State of New Hampshire

PERSONNEL APPEALS BOARD
54 Regional Drive, Unit 5
Concord, New Hampshire 03301

STATE OF NEW HAMPSHIRE

DECISION OF THE PERSONNEL APPEALS BOARD

REBECCA PINARD

V.

N.H. DEPARTMENT OF SAFETY - DIVISION OF MOTOR VEHICLES

DOCKET # 2019-T-006

APPEARANCES: Attorney David Hilts represented the State.

SEA Grievance Representative Charles McMahon represented the Appellant.

ISSUE OF LAW: Per1002.04 (b) (3) and (4) – absenteeism and unauthorized leave.

Per 1002.08 (c) (1) – Dismissal.

WITNESSES: William Joseph – Deputy Director – Division of Motor Vehicles.

Christina Martin – Human Resources Director – Department of Safety.

Brittany Shute – Bureau Chief – Division of Motor Vehicles.

Kevin McMahon – SEA Steward - Department of Safety.

APPEAL HEARING: The Board conducted an in-person hearing at the offices of the N.H. Division of Personnel in Concord, N.H. on September 30, 2020.

APPEAL TRIBUNAL: A quorum of the Board sat on this appeal: Commissioner Gail Wilson, Commissioner Marilee Nihan, Attorney Jason Major and Attorney Norman Patenaude as presiding officer.

BACKGROUND

The N.H. Department of Safety - Division of Motor Vehicles ("DMV") terminated the appellant's employment for chronic absenteeism and unauthorized use of leave time. She disagreed with that disciplinary action and requested a hearing to adjudicate the issue.

FINDINGS OF FACT

The DMV hired the appellant on December 20, 2003 to work as a Data Control Clerk II ("Clerk") in its Bureau of Financial Responsibility. In that position she updated the database with documentary information received from other law enforcement agencies, other state DMS's and courts, she handled cash transactions at the counter, she processed mail-in pleas, and she answered telephone calls about DMV rules and procedures. As a State employee she was responsible for monitoring and managing her use of leave time. State employees may utilize sick leave for unscheduled illnesses or injuries on short notice but make sure that they have sufficient sick leave time on the record to cover those absences. Maintenance of good attendance is a condition of employment.

On October 8, 2004, the assistant DMV Director issued a Memo of Counsel ("MOC") to the appellant after only 9 months on the job for unauthorized absences averaging one day each month.

On January 31, 2007, the Bureau Supervisor issued a second MOC to the appellant for unauthorized absences and lack of dependability. For example, from January 1, 2006 to December 31, 2006, the appellant utilized over 96 hours of sick leave which averaged over one day each month.

On May 3, 2013, the Bureau Supervisor and the DMV Director issued a third MOC to the appellant for taking leave without prior authorization due to the depletion of her accrued sick time.

The Team Lead counseled the appellant on December 10, 2013, January 24, 2014 and April 24, 2014 regarding the appellant's unscheduled absences and about keeping track of earned time and being mindful of a pattern of absences that occurred on Mondays, Fridays and days after holidays and its continued negative impact on the work unit.

On June 27, 2014, the Bureau Supervisor and DMV Director administered a Letter of Warning ("LOW") to the appellant for repeated unscheduled absences and for taking unauthorized leave without pay. Citing an ongoing pattern and a failure to correct her behavior, the Supervisor and the Director reminded the appellant about the importance of adequate staffing to provide good

customer service to the citizens of New Hampshire. The LOW included a corrective action plan ("CAP") that called for showing up for all scheduled work days, not substituting other types of leave for insufficient sick leave, and following established notification procedures before the beginning of any scheduled shift in the event of unscheduled absences.

On May 15, 2017, the Bureau Supervisor and DMV Director administered a second LOW to the appellant for continued unauthorized absences from work and cited the earlier MOC's and LOW for the same attendance issues. For example, from May 1, 2016 through May 1, 2017, the appellant utilized 107 hours of unscheduled sick leave with 79% of those hours used on Mondays, Fridays and around holidays. This LOW included a CAP that called for reporting to work as expected on all scheduled shifts and submitting a certificate from a health care provider for each unscheduled absence. The LOW also warned the appellant that failure to comply with the CAP would subject her to further disciplinary action including discharge from employment. More specifically, the LOW reminded the appellant that the issuance of three warnings for the same type of offense within five years was in and of itself grounds for dismissal. The LOW also reminded the appellant of the availability of the Employee Assistance Program that the State offers for dealing with issues affecting work performance.

In every annual performance evaluation conducted from 2004 to 2018 the evaluator rated the appellant "below expectations" for attendance. DMV Director William Joseph indicated on those evaluations and at the hearing that he had many conversations with the appellant about her absenteeism. Despite the serial MOC's ad LOW's, the appellant never really improved her attendance record. He explained that the agency was in the middle of a 5-year systems upgrade, that it suffered from budget and staff reductions, that it was nevertheless trying to keep up with the same workload and that reliable staffing was critical to the agency's mission.

Christina Martin, the Director of Human Resources at DOS, explained that employees had to submit electronic time cards every Thursday for time worked and for leave taken. Sick leave had to be used for unscheduled absences lasting up to three days. All the appellant's requests for paid leave were approved if she had enough sick leave on the books as the administrative rules for leave provided. This was for payroll purposes only as it provided for income continuity. It did not mean that the appellant was on approved sick leave. It was the appellant's longstanding pattern of utilization of unplanned sick leave usage around weekends and holidays that disrupted the workflow and that resulted in disciplinary action. Brittany Shute, the Bureau Chief, stressed the importance of keeping its records up to date for courts, prosecutors, insurers, and drivers.

On February 4, 2019, the DMV Director and the Commissioner of Safety issued a third and Final Written Warning with Notice of Intent to Dismiss to the appellant for her failure to comply with the earlier CAP for continued and repeated unauthorized absences from work on Mondays and Fridays which constituted 83% of that leave time. The LOW noted that her inconsistent attendance resulted in the exhaustion of her leave balances which led to the conclusion that she used sick leave for unauthorized purposes. The Director and the Commissioner provided

the appellant with an opportunity to meet and refute the evidence and she did so on February 7, 2019; the Bureau Chief and the SEA Steward participated in the meeting as well. The focus was on her significant and continued use of unplanned sick time usage over a period of 15 years that disrupted business operations and which the appellant failed to correct despite numerous admonitions over the years. The appellant argued that she suffered from real illnesses and apologized for not meeting work performance expectations, but she failed to refute the evidence that was presented.

On February 11, 2019, the DMV Director dismissed the appellant from state employment based on the issuance of three LOW's for the same or substantially similar type of conduct or offense within a period of five years.

In its closing summation, the State argued that the appellant's dismissal was warranted by the facts presented. It restated the agency's need to function optimally and to process a high volume of work with adequate staffing and without chronic unplanned absences. The State followed a path of progressive discipline over the years that included many MOC's. As a result of the appellant's failure to correct her behavior, the State issued three LOW's for the same or substantially similar misconduct during a 5-year period that led to her dismissal from service. The State asked the Board to uphold the dismissal.

On the other hand, the appellant noted that her requests for sick leave were usually approved after the fact and that it was within the agency's discretion to ask for a medical verification but they did not request it. She argued that her superiors never questioned if medical issues existed that were resulting in excessive leave use. Other than the attendance issue, she was a good employee. She asked the Board to overturn her termination and to reinstate her to the position she held at the agency.

CONCLUSIONS OF LAW

The Board concludes that the appellant failed to satisfy her burden of proof and to establish by a preponderance of the evidence that her dismissal was unjust, unlawful, or unwarranted in light of the facts in evidence. The Board reached this conclusion in reliance upon the following facts.

The appellant established a pattern of chronic absenteeism during her 15-year tenure at the Bureau of Financial Responsibility. She chronically utilized her sick leave as fast as she earned it for unplanned absences many of which revolved around Fridays, Mondays, and holidays. She was constantly warned verbally and in writing for leaving the Bureau strapped with fewer employees to process a high volume of documents pertaining to drivers' licenses. All her performance evaluations referenced her chronic absences. She received three MOC's and two LOW's that included warnings about the consequences of failing to correct her behavior including dismissal but she failed to maintain consistent attendance and to heed most of those

warnings and she continued the pattern of unplanned absences that disrupted the workflow at the office. The utilized sick leave was approved for payroll purposes as provided for by administrative rule. The appellant had many opportunities to correct her behavior but did not continuously do so. The Bureau saw no alternative but to proceed to the most severe form of discipline. The Board finds the voluminous evidence of misbehavior to be very persuasive, convincing, and warranting the appellant's dismissal from service.

DECISION

Based on the evidence of record, the Board denies the appeal and upholds the dismissal.

Gail A. Wilson

Commissioner Gail Wilson

Marilee Nihan

Commissioner Marilee Nihan

Norman J. Patenaude

Attorney Norman J. Patenaude

Attorney Jason R.L. Major

October 21, 2020