

State of New Hampshire



PERSONNEL APPEALS BOARD
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Concord, New Hampshire 03301
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Appeal of Cherene Drew

Docket #2006-T-017

New Hampshire Veterans Home

June 2, 2006

The New Hampshire Personnel Appeals Board (Bonafide, Johnson and Reagan) met in public session at Franklin Pierce College on Wednesday, May 24, 2006, 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 Cherene Drew, a former probationary employee of the NH Veterans Home. Ms. Drew appeared pro se. Mindy Normand, Human Resources Technician, appeared on behalf of the Veterans Home.

The record of the hearing in this matter consists of the audiotape recording of the hearing on the merits of the appeal, notices issued by the Board, documents submitted by the Appellant prior to the hearing (identified below as Appellant's Exhibits) and documents offered by the Veterans Home at the hearing (identified below as State's Exhibits).

Appellant's Exhibits:

1. Notice of Appeal dated March 24, 2006
2. Official Letter of Warning issued to Cherene Drew for continued failure to meet the work standard, dated December 28, 2005
3. Westside Healthcare note dated February 27, 2006 asking that Cherene Drew be excused from work on February 28, 2006
4. Official Letter of Warning issued to Cherene Drew for failure to meet the work standard, dated March 15, 2006

5. Notice of termination issued to Cherene Drew for continued failure to meet the work standard, dated March 16,2006
6. Westside Healthcare note dated March 20,2006 concerning Ms. Drew's absences

State's Exhibits

- A. Written Letter of Counseling issued to Cherene Drew on October 20,2005 for excessive absenteeism (32 hours in one month)
- B. Performance Summary for Cherene Drew dated November 28,2005
- C. Westside Healthcare note dated December 5,2005 concerning Cherene Drew
- D. Westside Healthcare note dated December 7,2005 concerning Cherene Drew
- E. Attendance Calendar for Cherene Drew

The following persons gave sworn testimony:

Mindy Normand, Human Resources Technician

Cherene Drew, Appellant

Wayne Couture

Position of the Parties

Ms. Normand argued that the Appellant was a probationary employee at the time of termination, and was dismissed prior to completion of her initial probationary period for failing to meet work standards as a result of excessive absenteeism. She argued that the Veterans Home has a policy requiring regular attendance, and that Ms. Drew's attendance throughout her probationary period was well below the agency's allowable level of use. She argued that because the facility operates twenty-four hours a day, seven days a week, providing residential and nursing care, regular attendance is a critical job function. She indicated that the Appellant was well aware of the policy when she assumed her full time position. She also argued that the Appellant was counseled and warned formally that failure to improve her record of attendance would result in dismissal. She said that while the Veterans Home was sympathetic to Ms. Drew's situation, it nevertheless had an obligation to maintain appropriate levels of staffing in the areas of resident/patient care.

Ms. Drew admitted that her attendance was below the standard that the Veterans Home found acceptable, but argued that her absences were for legitimate reasons. She said that some of her absences were related to caring for a special needs child at home, but admitted that the majority of her absences were for her own illnesses.

Ms. Drew said that she was making an effort to improve her attendance, but had suffered a number of illnesses that prevented her from working. Ms. Drew testified that her entire household had suffered at one point from a rash that she thought she might have picked up at work. When questioned about that absence, she admitted that she had never made a formal report of a rash to the infectious disease personnel, never indicated anything about a rash in the communications log, and never filed a report of illness or injury.

Ms. Drew said that her work performance was excellent in all other regards, noting that she had been considered at one time for promotion. She said that she complied with all the agency's requests for verification of her absences, noting that when she was directed to bring in notes from her healthcare provider, she did so. She also asked the Board to note that her most recent absences were due to a serious bacterial infection. She said that on one of the days that she tried to work, she was sent home by the infectious disease control nurse.

After considering the evidence offered by the parties, the Board made the following findings of fact and rulings of law:

Findings of Fact

1. Ms. Drew was hired by the NH Veterans Home on or about November 2, 2002, as a part-time nursing assistant. She converted to full-time on or about September 30, 2005. At all relevant times, she was a probationary employee serving her initial probationary period.

2. For direct care positions such as Licensed Nursing Assistant, regular attendance is a bona fide occupational requirement and an essential function of the position.
3. On October 20,2005, less than a month after Ms. Drew had converted to full-time employment, she was formally counseled for excessive absenteeism. The counseling letter issued to her on October 20,2005, indicated that she had used thirty-two hours of sick leave in less than a month, and advised her that she needed to improve her attendance immediately.
4. Ms. Drew's supervisors discussed the possibility of returning her to part-time status until she was able to maintain a full-time schedule, but the Appellant rejected the offer, saying that her attendance would improve.
5. On November 28,2005, Ms. Drew received a performance summary that rated her as meeting expectations in every category except attendance.
6. On December 28,2005, Nurse Coordinator Kristine Day issued an official letter of warning to Ms. Drew for failure to meet the work standard as a result of her continued, excessive absenteeism. Ms. Day indicated that since the counseling session in late October, Ms. Drew had used an additional thirty-two hours of sick leave.
7. The December 28,2005 warning indicates that Ms. Drew's request for time off on December 27th and December 28th had been denied, and that when she reported for work on December 28th, she was displeased with her work assignment. The letter describes Ms. Drew as leaving work saying, "I'm really sick, I guess I'm going home."
8. By the time Ms. Drew received her second official written warning on March 15, 2006, she had already "called out" an additional thirteen days.
9. A note from Westside Healthcare dated March 20,2006, indicated that Ms. Drew had been seen by a nurse practitioner six times between January 6,2006 and March 15,2006, for conditions including including influenza, bacterial conjunctivitis and cellulitis. The previous notes from Westside Healthcare did not include any dates of service, and simply stated, "The above patient has been seen, or has reported to us, that due to a medical condition they were unable to attend school or work."

10. The Veterans Home tried to work with Ms. Drew and offered her the opportunity to return to part-time or per diem employment until her schedule and personal circumstances might allow her to maintain a regular, full-time schedule.
11. Although Ms. Drew said in October 2005 that she would be willing to discuss reducing her hours to part-time if her attendance did not improve, she wanted to remain employed full-time in order to qualify for health insurance benefits. Her attendance did not improve.
12. The Veterans Home has a strict attendance policy and has dismissed an average of five to six employees per year for the last several years for chronic absenteeism.
13. Ms. Drew's level of absenteeism during the first few months of her probationary period was excessive and unacceptable, regardless of the circumstances that caused her to be absent.

Rulings of Law

1. At all relevant times, Ms. Drew was an initial probationary employee subject to dismissal without warning for failure to meet the work standard, provided that her termination was not arbitrary, illegal, capricious or made in bad faith. (Per 1001.02, NH Code of Administrative Rules)
2. Although the Veterans Home could have dismissed Ms. Drew without prior warning under the provisions of Per 1001.02, the Veterans Home first provided both written counseling and an official written warning to the Appellant advising her that she would be dismissed from her employment unless her attendance improved.
3. Chronic absenteeism constitutes failure to meet the work standard as described in Chapter Per 1000 of the NH Code of Administrative Rules.
4. When the New Hampshire Veterans Home dismissed Ms. Drew from her employment on March 16, 2006, it did so in compliance with Chapter Per 1000.

Decision and Order

The Board understands that absenteeism is sometimes the unfortunate result of legitimate problems and circumstances beyond an employee's control. Nevertheless, the Veterans Home has a duty to provide acceptable levels of staffing to ensure that the residents receive the care they require. Demanding regular attendance by employees is the only way that agencies like the Veterans Home can maintain acceptable levels of coverage.

After considering all the evidence and argument offered by the parties, the Board voted unanimously to DENY Ms. Drew's appeal and to affirm the Veterans Home's decision to terminate her employment as a probationary employee for failure to meet work standards. In doing so, however, the Board notes that the Veterans Home has successfully rehired a number of employees once they could offer proof of a successful attendance and work record elsewhere. In the future, if Ms. Drew can provide evidence that she had been able to hold a job and report to work regularly, there is nothing that would preclude her reapplying for employment with the Veterans Home

THE PERSONNEL APPEALS BOARD

PS
Philip Bonafide, Chair

RS
Robert Johnson, Commissioner

RS
John Reagan, Commissioner

cc: Karen A. Levchuk, Director of Personnel
Cherene Drew, Appellant
Mindy Normand, NH Veteran Home