

State of New Hampshire



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

APPEAL OF DREW LEE DUGAL

Docket #97-T-19

Department of Corrections

***Reconsideration Decision on State's Motion to Dismiss
and Appellant's Objection Thereto***

June 30, 1998

The New Hampshire Personnel Appeals Board (Bennett, Wood and Barry) met on Wednesday, April 29, 1998, under the authority of RSA 21-I:58, to reconsider arguments on the State's Motion to Dismiss the above-titled appeal, and the Appellant's Objection thereto. Attorney John E. Vinson appeared on behalf of the Department of Corrections. Attorney Shawn Sullivan appeared for the appellant.

The material facts are not in dispute:

1. Prior to his termination for non-disciplinary reasons, Mr. Dugal was employed by the Department of Corrections at the Lakes Region Facility as a Corrections Unit Manager.
2. Mr. Dugal had been away from work since January 10, 1997, due to a medical condition.
3. Timothy J. Wildman, a Certified Pastoral Counselor, provided to the Department of Corrections a handwritten note dated 1/13/97, indicating that Mr. Dugal was receiving individual therapy and medical treatment for a Post-Traumatic Stress Disorder. He wrote that, due to an increase in symptoms, Mr. Dugal was unable, "...to perform the sensitive and highly responsible position... he has in the Department of Corrections." The note explained that Mr. Wildman had recommended to Mr. Dugal that he not return to work until there was a significant reduction in his symptoms.
4. Mr. Dugal signed a "Certification of Health Care Provider," dated January 22, 1997, which also was signed by Timothy J. Wildman. The statement certified that Mr. Dugal was

- suffering from a serious medical condition, that he was completely unable to work, and that it was difficult at that point to predict how long the period of incapacity¹ was likely to last.
5. On the certification form, in response to a question of whether the appellant was able to work at all,² Mr. Wildman responded, "Not at this point."
 6. On March 25, 1997, the Department of Corrections received a letter from Tammy L. Eccard, Retirement Counselor, indicating that Mr. Dugal had filed an application for New Hampshire Retirement System accidental disability retirement benefits.
 7. By letter dated May 7, 1997, Lisa Currier, HR Administrator for the Department of Corrections, wrote to Mr. Dugal informing him that the department was in receipt of medical documents indicating that Mr. Dugal was unable to return to work. In her letter Ms. Currier wrote, "Under the Administration Rules of the Division of Personnel, PART Per 1002.03, Removal, when an employee is deemed unable to perform his job the appointing authority may proceed with Removal for Non-Disciplinary Reasons."
 8. Ms. Currier wrote that in light of the medical documentation on file and the Department's receipt of notification that Mr. Dugal had applied for disability retirement benefits, the Department of Corrections planned to terminate his employment for non-disciplinary reasons.
 9. Ms. Currier wrote that the appellant could avoid termination, "...if your medical status has changed and you are able to return to the Department of Corrections." She instructed the appellant to, "...provide current medical information as to your availability to return to work within the New Hampshire Department of Corrections." Ms. Currier also informed him that his "FMLA provisions" had expired effective April 11, 1997. He was instructed to respond by May 20, 1997.
 10. Mr. Dugal responded by telephone that he was unable to return to work.
 11. In a letter to the appellant dated June 9, 1997, John Sanfilippo, Superintendent of the Lakes Region Correctional Facility, advised Mr. Dugal that he was being dismissed for non-disciplinary reasons based on his medical status. In that letter, Mr. Sanfilippo wrote that the

¹ On the form, incapacity is defined as, "inability to work, attend school or perform other regular daily activities due to a serious health condition, treatment therefor or recovery therefrom."

The question reads, in part, "If medical leave is required for the employee's absence from work... is the employee unable to perform work of any kind?" Where both parties agree that the appellant was totally disabled, the Board found that the response was intended to convey that the appellant was unable to perform work of any kind.

department had reviewed the appellant's duties as a Corrections Unit Manager in light of the medical assessment on file. He wrote that the department was unable to make reasonable accommodations or to offer the appellant another position for which he would qualify that would conform to his medical needs.

Relevant Administrative Rules

- A. "The purpose of this Rule shall be to provide for the removal of an employee for non-disciplinary reasons, when: (a) The employee is medically unable to perform the required duties and responsibilities of the position to which appointed; (b) The employee's medical condition creates a hazard for the employee, the employee's co-workers or clients of the agency; or (c) The employee's presence in the workplace, because of the medical condition, is deleterious to the employee's health." [Per 1002.011
- B. "Written Notice.
- (a) When an appointing authority determines that, pursuant to Per 1002.01, an employee should be removed for non-disciplinary reasons, the appointing authority shall: (1) Inform the employee in writing that the employee shall be required to provide the appointing authority with a written assessment from the employee's licensed health care practitioner detailing: a. The employee's general state of health. b. The specific nature of any relevant injury, illness, disability or condition which may affect the employee's ability to perform all the bona fide occupational duties of the position.
- (b) The employee shall provide the appointing authority: (1) The name and address of the employee's licensed health care practitioner. (2) a signed statement authorizing the release of assessment information from the licensed health care practitioner to the appointing authority.
- (c) The appointing authority shall be responsible for providing the following information to the licensed health care practitioner: (1) The employee's class specification, (2) The employee's supplemental job description, (3) The employee's work schedule, (4) A written description of the employee's work location, (5) A written description of the employee's work environment.
- (d) The appointing authority shall inform the employee in writing that failure to comply with the request for a medical assessment described in Per 1002.02 (b)(2) may result in disciplinary action as provided in PART Per 1001." [Per 1002.021

- C. "An appointing authority shall not remove an employee under the provisions of Per 1002.01 until the appointing authority has received a medical assessment which supports the removal of the employee." [Per 1002.03 (a)]
- D. "Prior to removal of an employee under the provisions of Per 1002.01, the appointing authority shall determine if any of the following adjustments can be made to allow the employee to avoid removal for non-disciplinary reason(s): (1) Amend the duties of the position to accommodate the employee's known medical condition(s) provided, however, that such amendment does not alter the essential duties and responsibilities of the employee's position; (2) Transfer the employee to a position for which the employee qualifies which will not require removal under the provisions of Per 1002.01; or (3) Demote the employee to a position for which the employee qualifies which will not require removal under the provisions of Per 1002.01." [Per 1002.03 (b)]

Mr. Sullivan argued that the Rules must be read literally, and enforced absolutely. He argued that agencies should not be permitted to excuse their failure to comply with the letter of law simply by claiming "substantial compliance" with its intent. He argued that before the Department of Corrections legally could have initiated removal for non-disciplinary reasons, it was required to comply with the written notice requirements of Per 1001.02. He argued that until each of the activities listed therein had been completed, removal was both premature and illegal. Mr. Sullivan argued that the Department "shorted out" Mr. Dugal's access to paid health insurance by dismissing him sooner than was legally permissible, and that in light of the Court's decision in Boulav, the appellant was entitled to the benefits of reinstatement under the provisions of RSA 21-I:58, I. ³

Attorney Vinson argued that in Boulav, the Court ordered the appellant reinstated because the agency violated the appellant's due process rights, and failed to give the appellant appropriate

³ "...If the personnel appeals board finds that the action complained of was taken by the appointing authority... in violation of a statute or of rules adopted by the director, 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. ...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."

notice about his conduct. He argued that in this case, the agency had given the appellant ample notice and had not deprived him of any due process.

Attorney Vinson argued that Per 1002.02 is designed primarily to protect the agency, not the employee, by placing the burden upon the employee to provide information that might lead to the employee's involuntary removal. He argued that in this instance, the agency had all the appropriate medical assessments. He suggested that requiring the appellant to resubmit that information, which the parties agreed was an accurate assessment of the appellant's medical condition, and threatening to take disciplinary action should the appellant fail to provide or resubmit such information [Per 1002.02 (d)] could be viewed by the appellant as a form of harassment.

Mr. Vinson argued that appellant's rights are set forth in Per 1002.03. He argued that the agency had already received a medical assessment supporting the appellant's removal under Per 1002.03 (a), and that the appellant had declined alternative employment as described by Per 1002.03 (b). The termination letter indicates, in accordance with Per 1002.03 (c), that removal would not reflect discredit on the employee's past service.

Decision and Order

- I. The Board found that the May 7, 1997, letter from Ms. Currier to the appellant satisfied the notice requirements of Per 1002.02 (a)(1).
- II. The agency already had in its possession undisputed medical assessments indicating that the appellant was unable to perform the bona fide occupational duties of the position, and could not return to work of any kind at the Department of Corrections. Requiring Mr. Dugal to submit the same information a second time would have served no useful purpose. However, the agency did afford the appellant an opportunity to apprise them of any changes in his condition. When asked to do so, he reported that his medical condition was unchanged and that he was unable to return to work.
- III. Inasmuch as the appellant had exhausted his entitlement to paid medical insurance under the FMLA approximately two months prior to his actual separation from service, the appellant

failed to persuade the Board that the department "shorted out" his entitlement to benefits by dismissing him for being medically unable to perform the duties of his position.

IV. Mr. Dugal's separation from service did not violate the provisions of Per 1002 of the Rules of the Division of Personnel.

For the reasons set forth above, the Board voted unanimously to dismiss Mr Dugal's appeal.

THE PERSONNEL APPEALS BOARD



Mark J. Bennett, Chairman



Patrick H. Wood, Commissioner



James J. Barry, Commissioner

cc: Virginia A. Lamberton, Director of Personnel, State House Annex, 25 Capitol St.
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APPEAL OF DREW LEE DUGAL

Docket #97-T-19

Department of Corrections

***Response to State's Motion for Clarification and Reconsideration
and Appellant's Objection***

April 6, 1998

On March 4, 1998, the New Hampshire Personnel Appeals Board issued a decision denying the State's Motion to Dismiss the above-named appeal. Mr. Dugal, a former employee of the Department of Corrections, had been terminated from employment when the agency received confirmation that the appellant was medically unable to return to duty. At a prehearing conference convened by the Board on July 30, 1997, the parties agreed that favorable action on Mr. Dugal's application for disability retirement benefits could render any possible remedy moot. In its March 4th decision, the Board asked for the status of that application.

On March 12, 1998, Attorney Sullivan responded, advising the Board that that the Retirement System had tabled Mr. Dugal's request pending further investigation. He advised the Board that he expected it would take more than six additional months for the matter to be resolved. He informed the Board that he would provide an updated report by March 4, 1999, so that the Board could have a one-year follow-up.

On March 19, 1998, the Board received the State's Motion for Clarification and Reconsideration of the March 4, 1998, decision. In his Motion, Atty. Venison asked the Board to clarify its finding, "...that although the facts are not in dispute, the appellant's allegation that the Department violated the Rules of the Division of Personnel could affect

any remedy to which [the appellant] might be entitled." Mr. Vinson also asked the Board to reconsider its decision, and grant the State's Motion to Dismiss. The appellant's Objection to that motion was received on March 23, 1998.

Having considered the Motion and Objection in conjunction with the Board's March 4, 1998, decision, the Board voted to grant the State's Motion for Reconsideration, and to schedule a hearing on the Motion as follows:

Hearing: April 29, 1998, 9:00 a.m.
 State House Annex - Rm 411
 25 Capitol Street, Concord, NH 03301

Motions to reschedule or postpone this heaving must be made in writing and must be received by the Board within ten calendar days of the date of this order to be considered. Untimely requests will be denied, except in the event of a bona fide emergency.

For the Personnel Appeals Board



Mary Ann Steele, Executive Secretary

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APPEAL OF DREW LEE DUGAL

DOCKET #97-T-19

Department of Corrections

March 4, 1998

The New Hampshire Personnel Appeals Board (Rule, Johnson and Wood) met on Wednesday, July 30, 1997, under the authority of RSA 21-I:58 and RSA 541-A to convene a prehearing conference and hear oral argument on the State's Motion to Dismiss in the appeal of Drew Lee Dugal, a former employee of the Department of Corrections. Attorney Shawn Sullivan appeared on the appellant's behalf. Attorney John E. Vinson appeared on behalf of the Department.

Mr. Dugal was appealing his June 9, 1997, Notice of Removal for Non-Disciplinary Reasons, in which the Department of Corrections asserted that it had medical documents on file indicating that the appellant was medically unable to return to work as a Corrections Unit Manager. The Department further alleged that the Department would be unable to make reasonable accommodations or offer the appellant another position for which he might qualify that would conform to his medical needs. The Department advised that his leave under the provisions of the Family and Medical Leave Act had expired on April 11, 1997, and the appellant's medical condition had not improved to allow him to return to work. The letter noted that Mr. Dugal had also applied for accidental disability benefits through the New Hampshire Retirement System.

In the appeal filed on Mr. Dugal's behalf, Attorney Sullivan argued that the Department's Notice of Removal for Non-Disciplinary Reasons did not conform with Per 1002.02 of the Rules of the Division of Personnel and must be deemed invalid. He argued that the appointing authority had failed to request a medical assessment from the appellant's treating practitioner, that the department had failed to schedule an independent medical examination, and failed to make any determination if the appellant's duties could be amended, or the employee could be transferred or demoted to another position for which he was qualified.

Mr. Vinson argued that the appeal was strictly procedural, and that the State had no reason to request additional documents when it already had reliable evidence that the appellant could not return to work. He noted that the appellant's own physician had refused to allow the appellant to return to duty, and the appellant had applied for disability retirement benefits.

Mr. Sullivan agreed that the challenge was procedural, but argued that the State should have been required to comply with the provisions of Per 1002.02 of the Rules of the Division of Personnel before removing the appellant from his position. He argued that the State had an obligation to determine if there were any positions into which the appellant could have been transferred or demoted before dismissing him from his position. However, he admitted that any relief which the Board might grant might be rendered moot if the appellant's request for disability retirement was granted.

After considering the arguments offered by both parties, the Board voted to deny the Motion to Dismiss. In so doing, the Board found that although the material facts are not in dispute, the appellant's allegation that the Department violated the Rules of the Division of Personnel could affect any remedy to which he might be entitled. However, before scheduling the matter for a hearing on the merits, the Board requests that the appellant provide a report on the status of his application for disability retirement benefits so that the Board might determine whether any possible remedy might be rendered moot.

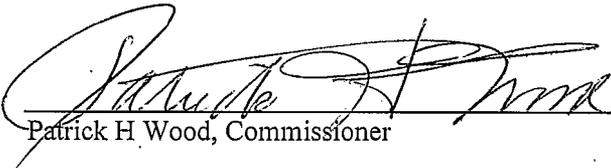
THE PERSONNEL APPEALS BOARD



Lisa A. Rule, Acting Chairperson



Robert J. Johnson, Commissioner



Patrick H. Wood, Commissioner

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