10, 2002, to finalize a hearing schedule and argue their respective positions on the scope of the hearing.

On April 24, 2002, after reviewing the memoranda and hearing the parties' oral argument, the Board issued a pre-hearing order. To the extent that the agency relied on the factual information behind any of those disciplinary actions in the termination itself, the Board indicated, the evidence would be subject to review and challenge. The Board also would allow the appellant to offer evidence of an alleged pattern or a claim that the agency "zeroed in" on him and held him to a standard substantially different from similarly situated employees. Otherwise, the Board would not allow the appellant to litigate any of the disciplinary action in which the appellant either decided not to prosecute the appeal fully or did not appeal at all within the fifteen-day statutory deadline imposed by RSA 21-I:58.

Position of the Parties

The State argued that the appellant had all the necessary technical skills to perform well in his job. However, the State argued, he had developed a poor attendance record, lacked dependability, demonstrated poor organizational and time management skills, and failed to adhere to bureau policies and procedures. The State argued that it tried to correct the appellant's unsatisfactory conduct and work performance by counseling him and using progressive discipline. Despite those efforts, the State argued, the appellant repeatedly failed to take corrective action and was therefore subject to additional disciplinary action, up to and including his termination from employment.

The appellant argued that the agency held him to a higher standard than it did his co-workers. He attributed the additional scrutiny to anti-union *animus* throughout the ranks of management, and frustration on the part of his own supervisors with his expanding role within the union. He alleged that the agency showed extreme hostility toward him personally as a result of his participation in the Labor Department's surprise inspection and investigation into the possible presence of asbestos at the BEC Offices in Laconia.

The appellant argued that the agency violated his rights to due process by failing to apprise him of all the evidence it considered in reaching its decision to dismiss him. He also argued that the

agency factored in written warnings that had already expired as a basis for further discipline. Finally, he argued that the agency's decision was made in bad faith and violated the spirit and intent of the Personnel Rules.

Standard of Review – Per-A 207.12 (b), NH Code of Administrative Rules

“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.”

* * * * *

Several facts are not in dispute:

1. John Thyng, Jr. was hired by the Bureau of Emergency Communications on September 30, 1994, and remained an employee of the Bureau until his termination from employment on December 31, 2001.
2. At all relevant times, the appellant's employment was subject to the Personnel Rules (NH Code of Administrative Rules, Chapters Per 100—1500).
3. In 1998, the Personnel Rules were amended, increasing from two to five years in the length of time that a written warning can remain in effect for purposes of additional discipline. Any disciplinary action taken prior to April 21, 1998, the date the current rules became effective, would have expired as a basis for further discipline on or before April 21, 2000. Disciplinary action taken on or after April 21, 1998, can remain in effect for purposes of additional disciplinary action for a period of five years.

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

Disciplinary Action That Was Not Appealed or Prosecuted to Completion

4. At the time of his dismissal from employment, the appellant's personnel file included two outstanding written warnings that he elected not to appeal as well as a disciplinary suspension that he accepted after the agency director agreed to make certain revisions.
5. On or about August 5, 2000, the appellant received a written warning dated August 2, 2000, from his supervisor Peter DeNutte for excessive unscheduled absences. (Exhibit H).
6. The August 2, 2000 warning instructed the appellant to improve his attendance and report to work at his scheduled times. It also informed the appellant that he had fifteen days in which to request informal settlement through the agency or appeal to the Board.
7. The appellant admitted that he had been late on several occasions and decided not to appeal the letter to the Board.
8. In the absence of settlement agreement or a timely-filed appeal, the August 2, 2000 warning remains on file and stands as a basis for additional disciplinary action, up to and including termination from employment.
9. On October 24, 2000, the appellant was informed that effective October 25, 2000, he would be suspended without pay for a period of fifteen days for "unauthorized use or misuse of information or communications systems" and "violation of a posted or published agency policy, the text of which clearly states that violation of same will result in immediate dismissal." (Exhibit I)
10. The notice of suspension informed the appellant that he had fifteen days in which to appeal
11. The appellant initiated the informal settlement process and discussed the warning in a meeting with Director Cheney and SEA Representative McCormack.
12. As a result of the meeting, the appellant agreed to accept the terms of the suspension, provided that Director Cheney would amend the language of the warning and would

agree to remove the allegation about driving a State vehicle without a valid license if there was evidence that the offense did not occur.

13. The appellant served the period of suspension and did not pursue a further appeal, either through the agency or to the Personnel Appeals Board.
14. The October 24, 2000 suspension without pay remains on file and stands as a basis for additional disciplinary action, up to and including termination from employment.
15. Between January 22 and June 13, 2001, the appellant was counseled formally on at least six occasions for a variety of concerns including his continued tardiness, failing to wear his ID badge, working over-time that had not been authorized in advance, and conducting union business on working time.
16. On May 17, 2001, the appellant received a performance evaluation that rated him overall as meeting expectations. In the evaluation, IT Manager Brown acknowledged the appellant's technical skills, job knowledge, productivity and willingness to take on assignments other employees were unable to perform. He also noted deficiencies in terms of tardiness, follow-through on assigned tasks, organizational skills, timely completion of assigned tasks, and conformance to work standards.
17. On June 13, 2001, the appellant was ten minutes late reporting for work. The appellant told his supervisors that while he was driving to work, he realized that he had forgotten to wear a necktie. He was late, he said, because he had decided to return to his house to get a tie rather than risk being disciplined for improper attire in the office.
18. IT Manager Robert Brown issued a written warning to the appellant on June 13, 2001, for tardiness, noting that the appellant had been warned and counseled in the past about reporting on time for work. The letter also advised the appellant that he had fifteen days in which to appeal the warning.
19. In the absence of settlement agreement or a timely-filed appeal, the June 13, 2001 warning remains on file and stands as a basis for additional disciplinary action, up to and including termination from employment.

Disciplinary Action Under Appeal

Docket #2002-D-11 – Written Warning Dated December 21, 2000

20. In the late 1990's, during the period that the appellant was working as an Administrative Supervisor for the Mapping Unit, he and Mr. Wolfert were both assigned to the Bureau office on Chenell Drive.
21. At that time, it was fairly common during the winter months for employees to pull their work vehicles to the front of the building and leave them there, allowing the engines to run so the vehicles would warm up.
22. Peter DeNutte, then the appellant's immediate supervisor, instructed the appellant to inform his subordinates that allowing their vehicles to run, unlocked and unattended, violated State law and was contrary to department policy.
23. Chapter 265, Section 265:72, provides that "No person driving or in charge of a vehicle shall permit it to stand unattended without first stopping the engine, locking the ignition, removing the key and effectively setting the brake..."
24. Mr. Wolfert, who was one of the appellant's subordinates at the time, recalled receiving notice from the appellant that employees who left a vehicle running, unlocked and unattended, would be subject to disciplinary action for violating agency policy and State law.
25. In December 2000, the appellant was no longer a supervisor and was working as a Technical Support Specialist under the supervision of Scott Wolfert and Robert Brown.
26. The appellant and other mapping personnel were assigned to the Bureau offices in Laconia on the grounds of the Department of Corrections Lakes Region Facility.
27. On the morning of December 21, 2000, Mr. Wolfert, received a telephone call from another employee who informed him that the Technical Support van was in the Bureau's Laconia office parking lot, unlocked and unattended, with the engine running.
28. Mr. Wolfert confirmed the accuracy of the report and then went to look for the appellant, to whom the vehicle was assigned.
29. Mr. Wolfert located the appellant inside the building in the hallway near the supply closet, where he had gone to pick up some windshield washer fluid.

30. Mr. Wolfert issued the appellant a written warning for leaving his vehicle unlocked and unattended with the keys in the ignition and the engine running.
31. Throughout the various steps of the informal settlement process, Mr. Brown, Mr. DeNutte, Director Cheney, and Personnel Director Manning all concurred with Mr. Wolfert's decision to issue the December 21, 2000 warning.
32. The appellant admitted that he was aware of the law, but until confronted by Mr. Wolfert, he had not given much thought to the increased security risks associated with the bureau's location on the grounds of the prison where inmates could walk within 50 – 100 feet of the parking area.

PAB Docket #2002-D-10

December 21, 2001 Written Warning for Failure to Meet a Work Standard

33. In January, February and March 2001, the appellant was counseled by his supervisors about reporting to work on time. He was instructed to allow sufficient additional travel time during periods of inclement weather to assure his timely arrival at work. Supervisors also instructed him to call in advance if he would be unable to report on time for duty.
34. On May 17, 2001, the appellant acknowledged receipt of a performance evaluation that rated his work as meeting expectations in the general areas of quantity of work, job knowledge, communications, cooperation, initiative, safety and appearance. The evaluation also rated his work as below expectations in the following areas: "performs responsibilities with a minimum of mistakes;" "work is done thoroughly and follow up as required;" and "follows policy and procedural guidelines and instructions in an appropriate, effective way."
35. The evaluation directed the appellant to improve on, "1) Being prepared for work on time and within the required work standard. 2) Being more aware of the time a task is taking to ensure no unauthorized overtime is worked. 3) Complete tasks assigned more thoroughly with more attention to detail."
36. Overall, the employee's level of productivity for the quarter was rated as excellent.

37. In August 2001, the appellant's work schedule was changed so that instead of working from 8:00 a.m. to 4:00 p.m., he was scheduled to work 3:30 p.m. to 10:30 p.m.
38. On December 17, 2001, the appellant reported for work approximately 17 minutes after his scheduled start time, claiming that he was delayed because of poor road conditions. He indicated that he decided not to call in advance, believing that the call would only delay him further.
39. Road conditions that day were less than optimal. In the hour before the appellant should have reported for duty, the Daily Log for State Police Headquarters reported two vehicles off the road and two motor vehicle accidents.
40. None of the other employees at the Bureau of Emergency Communications reported late for duty.
41. On December 21, 2001, Mr. Wolfert issued a written warning to the appellant for failing to meet work standards as a result of his continued tardiness and lack of dependability.

Docket #2002-T-012

Termination from Employment for Failure to Meet a Work Standard

42. On December 31, 2001, IT Manager Brown and Scott Wolfert met with the appellant, issuing him an unsatisfactory performance evaluation and a notice of dismissal for failing to meet work standards.
43. The letter, which was dated December 27, 2002, stated, "Areas marked as below expectations during your last evaluation [4/16/01] have not improved. In fact several areas have regressed rather than progressed. The specific areas lacking are dependability, organizational/time management skills, and adhering to bureau policies/work standards."
44. The appellant wanted an SEA Field Representative or union counselor present during the meeting. Because there were no stewards at the Laconia office, the appellant was permitted to ask a union member to sit in on the meeting and take notes. The appellant chose Joanna Drouin, whose notes of the meeting were admitted into the record of this hearing as Appellant's Exhibit C.

45. When presented with his evaluation, copies of counseling memoranda and his notice of dismissal, the appellant questioned Mr. Brown and Mr. Wolfert about the evaluation, asking them to explain who had prepared the evaluation and when it was prepared.
46. Ms. Drouin's notes are consistent with the description of the termination meeting as described by Mr. Wolfert, Mr. Brown and Mr. Thyng.

Rulings of Law

- A. Per 1001.03 of the NH Code of Administrative Rules provides that "An appointing authority shall be authorized to use the written warning as the least severe form of discipline to correct an employee's unsatisfactory work performance or misconduct..."
- B. The offenses for which an appointing authority is authorized to issue a written warning include: "(1) Failure to meet any work standard; (2) Unauthorized absences from work; (3) Excessive unscheduled absences even if payment or approval for the leave is authorized; (4) Sexual harassment; (5) Exhibiting physically or verbally abusive behavior in the workplace including, but not limited to, injuring or attempting to injure any person in the workplace..., (6) Working unauthorized overtime; (7) Failure to report immediately to the appointing authority the expiration of a license or certificate required by the class specification or supplemental job description for performance of the duties of a position; and (8) Unauthorized use or misuse of information or communications systems." [Per 1001.03 (a) NH Code of Administrative Rules]
- C. Per 1001.08 (b) of the NH Code of Administrative Rules authorizes an appointing authority to dismiss an employee upon issuance of a third written warning for the same offense within a period of five years, or by issuance of a fifth written warning for various offenses within a period of five years.
- D. Per 1001.08 (c) of the NH Code of Administrative Rules prohibits the dismissal of a classified employee 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 employee; (2) Offers to provide the employee with an opportunity to refute the evidence presented by the appointing authority... [and] (3) Documents in writing the nature and extent of the offense.”

- E. In accordance with Per 1001.08 (d), “If an appointing authority, having complied with the provisions of Per 1001.08(c), finds that there are sufficient grounds to dismiss an employee, the appointing authority shall: (1) Provide a written notice of dismissal, specifying the nature and extent of the offense; (2) Notify the employee in writing that the dismissal may be appealed under the provisions of RSA 21-I:58, within 15 calendar days of the notice of dismissal; and (3) Forward a copy of the notice of dismissal to the director.”

Decision and Order - Docket #2002-D-11 (Written Warning Dated December 21, 2000)

The appellant argued that the December 21, 2000 warning must be overturned because the State failed to prove that the appellant had violated the criminal code. Further, the appellant argued, the State’s practice of issuing warnings for such an offense was inconsistent, as Mr. Wolfert admitted that he would not necessarily issue a warning in all cases where a vehicle was left running and unattended. Finally, the appellant argued that Mr. Rivard had given uncontroverted testimony that employees continued to leave their vehicles unlocked and unattended with the engines running, in spite of directives they had received not to do so.

The evidence reflects that the appellant was well aware of the law prohibiting any motorist from leaving the engine running in a vehicle if the vehicle is unlocked and unattended. The evidence further reflects that while the appellant was a supervisor in the mapping section on Chenell Drive, his supervisor Mr. DeNutte not only discussed the issue with him but instructed him to warn his own subordinates that leaving an unlocked, unattended vehicle running violated the law and constituted a violation of agency policy that could lead to disciplinary action. The appellant admitted that he had left his vehicle running with the keys in the ignition when he went to the

supply room, and although he could see the vehicle through the window most of the time, he could not see the vehicle all of the time and he had not asked anyone to watch the vehicle while he was away from the vehicle. Looking back, the appellant said, he realized he should have been more aware of the location and the increased risk.

The Board found that it was not the agency's burden to prove a violation of the criminal code in the face of the appellant's admissions. Further, the argument that, "He could see the vehicle virtually at all times, and could get to it very quickly," [State's Closing Arguments, p.8] is unpersuasive.

Per 1001.03 of the NH Code of Administrative Rules allows an appointing authority "...to use the written warning as the least severe form of discipline to correct an employee's unsatisfactory work performance or misconduct..." The appellant was familiar with the law and was responsible, while employed as a supervisor, for warning his own subordinates that they might be disciplined for violating the law. Although the appellant has attempted to characterize Mr. Wolfert and Mr. Brown as "the appointing authority's henchmen... exaggerating this and other charges against the appellant," the fact remains that it was one of the appellant's co-workers who found the vehicle running unattended outside on prison grounds and reported it to Mr. Wolfert. The evidence reflects that the infraction was significant enough to attract the attention of another employee and generate a report to a supervisor.

The appellant failed to prove that the disciplinary action was unlawful or that the appointing authority violated the rules of the division of personnel by imposing the disciplinary action under appeal. The appellant also failed to prove that the disciplinary action was unwarranted or that it was unjust in light of the facts in evidence. Therefore, on the evidence and argument offered by the parties, the Board voted unanimously to DENY the appeal and to uphold the agency's authority to issue a written warning in this case.

Decision and Order - Docket #2002-D-10, December 21, 2001 Written Warning for Failure to Meet a Work Standard

The appellant admitted that he went to the wrong location for one of his assignments and that he accidentally locked himself in the back of his van. The evidence also reflects that there were several occasions when the appellant did not complete the tasks he was assigned to perform. There is no dispute that the appellant was frequently late reporting for work, and the appellant admitted that his managers had spoken to him on a number of occasions about being late for work. The issues of tardiness had been addressed in performance evaluations and the appellant had been warned previously about reporting for duty on time, ready to work. The appellant admitted that he was late for work on the afternoon of December 17, 2001, having reportedly underestimated driving conditions and amount of time it would take him to get to work. The appellant also admitted that, contrary to the instructions his supervisors had given him the previous March, he decided not to telephone in advance to inform his supervisors that he would likely be late arriving for work.

The appellant argued that the agency demonstrated its lack of good faith in dealing with him when it failed to disclose that it had contacted the Department of Safety to ascertain the condition of the roads on the date in question. The appellant also argued that under the provisions of the Collective Bargaining Agreement, he was entitled to take leave if he was late for work as a result of inclement weather or other unforeseen circumstances. He argued that the agency's refusal to consider the mitigating circumstances demonstrated that the agency was "determined to get as much discipline on the appellant as possible, because by this time they had determined to terminate him, although they were just not honest enough to say so." [Appellant's Closing Arguments, p. 9.]

Article X, Section 10.9. of the Collective Bargaining Agreement addresses "Inclement Weather" as follows:

The Employer shall not arbitrarily or capriciously withhold approval of annual leave requested due to and during periods of severe inclement weather. When the

Governor or his/her designee determines that inclement weather is severe enough to close or delay opening State offices, employees who are not already on leave and who are relieved of work due to such a determination, will not be charged leave for the period of closure. Employees who do report to work during periods of closure shall only be entitled to their normal rate of compensation and shall not receive additional leave or compensatory time.

Although the appellant and one of his witnesses made reference to other employees frequently reporting late for work, they did not name any of those employees or offer evidence to support that claim. The evidence reflects that none of the other BEC employees reported late for work on December 17th, despite the road conditions. There also was no evidence that the employer arbitrarily or capriciously withheld approval of annual leave. Additionally, the granting or withholding of leave does not change the fact of the appellant's tardiness.

The evidence reflects that the appellant had an extensive, and an admitted, history of tardiness. The appellant clearly understood the personnel rules and the agency's authority to discipline him if he failed to take corrective action by reporting on time for work. The appellant also knew that his supervisors had significant concerns about his level of dependability and expected him to notify them if he expected to be late for work. The appellant admitted that in this case, he ignored his supervisors' instructions to provide notice when circumstances, such as inclement weather, prevented him from reporting for work on time.

Per 1001.03 of the NH Code of Administrative Rules allows an appointing authority "...to use the written warning as the least severe form of discipline to correct an employee's unsatisfactory work performance or misconduct..." The appellant was familiar with the work standard and with his supervisors' instructions to call ahead whenever he was going to be late. The warning does not "pull together prior allegations" [Appellant's Closing Arguments, p. 9] as the appellant alleged. Rather, it indicates the number of times that the agency counseled the appellant and elected not to take formal disciplinary action.

The appellant failed to prove that the disciplinary action was unlawful or that the appointing authority violated the rules of the division of personnel by imposing the disciplinary action under appeal. The appellant also failed to prove that the disciplinary action was unwarranted or that it was unjust in light of the facts in evidence. Therefore, on the evidence and argument offered by the parties, the Board voted unanimously to DENY the appeal and to uphold the agency's authority to issue a written warning in this case.

Decision and Order - Docket #2002-T-012, Written Warning with Dismissal for Failure to Meet Work Standards (December 27, 2001)

The Rules of the Division of Personnel authorize an appointing authority to conduct periodic reviews of an employee's performance and to issue written warnings to correct unsatisfactory behavior or work performance that fails to meet work standards. The appellant's supervisors conducted such a review in December 2001 and determined that the appellant was still not meeting expectations with respect to dependability, organizational and time management skills and adhering to Bureau policies, procedures and work standards. Examples of the how the appellant's work failed to meet those expectations were noted in the evaluation.

Per 1001.08 (b) of the NH Code of Administrative Rules authorizes an appointing authority to dismiss an employee "by issuance of a third written warning for the same offense within a period of 5 years" or "by issuance of a fifth written warning for different offenses within a period of 5 years." Between August 5, 2000 and December 21, 2001, the appellant received five written warnings for a variety of offenses including excessive unscheduled absences, unauthorized use/misuse of information or communications systems, driving a State vehicle without a valid driver's license, violation of Motor Vehicle law and agency policy, continued tardiness, lack of dependability, and failing to meet work standards. It is clear that the appellant has the technical abilities to perform the duties assigned him. It is equally clear that the agency gave him substantial leeway because of those abilities, waiting for him to improve in terms of punctuality, dependability, adherence to agency procedures, and follow-through. The Board found that there were sufficient grounds to dismiss the employee based on his accumulated warnings.

The appellant argued that at the termination meeting, the agency violated Per 1001.08(c) when Mr. Brown and Mr. Wolfert “continually cut the appellant off and would not let him ask any in-depth questions,” and that “much of the information referenced in the termination letter and factored into the termination letter otherwise, was not even presented to the appellant in writing at any time.” [Appellant’s closing arguments, p. 2.] By way of example, the appellant argued that documents supporting the termination, such as those found in pages 61-76 of the State’s Exhibits were not shown to the appellant at the December 31, 2001 termination meeting, “...and virtually none of the allegations contained therein were presented orally to the appellant.” [Appellant’s closing arguments, p. 4.] The appellant also argued that the agency illegally factored into the dismissal his earlier, expired letters of warning, and that the decision to dismiss him had been made prior to the termination meeting

Per 1001.08 (c) of the NH Code of Administrative Rules prohibits the dismissal of a classified employee 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 employee; (2) Offers to provide the employee with an opportunity to refute the evidence presented by the appointing authority... [and] (3) Documents in writing the nature and extent of the offense.”

The appointing authority did meet with the appellant to discuss the evidence supporting his termination. The appellant challenged but never actually refuted the evidence. It is clear from Ms. Drouin’s summary of the meeting and Mr. Wolfert’s and Mr. Brown’s testimony that once they had identified examples of deficiencies in the appellant’s performance, the appellant challenged them and demanded more information. It is equally clear that the appellant did nothing to refute the allegations or the evidence they presented.

The Board found little merit in the appellant’s argument that the termination was flawed because a decision already had been made to dismiss him before the dismissal meeting took place. The

appellant also argued that he was deprived of appropriate representation in violation of the Collective Bargaining Agreement. The Board does not accept either argument.

It was clear that any “investigation” into the appellant’s performance had already been finalized when Mr. Wolfert and Mr. Brown conducted the appellant’s final performance evaluation. Although discipline did result, the meeting itself was not investigative in nature. Consequently, Weingarten rights as described by the Collective Bargaining Agreement would not apply. Similarly, the fact that the agency had already decided to dismiss the appellant is absolutely consistent with the language of Per 1001.08 (c)(1) since the purpose of the meeting is to discuss whatever evidence the appointing authority believes supports the decision to dismiss the employee.

The appellant’s argument that he was deprived of an opportunity to see the evidence supporting his dismissal is equally unpersuasive. Although the appellant has seized upon certain words and phrases in Mr. Wolfert’s and Mr. Brown’s testimony in an effort to support a due process argument, their testimony in its entirety demonstrates that they did apprise the appellant of the evidence supporting his dismissal. They did not allow the appellant to engage in extensive argument, telling him that was “for the appeal.”

The termination can be supported by three written warnings for the same offense and/or five written warnings for a variety of offenses. The appellant was apprised in each of the disciplinary notices of his right to appeal. The appointing authority was under no obligation to revisit each of the warnings, or to review with the appellant any of the warnings. The appellant was informed that the evidence supporting his termination included a series of written warnings and a final evaluation of his work performance as unsatisfactory. State’s Exhibit pages 61-76 are a series of e-mail documents created by or received by the appellant. The handwritten notes on the e-mail admitted into evidence simply memorialize the information that the appellant was given verbally at the termination meeting. Although the appellant argued that the agency improperly factored into the termination prior, expired warnings, the Board found that they simply formed part of his record of employment. Being aware of expired warnings does not equate to inclusion of those

warnings in a decision to dismiss on the basis of cumulative warnings, all of which are valid for purposes of discipline up to and including termination from employment. On all the evidence, the Board found that the agency complied with the provisions of Per 1001.08 (c) and provided the appellant all his due process rights.

The appellant argued that the termination decision constituted a form of retaliation for his union activities, particularly as they related to a surprise visit and investigation by the Labor Department following reports of asbestos on the premises. Neither argument is borne out by the evidence. Director Cheney testified that he was “madder than hell” at SEA Field Representative McCormack when he showed up at the bureau offices with an inspector from the Labor Department. Director Cheney testified that only a short time earlier, Mr. McCormack had discussed with him the need for the bureau and the union to work together collaboratively and cooperatively for the benefit of the employees and the agency. Director Cheney considered it a betrayal of that trust when no one gave him the courtesy of some notice that the Labor Department was coming to investigate.

The evidence also does not support the appellant’s claim of anti-union *animus*. Ralph Waas, one of the appellant’s co-workers and a fellow union member, testified that there never were problems as a result of his union membership. The problems between management and the appellant over his union activities occurred when the agency discovered that the appellant was engaged in organizing efforts and union business on State time, and that the appellant had supplied information to the union that he apparently had retrieved from computerized agency personnel records.

The appellant also points to a statement by one of his supervisors that, “The union shop is closed in Concord” as evidence of discrimination and retaliation. Taken out of context, the statement certainly seems inappropriate; however, a review of the testimony in its entirety demonstrates that his supervisors were addressing their concerns that the amount of time appellant was spending during normal working hours performing union-related activities was interfering with his performance as a State employee.

Having considered all the evidence and argument, the Board voted unanimously to DENY the appellant's termination appeal and to uphold the termination based on the appellant's receipt of three written warnings for the same offense within a period of five years as well as five warnings for a variety of offenses within the same period of time.

THE PERSONNEL APPEALS BOARD,

Patrick H. Wood, Chairman

Robert J. Johnson, Commissioner

Anthony B. Urban, Commissioner

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