

State of New Hampshire



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

APPEAL OF HASSAN FOFANA **Docket #95-T-21**

Response to:
Appellant's Motion for Discovery
State's Objection to Motion for Discovery
Response to Respondent's Objection to Motion for Discovery
State's Clarification of Objection to Motion for Discovery

August 23, 1995

The New Hampshire Personnel Appeals Board (Bennett, Johnson and Rule) met Wednesday, July 5, 1995, to consider the above-listed pleadings relative to the appeal of Hassan Fofana, a former probationary employee of New Hampshire Hospital.

At a prehearing conference convened by the Board on May 24, 1995, the parties appeared to have no outstanding discovery requests, and agreed that any patient names appearing in documents which might be exchanged by the parties prior to the hearing would be redacted to protect patient confidentiality requirements.

On June 7, 1995, the Board received Appellant's Motion for Discovery in which he requested the "results of the investigation of the two alleged incidents". In his motion, Appellant argued that he had requested a copy of the investigative report, but was denied access by New Hampshire Hospital on the grounds that the report and investigative documents were "confidential." (Motion, 112). Appellant argued that New Hampshire Hospital's refusal to release the investigative file violated his rights under the Collective Bargaining Agreement, Article XVI, to examine any and all documents relative to his employment status. (Motion ¶5)

In its June 15, 1995 Objection, New Hampshire Hospital argued that the investigative file sought by the Appellant was not a part of his personnel record (Objection, ¶8), that abuse and neglect investigation records are maintained in the patient's, not the employee's name, and that the confidentiality of the investigative process and any reports produced as a result of such investigations were governed by an agreement between New Hampshire Hospital and the New Hampshire Division of Elderly and Adult Services. (Objection 1110)

On June 27, 1995, the Board received the Appellant's Response to Respondent's Objection to Motion for Discovery. In that Response, Appellant argued that confidentiality of patient information could be protected by blacking out any of the patients' names which appeared in the report. (Response 113) He also argued that under the provisions of He-M 202.07 (j) of the Rules of the Division of Mental Health and Developmental Services, Mr. Fofana was entitled to a copy of the abuse and neglect complaint investigation. (Response ¶6) The Appellant reiterated his argument that without access to the investigative file, he had effectively been

denied the right to defend against New Hampshire Hospital's decision to terminate his employment (Response 115)

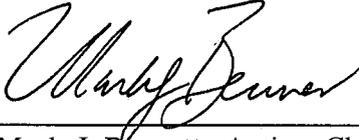
New Hampshire Hospital's June 28, 1995 letter further clarifying its objection to the Motion for Discovery asserted that He-M 202.02 requires the Division of Mental Health and Developmental Services to provide copies of investigative files involving abuse and neglect to the individual who was allegedly abused and/or neglected, not to the person who allegedly committed the act of abuse or neglect. (Clarification ¶1) New Hampshire Hospital argued that Mr. Fofana would have the opportunity at the hearing to cross-examine the State's witnesses who would be called to substantiate the charges that he was sleeping on duty. (Clarification 113) New Hampshire Hospital argued that Mr. Fofana had the burden of proving that New Hampshire Hospital's decision to terminate his employment was arbitrary, illegal, capricious, or in bad faith, and that by focusing on the investigative report, he was simply clouding the real issue behind the termination.

While the Board is mindful of the Hospital's obligations to maintain the confidentiality of patient records, the Board does not believe that the Hospital's interest in maintaining the confidentiality of its abuse/neglect investigations outweighs the appellant's interests in challenging the findings of that investigation if they resulted in his termination from employment.

1. New Hampshire Hospital shall disclose any and all information upon which it relied in terminating Mr. Fofana's employment, including but not limited to, personnel evaluations, supervisory reports or assessments, and the statements of witnesses as may appear in investigative documents or reports relating to the charges that Mr. Fofana was sleeping on duty on April 17, 1995 and April 18, 1995.
2. Although Mr. Fofana was a probationary employee at the time of his termination from employment, his dismissal was allegedly "the result of two substantiated Class I Neglect violations." (Notice of Termination, May 4, 1995) New Hampshire Hospital shall disclose and release to the appellant the investigative documents and report which allegedly substantiated the violations.
3. To the extent that the information disclosed to the Appellant may contain the names of patients, or personally identifying information about patients of New Hampshire Hospital, that information shall be redacted from any reports or documents disclosed to the appellant and/or his representatives. In the event that the appellant should discover the names of patients or any personally identifying information about patients which New Hampshire Hospital may not have redacted completely, the appellant and his representative shall immediately notify New Hampshire Hospital of the discovery and shall redact that information from his own copy.
4. At the conclusion of the hearing, New Hampshire Hospital may request the return of any documents containing patient sensitive information, and the Board will issue an order concerning those documents if necessary.

5. The appellant and his representative shall treat as confidential any and all patient sensitive information, and shall attest to their understanding that any breach of confidentiality may subject them to sanctions.

THE PERSONNEL APPEALS BOARD



Mark J. Bennett, Acting Chairman



Robert J. Johnson, Commissioner



Lisa A. Rule, Commissioner

cc: Virginia A. Lamberton, Director of Personnel
M. J. Mickey Busca, SEA Legal Intern
Barbara Maloney, Esq., Director of Legal Services, N.H.H.H.

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APPEAL OF HASSAN FOFANA

Docket #95-T-21
New Hampshire Hospital

Order on State's Motion for Rehearing

December 8, 1995

On September 20, 1995, the Personnel Appeals Board received Attorney Maloney's Motion for Rehearing filed on behalf of New Hampshire Hospital in the above-titled appeal. In that Motion, Ms. Maloney asked the Board to reconsider the "broad ramifications of its ruling" and requested that the Board reconsider the possibility of limiting the appellant's access to investigative materials to an "in office" review. Ms. Maloney argued that although the appellant would not be permitted to copy any documents or to remove them from New Hampshire Hospital, his review of the materials would disclose any exculpatory information in the file which he had not discovered previously in preparation for a hearing on the merits of the appeal.

The arguments raised by New Hampshire Hospital in this instance are the same as those raised by the State at the prehearing conference on July 5 1995, and the State has offered neither evidence nor argument to demonstrate that the Board's order was either unlawful or unreasonable. Accordingly, the Board voted to deny the State's Motion for Rehearing, and to affirm the Board's August 23, 1995 Order.

THE PERSONNEL APPEALS BOARD

A handwritten signature in cursive script, appearing to read "Mark J. Bennett".

Mark J. Bennett

A handwritten signature in cursive script, appearing to read "Robert J. Johnson".

Robert J. Johnson

cc: Virginia A. Lamberton, Director of Personnel
M. J. Mickey Busca, SEA Legal Intern
Barbara Maloney, Esq., Director of Legal Services, N.H. Hospital

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APPEAL OF HASSAN FOFANA

Docket #95-T-21

New Hampshire Hospital

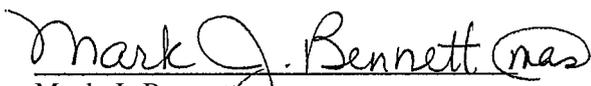
Order on State's Motion for Rehearing

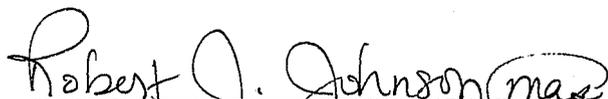
April 4, 1996"

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THE PERSONNEL APPEALS BOARD


Mark J. Bennett


Robert J. Johnson

cc: Virginia A. Lamberton, Director of Personnel
M. J. Mickey Busca, SEA Legal Intern
Barbara Maloney, Esq., Director of Legal Services, N.H. Hospital

* Finding that there may have been an error in mailing, this decision, which was previously issued on December 8, 1995, has been re-issued.

State of New Hampshire



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25 Capitol Street
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April 4, 1996

Barbara M. Maloney, Esq.
Director of Client and Legal Services
New Hampshire Hospital
105 Pleasant Street
Concord, NH 03301

Michael C. Reynolds, SEA General Counsel
State Employees' Association of N. H., Inc.
105 North State Street
P.O. Box 3303
Concord, NH 03302-3303

re: Personnel Appeals Board Decision - Appeal of Hassan Fofana
(Docket #95-T-21)

Dear Ms. Maloney and Mr. Reynolds:

Please be advised that according to New Hampshire Personnel Appeals Board records, the Board issued a decision in the above captioned appeal on December 8, 1995, on New Hampshire Hospital's Motion for Rehearing of the Board's August 23, 1995, Order granting the Appellant's Motion for Discovery. In recent discussions, both parties advised me that they had not received the December 8, 1995, Order.

I have discussed this matter with the Appeals Board. In fairness to both parties, and in order to allow either party to file a timely appeal of that decision, as New Hampshire Hospital had suggested it might do, the Board is re-issuing the decision on this date. A copy for your records is attached herewith.

If you have any questions, please call me at your convenience.

Sincerely,

A handwritten signature in cursive script that reads "Mary Ann Steele".

Mary Ann Steele, Executive Secretary
New Hampshire Personnel Appeals Board

cc: Virginia A. Lamberton, Director of Personnel

State of New Hampshire



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APPEAL OF HASSAN FOFANA

New Hampshire Hospital

Docket #95-T-21

January 31, 1997

The New Hampshire Personnel Appeals Board (Bennett, Rule and Barry) met on Wednesday, October 9, 1996, under the authority of RSA 21-I:58, to hear the appeal of Hassan Fofana, a former employee of New Hampshire Hospital, who was dismissed from his employment for sleeping on duty. Mr. Fofana was represented at the hearing by SEA General Counsel Michael Reynolds. Barbara Maloney, New Hampshire Hospital's Director of Legal Services, appeared on behalf of the State.

Before taking up the merits of Mr. Fofana's appeal, the parties stipulated that at the time of his termination, the appellant was a probationary employee who was originally hired as a Certified Nursing Assistant, and later assigned to the position of Mental Health Worker Trainee. The parties also agreed that the appellant would be provided with a copy of the investigative file detailing the incident in question, but that those records would be returned to New Hampshire Hospital at the close of the hearing, and that no copies of the investigative file would be copied or retained by the appellant.

The record in this matter consists of the audio tape recording of the hearing on the merits, pleadings and documents submitted by the parties prior to the hearing, and documents entered into evidence as follows:

New Hampshire Hospital #1: Notice of Personnel Change

New Hampshire Hospital #2: Orientation Checklist

New Hampshire Hospital #3: Clinical Evaluation Checklist

New Hampshire Hospital #4: First Day Orientation Agenda
New Hampshire Hospital #5: Departmental/Orientation Checklist
New Hampshire Hospital #6: New Hampshire Hospital Policies and Procedures
New Hampshire Hospital #7: 4/17/95 Client Care Checklist - Pond West

The following persons gave sworn testimony:

Hassan Fofana, Appellant
Robert Albright, R.N.
Susan Freeman, Mental Health Worker
Elizabeth Shartner, Mental Health Worker
Al Johnson, 2nd Shift Supervisor

Mr. Fofana argued that he had always done his best to provide quality patient care and that he never would have done anything to neglect or endanger the patients in his care. He noted that when he was allegedly sleeping on duty at Pond Place West, he was not "on a level" with the resident, that the patient was asleep, and that he had done nothing which would have compromised the resident's care. He argued that there had been no complaints about his work until he reported problems with other staff to supervisory personnel.

Mr. Fofana testified that on April 18, 1995, one of the nights when he was reportedly found sleeping on duty, he had been very upset and preoccupied, having just learned that his son had been diagnosed with cancer. Mr. Fofana testified that he was "upset and thinking" and that he simply sat down to watch television. He argued that investigators should have realized that he couldn't possibly have been sleeping if later he was able to describe the subject matter and specific content of the program he was watching at the time.

Mr. Fofana alleged that New Hampshire Hospital's decision to dismiss him from his employment may have been in retaliation for complaints he had made to supervisory personnel about other staff taking too many unauthorized breaks and spending too much work time using the telephone for personal calls.

He also argued that his termination may have been racially motivated, as one or more of his co-workers had made racial remarks to him.'

The appellant denied all of New Hampshire Hospital's allegations, asserting that he was not sleeping on duty and that those witnesses who would testify that they had seen him asleep either were mistaken or were misrepresenting the facts. He asked the Board to find that it was incredible to think that he could have been in deep sleep for fifteen minutes while other staff observed him and tried to wake him. The appellant argued that New Hampshire Hospital failed to confront him with allegations of sleeping on duty until three days after the incident, thereby effectively denying him an opportunity to refute the charges. He also suggested that the delay of three days in confronting him with those allegations provided an opportunity for the witnesses against him to plan their stories.

On behalf of New Hampshire Hospital, Ms. Maloney argued that Mental Health Workers assigned to transitional housing units receive intensive training, with specific attention to the needs of the residents to whom they are assigned. She argued that residents of transitional housing are extremely vulnerable and unpredictable, requiring staff to be alert and attentive at all times. Ms. Maloney argued that staff are also taught to report any incidents to supervisory staff which might compromise professional patient care. She argued that three other staff members had witnessed the appellant sleeping on duty, and reported those incidents in accordance with Hospital policies and procedures. She asserted that upon receipt of the complaints, the appellant was suspended pending the outcome of an investigation. She asserted that the investigation was completed in a thorough and timely manner, and that the Investigator ultimately sustained the findings that the appellant had been sleeping on duty, thereby compromising patient safety and care.

Ms. Maloney argued that as a probationary employee, Mr. Fofana was subject to immediate dismissal without prior warning for any failure to meet the work standard. She asserted that sleeping on duty constitutes a violation of a posted or published agency policy which in and of itself warns of immediate dismissal. She asked the Board to find that New Hampshire Hospital properly terminated the appellant's employment under the provisions of Per 1001.02 (a) of the Rules of the Division of

¹ The appellant offered no evidence of racial bias on the part of New Hampshire Hospital staff or administrative personnel. On the facts in evidence, the Board noted that the only discussion of race is that in which Ms. Shartner and Mr. Fofana engaged when she asked him questions about his birthplace and culture.

Personnel, and in so doing, did not act in a manner which was arbitrary, illegal, capricious, or in bad faith.

At the conclusion of the hearing, New Hampshire Hospital submitted the Appointing Authority's Request for Findings of Fact and Rulings of Law, which are disposed of as follows:

Findings of Fact Number #1, #3 - #8, #10 - #18, #20, and #21 are granted. #2 is granted to the extent that the evidence reflects that Mr. Fofana completed 320 hours of training at New Hampshire Hospital to perform duties as a Certified Nursing Assistant and Mental Health Worker. #9 is granted to the extent that the evidence reflects that Ms. Freeman called Mr. Fofana's name three times before he responded. #19 is granted to the extent that the complaint investigation substantiated the allegation that he was sleeping on duty. #22 is granted to the extent that the appellant was dismissed for failing to meet the work standard as a probationary employee by sleeping on duty, which constituted a violation of Hospital policies, and that sleeping on duty is defined by those policies as Class I Neglect.

The Board made additional findings as follows:

1. When both incidents occurred, the patient in residence on the unit was in bed and believed to be asleep.
2. There is neither allegation nor evidence that the patient suffered any harm as a result of the incidents.
3. There is neither allegation nor evidence that the appellant intentionally committed any act or knowingly neglected to perform any specific, assigned task which would have jeopardized the patient's individual medical treatment plan or which would have put the patient or other staff persons at risk.

Rulings of Law #1, #2 and #4 are granted. Rulings of Law #3 and #5 - #7 are addressed below:

Discussion

In his capacity as a Mental Health Worker, the appellant was responsible for providing direct care and supervision of a resident in a transitional housing unit at New Hampshire Hospital. Due to their mental

and physical condition, patients in those units are vulnerable and sometimes unpredictable, requiring staff to be alert and attentive in order to assure the safety and well-being of staff as well as patients. A staff member who is sleeping on duty is neither alert nor attentive to the needs of the patient or the staff. As such, New Hampshire Hospital policies and procedures include: sleeping on duty as an offense which may result in an employee's immediate dismissal. Even where no direct harm may be attributable to an individual instance of sleeping on duty, it nonetheless constitutes a clear failure to meet the work standard. Consequently, any employee, particularly a probationary employee, would be subject to immediate discharge in the face of substantial evidence that the employee was sleeping on duty.

The Board found that New Hampshire Hospital was authorized under the provisions of Per 1001.02 (a) of the Rules of the Division of Personnel to dismiss the appellant for violation of a posted or published agency policy, the text of which warned of immediate dismissal, and for failing to meet the work standard prior to the completion of his probationary period. Accordingly, the Board voted unanimously to deny Mr. Fofana's appeal.

THE PERSONNEL APPEALS BOARD



Mark J. Bennett, Acting Chairman



Lisa A. Rule, Commissioner



James J. Barry, Commissioner

cc: Virginia A. Lamberton, Director of Personnel
Michael C. Reynolds, SEA General Counsel
Barbara Maloney, Director of Legal Services, New Hampshire Hospital