

The State of New Hampshire

Supreme Court

No. 99-501 *Appeal of Gamil Azmy*

TO THE CLERK OF NH PERSONNEL APPEALS BOARD
#99-D-18, 99-D-19

*I hereby certify that the Supreme Court has issued the following order
in the above-entitled action:*

*October 21, 1999. Appeal from administrative agency is declined.
See Rule 10(1).*

November 18, 1999

Attest: *Carol A. Belmain*
Carol A. Belmain, Deputy Clerk

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 99-501, Appeal of Gamil Azmy, the court upon October 21, 1999, made the following order:

Appeal from administrative agency is declined. See Rule 10(1).

Distribution:

NH Personnel Appeals Board 99-D-18, 99-D-19
Michael C. Reynolds, Esquire
Attorney General
Donna K. Nadeau, Supreme Court
File

Howard J. Zibel,
Clerk

State of New Hampshire



PERSONNEL APPEALS BOARD

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APPEALS OF GAMIL AZMY Docket Numbers 99-0-18 and 99-0-19

New Hampshire Hospital

July 28, 1999

On July 28, 1999, the New Hampshire Personnel Appeals Board reviewed SEA General Counsel Michael Reynolds' July 27, 1999, request for confirmation that the Board considers Wednesday, July 21, 1999, to be the effective date of the Board's previously issued decision¹ on the Appellant's Motion for Reconsideration in the above-titled appeals. The Board granted that request, and will amend its records accordingly.

FOR THE PERSONNEL APPEALS BOARD



PATRICK H. WOOD, CHAIRMAN

cc: Virginia A. Lamberton, Director of Personnel, 25 Capitol Street, Concord, NH 03301
Michael Reynolds, SEA General Counsel, PO Box 3303, Concord, NH 03302-3303
Attorney John Martin, Behavioral Health, 105 Pleasant Street, Concord, NH 03301

¹ On June 11, 1999, the Board issued a decision on the Appellant's Motion for Reconsideration/Rehearing. During the second day of Mr. Azmy's termination appeal hearing on July 21, 1999, the parties indicated that neither of them had received a copy of that decision. Additional copies were distributed to the parties at that time

State of New Hampshire



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APPEALS OF GAMIL AZMY
Motions for Rehearing/Reconsideration
DOCKET #99-D-18¹
DOCKET #99-D-19²
New Hampshire Hospital

June 11, 1999

By letter dated May 28, 1999, SEA Field Representative Linda Chadbourne requested that the Board Rehear/Reconsider its decision dated May 3, 1999, in the appeals of Gamil Azmy (Docket #99-D-18 and #99-D-19). In general, a request for reconsideration must either allege that the Board has made an error of law or must present additional facts that were not available at the original hearing. In order to request a rehearing, the party dissatisfied with the Board's order must set forth every ground upon which it is alleged that the Board's decision is unlawful or unreasonable. The Board may grant a rehearing if, in its opinion, good reason for such rehearing is stated in the motion.

Having reviewed the Motion in conjunction with the Board's decision in this matter, the Board voted to DENY the Motion. The Board's responses to the specific grounds raised in that Motion are as follows:

¹ 99-D-18: November 20, 1998, notice of the withholding of Mr. Azmy's annual increment, and November 30, 1998, written warning issued pursuant to Per 1001.04 of the Rules of the Division of Personnel for failing to meet the work standard in categories identified as "quantity of work," "quality of work," "communication," "dependability," and "cooperation."

² 99-D-19: January 18, 1999, written warning issued pursuant to Per 1001.03 of the Rules of the Division of Personnel for failing to meet the work standard with respect to communications and problem solving, and insubordination for failing to follow the recommendations and/or corrective action plans outlined in prior counseling and warnings.

Docket #98-D-18

1. The appellant argued that, "The written warning dated November 30, 1998 withholding Mr. Azmy's annual increment contained vague, non-specific allegations of poor performance, contrary to the provisions of PART Per 1001.03(b) of the Personnel Rules."

Specific allegations of poor performance are cited in the appellant's performance evaluation, counseling letters and prior warnings, all of which are referenced in the written warning summarizing the basis for the withholding of Mr. Azmy's increment.

2. The appellant wrote, "It is our position that a formal disciplinary action such as a letter of warning, which could (and in this case did) support a future termination, gives rise to the employee's right to a full evidentiary hearing, including the right to present testimonial evidence and cross-examine all witnesses. Therefore, the Board's refusal to provide such a hearing was erroneous as a matter of law."

The parties were notified three weeks in advance of the hearing that the appeal(s) would be heard on offers of proof by the representatives of the parties. The February 16, 1999, Notice of Scheduling advised the parties that they would be permitted to, "...submit documentary evidence, present oral argument and make offers of proof," and that, "[if] the Board should then determine that it has insufficient evidence to fairly decide the appeal, the Board, upon its own motion or on the motion of a party, may vote to compel the production of additional evidence, up to and including the testimony of witnesses." The appellant made no objection to the appeal being heard on offers of proof. The appellant, made no motion for the Board to take the testimony of any witness(es). The Board received documentary evidence, offers of proof and oral argument on all the issues that the appellant raised. In the Motion for Rehearing/Reconsideration, the appellant has failed to show that live testimony would have produced evidence that was not otherwise available at the hearing on the merits or that such testimony would have prompted the Board to reach a different conclusion.

3. The appellant argued that by refusing to admit documents into the record because they had not been disclosed to the State prior to the hearing, the Board deprived Mr. Azmy of his due process rights. The appellant attached to the Motion those documents that the Board had voted to exclude.

The appellant offered neither evidence nor argument to persuade the Board that exclusion of the proffered documents was unlawful or unreasonable. The documents that the Board excluded are all dated after November 23, 1998, the date of the evaluation and the notice of withholding of the increment. The appellant failed to persuade the Board that such evidence would be material or relevant, even if it had been disclosed to the State prior to the hearing. February 16, 1999, Notice of Scheduling advised the parties that, "Documentary evidence shall be exchanged by the parties prior to the hearing in accordance with the Rules of the Personnel Appeals Board." The appellant did not exchange the proffered evidence with the State prior to the hearing, nor make any offer to prove why such an exchange could not have been accomplished in a timely fashion. Therefore, the Board found that its decision to exclude those documents was neither unlawful nor unreasonable.

4. *The appellant argued that, "The Board apparently found that Mr. Azmy was unreasonable, uncooperative and/or insubordinate when he disagreed with the 'No' boxes checked in the competency section of his November, 1998 performance evaluation and failed to sign them or the evaluation itself."*

The appellant's assertion that Mr. Azmy is entitled to, "...present testimonial evidence and be able to cross-examine the 'evidence' used to support these 'findings'," is without merit. The "findings" at issue are not the Board's findings. On the facts in evidence, the Board decided that, "The evidence reveals a pattern of conduct on the appellant's part consistent with New Hampshire Hospital's representations that the appellant is not responsive to feedback and constructive criticism." (Decision page 9)

5. *The appellant argued that, "...Mr. Azmy's failure to sign [his evaluations or competency statements] should be interpreted as, at best, an ineffective expression of disagreement, not as action warranting or even supporting formal discipline." The appellant also argued that, "...by punishing Mr. Azmy for requesting a consult and refusing to sign statements he disagreed with, the Board is depriving him of his right to disagree and explain his position."*

Mr. Azmy was not punished for refusing to sign his evaluations or for disagreeing with the hospital's assessment of his competency. The Board simply applied the language of the statutes and the administrative rules in finding that Mr. Azmy did not avail himself of the opportunity to respond to his evaluations, and that under the provisions of Per 801.02 (j), "If an employee refuses to sign the evaluation after being given the opportunity to do so, the supervisor shall so

certify in writing and the evaluation shall be valid for all purposes," including the withholding of an employee's annual salary increment.

Docket #99-D-19

1. *The appellant argued that, "Part of the January 18 letter of warning alleged that Mr. Azmy had engaged co-workers in conversation regarding other co-workers being 'out to get him.' The Board did not thoroughly address this matter, and indeed it could not without live witness testimony."*

The appellant failed to persuade the Board that live testimony would have produced evidence that was not otherwise available through offers of proof at the hearing on the merits. The Board found, and continues to find, that, "Mr. Azmy's conduct represented a simple refusal to accept supervision, direction, feedback and constructive criticism."

2. *The appellant argued that, "The Board's finding that Mr. Azmy brought piglets onto Hospital grounds to show the patients is inaccurate." He argued that he had brought the animals to work with him so that he could provide care not being provided by the animals' mother, and that his comment at the morning meeting with patients and staff about feeding the animals during the day was "an off-the-cuff comment" typical of the "light personal information" often shared in those meetings. He argued that, "When the patients asked if they could see the piglets, Mr. Azmy told them, truthfully, that Brad Gelz said it would not be possible," an answer that was not intended, "to put Brad Gelz or any member of NHH management in an [Ms.] unfavorable light." The appellant argued that, "Once again, the Board appears to be rewriting a letter of warning to add 'offenses' not originally alleged [namely, the Pet Therapy Policy]."*

Neither the warning nor the Board's decision turn on the appellant's motivation for bringing the piglets to work, or his adherence to the Pet Therapy Policy. As the Board noted in its decision, "Mr. Azmy's conduct [in response to Dr. Ajemian's concerns] represented a simple refusal to accept supervision, direction, feedback and constructive criticism. Moreover, the evidence reflects that the appellant would not accept responsibility for his own part in the disintegration of relations with supervisory and treatment staff, as evidenced by his reaction to the piglet incident." Mr. Azmy and Mr. Gelz had discussed allowing the patients to see the piglets prior to his disclosure to patients that he had the animals on hospital grounds. That disclosure without any

explanation of why Mr. Gelz would not permit the patients to see the animals, and the appellant's subsequent explanation for that conduct, support the Board's conclusions.

3. *The appellant argued that the December 11 letter of counseling "...was a clear example of NHH supervision overreacting to Mr. Azmy's appropriately questioning the use of strong disinfectants to clean the greenhouse plants." The appellant further argued that, "To penalize an employee for asking questions or expressing opinions which may differ from those of management not only violates the spirit of the Personnel Rules and the Collective Bargaining Agreement, but state and federal laws as well."*

Neither the evidence, arguments nor offers of proof support the appellant's claim that Mr. Azmy was disciplined for asking questions or expressing an opinion. The evidence supports the conclusion that Mr. Azmy's conduct overall represented a simple refusal to accept supervision, direction, feedback and constructive criticism.

For all the reasons set forth above, the Appellant's Motion for Rehearing/Reconsideration is DENIED.

THE PERSONNEL APPEALS BOARD



PATRICK H. WOOD, COMMISSIONER



LISA A. RULE, COMMISSIONER

cc: Virginia A. Lamberton, Director of Personnel, 25 Capitol St., Concord, NH 03301
Linda Chadbourne, SEA Field Representative, PO Box 3303, Concord, NH 03302-3303
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State of New Hampshire



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APPEALS OF GAMIL AZMY

DOCKET #99-D-17¹

DOCKET #99-D-18²

DOCKET #99-D-19³

New Hampshire Hospital

May 3, 1999

The New Hampshire Personnel Appeals Board (Bennett, Wood and Rule) met on Wednesday, March 10, 1999, under the authority of RSA 21-I:58 to hear the appeals of Gamil Azmy, an employee of New Hampshire Hospital. Mr. Azmy, who was represented at the hearings by SEA Field Representative Linda Chadboume, was appealing three written warnings issued to him for failure to meet the work standard. Attorney John Martin appeared on behalf of New Hampshire Hospital. The appeals were heard on offers of proof by the representatives of the parties without objection by either party.

The record of the hearing in each appeal consists of pleadings submitted by the parties prior to the hearing, notices and orders issued by the Board, the audio tape recording of the hearing on the merits of the appeal, and documents admitted into evidence at the hearing.

¹ 99-D-17: August 28, 1998, written warning issued pursuant to Per 1001.03 of the Rules of the Division of Personnel for failing to meet the work standard by violating the hospital's Boundary Policy when he disclosed personal information about himself to a patient.

² 99-D-18: November 20, 1998, notice of the withholding of Mr. Azmy's annual increment, and November 30, 1998, written warning issued pursuant to Per 1001.04 of the Rules of the Division of Personnel for failing to meet the work standard in categories identified as "quantity of work," "quality of work," "communication," "dependability," and "cooperation."

³ 99-D-19: January 18, 1999, written warning issued pursuant to Per 1001.03 of the Rules of the Division of Personnel for failing to meet the work standard with respect to communications and problem solving, and insubordination for failing to follow the recommendations and/or corrective action plans outlined in prior counseling and warnings.

The State offered "Miscellaneous Exhibits" 1 and 2 described as follows:

1. December 1, 1998 letter from NHH Superintendent Chester Batchelder to SEA Field Representative Linda Chadbourne relative to Doctet #99-D-17
2. January 20, 1999, letter from Chester Batchelder to Linda Chadbourne relative to Doctet #99-D-18

The appeals were not consolidated. However, the parties agreed that the Board should take notice of all of the evidence generally in deciding each case. Evidence is listed below in the section of the decision that applies specifically to each individual doctet number.

DOCKET #99-D-17

State's Exhibits

1. NHH Boundary Policy
2. Memo dated April 18, 1998, from Roberta Lavey to Gamil Azmy
3. Memo from Diane Lapp to Nancy Clark
4. Letter of Warning dated August 28, 1998
5. Letter dated September 21, 1998, from Nancy Clark to Linda Chadbourne
6. Letter from Chet Batchelder
7. Letter of Counsel dated November 20, 1998, from Brad Geltz
8. Decision of the PAB dated 2/12/99

Appellant's Exhibits

- A. Letter of Warning dated August 28, 1998, from Brad Geltz to Gamil Azmy
- B. New Hampshire Hospital Investigation Report dated August 17, 1998
- C. Letter from Diane Lapp to Nancy Clark
- D. Letter to Linda Chadbourne from William F. Haley dated September 25, 1998
- E. New Hampshire Hospital boundary policy

In its warning of August 28, 1998, the State asserted that Mr. Azmy violated the Hospital's Boundary Policy, Section III A and B and Section IV 2.1. by disclosing personal information about himself to a patient. Specifically, the State alleged that the appellant used poor judgment by discussing a personal issue with another staff member within earshot of patients in the greenhouse where Mr. Azmy was working. The State alleged that having done so, the appellant had focused on his own personal issue rather than the needs of the patients under his supervision, and that the patient who became aware of Mr. Azmy's employment issues as a result was

"...distressed enough to voice concern to a staff person, thus adding to the patient's burdens and shifting the focus from himself to [the appellant]."

The following facts are not in dispute:

1. Mr. Azmy was working as a Training and Development Therapist in the Hospital's greenhouse at the time of the incident giving rise to the warning.
2. Mr. Azmy had been under investigation by Hospital staff for an alleged violation of the Hospital's Boundary Policy and he wanted to arrange for union representation prior to his meeting with supervisors to discuss that allegation.⁴
3. Mr. William Haley, a co-worker who also serves as an SEA Steward, was escorting a group of patients through the area when Mr. Azmy said he needed to speak with Mr. Haley about the investigation.
4. In his September 25, 1998, letter to SEA Field Representative Chadbourne (SEA Exhibit D), Mr. Haley wrote that the appellant, "...was very upset saying that he had been told that the earlier allegation that he had given money to a client had been investigated and found to be unsubstantiated, but now was being told that the investigation was continuing."
5. Mr. Haley wrote that to his knowledge, there were no clients within earshot, as those who had come into the greenhouse with him had continued on their way, and those who had been in the greenhouse when he arrived were going about their jobs. Mr. Haley also wrote that he and Mr. Azmy did not discuss any of the specifics.
6. On or about July 6, 1998, Diane Lapp, an Occupational Therapist, reported to her superiors the substance of a conversation between herself and two patients that had occurred on July 2, 1998, at a patient/staff cook-out. In a follow-up letter to Nancy Clark, Director of Rehabilitation Services, Ms. Lapp wrote that two of the patients who were supervised by the appellant had approached her about Mr. Azmy. The first reportedly asked if the appellant was going to be fired for making change for a patient. The second reportedly made a comment about the appellant being mistreated by management. In her letter to Ms. Clark, Ms. Lapp wrote, "I do not know how these patients came upon this information [about the money or the discipline]. I did not discuss the matter with them. My concern was that a boundary had been violated, causing them to be distracted away from their own situations and potentially alienated from staff even more than they are at times already."
7. After the appellant's supervisor, Brad Geltz, was advised of the incident, Complaint Investigator Tom Flynn was assigned to conduct an investigation.

⁴ The issue Mr. Azmy wanted to discuss was the incident giving rise to the June 29th written warning that he received and which was later the subject of PAB Docket #99-D-12...

8. Mr. Flynn interviewed the appellant, Ms. Lapp and the two patients. In his report, he concluded that, "Although there is no evidence to suggest that Mr. Azmy has been disclosing work or personal information about himself on a one to one basis with patients, a patient did overhear Mr. Azmy talking about a personal work situation. Because of what this patient overheard, the patient was concerned enough about this situation to make a comment to a staff member at the liospital. Whether the information was shared with a patient personally or as in this case overheard in a conversation, the information still has been shared with a patient. This situation should be considered a violation of NH Hospital's Boundary Policy."
9. Mr. Geltz agreed with that finding and issued a written warning to the appellant for violation of the Boundary Policy. Specifically, Mr. Geltz wrote, "Your lack of judgment was demonstrated by your focus on your own personal issue rather than the needs of the patient for whom you had responsibility at the time... The patient was distressed enough to voice concern to a staff person, thus adding to the patient's burdens and shifting focus from himself to you..."

Ms. Chadbourne argued that all the definitions of "disclose" imply intent, and that there was no evidence that the appellant intended to disclose anything to a patieiiit. She also argued that both of the patients who were interviewed during the investigation stated specifically that Mr. Azmy did not discuss any personal information with them.

Ms. Chadbourne argued that while there was no dispute that at least one patient had overheard the brief conversation between Mr. Azmy and Mr. Haley, it was undoubtedly more upsetting for patients to be asked to participate in the investigation. She argued that by conducting such investigations, New Hampshire Hospital was violating its own boundary policy.

Mr. Martin argued that New Hampshire Hospital is designed to treat patients suffering from acute instances of mental illness, and that the Boundary Policy was developed to assist staff in maintaining therapeutic relationships with the patients so as not to coinpromise the treatment process or patient care. He argued that employees receive extensive and on-going training on the issue of maintaining appropriate boundaries, and that it's clear that the policy does not differentiate between intentional and unintentional violations of patient/staff boundaries. Mr. Martin argued that Mr. Azmy's repeated problems adhering to the requirements of the Hospital's policies were reflected in his overall employment history and the number of complaints that the Hospital had received about his conduct.

Mr. Martin argued that although Mr. Azmy had the right to consult with a union steward about representation at a meeting with his supervisor if the appellant reasonably believed the meeting might result in disciplinary action, he should not have done so in the patients' presence. He argued that the appellant demonstrated poor judgment by having that discussion without first taking all the steps necessary to ensure that the patients were receiving appropriate supervision, and that they could not hear his conversation with Mr. Haley.

Rulings of Law:

1. The NH Hospital Boundary Policy defines a boundary as, "A limit or margin that describes the way employees interact and/or communicate with patients/residents. Additionally, professionals are expected to maintain the necessary workplace behaviors and attitudes required by the ethical standards of their professional discipline."
2. The NH Hospital Boundary Policy defines a boundary violation as, "An infringement of the limit or margins. The failure to maintain a boundary and become 'over involved' in a manner which has the potential to compromise patient/resident care. Boundary violations may be emotional, physical, spiritual, financial or sexual in nature, and may be accidental or intentional."
3. The NH. Hospital Boundary Policy states, in pertinent part, "Behaviors which may be interpreted as exceeding a boundary include, but are not limited to: a) disclosure of personal information such as details of marital status, telephone numbers, family issues..."

Decision and Order - Docket #99-D-17

The Board disagrees with the appellant that only intentional disclosures of personal information can or should be deemed boundary violations. The policy warns that, "...failure to maintain appropriate boundaries shall result in disciplinary action against the employee... and shall vary with the severity of the offense." The policy also warns that, violations, "...may be accidental or intentional." However, the policy also refers to the way, "...employees interact and/or communicate with patients/residents," and in that sense, seems to imply that an unintentional disclosure of personal information would entail conversations or interactions between patients and staff where the staff person accidentally disclosed personal information directly to the patient(s). In this instance, Mr. Azmy clearly was not interacting or communicating with the patients. In fact, quite the opposite was true. During his brief conversation with Mr. Haley, Mr.

Azmy was sufficiently engrossed in his own problems that there was no interaction or communication with the patients under his supervision. While the Board considers the appellant's inattention to his duties for that brief period a work issue in need of correction, the Board believes that counseling would have been sufficient.

Therefore, on the evidence, oral argument and offers of proof, the Board voted unanimously to GRANT Mr. Azmy's appeal, finding that the August 28, 1998, written warning should be reduced to a counseling letter.

* * * * *

Docket #99-D-18

State's Exhibits

1. Memo dated July 30, 1998, from Nancy Clark to Gainil Azmy
2. Letter from Marie Lang to Nancy Clark dated October 2, 1998
3. Performance summary dated November 23, 1998, including the letter to Virginia Lamberton dated November 23, 1998 and the hospital wide competency
4. Letter of Concern dated November 20, 1998 from Brad Geltz to Gamil Azmy
5. Letter of Warning dated November 30, 1998
6. Letter dated December 1, 1998, from Chet Batchelder to Linda Chadbourne

Appellant's Exhibits

- A. Gamil Azmy's annual performance review with supporting documentation, dated November 23, 1998
- B. Letter of counsel dated November 20, 1998, from Brad Geltz to Gamil Azmy
- C. Letter of warning dated November 30, 1998, from Brad Geltz to Gainil Azmy

The parties agreed that the notice of the withholding of Mr. Azmy's annual salary increment dated November 30, 1998, and the written warning dated November 23, 1998, constitute the same action under appeal.

Ms. Chadbourne argued the written warning and withholding of the appellant's annual increment merely restated issues raised in earlier counseling and warnings, and relied on undocumented allegations about poor performance. She argued that issues raised in the unsatisfactory performance evaluation had been outlined already in a letter of counsel dated November 20,

1998, that did not support formal discipline. She argued that counseling had occurred mere days before the warning, and the appellant had no opportunity to take corrective action.

Ms. Chadbourne argued that the complaint that Mr. Azmy had not produced his paperwork in a timely fashion could be disproved by information that had been provided to her by his staff. The State objected to the evidence being offered by the appellant because it was not disclosed to New Hampshire Hospital in a timely fashion, and did not relate to documentation and progress notes that had been of concern to the Hospital. The Board voted to sustain the objection and exclude the proffered documents from the record.

Mr. Martin argued that the unsatisfactory evaluation and resulting warning should include information about earlier letters of warning, counseling and supervision, because it addressed his performance over a period of time. He said that the July 30th letter of supervision issued by Nancy Clark referred to a July 21, 1998, meeting with Mr. Azmy and the discussion that had occurred between him and his supervisors. He argued that the letter primarily addressed the appellant's need to engage in "active listening," his need to accept and utilize constructive feedback, and his need to avoid seeing issues as "black or white." He argued that Ms. Clark praised the appellant's horticultural skills, but reminded him that horticulture was a tool, not his primary job responsibility. Mr. Martin argued that the Hospital was concerned about Mr. Azmy's statement that he didn't trust management, and was frustrated with the lack of progress in his hearing constructive criticism without becoming defensive.

Mr. Martin argued that the appellant repeatedly refused to accept the fact that his own conduct was responsible in part for management's reaction when none of the interventions, including supervision, counseling, warnings, and reassignment, had worked. He argued that the Hospital had no choice but to withhold the appellant's increment and issue the warning.

Ms. Chadbourne argued that the problems between the appellant and management at the Hospital seemed to hinge on the appellant's alleged failure to listen. She suggested that the disciplinary action was actually a reaction by staff to the appellant's assertion of his right as a state employee and union member to disagree with management on issues that affected his employment. She argued that the appellant's supervisors over-reacted to the appellant's refusal to be complacent, and that the Hospital was responsible for any mistrust between the appellant and management.

The following facts are not in dispute:

1. On November 20, 1998, Mr. Azmy received a letter of counsel from his supervisor, Brad Geltz, concerning alleged deficiencies in writing "Interventions on the Treatment Plan" and "Progress Notes."
2. On November 23, 1998, Mr. Azmy received a performance evaluation rated "below expectations" overall, and "below expectations" in the following areas: 1) prioritizes work effectively and completes assignments on time; 2) plans and organizes workload efficiently; 3) when mistakes are made, learns from them and does not repeat the same mistake; 4) work is done thoroughly and followed up as required; 5) when necessary, expresses information in an appropriate fashion; 6) follows policy and procedural guidelines and instructions in an appropriate, effective way; 7) does not discuss confidential matters; and 8) adapts to new methods or tasks in a cooperative manner.
3. The "general comments" written by Mr. Azmy's supervisor describe him as "a talented staff person," but indicate that he "has had difficulty working within some of the policies and procedures of NH.H." The evaluation notes that since his transfer to the APS building, Mr. Azmy had received two written warnings, two counseling letters and a number of letters of supervision.
4. In the self-evaluation attached to the performance summary, Mr. Azmy listed his accomplishments as including, "Programs in wood working, greenhouse plants in all areas - and on D unit as establishing, "[illegible], baking, crafts, horticulture, woodworking, ground." He listed his strengths as, "Experience for over 33 years in this kind of programming. Education 2 BS and Masters in Recreation, Rec. Therapist TR and OTRS for over 25 years." Mr. Azmy gave no response to the question, "What needs improvement in your job performance?" Mr. Azmy gave no response to the question, "List goals you would like to achieve next year." When asked, "What training you would like in next year?" he replied, "How to deal with." On a scale of 1 to 5, with 5 being the highest rating, Mr. Azmy rated his own performance at a "5."
5. The appellant did not sign the evaluation when it was provided to him for review. In the place reserved for the employee's signature Mr. Geltz wrote, "Gamil chose not to sign the evaluation at this time. BG/11/23/98/Gamil attended 11:15 - 12 noon."

Rulings of Law

- A. Per 801.01 of the Rules of the Division of Personnel provides that, "An employee's immediate supervisor shall evaluate the performance of each employee in a full-time classified position..."
- B. Per 801.02 provides that, "Each evaluation shall measure the employee's performance in relation to the performance expectations of the position. At a minimum, these expectations shall include each accountability listed in the employee's supplemental job description..."
- C. Per 801.02 (g) provides that, "The employee shall have the opportunity to comment in writing on the evaluation. If the employee does not concur with the evaluation's findings, the employee shall include an explanation of the reasons for non-concurrence."
- D. Per 801.02 (I) provides that, "The employee's signature on the evaluation shall certify only that the evaluation has been read and discussed and that the employee's comments, if any, are an accurate statement of the employee's response to the evaluation."
- E. Per 801.02 (j) provides that, "If the employee refuses to sign the evaluation after being given the opportunity to do so, the supervisor shall so certify in writing and the evaluation shall be valid for all purposes."
- F. Per 901.05 (a) of the Rules provides that, "An appointing authority may withhold an annual increment under Per 1001.04 for unsatisfactory work performance or for other good cause, provided the reasons for withholding the increment are documented by the performance evaluation required under Per 801."

Decision and Order - Docket #98-D-18

The parties agree that the underlying basis for the discipline is the manner in which Mr. Azmy communicated with his supervisor and responded to supervision, although the appellant argued that none of his alleged difficulties in communicating with management rose to the level of offenses warranting discipline. The Board does not agree. The appellant also argued that management was at fault in large part, having created an atmosphere where the appellant felt he had no one with whom he could communicate openly without sparking further controversy and discipline. Again, the Board does not agree.

The evidence reveals a pattern of conduct on the appellant's part consistent with New Hampshire Hospital's representations that the appellant is not responsive to feedback and constructive criticism. The appellant's response to the competency statements attached to his November 23,

1998, evaluation are a good example. Mr. Azmy signed each of the competency statements where he was found to satisfy the work requirements, including: 1) Back Safety, 2) Infection Control, 3) Calculate/Document Patient Salary, 4) Supervision of Therapeutic Employment, 5) Community Trips, and 6) Evening/Weekend Activities. By contrast, whenever the appellant's supervisor indicated that Mr. Azmy had not completely mastered the competency, the appellant requested a consultation and declined to sign the statements. The unsigned competency statements included: 1) Therapeutic Rapport: Interpersonal Relationship, 2) Rehabilitation Treatment Planning, and 3) Program Implementation/Group Leadership.

Mr. Azmy's conduct during the course of the hearings themselves provided further evidence of the appellant's unwillingness to communicate cooperatively with staff. During the hearing on Docket #98-D-17, for instance, when asked by the Hospital's representatives to assist them with information in order to produce an accurate sketch of the greenhouse layout, Mr. Azmy simply refused, saying he would do his own sketch. Even when the Board directed the appellant to make corrections on the Hospital's sketch, Mr. Azmy insisted upon doing his own drawing of the layout instead.

Per 801.02 (g) provides an opportunity for employees to comment in writing on their evaluation. Per 801.02 (i) provides a further opportunity to certify that the employee's comments are, "...an accurate statement of the employee's response to the evaluation." The appellant did not sign the evaluation or offer any written response to its content. Per 801.02 (j) warns that if the employee refuses to sign the evaluation after being given the opportunity to review and comment on the evaluation, "...the evaluation shall be valid for all purposes." As a matter of rule, such purposes would include the withholding of an employee's annual salary increment for unsatisfactory work performance, and the issuance of a written warning for failure to meet work standards.

Having considered the evidence, arguments and offers of proof, the Board voted to DENY Mr Azmy's appeal of the written warning and withholding of his annual salary increment for his continued failure to meet the work standard.

* * * * *

DOCKET #99-D-19

State's Exhibits

1. Letter dated December 11, 1998, from Brad Geltz to Gamil Azmy
2. Memo dated December 29, 1998, from Brad Geltz to Gamil Azmy

3. Letter of Counsel dated January 1, 1999, from Nancy Clark to Gamil Azmy
4. Letter from Chet Batchelder

Appellant's Exhibits

- A. Letter of warning dated January 18, 1999, from Nancy Clark to Gamil Azmy
- B. Letter of Counsel dated December 29, 1998, from Brad Geltz to Gamil Azmy
- C. Memorandum (undated, unaddressed) from C. Ajemian, Psy.D.
- D. Letter dated December 18, 1998, from Gamil Azmy to Brad Geltz
- E. Letter of counsel dated December 16, 1998, from Nancy Clark to Gamil Azmy, with addendum
- F. Letter of counsel dated December 11, 1998, from Brad Geltz to Gamil Azmy

The following facts are not in dispute:

1. On November 17, 1998, during a goal-setting exercise taking place as part of the D-Unit morning meeting, Mr. Azmy mentioned that he had some piglets in his vehicle, and that his goal for the day was to visit the animals and feed them at least five times.
2. When the patients expressed interest in seeing the animals, Mr. Azmy said that they would not be allowed to do so. When the patients asked him why they could not see the animals, Mr. Azmy told them that Brad Geltz had said no.
3. Mr. Azmy did not explain to the patients that there was a policy lie would have needed to follow in order to get permission for such an activity.
4. Dr. C. Ajemian, who participated in the meeting, reported the exchange between Mr. Azmy and the patients, identifying her concerns about the incident as follows: 1) Mr. Azmy "sent the message that lie was going to use work time to attend to this personal goal;" 2) There were questions about the appropriateness of his leaving the animals in a vehicle in the parking lot all day; and 3) By failing to explain the reason for Mr. Geltz's decision, Mr. Azmy jeopardized the clinical relationship between Mr. Geltz and the patients.
5. Mr. Azmy did not believe that he had done anything wrong by saying that Mr. Geltz would not allow the animals on the unit, and he did not believe it was necessary to engage in any further explanation.
6. On or about November 24, 1998, Mr. Azmy and Mr. Geltz had a conversation about greenhouse procedures and about supplies for the appellant's woodworking group.
7. On December 11, 1998, Mr. Geltz issued a letter of counsel to the appellant as a result of that conversation, asserting that the appellant had accused his supervisor of deliberately

- attempting to kill the plants in the greenhouse by ordering the use of disinfectants, and of ruining Mr. Azmy's woodworking group by not processing his materials/supply request.
8. The appellant met with Mr. Geltz, Mr. Clark and SEA Field Representative Chadbourne on December 17, 1998, to review those issues.
 9. On December 18, 1998, Mr. Azmy wrote to Mr. Geltz, insisting that what Mr. Geltz considered an accusation was simply the appellant's way of trying to make Mr. Geltz understand how concerned he was that there was no money for woodworking supplies, which would make it difficult for him to conduct any worthwhile sessions for the patients. He also wrote that he had only tried to make Mr. Geltz aware of his concerns about using chemicals in the greenhouse because the plants were dying, and those patients spraying the chemicals were developing skin problems. In his letter he wrote, "I am sorry that you think I am trying to 'blame' you. I am not trying to blame you; I am simply trying to do my job. When things get in the way of me doing my job, it makes me unhappy."
 10. The appellant received another letter of counsel on November 29, 1998, in response to the appellant's handling of the piglet incident, and for his refusal to accept any responsibility for failing to provide the patients with complete information about why they were unable to see the animals.
 11. On January 12, 1999, the appellant received a letter of counsel concerning his unscheduled absences during the period of July 1, 1998 through January 11, 1999. The letter indicated that 11 of the 16 days of sick leave taken by the appellant were taken adjacent to his usual scheduled days off.

Ms. Chadbourne argued that the January 18, 1999, warning for failure to meet the work standard was another example of discipline based on vague, unproven allegations about Mr. Azmy's work performance and communications. She argued that the warning disciplined the appellant for discussing his own performance with co-workers, for exercising his right to comment on matters of public policy, for bringing matters of concern to his supervisor and to other management personnel, and for attempting to defend himself to his supervisor. She argued that every time Mr. Azmy tried to respond to supervision or tell his "side of the story," his actions would be interpreted by management as "challenging every detail," "failure to stay focused," and "insubordination."

Ms. Chadbourne argued that every one of the appellant's attempts to work cooperatively with management and to keep management apprised of problems in his work area would be met with accusations by his supervisor. She argued that Appellant's Exhibit D would provide a "milder"

explanation of interactions with Mr. Geltz after Mr. Azmy had objected to his supervisor's orders to clean the greenhouse plants with Pine-Sol. She argued that when the appellant realized that the plants were dying and that the patients were developing skin rashes, the appellant did what he needed to do and apprised his supervisor of the problems. She argued that the appellant's efforts were continually thwarted, even when the appellant tried to get feedback from a co-worker about whether or not he had been out-of-line in his reaction to the letter from Dr. Ajeinian.

Ms. Chadbourne argued that Mr. Azmy was not trying to "stir things up" in his conversation with Diane Lapp, but was simply trying to get feedback from her about the letter from Dr. Ajemian, and whether Ms. Lapp thought the appellant had been out of line. Ms. Chadbourne said it was true that the appellant did bring piglets to the Hospital without receiving prior approval, but that the animals were in a truck with appropriate housing. She said that it was not his intention to take the patients to see piglets. She argued that instead of giving the patients a lengthy explanation of why it wasn't possible for them to see the piglets, he told them the truth that Brad had said it would not be possible.

Mr. Martin argued that the Hospital had no problem with an employee seeking feedback from a fellow employee as long as it was done in a positive manner, not in a way that undermines and disrupts the workplace. He argued that the appellant was hostile, uncooperative and disrupted the work place, and that the appellant had offered no real evidence that the appellant had ever attempted to take the corrective action outlined in the warnings or counseling.

Mr. Martin argued that the appellant had said that he wanted to bring the piglets to the Hospital and that Mr. Geltz told him it could be possible if the appellant followed the correct procedures. Instead, he argued, the appellant brought the animals to the Hospital grounds, told the patients he had the piglets with him, and then told the patients it was because of Mr. Geltz that they were unable to see them.

Mr. Martin argued that Mr. Azmy was not disciplined for talking with co-workers, for bringing concerns to supervisors, or for defending himself. He argued that the appellant was disciplined for the way in which he approached any disagreement or conflict. He argued that the appellant frequently missed the point of supervisory intervention, and refused to assume any responsibility for conflicts between himself and supervisory personnel. He argued that his failure to communicate and interact appropriately constituted a failure to meet the work standard and warranted a written warning.

Rulings of Law

A. Per 1001.03 (a) 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 for offenses including, but not limited to: (1) Failure to meet any work standard..."

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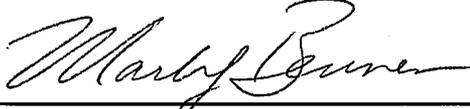
The evidence reflects that the appellant had numerous opportunities to discuss with supervisory personnel any issues that were of concern to him. The only evidence the appellant offered as proof of his attempts to communicate in a cooperative and effective manner was his letter of December 18, 1998. In that letter he wrote, "When things get in the way of me doing my job, it makes me unhappy." The Board found that the message Mr. Azmy continued to convey to his supervisors was that he was unhappy whenever things got in the way of his doing his job his way.

Despite the appellant's characterization of the Hospital's counseling and supervision as a reaction to his refusal to be complacent, or his insistence on exercising his right to free speech, the Board found that Mr. Azmy's conduct represented a simple refusal to accept supervision, direction, feedback and constructive criticism. Moreover, the evidence reflects that the appellant would not accept responsibility for his own part in the disintegration of relations with supervisory and treatment staff, as evidenced by his reaction to the piglet incident.

In that instance, the appellant indicated that he wanted to bring the piglets to work for the patients to see. Mr. Geltz did not deny the request outright, but told the appellant that he would have to comply with the Pet Therapy Policy guidelines in order to do so. Instead of requesting that approval under the appropriate guidelines as directed by his supervisor, the appellant brought the animals to work, told the patients the animals were on the grounds, then told them that the reason they could not see them was because Mr. Geltz would not permit it. Rather than follow the policy or explain the policy, he simply blamed his supervisor.

On the evidence, argument and offers of proof, the Board voted to DENY Mr. Azmy's appeal of his January 18, 1999, written warning.

THE PERSONNEL APPEALS BOARD



Mark J. Bennett, Chairman



Patrick H. Wood, Commissioner



Lisa A. Rule, Commissioner

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