

# State of New Hampshire



## PERSONNEL APPEALS BOARD

25 Capitol Street  
Concord, New Hampshire 03301  
Telephone (603) 271-3261

### APPEAL OF JOHN DUCKWORTH

Department of Health and Human Services/Division of Public Health Services

Docket #94-T-4<sup>5</sup>

March 8, 1995

The New Hampshire Personnel Appeals Board (McNicholas, Johnson and Rule) met Wednesday, December 21, 1994, to hear the termination appeal of John Duckworth, a former employee of the Division of Public Health Services, Department of Health and Human Services. Sandra Platt, Administrator, appeared on behalf of the Department of Health and Human Services. Attorney Shawn J. Sullivan appeared on behalf of the appellant. Mr. Duckworth was discharged from his position in the Bureau of Management Information Systems, effective August 2, 1993, by receipt of a third letter of warning for sleeping on duty.

On August 24, 1992, and June 14, 1993, Mr. Duckworth received letters of warning from his supervisor, Stig Nelson, for sleeping on duty. Both letters indicated that Mr. Nelson and another employee had observed the appellant asleep at his work station. Both letters made reference to a conversation between Mr. Nelson and Mr. Duckworth in which Mr. Duckworth was asked if there might be a physical problem causing him to fall asleep at work, and that the appellant had denied any physical cause. Both letters of warning advised Mr. Duckworth that he had fifteen days within which to initiate the procedures for informal settlement of disputes, and that failure to do so would be deemed his acknowledgement that the warnings were justified. Mr. Duckworth did not appeal either warning. On August 2, 1993, Mr. Duckworth received a third and final warning from his supervisor, Maurice Fortier, for sleeping on duty and was discharged immediately.

Mr. Duckworth timely filed his appeal by letter dated August 17, 1993, requesting a hearing before this Board. In his appeal, Mr. Duckworth argued that he did not receive three letters of warning for the same offense, that the allegations contained in the August 2, 1993 letter of termination were untrue and that his actions did not constitute grounds for a written warning. Mr. Duckworth argued that his employer violated Per 1001.08 (f) and (g) by preparing his notice of dismissal before the meeting at which his dismissal was discussed, and that under the circumstances, his dismissal was far too harsh. Mr. Duckworth argued that his employer violated the Americans with Disabilities Act by failing to make reasonable accommodations for him as "a person perceived as having a disability." He also argued that his dismissal was arbitrary, illegal, capricious, and made in bad faith.

At the conclusion of the State's presentation at the hearing on the merits of the appeal, Mr. Sullivan made, a Motion for Summary Judgement<sup>1</sup> asking the Board to order Mr. Duckworth's immediate reinstatement with full back pay, benefits and seniority credit. In support of that motion, Mr. Sullivan reiterated the arguments raised in the original notice of appeal. He argued that the Personnel Rules provide few procedural protections for classified employees, and that by preparing the notice of dismissal prior to the meeting with Mr. Duckworth, the appointing authority denied Mr. Duckworth the rights to which he was entitled. He argued that the Board should reinstate Mr. Duckworth, even if it were to find that the third letter of warning for sleeping on duty was warranted.

The Board voted unanimously to deny the Motion for Summary Judgement. First, there are genuine issues of material fact in dispute. In his August 17, 1993 letter of appeal, Mr. Duckworth argued that he did not receive three letters of warning for the same offense, that the allegations contained in the August 2, 1993 letter of termination were untrue, and that as "a person perceived as having a disability", he was entitled to a reasonable accommodation. Those assertions are unsupported by the facts of the case:

1. In the late afternoon on July 30, 1993, Mr. Duckworth was observed sleeping at his work station. Paul Schaney, a Consultant with Deloitte and Touche who was working on the NECSES (New England Child Support Enforcement System) project, had entered Mr. Duckworth's office cubicle at approximately 4:00 p.m. to discuss a work issue with the appellant. Mr. Schaney observed Mr. Duckworth leaning back in his chair with his eyes closed, head down, arms crossed across his chest, and legs extended out in front of him. Mr. Schaney believed that Mr. Duckworth was asleep, and made several gestures at the appellant in an unsuccessful attempt to get his attention. Mr. Duckworth's immediate supervisor was away from the office at the time. Mr. Schaney called Tom Daniels, Deputy Director in the Commissioner's Office of Administration and Finance, and advised him that Mr. Duckworth appeared to be sleeping at his desk.
2. After receiving the call from Mr. Schaney, Mr. Daniels left the meeting he was attending and came to Mr. Duckworth's work area where he also observed Mr. Duckworth sleeping. In Mr. Schaney's presence, Mr. Daniels attempted to get Mr. Duckworth's attention by moving about in the work area and clearing his throat. Mr. Daniels remained in the work area for five to ten minutes, during which time he observed the appellant sleeping. Mr. Daniels then left the cubicle and returned a few minutes later. Mr. Duckworth did not respond when Mr. Daniels called his name. Mr. Daniels finally awakened Mr. Duckworth by placing a hand on his shoulder and jostling him. In the brief conversation with Mr. Daniels which followed, Mr. Duckworth neither admitted nor denied that he had been sleeping at his work station.
3. Mr. Daniels, who was scheduled to be out of the office on vacation the following week, informed Jim Fredyma, his own supervisor, of the incident. Mr. Fredyma then related the information to Mr. Maurice Fortier, the appellant's immediate supervisor.

---

<sup>1</sup> Summary Judgment is a procedural device available for prompt and expeditious disposition of controversy without trial when there is no dispute as to either material fact or inferences to be drawn from undisputed facts, or where only a question of law is involved. A party may move for a summary judgment on a claim when he believes that there is no genuine issue of material fact and that he is entitled to prevail as a matter of law. [Black's Law Dictionary, 6th edition, p. 1435].

4. After learning of the incident, Mr. Fortier met with Mr. Fredyma and Sandy Platt, Human Resources Administrator, to discuss and review the steps he needed to take to discipline or dismiss Mr. Duckworth. Mr. Fortier was informed that he needed to meet with Mr. Duckworth and allow him to tell his side of the story. He was also informed that although he could draft a termination letter based on the facts as he understood them, he needed to give Mr. Duckworth an opportunity to refute the evidence against him. Mr. Fortier was also advised that if after discussing the matter with Mr. Duckworth he believed that termination was the appropriate course of action, he could then issue the letter of termination.
5. Mr. Fortier met with Mr. Duckworth on the afternoon of August 2, 1993. He told Mr. Duckworth that he had been observed sleeping at his work station by both Paul Schaney and Tom Daniels. He asked Mr. Duckworth for his side of the story. Mr. Duckworth only said he couldn't be certain whether or not he was sleeping. Mr. Duckworth did not claim to have a disabling condition which would cause him to fall asleep at his desk, nor did he claim that he was entitled to a reasonable accommodation for a physical condition which would cause him to fall asleep at work.
6. Mr. Fortier issued the third and final letter of warning to Mr. Duckworth, informing him that his termination was effective immediately. The notice also informed Mr. Duckworth of his rights to appeal the decision.

In consideration of the testimony and evidence received in this matter, the Board found that Mr. Duckworth was sleeping on duty and that the warning was justified. The Board also found that the appellant did receive three letters of warning for the same offense. The warnings dated August 24, 1992, June 16, 1993 and August 2, 1993, were all issued for the offense of sleeping on the job. Neither the first nor second letters of warning were appealed.

Mr. Duckworth testified that late in June, 1993, he "dropped in" to see his physician at the Hitchcock Clinic, but did not make an appointment because he was already scheduled to see the physician in August or September. He said he had intended to take up the issue of his falling asleep on the job at that time. Mr. Duckworth admitted that he had not discussed his plans to see a physician with Mr. Fortier or with Ms. Platt prior to his termination. He also admitted that he did not actually see a physician about possible sleep disorders until after he had been discharged from his employment. Accordingly, the Board found that there was insufficient evidence to support a finding that at the time of his termination, Mr. Duckworth considered himself to be a person with a disability, or that his employer should have regarded him as such.

Mr. Duckworth argued that before terminating his employment, the State had an obligation to send him to a physician to determine what medical reason there might be for his sleeping on duty. The Board does not agree. Mr. Duckworth had not requested the use of sick leave<sup>2</sup> and

---

<sup>2</sup> Per 1204.07 (a) The appointing authority shall have the option to require the employee to furnish a certificate from an attending physician or other licensed health care practitioner when, for reasonable cause, the appointing authority 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 part.

Per 1204.07 (c) The appointing authority, at state expense, shall have the option to have an independent physician examine an employee when, in the opinion of the appointing

when the appointing authority had asked if there might be a medical problem, even in the context of disciplinary meetings, Mr. Duckworth had denied having an illness or disability which might cause him to fall asleep at work.<sup>3</sup> Mr. Duckworth testified that his supervisor had spoken to him about sleeping on duty, and that those discussions took place within the context of disciplinary meetings. Mr. Duckworth was warned twice within a two year period that sleeping on duty could lead to his termination from employment. He was advised to consider seeing a physician to determine if there might be a physical cause for his sleeping on duty. Mr. Duckworth failed to see a physician before his termination to determine if he had a sleeping disorder, or to take the corrective action demanded in the written warnings to avoid termination from employment.

The Board also found that Mr. Duckworth was not entitled to prevail in his appeal as a matter of law. Per 1001.08(e)(1) allows an appointing authority to dismiss an employee by issuance of a third written warning for the same offense within a period of 2 years. Per 1001.08(f) defines the steps which an appointing authority must take before dismissing an employee in the classified service. Those steps include the following:

- (1) meets with the employee to discuss whatever evidence the appointing authority believes supports the decision to dismiss the employee prior to issuing the notice of dismissal;
- (2) provides the employee an opportunity at the meeting to refute the evidence presented by the appointing authority;
- (3) documents in writing the nature and extent of the offense;
- (4) lists the evidence the appointing authority used in making the decision to dismiss the employee.

The rule clearly contemplates a series of events beginning with a preliminary decision by the appointing authority to dismiss the employee. The appointing authority is then expected to meet with the employee, to discuss the evidence supporting dismissal and to allow the employee to refute that evidence. Per 1001.08(g) then requires the appointing authority to "prepare a written notice of dismissal" which specifies the nature and extent of the offense, and apprises the employee of his/her rights to appeal the dismissal.

Mr. Sullivan argued that Mr. Duckworth was entitled to reinstatement because the notice of dismissal was drafted in advance of the meeting between him and Mr. Fortier. Again, the Board does not agree. The Board believes the Rule was written to ensure that employees receive more than an oral notice of dismissal and the reasons therefor.

Mr. Sullivan failed to persuade the Board that writing the termination letter before the meeting with Mr. Duckworth constituted a violation of the rule, affected the outcome of the meeting

---

authority, the employee is not entitled to sick leave...

<sup>3</sup> 1002.01 (e) If the appointing authority determines that the information supplied by the employee's licensed health care practitioner is unresponsive to the assessment request pursuant to Per 1002.02(a) (1) and Per 1002.02(b) (b), the appointing authority shall arrange to have an independent medical assessment of the employee performed.

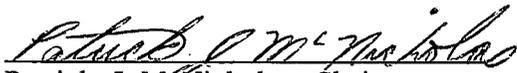
between Mr. Fortier and Mr. Duckworth, or had any effect on the final decision to terminate Mr. Duckworth's employment. The Board does not believe that the rule prohibits the employer from drafting a notice of dismissal prior to meeting with the employee. The rule must be read in its entirety, and not so narrowly as to require the reversal of a decision which is so clearly supported by the evidence.

On the evidence, the Board found that the letter of warning issued to Mr. Duckworth on August 2, 1993, for sleeping on the job was justified. While there is no rule specifically prohibiting employees from sleeping on the job, a reasonable definition of "meeting the work standard" would not include sleeping on duty. The record reflects that Mr. Duckworth was fully apprised of the seriousness of the offense, that he was counselled to seek medical assistance if he believed a physical condition was causing him to fall asleep at work, and that he had been warned repeatedly that his conduct would result in additional disciplinary action, up to and including his termination from employment. When confronted with the evidence supporting his termination, Mr. Duckworth failed to refute the evidence or offer any compelling reason why termination was inappropriate.

Mr. Sullivan failed to persuade the Board that it should reinstate the appellant, substituting some lesser disciplinary action for the termination. RSA 21-I:58 provides that, "...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." Mr. Sullivan failed to persuade the Board that the Department of Health and Human Services acted in violation of statute or rules adopted by the Director, or that justice would be served by modifying the order of the appointing authority dismissing Mr. Duckworth from employment.

Therefore, in consideration of the evidence and argument offered by both parties to this appeal, the Board voted unanimously to deny Mr. Duckworth's appeal, and to uphold the Department of Health and Human Services' decision to terminate his employment by issuance of a third written warning for sleeping on duty.

THE PERSONNEL APPEALS BOARD

  
Patrick J. McNicholas, Chairman

  
Robert J. Johnson, Commissioner

  
Lisa A. Rule, Commissioner

cc: Virginia A. Lambertson, Director of Personnel  
Sandra Platt, Human Resources Administrator, Health and Human Services  
Shawn J. Sullivan, Esq., Cook and Molan P.A.