

State of New Hampshire



PERSONNEL APPEALS BOARD

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Appeal of Joshua Burney

Docket #2012-T-005

New Hampshire Hospital

April 5, 2012

A quorum of the New Hampshire Personnel Appeals Board (Bonafide and Casey)¹ met in public session on Wednesday, March 28, 2012, under the authority of RSA 21-I:58, to hear the appeal of Joshua Burney, a former employee of New Hampshire Hospital. Mr. Burney, who was represented at the hearing by SEA General Counsel Michael Reynolds, was appealing his November 23, 2011, termination from employment as a Registered Nurse II after receiving four warnings for absenteeism. Attorney Lynne Mitchell appeared on behalf of New Hampshire Hospital.

The record of the hearing in this matter consists of pleadings submitted by the parties, notices and orders issued by the Board, the digital audio recording of the hearing on the merits of the appeal, and the following documents admitted into evidence without objection.

State's Exhibits

1. Performance Summary forms (12/23/10)
2. Letter of Warning (10/25/10)
3. Letter of Warning (11/22/10)
4. Letter of Warning (01/06/11)
5. Letter of Warning (03/07/11)
6. Letter of Intent to Dismiss (11/14/11)
7. Letter of Dismissal (11/23/11)
8. FMLA Documents (11/23/11)

¹ Although RSA 21-I:46, II, authorizes quorum of the Board, consisting of any two members, to conduct its business, the Board's practice has been to allow parties to object, in most instances, if a full three-member panel is unavailable. Neither party objected to having the appeal heard by a quorum of the Board.

Appellant's Exhibits

- A. SEA Collective Bargaining Agreement Article 11
- B. 2008, 2009 and 20011 Performance Evaluations
- C. November 9, 2011, correspondence from Audrey M. Wells, RN-BC, Nurse Coordinator, Unit E
- D. State of New Hampshire Pay Statement for period ending November 17, 2011

The State also offered into evidence a photocopy of a handwritten note written by Ms. Wells, which was marked for identification as State's Exhibit 9. Attorney Reynolds objected to its admission into evidence, arguing that it was irrelevant to the stated basis for the dismissal decision. Attorney Mitchell argued that it provided evidence regarding the Appellant's credibility. The Board determined that the Appellant's credibility was not a basis for dismissal and sustained the Appellant's objection, refusing to accept the exhibit or admit it into evidence. The Board took notice of Attorney Mitchell's exception to that ruling.

The following persons gave sworn testimony:

Alice Leeming, Human Resources Coordinator for New Hampshire Hospital
Audrey Wells, RN, Nurse Coordinator
Joshua Burney, former RN II

After carefully considering the evidence and argument offered by the parties, the Board made the following findings of fact and rulings of law. In so doing, the Board noted that the material facts are not in dispute.

Findings of Fact

1. At the time of his dismissal, the Appellant was working as a Registered Nurse II on second shift at E-Unit at New Hampshire Hospital.
2. Between October 25, 2010, and March 7, 2011, the Appellant received four written warnings for, "repeated, unauthorized, and unscheduled absences from work and [his] unsatisfactory and unacceptable attendance pattern in violation of the New Hampshire Hospital Employee Attendance policy." Each of the four

- warnings refer to the Appellant's habitual tardiness. None of the warnings were appealed to this Board. (State's Exhibits 2-5 and testimony of Joshua Burney)
3. The fourth written warning issued to the Appellant on March 7, 2011, listed five specific corrective actions that the Appellant was required to take, "in order to avoid additional disciplinary action which may include additional Letters of Warning, suspension with or without pay, demotion, or discharge from employment." Three months after issuing the fourth written warning, Ms. Wells lifted three of the five corrective action requirements, leaving only two: "1. Report to work when scheduled, on time, and ready to work," and "2. Sign on the timesheet accurately every day." (Exhibit 5, page 4)
 4. Between June 19, 2011, and November 2, 2011, the Appellant had seven unscheduled absences, each of which was reported by the Appellant as sick leave. No one questioned the legitimacy of the Appellant's reports that he was sick, and no one required the Appellant to produce certification from a licensed health care practitioner to verify the Appellant's need for sick leave. Each period of absence was paid from the Appellant's available balance of accrued of sick leave. (Testimony of Joshua Burney and Audrey Wells)
 5. On two of the occasions when the Appellant requested sick leave, the Appellant reported to his shift supervisor that he was ill and he received the shift supervisor's permission to leave the unit and use sick leave to cover the remainder of his shift. Leave slips submitted by the Appellant for those absences were marked "Approved" and the Appellant was paid from his accrued, available sick leave. For the Appellant's remaining full-day absences, there were no allegations that the Appellant failed to call the nursing office, as required, to notify the hospital that he was ill and taking sick leave for the day. (Exhibit 6, and testimony of Joshua Burney and Audrey Wells)
 6. Sick leave slips that were submitted by the Appellant for full-day absences on August 25, September 13, September 14, October 7, and November 2, 2011, were signed by Ms. Wells, but not marked as approved or disapproved. The Appellant was paid from his accrued, available sick leave for each of those absences. (Exhibit 6, and testimony of Joshua Burney and Audrey Wells)
 7. When direct care staff at New Hampshire Hospital are going to be absent unexpectedly, they are required to call the nursing office two hours before the start of their shift so that other staff can be reassigned, if necessary, to provide

sufficient coverage on each of the units. The nursing office is staffed by Mental Health Workers, who take the calls and assist in scheduling. Nursing office staff do not approve or deny requests for time off, nor do they tell employees whether or not they will be expected to provide certification of the need for sick leave when they return to work. (Testimony of Audrey Wells)

8. The Appellant was notified by letter dated November 9, 2011, that Ms. Wells believed there were sufficient grounds to dismiss the Appellant from state service. Specifically, Ms. Wells wrote, "In spite of written warnings and corrective action plans regarding your frequent absences taken in conjunction with your days off, your attendance has failed to improve. You were warned that failure to improve might lead to further disciplinary action up to and including dismissal. Over the past five months, you have had unscheduled absences from work on seven days, three in conjunction with your scheduled days off. Your pattern of unscheduled absences causes your co-workers to work overtime and is detrimental to the agency's ability to provide services." (Exhibit C)
9. After being questioned by the Appellant about why the November 9, 2011, letter included reference to counseling memos, and after consulting with the human resources office at New Hampshire Hospital, Ms. Wells issued an "Amended Intent to Dismiss" letter dated November 14, 2011, removing references to earlier counseling, but retaining references to each of the four prior written warnings. (Exhibit 6, and testimony of Joshua Burney and Audrey Wells)
10. The Amended Intent to Dismiss letter issued to the Appellant on November 14, 2011, quotes a portion of the New Hampshire Hospital Employee Attendance Policy as follows: "Absenteeism is defined as the habitual failure to report and/or to remain at work without good reason on scheduled work days whether or not the employee has called and has leave available." (Exhibit 6, page 2)
11. On November 16, 2011, Ms. Wells met with the Appellant, his SEIU Representative Laurie Aucoin, and Rosemary Costanzo, the Nurse Coordinator for J Unit, to discuss the evidence supporting the Appellant's dismissal from employment. During that meeting, the Appellant asserted that his absences were related to personal health issues, for which he had been under the care of a licensed health care practitioner. Ms. Wells addressed that assertion in the letter of dismissal issued to the Appellant on November 23, 2011, writing, "I reminded

you that I had spoke[n] to you on two occasions recently about the option of you seeking out FMLA, if that were appropriate to your needs. (Exhibit 7)

12. The Appellant supplied certification from a licensed health care practitioner, dated November 19, 2011, certifying the Appellant's need for intermittent FMLA leave, effective November 19, 2011. By letter dated November 23, 2011, addressed to the Appellant, and copied to Ms. Wells, staff from the Human Resources Bureau in the Department of Health and Human Services informed the Appellant that he had eight weeks of FMLA leave available to him at that time, which the Appellant's health care provider believed would be used intermittently, one day per month. A copy of that letter also was sent to Ms. Wells. (Exhibit 8)
13. The Appellant was notified by letter dated November 23, 2011, that he was being dismissed pursuant to Per 1002.08 (c)(1) of the NH Code of Administrative Rules, which states, "An appointing authority may dismiss an employee pursuant to Per 1002.04 by issuance of a third written warning for the same type of offense within a period of five years." (Exhibit 7)

Rulings of Law

- A. Per 1204.05 of the NH Code of Administrative Rules, and Article 11 of the Collective Bargaining Agreement describe the purpose of sick leave as a full-time employee's means of, "protection against lost income from absences due to illness or injury and, in particular, long-term disability due to catastrophic illness or injury." Article 11 of the CBA also indicates that, "Sick leave is not intended to supplement other leave provisions of this Agreement and is intended to be used only for the purpose set forth herein."
- B. The "Application for Leave" process is defined by Per 1202.02 (a) through (c) of the NH Code of Administrative Rules, which states, "(a) Written leave requests from an employee shall be accepted by the appointing authority at reasonable times. (b) The appointing authority shall return one copy of the leave application to the employee, either approving or disapproving the request. (c) No employee shall be compensated unless the employee has first obtained an approved application for leave from the appointing authority."

- C. According to Per 1204.07, "(a) The appointing authority may require the employee to furnish a certificate from an attending physician or other licensed health care practitioner when the appointing authority has reason to believe that the employee's use of sick leave does not conform to the reasons and requirements for sick leave use set forth in this part."
- D. Requirements for certification of leave also appear in the Collective Bargaining in Article 11, which states, in pertinent part, "An employee may be required by the Employer to furnish the Employer with a certificate from the attending physician or other licensed health care practitioner when, for reasonable cause, the Employer believes that the employee's use of sick leave does not conform to the reasons and requirements for sick leave use set forth in this Agreement. Such certificate shall contain a statement that in the practitioner's professional judgment sick leave is necessary. In addition, the Employer may, at state expense, have an independent physician examine one of his/her employees who, in the opinion of the Employer, may not be entitled to sick leave. The time related to such examination shall not be charged to the employee's leave."

Position of the parties

Ms. Mitchell argued that the Appellant had been warned numerous times about his repeated, unscheduled absences, and that the Appellant fully understood the negative impact that repeated, unauthorized absences have on delivery of services to patients and management of staff. Ms. Mitchell argued that the Appellant was urged repeatedly to seek counseling through the Employee Assistance Program if problems in his personal life were affecting his ability to report for work as scheduled, and that he also was urged to consider applying for FMLA leave to protect his absences if he had a qualifying chronic health condition. Ms. Mitchell argued that the Appellant failed to take the necessary steps to have his absence protected under the FMLA, and that the Appellant failed to correct an unacceptable pattern of behavior related to his attendance. Ms. Mitchell argued that the Board should not adopt the Appellant's position that different reasons for unscheduled absence should be treated differently, as those absences had the same negative effect on operations in the workplace. Ms. Mitchell asked the Board to uphold the termination and find that the decision to dismiss the Appellant was not illegal, unjust or inappropriate.

Attorney Reynolds argued that employees who are sick have the right to use sick leave, and that employees can not be dismissed simply for using sick leave as long as their requests for leave comport with the provisions of the Personnel Rules and the Collective Bargaining Agreement. Attorney Reynolds argued that the agency could have required the Appellant to provide medical certification if they questioned the legitimacy of his sick leave requests. Attorney Reynolds also argued that not all sick leave will qualify as FMLA leave, and that the Appellant could not be dismissed simply because he did not have an FMLA certification of the need for leave for the seven absences listed in the notice of dismissal. Attorney Reynolds argued that, despite the State's arguments about the effect of absenteeism, it was important for the Board to note that the Appellant was dismissed for using paid sick leave, when all four written warnings that preceded the notice of dismissal cited tardiness as the basis for discipline. Attorney Reynolds argued that the Appellant tried to tell Ms. Wells the reason he was unable to report for work, but that Ms. Wells simply did not want to hear it. Attorney Reynolds argued that it was both illegal and unjust for New Hampshire Hospital to dismiss the Appellant for using sick leave that he was legitimately entitled to use, and that was authorized by the employer.

Discussion of the Evidence and Argument

The Board fully appreciates the frustration that managers experience, and the disruption of services that can occur, when employees are frequently and unexpectedly absent from work. The record reflects that the Appellant was disciplined repeatedly between October 25, 2010, and March 7, 2011, for being late to work. In written warnings issued by his managers, the Appellant was informed that additional disciplinary action would follow if he failed to improve his attendance and report to work on time. Although the Appellant could have been dismissed on January 6, 2011, by issuance of a third written warning for absenteeism/tardiness, or on March 7, 2011, by issuance of a fourth written warning for absenteeism/tardiness, the agency chose in this case not to dismiss the Appellant. Instead, the agency advised the Appellant that his attendance would be monitored and that his continued absenteeism, and failure to report to work on time as scheduled, could result in additional disciplinary action up to, and including, dismissal.

New Hampshire Hospital policy defines absenteeism as, “the habitual failure to report and/or to remain at work without good reason² on scheduled work days whether or not the employee has called and has leave time available.” (Emphasis added) The agency has asked the Board to find that absences resulting from tardiness and unexpected absences related to requests for sick leave have the same effect on the workplace and therefore should be treated similarly for purposes of determining an appropriate level of discipline. The Board does not agree. Unlike absences due to illness, which are generally unpredictable, employees have control over the timeliness of their arrivals at work in almost all cases. Employers can require their employees to report to work on time; they can not demand that their employees never get sick.

The record reflects that Ms. Wells spoke to the Appellant about his absences and recommended that the Appellant consult with the Employee Assistance Program (EAP) to address any personal issues that might be affecting his ability to report for work. Ms. Wells also suggested that the Appellant investigate the possibility of obtaining approval for job-protected leave under the provisions of the Family and Medical Leave Act if the Appellant felt that his absences would qualify.

Although an agency can recommend EAP services, it can not mandate an employee’s participation in counseling provided by the program. On the other hand, an agency can and should require an employee to obtain certification from a licensed health care provider if the employee’s absences from work appear to be, or are reported to be, the result of a serious medical condition that prohibits the employee from reporting for work as scheduled and performing the essential functions of his or her position. Similarly, if an agency suspects that an employee’s use of leave does not conform to the terms of the Collective Bargaining Agreement or Personnel Rules, it has the right to require the employee to obtain medical certification of the need for leave.

² In closing arguments, Ms. Mitchell argued that there was no “good reason” for the Appellant to be absent. During the hearing itself, Ms. Mitchell suggested that the Appellant may have taken sick leave on one or more occasions in order to avoid reporting late to work. If New Hampshire Hospital had concerns about possible misuse of leave, they had an obligation to address that issue with the Appellant when those suspicions arose, and they should have conducted an appropriate inquiry prior to the Appellant’s dismissal. Had there been evidence of misuse or leave abuse, they should have included that allegation and supporting evidence in the notice of termination of employment. Since the agency did not question the reasons behind the Appellant’s requests for sick leave and made no reference to it in his notice of dismissal, the Board refused to receive any evidence on that point.

Once an employer has received sufficient notice of the possible need for FMLA leave, it is the agency's responsibility to notify the employee of his or her eligibility for such leave, to require the employee to produce the required medical certification, and to notify the employee of the possible consequences of failing to do so. If Ms. Wells believed that it was inappropriate for her to receive any information from the Appellant about the Appellant's personal issues or the state of his health, she needed to do more than recommend a visit to EAP or suggest that he make a request for FMLA leave. She should have required the Appellant to report to the human resources office to address those issues with them. Employees are entitled to receive timely notice of their rights and responsibilities, including specific information about the possible consequences of failing to provide information to which the agency is legally entitled. When an agency neglects to provide the required notification, as appears to have occurred in this case, or if the agency fails to inform the employee that he or she is responsible for obtaining certification of the possible need for leave, the agency can not then hold the employee responsible for failing to prove the need for leave, or discipline the employee for using accrued sick leave.

While agencies are required to provide twelve weeks of FMLA job-protected leave in a twelve month period to eligible employees who must be absent as a result of a "serious health condition," not all sick leave absences are FMLA-qualifying, and not every employee is entitled to unlimited leave. In some cases, even when an employee does not suffer from a serious or chronic health condition, an employee's general state of health may make it impossible for the employee to maintain a regular schedule of work. In those cases, an agency may remove an employee for non-disciplinary reasons when the employee is medically unable to perform the essential functions of the position, including the requirement to maintain a regular work schedule.

Decision and Order

Having carefully considered the evidence and arguments presented, the Board found that the decision to dismiss the Appellant was unjust in light of the facts in evidence and voted to order New Hampshire Hospital to reinstate the Appellant to his former position as a Registered Nurse II. As set forth in the provisions of RSA 21-I:58, I, "The employee shall be reinstated without loss of pay, provided that the sum shall be equal to the salary

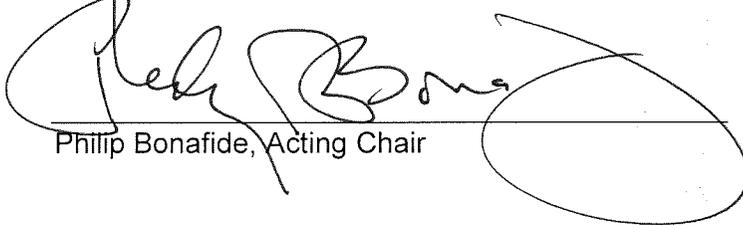
loss suffered during the period of denied compensation less any amount of compensation earned or benefits received from any other source during the period. "Any other source" shall not include compensation earned from continued casual employment during the period if the employee held the position of casual employment prior to the period, except to the extent that the number of hours worked in such casual employment increases during the period."

New Hampshire Hospital and the Department of Health and Human Services are directed to remove letters from the Appellant's file referring to the intent to dismiss him, and the notice of dismissal. Any absences noted in the November 23, 2011, letter of dismissal shall not be treated as "absenteeism" as defined by New Hampshire Hospital policy, and shall not be considered in any future disciplinary action.

Although the Board has ordered the Appellant's reinstatement, the Appellant is reminded that his file still contains four written warnings for absenteeism resulting from the Appellant's alleged tardiness. Because none of the four warnings were appealed to this Board, they are not now subject to removal or amendment. Therefore, they remain a part of the employee's file, and may be included as a basis for future disciplinary action.

As set forth above, the appeal of Joshua Burney is GRANTED.

THE NEW HAMPSHIRE PERSONNEL APPEALS BOARD



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