

State of New Hampshire

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PERSONNEL APPEALS BOARD

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APPEAL OF DIANA DAILEY
New Hampshire Hospital
Docket #90-T-1

April 17, 1990

The New Hampshire Personnel Appeals Board (Bennett, Johnson and Rule) met Wednesday, March 21, 1990, to hear the termination appeal of Diana Dailey, a former employee of New Hampshire Hospital. Ms. Dailey was represented at the hearing by Michael C. Reynolds, SEA General Counsel. New Hampshire Hospital (hereinafter "Hospital") was represented by Staff Attorney Barbara Maloney.

Acting Chairman Mark J. Bennett opened the hearing, noting for the record that he was familiar with a number of those present for the Hospital, and asking if either party objected to his hearing Ms. Dailey's appeal. Neither party objected.

Attorney Reynolds made a preliminary objection to one of the Hospital's exhibits, a letter of counselling not contained in Ms. Dailey's personnel file from the Hospital. He indicated he had not seen the letter until the date of the hearing, and argued that on that basis, it should be excluded. Attorney Maloney responded that the Hospital had notified counsel for the appellant that the Hospital intended to present evidence from the appellant's personnel file, and other correspondence and documentation relating to the appellant's attendance record. Maloney asked that the Board over-rule the objection or, in the alternative, should the exhibit in question be excluded, asked that the Board hold open the record of the hearing, allowing the Hospital an opportunity to provide additional documentation. The Chair over-ruled Attorney Reynolds' objection, and noted that there had been sufficient fair notice of the types of exhibits the Hospital intended to submit.

Ms. Dailey had originally been employed by the Hospital and assigned to the Certified Nursing Assistant training program in the summer of 1989. She experienced personal problems, however, and missed several days of classes. The program's educational director notified Dailey that because she had missed too many classes, she would be terminated from the program. She was told that she could reapply at a later date when her personal problems had been resolved.

Ms. Dailey did reapply for the program, and was rehired in September. Ms. Dailey was a probationary employee working as a Certified Nursing Assistant I (trainee) assigned to Thayer Building at the time of her discharge. Appellant's Exhibit 1 (copies of leave slips submitted by the appellant) list her absences, and the reasons therefor as follows:

September 18, 1989 - 0.25 hours (truck problems)
September 26, 1989 - 1.25 hours (over slept)
September 28, 1989 - 8.00 hours (truck starter would not work)
October 16, 1989 - 8.00 hours (bad cold)
October 17, 1989 - 8.00 hours (bad cold)
October 18, 1989 - 8.00 hours (bad cold)
November 18, 1989 - 6.50 hours (ill - plan to go to hospital)
November 19, 1989 - 8.00 hours (kidney infection)
December 18, 1989 - 0.50 hours (waiting for ride to arrive)
December 21, 1989 - 7.00 hours (work related injury)
December 27, 1989 - 8.00 hours (flu)
December 28, 1989 - 8.00 hours (flu)

Alvienar Howard, Director of Nursing, discussed Ms. Dailey's absences with her on October 24, 1989, and confirmed the substance of that conversation in a letter to Dailey dated October 25th in which she stated, "you need to be aware that you are on probation for nine months and that your attendance record will be monitored on an ongoing basis. As of this date, you have been tardy three times and sick without pay for 32 hours in five weeks. If this pattern of tardiness or illness continues to occur, this will lead to your termination." Although Ms. Dailey alleged that she had not received the letter of October 25, 1989, she admitted to having discussed her attendance with Ms. Howard.

After her absences of December 27 and 28, Ms. Dailey was telephoned by Mary Lougee, Director of Nursing at the Hospital, who informed her that if she were to be absent again for any reason, she would be discharged. According to the appellant, she was too ill to report to work on December 29th, and "assumed she was considered terminated; so she picked up her paycheck at the hospital and went home. Ms. Dailey did at a later date check to confirm her termination status and seek a formal letter of termination." [Dailey letter of appeal, January 12, 1990, page 1]

Appellant argues that her discharge was illegally accomplished by imposing upon her an arbitrary attendance standard. Ms. Dailey contends that she had not "taken off an inordinate amount of time, certainly no more than many other probationary employees have been allowed" (Dailey letter of appeal, January 12, 1990, page 2). She further argues that of the Rules of the Division of Personnel provide certain protections for probationary employees, allowing them to accrue and use sick time "...though they are usually paid for it after the probationary period [Per 307.04 (a)(j)]".

The Collective Bargaining Agreement, effective July 1, 1989, does not provide for retroactive payment for absences due to illness occurring during the initial six months of employment. Article 11.1 of the Collective Bargaining Agreement provides, in pertinent part:

"Employees in their first six (6) months of service do not accrue sick leave. Upon completion of six (6) months of service, employees will be credited with 7.5 days of sick leave. Employees will accrue additional sick leave in accordance with the accrual schedule listed above beginning with the first completed month of service following completion of six (6) months of service."

The Hospital argues that the issue should not be reduced simply to the total number of hours Appellant was absent, but must include consideration of the frequency of absenteeism and/or tardiness. The Hospital further argues that part of the purpose of a probationary period is to assess the employee's dependability, as can be reasonably assumed by reviewing the employee's attendance history. The Board agrees.

Appellant contends that "The policy statement articulated in appellant's Exhibit #1, whether aimed specifically at Ms. Dailey, or at all probationary employees who might reach an unstated (and unpredictable) maximum number of missed days, is arbitrary and capricious" [Dailey letter of appeal, January 12, 1990, page 2]. Were the Hospital to establish a fixed, maximum number of days which might be missed prior to termination of either probationary or permanent employees, Appellant might as easily argue that she had been discharged under the provisions of a rule which was not properly adopted under the rulemaking provisions of RSA 541-A. Further, the Board believes that an employee who has otherwise proven himself/herself to be dependable, but who misses a number of days of work because of a serious illness should not be necessarily be discharged without due consideration of the frequency of absences.

In this instance, Appellant had already been forced to leave the certified nursing assistant training program earlier in the year because of absenteeism. When rehired in September, before she had even completed four months of service, there were twelve separate instances of absenteeism and/or lateness. The Hospital had, warned Appellant, both verbally and in writing, that her attendance problems would have to be corrected or she would be discharged. The Hospital's concerns about Appellant's attendance record finally culminated in the call to her on December 28th informing her that if she were absent again for any reason, she would automatically be discharged.

After her absences of December 27th and 28th, and after the call of December 28th from the Hospital, Ms. Dailey appeared at the Hospital on December 29th to pick up her check, still allegedly suffering from the flu. The leave slip

indicates she was a "no-call/no-show" on December 29th. Appellant claims that she believed there would have been no point in calling in. However, in light of the previous warning, and the Hospital's call to her on December 28th, the Board believes that if Ms. Dailey were truly interested in continuing her employment, and if she were "distraught" as her letter of appeal indicates, she would have at least called her supervisor, rather than simply appearing to collect her paycheck.

The Board does not find Ms. Dailey's termination to have been arbitrary, illegal, capricious, or made in bad faith. The Hospital gave Appellant two separate opportunities for employment, both of which were terminated because of Appellant's unsatisfactory attendance record. During the course of her second period of employment at New Hampshire Hospital, having already been warned that her poor attendance had placed her employment in jeopardy, Ms. Dailey was absent on twelve separate occasions, totalling 55.75 hours. Almost 1/5th of the hours missed were for reasons other than illness.

Based upon the foregoing, the Board voted unanimously to deny Ms. Dailey's appeal, finding her termination was neither arbitrary, illegal, capricious, nor made in bad faith.

THE PERSONNEL APPEALS BOARD



Mark J. Bennett, Acting Chairman



Robert J. Johnson, Member



Lisa A. Rule, Alternate

cc: Michael C. Reynolds, SEA General Counsel
Barbara Maloney, NHH Staff Attorney
Sharon A. Sanborn, NHH Director of Human Resources
Virginia A. Vogel, Director of Personnel
David S. Peck, Assistant Attorney General