# State of New Hampshire

**PERSONNEL APPEALS BOARD**
**25 Capitol Street**
**Concord, New Hampshire 03301**
**Telephone (603) 271-3261**

**Appeal of Ronald Burns**

**Docket #2006-T-023**

**NH Community Technical College System**

**Decision on Appellant's Motion for Reconsideration/Rehearing**

**and**

**State's Objection to Motion for Reconsideration/Rehearing**

May 18,2007

By letter dated April 23,2007, SEA General Counsel Michael Reynolds requested Reconsideration and Rehearing in the Appeal of Ronald Burns, which the Board denied by Decision and Order dated March 28,2007. By letter dated April 26, 2007, Assistant Attorney General Anthony J. Blenkinsop filed the State's Objection to the Appellant's Motion.

In accordance with Per-A 208.03 (b) and (e), a Motion for Reconsideration and Rehearing, "…shall set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable." And, "A motion for rehearing in a case subject to appeal under RSA 541 shall be granted if it demonstrates that the board's decision is unlawful, unjust or unreasonable."

In support of his Motion for Reconsideration and Rehearing, Attorney Reynolds argued that: 1) Mr. Burns had sick leave remaining on the books on the date of termination, and was entitled to exhaust his sick leave before the agency could legally terminate his employment; 2) No medical determination was presented to indicate that Mr. Burns was

permanently disabled from his job; 3) Mr. Burns' condition had greatly improved at the time of termination; and 4) the termination was unlawful and unjust.

In response to the Appellant's Motion, Assistant Attorney General Blenkinsop argued that the Appellant had mischaracterized the Board's findings, noting that the Board did not determine that the Appellant was medically unable to perform his duties, but found instead that the Appellant's "physical condition created a direct hazard or threat to himself that could not be reasonably accommodated." (Objection, page 1) Assistant Attorney General Blenkinsop argued that the fact that the Appellant still had sick leave available to him on the date of separation was irrelevant, and that the evidence did not support the Appellant's claim that his health had "greatly improved" by the date of termination.

1. As the Board indicated in its March 28,2007 decision, "There is no provision in either the Collective Bargaining Agreement or the Personnel Rules that requires an employer to allow an employee to retain his or her position until that employee exhausts all accumulated leave." (Decision, page 9)
2. Under the rules in effect on the date of termination, the employer was not obliged to determine that the employee was permanently disabled. The employer did provide sufficient evidence to persuade the Board that his medical condition created a direct threat to himself that could not be reasonably accommodated.
3. The Appellant failed to offer evidence to persuade the Board that his health "greatly improved" or sufficiently improved on the date of termination to conclude that the Appellant's medical condition no longer created a direct threat to himself.
4. The Board's decision to uphold the Appellant's termination was lawful, reasonable and just under the facts in evidence.

Having considered the Motion and Objection in light of the Board's findings, the Board voted unanimously to DENY the Appellant's Motion for Reconsideration and Rehearing.

THE PERSONNEL APPEALS BOARD

Philip Bonafide, Chair

Robert Johnson, Commissioner

Joseph Casey, Commissioner

cc: Karen Hutchins, Director of Personnel, 25 Capitol St., Concord, NH 03301
Michael Reynolds, SEA General Counsel, 105 N. State St., Concord, NH 03301
Assistant AG Anthony Blenkinsop, Dept. of Justice, 33 Capitol St., Concord, NH 03301

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**Docket #2006-T-023**

**NH Community Technical College System**

March 28,2007

The New Hampshire Personnel Appeals Board (Bonafide, Johnson and Casey) met in public session on Wednesday, February 7,2007, under the authority of RSA 21-I:58 and Chapters Per-A 100-200 of the NH Code of Administrative Rules, to hear the appeal of Ronald Burns, a former employee of the NH Community Technical College System (hereinafter "State"). Mr. Bums, who was represented at the hearing by SEA General Counsel Michael Reynolds, was appealing his June 5,2006 dismissal for non-disciplinary reasons from his position as a Building Service Worker III. Assistant Attorney General Anthony Blenkinsop appeared on behalf of the State.

The record of the hearing in this matter consists of notices issued by the Board, pleadings submitted by the parties prior to the hearing, the audiotape recording of the hearing on the merits of the appeal, stipulations filed by the parties, and documents admitted into evidence as follows:

**State's Exhibits:**

1. June 5,2006 letter of dismissal from NHCTC to Mr. Burns
2. Building Service Worker III job descriptions and supplemental job descriptions for 'first, second, and third shifts for applicable time periods 'during Mr. Burns' employment
3. November 8, 2005 letter from NHCTC to Mr. Burns

4. October 26,2005 letter from Dr. J. Savage to NHCTC
5. October 25,2005 letter from NHCTC to Mr. Burns
6. October 25,2005 letter from NHCTC to Dr. J. Savage, with attachments
7. October 20,2005 letter from NHCTC to Mr. Burns
8. February 16,2005 letter from NHCTC to Mr. Burns
9. October 22,2004 letter from NHCTC to Mr. Burns
10. October 18,2004 letter from Dr. J. Savage
11. October 11,2004 letter from NHCTC to Mr. Burns
12. NHCTC-Manchester Campus Map
13. Incident memo dated May 23,2006 from Michael Coons re: diabetic incident of May 23,2006
14. Incident memo dated March 24,2006 from Tim McGinnin re: diabetic incident of March 22,2006
15. Incident memo dated March 22,2006 from Michael Coons re: diabetic incident of March 22,2006
16. Incident memo dated March 15,2006 from Michael Coons re: diabetic incident of March 15,2006
17. NHCTC Incident Report dated March 15,2006 from Raymond Godin re: diabetic incident of March 15,2006
18. Incident memo dated October 18,2005 from Michael Coons re: diabetic incident of October 18,2005
19. NHCTC medical file re: Ronald Burns
20. Rockingham Regional Ambulance Records
21. Catholic Medical Center Records
22. Dr. J. Savage Records

**Appellant's Exhibits**

A. Email reply fiom Tim McGinnin to Ronald Burns
B. Performance Evaluation for Ronald Bums for the period July 2004 – July 2005

The State objected to admission of Appellant's Exhibit A, as it was not disclosed to the State prior to the hearing. The document was admitted into the record over the State's objection.

In accordance with RSA 91-A:5, IV, various records may be deemed exempt from disclosure under the Right-to-Know Law. They include "....personnel, medical, welfare, library user, videotape sale or rental, and other files whose disclosure would constitute invasion of privacy. Without otherwise compromising the confidentiality of the files, nothing in this paragraph shall prohibit a body or agency from releasing information relative to health or safety from investigative files on a limited basis to persons whose health or safety may be affected." Although neither party asked the Board to restrict public access to any of the documents admitted into evidence, the Board, upon its own motion, voted to restrict access to those exhibits presented as medical records, including all of State's Exhibits 19, 20, 21 and 22, and to redact the Appellant's Social Security Number where it is found elsewhere in the record.

At the hearing on the merits of the appeal, the following persons gave sworn testimony:

Timothy McGinnin
Mary Kibbee-Lee
Mary Scerra
Sara Sawyer
Ronald Burns

The parties submitted the following "Stipulations of the Parties:"

1. Ronald Burns' employment with the State of New Hampshire, New Hampshire Community Technical College (NHCTC), began on July 11,2001, as a Building Service Worker III, third shift.

2. At all relevant times, Ronald Burns had been provided with a job description and supplemental job description regarding his duties and responsibilities as a Building Service Worker III.
3. On October 6,2004, Mr. Burns experienced diabetic complications during a meeting at work, resulting from low blood sugar. NHCTC called 911 and emergency personnel provided assistance to Mr. Burns and transported him from NHCTC to the local hospital via ambulance.
4. On October 11,2004, Mr. Burns was placed on sick leave due to his medical condition pursuant to Per 1204.05(f).
5. Mr. Burns was informed that in order to return to work he needed to provide a physician's certificate/notice regarding his fitness to return to duty.
6. Per letter dated October 18,2004, Dr. Savage discussed Mr. Burns' diabetic condition and authorized his return to work, with guidelines to follow regarding his diabetic care.
7. On October 24,2004, Mr. Burns returned to work with no restrictions in his job duties.
8. Effective February 22,2005, Mr. Burns was assigned from the third shift to the first shift.
9. On May 24,2005, Mr. Burns experienced diabetic complications in the workplace resulting from low blood sugar. NHCTC called 911 and emergency personnel treated Mr. Burns and transported him from NHCTC to the local hospital via ambulance.
10. On October 7,2005, Mr. Burns experienced diabetic complications in the workplace resulting from low blood sugar. NHCTC called 911 and emergency personnel treated Mr. Burns at NHCTC. Mr. Burns left the workplace with his wife.
11. On October 18,2005, Mr. Burns experienced diabetic complications in the workplace resulting from low blood sugar. NHCTC called 911 and emergency personnel treated Mr. Burns and transported him from NHCTC to the local hospital via ambulance.
12. Via letter dated October 20,2005, Mr. Burns was placed on leave, effective October 19,2005, pending a health assessment and certification of his ability to fulfill his work duties pursuant to Per 1204.05(f).
13. Mr. Burns was asked to provide a written assessment from Dr. Savage.

14. In an October 26,2005 report (3 pages), Dr. Joseph B. Savage, Mr. Burns' diabetes specialist, diagnosed Mr. Burns with Diabetes Mellitus Type I.
15. According to Dr. Savage's October 26,2005 report, Diabetes Mellitus Type I is a permanent condition.
16. According to Dr. Savages' October 26,2005 report, *inter alia* "[d]iabetes could be a management problem [in the College's] setting." Mr. Burns "should be able to do almost any type of working [sic] in the environment Mr. Burns describes," provided that he has "adequate time to do testing and adequate time to take supplemental carbohydrate if he needs it, and adequate time to make adjustments in his problem."
17. Mr. Burns was cleared to return to work at NHCTC on November 8,2005.
18. According to a November 8,2005 letter from NHCTC to Mr. Burns, Mr. Burns was required to 1) test his blood sugar levels at two-hour intervals during his shift; 2) participate in Blood Glucose Awareness training; and 3) participate in a stress management program.
19. NHCTC informed Mr. Burns of a no-cost stress management program for his participation.
20. NHCTC instructed Mr. Burns to contact a Human Resource Representative, who would assist in locating and signing up for the training. Additionally, NHCTC informed Mr. Burns that the training would be paid for by NHCTC. Mr. Burns completed the Blood Glucose Awareness training on January 20,2006.
21. Mr. Burns was required to test his blood sugar every two hours, including "during [his] morning 15 minute break, [his] ½ hour lunch period, … during [his] afternoon 15 minute break," and as necessary.
22. The November 8,2005 letter from NHCTC advised Mr. Burns that he could use the Maintenance Shop for blood sugar testing and that a sharps container would be provided for lancet disposal, which it was.
23. On March 15,2006, Mr. Burns experienced diabetic complications in the workplace. NHCTC called 911 and emergency personnel treated Mr. Burns and transported him via ambulance from NHCTC to the local hospital.
24. Later on March 15,2006, Mr. Burns was cleared to return to work the following day.

25. On March 22,2006, Mr. Burns experienced diabetic complications in the workplace, resulting in him being removed from the workplace for a period of time.
26. Mr. Burns' blood sugar levels returned to a normal range after approximately one hour on March 22,2006.
27. On May 23,2006, Mr. Burns experienced diabetic complications in the workplace resulting from low blood sugar that removed him from the workplace for a period of time.
28. Mr. Burns returned to work later on May 23,2006.
29. Mr. Burns was terminated on June 5,2006 for non-disciplinary reasons. Expressed reasons for termination were due to Mr. Burns' physical condition, which the College alleged created a direct threat to his safety and well being in the workplace.

Position of the Parties

Attorney Reynolds acknowledged that the State had acted in good faith and had legitimate concerns about the Appellant's health and safety. Nevertheless, he argued, the State violated the Rules of the Division of Personnel by dismissing the appellant without a current medical assessment indicating that the Appellant was physically or mentally unable to perform the essential functions of his position. Attorney Reynolds argued that when Dr. Savage cleared the Appellant for return to work without restriction, the State either had to accept that assessment or request an independent medical evaluation if it believed that the assessment was inaccurate or unresponsive. Mr. Reynolds also argued that the Appellant had approximately 140 hours of sick leave available to him at the time of dismissal, and that if the State knew that the Appellant was ill, by terminating his employment before his sick leave was exhausted, the State violated the terms and conditions of the State's Collective Bargaining Agreement.

Assistant Attorney General Blenkinsop argued that the Appellant was not dismissed because he was physically or mentally unable to perform the duties of his position, but because the Appellant's physical condition created a direct hazard or threat to himself that could not be eliminated by a reasonable accommodation. He argued that over the

past few years, there had been numerous serious incidents at and away from the college when the Appellant was unable to care for himself. As a result, he argued, the Appellant's co-workers were forced to take responsibility for intervening, obtaining the necessary medical assistance, and in some instances, providing that assistance themselves. He argued that the situation was unsafe for the Appellant and his co-workers, and created an unacceptable liability for the college and staff.

Assistant AG Blenkinsop argued that although the Appellant blamed the latest series of incidents on the failure of the Appellant's insulin pump, the underlying problem remained; during diabetic emergencies, the Appellant was unable to care for himself or resolve his own medical problems without immediate and appropriate intervention by co-workers. Assistant AG Blenkinsop argued that the College requested and received an assessment from the Appellant's physician, which indicated that the Appellant's problem should be manageable in most instances if the Appellant took appropriate care to manage his health needs. The College implemented each of the accommodations recommended by the Appellant's physician, but the Appellant still suffered diabetic emergencies that placed the Appellant at grave risk and created a substantial liability for the College and the Appellant's co-workers. Ultimately, he argued, there were no further reasonable accommodations that the College could make that would sufficiently mitigate the risk, and the College acted reasonably in dismissing the Appellant under the provisions of Per 1002.

Rulings of Law

A. On October 18,2006, the Division of Personnel adopted revised administrative rules. Prior to that date, classified employees were subject to rules that had been adopted by the Division effective April 21, 1998.
B. Per 1002.01 in effect at the time of the Appellant's dismissal stated:
"The purpose of this rule shall be to provide for the removal of a full-time employee for non-disciplinary reasons, when:

a) The employee is physically or mentally unable to perform the essential functions of the position to which appointed;

b) The employee's physical or mental condition creates a direct threat or hazard for the employee, the employee's co-workers or clients of the agency which cannot be eliminated by a reasonable accommodation; or

c) The employee's presence in the workplace, because of the medical condition, is deleterious to the employees health.'"

C. The State complied with the requirements of Per 1002.02 in requesting and obtaining from the Appellant's licensed health care practitioner a medical assessment relative to the Appellant's ability to safely perform the duties and responsibilities of the position to which he was assigned, with or without accommodations.

D. Per 1002.02 did not specify a timeframe beyond which a medical assessment should be considered invalid or outdated. Absent any information to suggest that the Appellant's underlying condition had changed significantly between October 26, 2005 and May 23, 2006, or that the original medical assessment was inaccurate, it would be unreasonable to require the State to obtain additional assessment information from the employee's own physician, or to require the State to obtain an independent medical examination.

E. In compliance with Per 1002.03 (b), the State determined that it would be unable to amend the appellant's duties to accommodate his known medical condition, and that there were no positions for which the appellant qualified into which he could be transferred or demoted.

F. Per 1204.05 (f), in effect at the time, authorized an appointing authority "…to place a employee on sick leave when, in the opinion of the appointing authority, the employee appears to be of such a physical condition so as to prohibit the employee from fulfilling assigned duties."

G. In accordance with Article XI, Sections 11.1.3 and 11.1.4 of the 2005-2007 Collective Bargaining Agreement, employees are entitled to payment of their accumulated but unused sick leave only in the event that they retire under the provisions of RSA 100-A:5 or A:6, or in the event of a reduction in force. In either

[1] Per 1002 expired on October 18,2006, and was replaced by Per 1003.

case, employees are only entitled to receive payment for 41.7% of the number of days remaining to their credit, not to exceed 50 days.

H. There is no provision in either the Collective Bargaining Agreement or the Personnel Rules that requires an employer to allow an employee to retain his or her position until that employee exhausts all accumulated leave.

I. RSA 21-I:58, I provides, in part, "If the personnel appeals board finds that the action complained of was taken by the appointing authority for any reason related to politics, religion, age, sex, race, color, ethnic background, marital status, or disabling condition, or on account of the person's sexual orientation, or was taken in violation of a statute or of rules adopted by the director, the employee shall be reinstated to the employee's former position or a position of like seniority, status, and pay. … In all cases, the personnel appeals board may reinstate an employee or otherwise change or modify any order of the appointing authority, or make such other order as it may deem just."

Decision and Order

On all the evidence and argument offered by the parties, the Board voted unanimously to DENY the instant appeal, finding that the State was authorized to dismiss the appellant for non-disciplinary reasons as a result of his own medical condition, which created a direct threat to the employee's well being in the workplace. The Board further found that the State acted reasonably in doing so.

In reaching that decision, the Board gave very careful consideration to the Appellant's assertion that the insulin pump allowed him to better manage his diabetes, that the incidents in March 2005 occurred when the insulin pump failed, and that he recovered quickly from the episode in May after he drank some iced tea. However, the Board also noted that in each instance, the Appellant was unable to care for himself and required assistance to avoid or overcome loss of consciousness.

Despite the Appellant's insistence that his physician had cleared him for every kind of work except flying commercial aircraft, the Board found that the letter from Dr. Savage simply used flying commercial aircraft as an example of what most insulin dependent diabetics could or could not do. As Dr. Savage wrote, "Please note the insulin dependent diabetics are able to do most of all the tasks around the work place. The major limitation is only activity such as flying commercial planes or driving large trucks on interstate." (Appellant's Exhibit 4, page 15) With respect to the Appellant's own situation, Dr. Savage wrote was, "…It is my understanding that Mr. Burns is doing mostly physical work, is emptying the trash cans, cycling, or mopping as you had described, also assisting shoveling, etc. You then mentioned of the use of specific floor equipment. However, later there was a description of using saws, drills, and lawn mowers. I think most of these would be okay. There is a concern with any power equipment such as the power saw or power drill might continue your patient at altered level of consciousness and particularly was in a situation where he was alone."

The Board noted that although the Appellant's insulin pump reportedly has functioned effectively, the Appellant admitted that it depended on programming it properly to adjust for levels of activity and food,intake. In the last incident at the College, the Appellant's daughter explained that static electricity such as that caused by clothing, carpeting or cleaning equipment could cause the pump to malfunction. As the Appellant testified, he usually would experience some symptoms to indicate that he was becoming hypoglycemic, but the onset of his diabetic emergencies could be swift and unpredictable. The Appellant admitted that he does not always have a diabetic emergency kit available, and testified, "The insurance company will only let you have one at a time. If you use one and you don't go at the right time [to replace it], then they won't let you get one." The Appellant testified that his wife showed another employee at the College how to administer a glucose injection, but the employee received a written warning for doing so. When asked if he understood the College's concerns about expecting other employees to offer that kind of assistance in a medical emergency, the Appellant replied that all his co-workers knew that they should give him something liquid like iced tea or tonic instead of food if when those episodes occurred, but they usually gave him candy or chocolate to eat

instead. The evidence reflects that the Appellant's condition usually did not return to normal in a few minutes. Instead, his condition required intervention and in several instances, transport via ambulance to the local hospital.

Although Attorney Reynolds insisted that the State was not legally authorized to dismiss the Appellant without a specific determination that the Appellant was physically or mentally unable to perform the essential functions of his position, that is not what the personnel rule required on the date of dismissal. Per 1002.01 (b) in effect at the time specifically provided for the removal of an employee whose physical or mental condition created a direct threat or hazard for the employee, the employee's co-workers or clients of the agency, which could not be eliminated by a reasonable accommodation. The Appellant failed to persuade the Board that there were other accommodations that would be reasonable and that would sufficiently mitigate the risk in light of the Appellant's responsibilities and working environment.

The State complied with the requirements of the Rules in effect at the time, obtaining a medical assessment from the treating specialist who indicated that the Appellant should be able to manage his diabetes and perform most of the functions associated with his position without risk, so long as the College implemented a series of recommendations for accommodation. The College implemented each of those recommendations, but the problem persisted. As set forth in the letter of dismissal (State's Exhibit 1, page 3), "In accordance with Per 1002.01 of the Administrative Rules of the NH Division of Personnel, a full-time employee may be removed for non-disciplinary reasons when the employee's physical or mental condition creates a direct threat or hazard for the employee which cannot be eliminated by a reasonable accommodation. The college has made every reasonable accommodation possible; however, you continue to be unable to safety perform the functions of your job..."

In dismissing the employee, the State did not violate the NH Code of Administrative Rules, the provisions of the Collective Bargaining Agreement, or State law. The Appellant was dismissed when the State reasonably concluded, on all the evidence before

it, that the Appellant's physical condition created a direct hazard or threat to himself that could not be eliminated by a reasonable accommodation. Accordingly, the Board voted to DENY Mr. Burns' appeal.

THE PERSONNEL APPEALS BOARD

/S/

Philip Bonafide, Chair

Robert Johnson, Commissioner

Joseph Casey, Commissioner

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