

# State of New Hampshire

WPPID991



## PERSONNEL APPEALS BOARD

State House Annex  
Concord, New Hampshire 03301  
Telephone (603) 271-3261

### APPEAL OF GEORGE GIELEN

Docket #92-T-7  
Board of Nursing

October 1, 1992

The New Hampshire Personnel Appeals Board (McNicholas and Johnson) met Wednesday, April 1, 1992, to hear the appeal of George Gielen, a former employee of the New Hampshire Board of Nursing. Mr. Gielen, who was represented at the hearing by SEA General Counsel Michael Reynolds, was discharged by letter dated September 26, 1991, effective September 27, 1991. Attorney Dianne German appeared on behalf of the Board of Nursing.

On July 10, 1991, during administration of a nursing licensure examination, Mr. Gielen gave Dr. Doris Nuttleman, Executive Director of the Board of Nursing, the following note:

"Dr. Nuttleman:

"On Monday, July 15, 1991, I have an appointment with a doctor. It is very probable that I will not be returning to my position at the Board. I will be submitting the necessary paperwork if this is the case. I have asked Marion to forward my leave time to me and requested that all of my personal mail be forwarded to my home address.

"George E. Gielen, R.N., MS.  
"Coordinator of Nursing Practice"

Dr. Nuttleman questioned if the note was intended as a letter of resignation. Mr. Gielen said it was not, but that he expected to be on sick leave after July 15th. Mr. Gielen called in sick on Monday, July 15th. Mr. Gielen did not report to work again at the Board of Nursing and was terminated from his employment by letter dated September 20, 1991, for willful insubordination and willful falsification of requests for leave, as well as absence without leave.

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Prior to requesting the use of sick leave, Mr. Gielen had asked the leave clerk to forward his leave totals and personal mail to him at his home. He had removed all his personal belongings from his office and also had removed telephone logs used by him in the office during the course of his work. After notifying Dr. Nuttleman he had a doctor's appointment on Monday, July 15th, and after calling in sick that day, he sent the agency a request for sick leave dated July 15, 1991, and certified he was incapacitated due to "extreme stress, hypertension, PVC's and PAC's". In light of the above, the Appeals Board did not consider Dr. Nuttleman's repeated requests for a professional medical assessment to be unreasonable. Similarly, the Board found it reasonable for Dr. Nuttleman to require verification of the symptoms and the need for sick leave by someone qualified to make a medical assessment of the cardiovascular symptoms described by the appellant.

Instead of submitting a statement from a licensed health care provider qualified to assess cardiovascular complaints, the appellant forwarded a note from Mr. Braunstein, a Certified Associate Psychologist. Mr. Gielen had not seen a doctor on July 15, 1991, as he indicated he would in his July 10th note to Dr. Nuttleman. In fact, the medical records submitted by the appellant (Appellant's Exhibit 1), contain a note dated July 15, 1991, from patient records kept by Don Chan, M.D. :

DNKA [Did not keep appointment]

Pt has not returned for follow-up office visit, but told me verbally he has not been bothered by any recent cardiovascular sx. 1 new problem, but c/o stress relating to work/job and is seeing a psychologist. ? Skipped beats less. (Emphasis added)

Dr. Chan's letter of August 2, 1991 (State's Exhibit F-1), states in part:

"Prior to this year, he [George Gielen] was last seen in 1989. At that time, his EKG showed regular heart rhythm without any ectopic beats. In May, 1991, a colleague nurse detected irregular heartbeats on him. He came to see me on 5/30/91. ... He underwent a treadmill stress test, which showed rare to occasional PAC's. The stress test was negative for ischemia. ...

"According to Mr. Gielen, he said he was under a lot of stress, which may aggravate or contribute to this problem (although it is not definitive that stress entirely causes this problem or symptom).

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"According to Mr. Gielen, he went to see a counselor. He recently told me that he is now feeling fine without any more palpitation symptom or irregular heartbeats. Because he has been feeling well, he has not returned to see me recently."

The appellant argued his request for Workers' Compensation would ultimately be granted, thereby invalidating the State's claim he was absent without approved leave. He further argued:

"...because of his psychological and physical condition he is a handicapped employee pursuant to the Rehabilitation Act of 1973 and/or suffers from a disabling condition as contemplated by RSA 21-I:58, I, and has been unlawfully and unreasonably discriminated against because of such handicapping and/or disabling condition. There are reasonable accommodations the employer could make and should be required to make, which would enable Mr. Gielen to return to his job. [Ms. Nuttleman's retirement (see Dr. Rowan's September 10, 1991 letter) is not one of the contemplated accommodations - Dr. Rowan had not been made aware of possible accommodations,]" (See Notice of Appeal, October 11, 1991, page 3)

The appellant offered insufficient credible evidence to support a finding he is, or was, a "handicapped employee pursuant to the Rehabilitation Act of 1973 and/or suffers from a disabling condition as contemplated by RSA 21-I:58, I". The appellant offered no credible evidence to support a finding he was discriminated against for any reason. The appellant also failed to persuade the Board successfully appealing denial of Workers' Compensation Benefits would have any bearing on the termination decision. Although the September 26, 1991 letter notifying Mr. Gielen of his termination refers to his absence without leave since August 19, 1991, the actual grounds for termination were set forth in Dr. Nuttleman's letter of September 20, 1991 (State's Exhibit N-1):

"In the absence of a specific medical diagnosis supporting your request for sick leave (extreme stress, hypertension, PVC's and PAC's dated 7/17/91 ), you shall report to work at the Board of Nursing promptly at 8:30 a.m. on September 20, 1991, and shall report to me as Executive Director of the Board of Nursing. Failure to report to work and to me as specified, shall be deemed willful insubordination and shall result in your immediate discharge from employment under the provisions of Per 308.03(c)(2)b of the Rules...

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"Because you (a) failed to submit a medical diagnosis supporting your request for sick leave dated 7/15/91; and (b) failed to report for work on September 20, 1991 at 8:30 a.m. and to report to me as directed; you are hereby terminated from your employment. . . ."

After considering the evidence and testimony, the Board voted to deny Mr. Gielen's appeals. In so doing, the Board ruled as follows on the State's Proposed Findings of Fact and Rulings of Law:

FINDINGS OF FACT

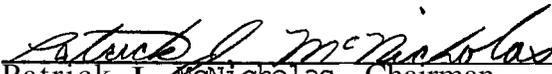
1, 2, 4, 5, 6, 7, 8, 9 granted.  
3 granted in part. Payment through August 17, 1991, was not documented by submission of payroll records for the period in question.

RULINGS OF LAW

1, 2, 3, 4, 5 6 granted.  
7 granted, after inserting the word "paid" between the words "additional" and "sick" so that it reads:

Neither the Board of Nursing nor the Division of Public Health Services has the statutory or regulatory authority to grant additional paid sick leave when an employee has exhausted his benefits.

THE PERSONNEL APPEALS BOARD

  
Patrick J. McNicholas, Chairman

  
Robert J. Johnson

cc: Virginia A. Vogel, Director of Personnel  
Michael C. Reynolds, SEA General Counsel  
Dianne German, Attorney, Civil Bureau, Department of Justice  
Doris Nuttleman, Ed.D., Director, Board of Nursing

# State of New Hampshire

WPPID1015



## PERSONNEL APPEALS BOARD

State House Annex  
Concord, New Hampshire 03301  
Telephone (603) 271-3261

### APPEAL OF GEORGE GIELEN Docket #92-T-7

Response to Appellant's October 21, 1992 Motion for Reconsideration  
and  
State's October 27, 1992 Objection to Motion

February 16, 1993

The New Hampshire Personnel Appeals Board (McNicholas and Johnson) met Wednesday, November 4, 1992, to consider the above-captioned Motion and Objection filed by the parties in reference to the Board's October 1, 1992 decision denying Mr. Gielen's appeal. Having reviewed the Motion and Objection in conjunction with the Board's October 1, 1992 decision in this matter, the Board voted unanimously to deny the Motion.

In his Motion for Reconsideration, Attorney Reynolds argued that the Board's findings and rulings in its October 1, 1992 decision were unclear and inadequate under RSA 541-A. He also argued the Board did not specify which offenses the Board had found Mr. Gielen to have committed which would permit his termination. Attorney Reynolds also reiterated his argument that Mr. Gielen was a disabled person protected from termination in this instance by the provisions of the Americans With Disabilities Act.

Assistant Attorney General Jones asked the Board to deny the appellant's Motion, and suggested the Board might clarify its decision by stating the appellant had been properly terminated on September 26, 1991, pursuant to Per 308.03 (c)(2)(b) of the [former] Rules of the Division of Personnel.

In fact, the Board's decision rested on far more than the grounds set forth in the State's Objection. For the purpose of clarification, the Board herein repeats its decision, in pertinent part, denying Mr. Gielen's appeal and upholding the Board of Nursing's decision to terminate the appellant's employment for "...willful insubordination <sup>1/</sup> and willful falsification of requests for leave <sup>2/</sup>, as well as absence without leave <sup>3/</sup>." (SEE P.A.B. Decision, October 1, 1992, Appeal of George Gielen, Docket #92-T-7, p. 1)

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- 1/ willful insubordination, Per 308.03(2) b  
2/ willful falsification of requests for leave, Per 308.03(2) e  
3/ absence without leave, Per 308.03(3) a and Per 307.06(c)(1)

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Willful insubordination, Per 308.03(2) b

The Board granted the State's proposed finding #7, which states, in part:

"Mr. Gielen was required to report to work on September 20, 1991 unless a specific medical diagnosis supporting his request for sick leave could be established. He was informed that his employment would be terminated at that time under the provisions of Per 308.03(c)(2)(b) of the Rules of the Division of Personnel." (SEE P.A.B. Decision, October 1, 1992, Appeal of George Gielen, Docket #92-T-7, p. 4)

Willful falsification of requests for leave, Per 308.03(2) e

Mr. Gielen's original "request" for leave was his July 10, 1991 note to Dr. Nuttleman in which he claimed he would be seeing a "doctor" on Monday, July 15, 1991. (SEE State's proposed finding #2) The leave slip completed by Mr. Gielen and signed by him on July 15, 1991, certifies he was unable to work due to extreme stress, hypertension, PVC's and PAC's (SEE State's proposed finding #3). Taken together, the note and leave slip give the impression Mr. Gielen had seen a physician July 15, 1991, that the symptoms listed on the leave slip were as reported by the physician, and that the symptoms listed had disabled Mr. Gielen from working for the duration of the leave requested. Mr. Gielen did not keep his "doctor's" appointment for July 15, 1991, seeing instead a psychologist. Further, the record reflects he verbally advised his cardiologist he was not experiencing any cardiovascular difficulties, although three of the four reasons for requesting sick leave are symptoms of cardiovascular difficulty. (SEE State's Exhibit F-1, SEE also, P.A.B. Decision, October 1, 1992, Appeal of George Gielen, Docket #92-T-7, p. 2)

Absence without leave, Per 308.03(3)a and Per 307.06(c)(1)

Although Mr. Gielen was paid from his accrued sick leave during his initial absence, he was not in an approved leave status. Further, the appointing authority was under no obligation to grant him a leave of absence without pay.

Mr. Gielen was terminated from employment on September 26, 1991, for absence without leave, willful falsification of requests for leave, and willful insubordination. Former Per 308.03 (3)a lists absenteeism without approved leave as a "letter of warning" offense. Former Per 307.06 (c)(1) provides the following in pertinent part:

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"...Failure on the part of an employee to report promptly at the expiration of the leave of absence **[with or without pay]** except for satisfactory reasons submitted in advance, shall be a cause for dismissal."

The Board continues to find that the termination was not effected for reasons related to a disability, nor was it the result of a failure on the part of the agency to provide for reasonable accommodation. The Equal Employment Opportunity Commission's regulations for enforcement of Title I of the Americans with Disabilities Act, 42 U.S.C. 12101 ~~et seq.~~ (1990), provide the following with regard to reasonable accommodation:

The term "reasonable accommodation means:

...**(iii)** Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

**(2)** Reasonable accommodation may include but is not limited to:

**(i)** Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

**(ii)** Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.

**(3)** To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, **interactive** process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

An agency certainly can not offer a reasonable or a meaningful accommodation to an otherwise qualified disabled individual without first understanding the nature and extent of the individual's disability. The record reflects the employer attempted to understand both the nature and extent of the appellant's self-report of illness **and/or disability**, requesting specific diagnostic information from the appellant's licensed health care practitioner(s), without which no "reasonable" **accommodation** could be devised. As late as September 5, 1991, the Board of Nursing pressed its request for information concerning Mr.

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Gielen's anticipated date of return to work. The appellant's own "licensed health care practitioner(s)" stated in notes dated July 16, 1991, August 23, 1991, August 26, 1991, August 28, 1991, September 10, 1991, and September 24, 1991, that Mr. Gielen would not be returning to work. The only reference to an accommodation of any kind in any of those notes came from Dr. Rowan in his letter to Dr. Nuttleman dated September 10, 1991:

"In response to your letter of September 5, it is my understanding that Mr. Gielen would not anticipate returning to work in your office until after you retired." (See: Appellant's October 11, 1991 appeal with attachments)

The mere presence of a disability, whether short-term or long-term, does not automatically entitle the appellant or any other individual to protection from discipline arising from conduct unrelated to the disability. The mere incidence of discipline involving a disabled person does not automatically require this or any other body to find that discrimination has occurred. Mr. Gielen continually maintained that he was not unable to work, only that he was unable to work with Dr. Nuttleman. That does not, in the Board's opinion, constitute a "handicap" or "disability" affecting one or more "major life functions".

As a final matter, the Board must again take issue with the Appellant's claim that "...the only time an appointing authority can mandate pre-approval for sick leave is for specific medical and dental 'appointments' (CBA Article 11.2. )." On the contrary, the clear language of the contract states that:

"An employee may be required by the employer to furnish the employer with a certificate from the attending physician or other licensed health care practitioner when, for reasonable cause, the Employer believes that the employee's use of sick leave does not conform to the reasons and requirements set forth in this Agreement. Such certificate shall contain a statement that in the practitioner's professional judgment sick leave is necessary."

One must assume if the parties to the agreement expected certification of leave to occur only after the employee had returned from leave, the contract language would be phrased in the past, not the present tense. Further, if certification could only occur after the employee had returned from leave, the remainder of Article 11.4 would be meaningless:

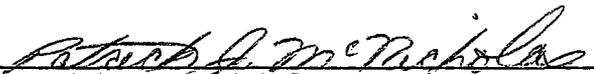
"... In addition, the Employer may, at state expense, have an independent physician examine one of his/her employees who, in the opinion of the Employer, may not be entitled to sick leave. The time related to such examination shall not be charged to the employee's leave."

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Obviously, an independent medical examination/evaluation occurring after the employee has recovered and returned to work could yield no meaningful result.

As noted in the State's Objection to Appellant's Motion for Reconsideration, the remaining issues raised in the Appellant's Motion are either irrelevant or repetitious, requiring no further discussion.

THE PERSONNEL APPEALS BOARD

  
Patrick J. McNicholas, Chairman

  
Robert J. Johnson, Commissioner

cc: Virginia A. Lamberton, Director of Personnel  
Michael C. Reynolds, SEA General Counsel  
Douglas N. Jones, Assistant Attorney General

NOTICE: This opinion is subject to motions for rehearing under Rule 22 as well as formal revision before publication in the New Hampshire Reports. Readers are requested to notify the Clerk/Reporter, Supreme Court of New Hampshire, Supreme Court Building, Concord, New Hampshire 03301, of any errors in order that corrections may be made before the opinion goes to press. 5: 11 95

THE SUPREME COURT OF NEW HAMPSHIRE

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Personnel Appeals Board  
No. 93-158

APPEAL OF GEORGE GIELEN  
(New Hampshire Personnel Appeals Board)

December 30, 1994

Michael C. Reynolds, general counsel, State Employees' Association of New Hampshire, Inc., of Concord, by memorandum and orally, for the petitioner.

Jeffrey R. Howard, attorney general (Lucy C. Hodder, assistant attorney general, on the memorandum, and Christopher Reid, assistant attorney general, orally), for the State.

JOHNSON, J. The petitioner, George Gielen, challenges the decision of the New Hampshire Personnel Appeals Board (the board) upholding the termination of his employment at the New Hampshire Board of Nursing (NHBN). We affirm.

In 1982, the petitioner began work at the NHBN as coordinator of nursing. On June 25, 1991, the petitioner applied for new employment with the bureau of health facilities administration. On his job application, the petitioner indicated that he was prepared to start work at the bureau on July 18, 1991.

On July 10, 1991, the petitioner submitted a note to his NHBN supervisor, Dr. Nuttelman, stating that he had a medical appointment on July 15 and anticipated being absent from work for an indefinite duration. The petitioner stated that his absence was not indicative of any intent to resign. Sometime between July 10 and July 15, the petitioner removed from his office telephone logs belonging to the State and all his personal belongings. In addition, he asked the leave clerk to forward his leave totals and personal mail to his home address.

The petitioner did not report for work on July 15 and called in sick. On the petitioner's application for sick leave dated July 15, 1991, he certified that his incapacitation was due to extreme stress, hypertension, and premature ventricular and auricular contractions. That same day, the petitioner missed an appointment with a dietician at his cardiologist's office but went to the office to explain that his cardiac difficulties had subsided.

In letters dated July 18 and 19, 1991, Dr. Nuttelman asked the petitioner to have his doctor send confirmation of the claimed cardiac problems. Dr. Nuttelman also asked the petitioner to advise her as to how long he expected to be absent from work. The petitioner's cardiologist, Dr. Chan, submitted a letter dated August 2, 1991, to Dr. Nuttelman. According to Dr. Chan's letter, although the petitioner had experienced some cardiac irregularities in May 1991, he had recently told Dr. Chan that he was "feeling fine without anymore [sic] palpitation symptom or irregular heartbeats."

On July 22, 1991, the petitioner telephoned the director of the State Department of Health and Human Services to discuss his application for sick leave. The director instructed the petitioner to address future employment-related communication to Dr. Nuttelman, and to submit to the NHBN documentation of his alleged cardiac problems. On August 7, 1991, the petitioner disregarded the director's instructions and delivered a letter from Dr. Chan, not to Dr. Nuttelman, but to the office of human resources. On that same day, the petitioner attended a job interview with the bureau of health facilities administration.

Dr. Nuttelman sent the petitioner his first official warning letter on August 20, 1991. The five-page warning states in part:

Your failure to comply with written instructions regarding your employment situation constitutes willful insubordination. Willful insubordination constitutes an offense for which an employee may be discharged without prior warning pursuant to Per 308.03 (c) (2) b of the Rules.

. . . .

Willful falsification for leave requests pursuant to 308.03 (c) (2) e constitutes a second option discharge offense for which an employee may be discharged without prior warning. Although you have a pending request for sick leave, you have been actively seeking alternative employment and participated in an employment interview on August 7, 1991 at 1:30 p.m. Sick leave within the meaning of the Rules and Collective Bargaining Agreement is intended solely for

the purpose of providing employees protection against lost income due to illness or injury. . . . Failure to return to work constitutes absence without leave and willful falsification for leave request.

. . . .

Your failure to substantiate an accurate, medically acceptable diagnosis provided by a licensed medical health-care provider by verifying your claims of "hypertension, PVC's and PAC's" as certified by you on your July 15, 1991 sick leave request, is considered further evidence of falsification for sick leave and will result in your immediate discharge from employment pursuant to Per 308.03 (c) (2) e of the Rules.

On August 26, 1991, another cardiologist, Dr. Deloge, reviewed the petitioner's medical records kept by Dr. Chan. Dr. Deloge informed Dr. Nuttelman that the petitioner's premature ventricular and auricular contractions were not so disabling as to preclude the petitioner's attendance at work. On August 30, 1991, the petitioner contravened the director's orders and again contacted someone other than Dr. Nuttelman to discuss employment matters.

Dr. Nuttelman sent the petitioner his second official warning letter on September 20, 1991. This warning referred to the previous warning and expressed an intent to discharge the petitioner because he had neither submitted a medical diagnosis documenting his cardiac problems nor returned to work. The letter informed the petitioner that he could avoid termination by reporting to Dr. Nuttelman at the NHBN on September 25, 1991, and by providing an explanation for his previous conduct. Despite this letter, the petitioner neither met with Dr. Nuttelman nor accounted for his absenteeism.

On September 26, 1991, Dr. Nuttelman sent the petitioner a final notice, which advised him that his discharge would take effect on September 27, 1991.

The petitioner appealed his discharge. After a hearing, the board ruled in favor of the NHBN. The petitioner's motion for reconsideration was denied, and this appeal followed.

The petitioner argues that the board's decision should be reversed because: (1) his dismissal was based upon infractions for which he had already been disciplined; (2) his supervisor did not consider in good faith his application for sick leave; (3) he did not receive the two warnings and proper final notice required for a dismissal premised upon unapproved leave; (4) the evidence does not support a dismissal based on willful falsification and

insubordination; (5) his dismissal was related to a disabling condition; and (6) the board did not fairly consider his appeal.

RSA 541:13 (1974) provides the applicable review standard:

Upon the hearing the burden of proof shall be upon the party seeking to set aside any order or decision of the [board] to show that the same is clearly unreasonable or unlawful, and all findings of the [board] upon all questions of fact properly before it shall be deemed to be prima facie lawful and reasonable; and the order or decision appealed from shall not be set aside or vacated except for errors of law, unless the court is satisfied, by a clear preponderance of the evidence before it, that such order is unjust or unreasonable.

We now address the petitioner's six contentions seriatim.

First, the petitioner argues that since the warning letter dated August 20, 1991, chastised him for his falsification of a sick leave form and for his insubordinate conduct, any future dismissal premised upon those behaviors would be improper. This assertion lacks merit. The August 20 warning letter apprised the petitioner that his defiance of the director's explicit instructions to communicate only with Dr. Nuttelman constituted insubordinate behavior. The insubordinate behavior that justified his later dismissal was the petitioner's refusal to meet with his supervisor, to explain his transgressions, and to return to work.

The August 20 warning further apprised the petitioner that his persistent failure to return to work constituted willful falsification of a sick leave request. Thus, the NHBN chose to treat the petitioner's falsification as a continuing offense for which he could take corrective action. The personnel rules, which both parties contend apply, allow the NHBN to dismiss an employee charged with falsifying leave requests without a warning. N.H. Admin. Rules, Per 308.03(c)(2)e (1985) (current version at Per 1001.08(b)(6)a (1992)). That the NHBN allowed the petitioner time to take remedial action in this instance did not render improper his later dismissal for continued dereliction.

Second, the petitioner argues that his supervisor did not consider in good faith his application for sick leave. He asserts that Dr. Nuttelman's testimony that she considered his application to be improper in form proves that she disregarded completely his leave request. This argument is untenable. The petitioner's intentional misrepresentation of his physical condition, not the form of his request, was the primary issue throughout the weeks following the submission of his request. Indeed, Dr. Nuttelman consistently focused on the application's

, substance and not once remarked upon the application's form at any time before the board hearing.

Third, the petitioner argues that his dismissal was invalid because the NHBN violated the personnel rules. Specifically, the petitioner complains that the NHBN did not give him two warnings and a proper final notice before terminating his employment.

The Administrative Procedure Act requires administrative agencies to follow their own rules and regulations. Appeal of Nolan, 134 N.H. 723, 728, 599 A.2d 112, 115 (1991). Where employment termination is involved, substantial violations of the rules render a dismissal invalid. Appeal of Fugere, 134 N.H. 322, 329, 592 A.2d 518, 522 (1991). The board made no explicit finding as to whether the NHBN complied with the personnel rules. Thus, we consider whether the NHBN violated the rules, and if so, whether such violations were substantial.

The personnel rules state that an employee's absenteeism without approved leave must be handled as follows:

a. One or more oral warnings may be given to the employee by the appointing authority. At the appointing authority's discretion, any number of oral warnings may be given depending upon the attitude of the employee and the appointing authority's judgment of the seriousness of the offense. It is the appointing authority's responsibility to point out the specific nature of the offense and discuss in detail with the employee the correct action to be followed in the future.

b. If the appointing authority feels oral warnings have been, are, or would be ineffective or insufficient in view of the attitude of the employee, and/or the nature of the offense, a written warning shall be prepared. Warnings must indicate that unless corrective action is taken the employee will be subject to discharge.

. . . .

e. Employees who receive 2 written warnings for the same offense may be discharged by receipt of a final written notice of subsequent violation for that offense.

N.H. Admin. Rules, Per 308.03(c) (4) (1985) (current version at Per 1001.03, 1001.08(e)(1) (1992)).

Admittedly, the first official warning, dated August 20, 1991, did not cite the personnel rule regarding unapproved absenteeism, N.H. Admin. Rules, Per 308.03(c)(3)b (1985) (current

version at Per 1001.03(a)(3), 1001.08(e)(1) (1992)). The warning's explicit advisement that the petitioner's truancy constituted absence without approved leave, however, rendered the letter a valid warning for that offense. We note that the warning distinctly stated that failure to return to work constituted both unapproved absence and willful claim falsification. The NHBN appears to have treated these two offenses interchangeably.

The second official warning, dated September 20, 1991, specifically referred to the first official warning. Although the September 20 warning neither reiterated the detail of the first warning nor specifically alerted the petitioner to the impropriety of his unapproved absence, it noted his failure to return to work and made clear the NHBN's intent to incorporate the substance of the first warning into the second.

In the petitioner's final notice, dated September 26, 1991, the NHBN declared its intent to terminate the petitioner's employment on the express account of his continued unapproved absence.

The purpose of the warning requirement is to notify employees that they have committed an offense, and to instruct them on the proper future course of conduct. Appeal of Fugere, 134 N.H. at 331, 592 A.2d at 524. Here, the two warnings apprised the petitioner of the specific corrective action required of him to avert dismissal. Moreover, two letters sent prior to the official warnings also advised the petitioner of the need to substantiate his leave application. Thus, we discern no prejudice to the petitioner arising from any failure of the second warning to specify the exact nature of the petitioner's offense.

Fourth, the petitioner argues that the board abused its discretion in upholding his dismissal based on willful insubordination and falsification. He claims that no evidence justified these charges. We disagree. The record contains ample support for the board's affirmation of the petitioner's discharge for willful insubordination. The NHBN directed the petitioner to report to work, to produce medical documentation of his claimed cardiac ailments, or to provide an explanation for his conduct. Dr. Nuttelman forewarned the petitioner that his refusal to do so would be tantamount to willful insubordination, and would result in the termination of his employment. The petitioner's disregard of this warning justified his discharge for willful insubordination.

The board's affirmation of the petitioner's discharge for willful falsification of a sick leave application was also proper. The evidence sustains the board's finding that the petitioner deliberately gave Dr. Nuttelman the false impression

(-- that a heart condition required his absence from work. At the time he submitted his leave application, the petitioner had no cardiovascular complaints. Yet he certified that hypertension and premature ventricular and auricular contractions necessitated his extended leave from work. The record does indicate that the petitioner was experiencing "extreme stress," which he also certified on his leave request. His application, however, gave the distinct and misleading impression that his primary concern was his heart condition. We therefore uphold the board's finding that the petitioner's purposeful deceit warranted the falsification charge.

Fifth, the petitioner argues that the board violated RSA 21-I:58, I, which requires reinstatement whenever a dismissal is "for any reason related to ... [a] disabling condition." RSA 21-I:58, I (Supp. 1993). The statute does not delineate the conditions for which the rule affords protection; however, the legislature specifically designed another law, RSA chapter 354-A, to protect disabled people from employment discrimination. RSA 354-A:1 (Supp. 1993). Thus we use RSA chapter 354-A for assistance in interpreting the similar proscription against such discrimination in RSA 21-I:58, I. See Petition of Public Service Co. of N.H., 130 N.H. 265, 282, 539 A.2d 263, 273, appeal dismissed sub nom. Public Service Co. of N.H. v. New Hampshire, 488 U.S. 1035 (1988).

) RSA chapter 354-A defines "physical or mental disability" as a "physical or mental impairment which substantially limits one or more of such person's major life activities." RSA 354-A:2, IV (Supp. 1993). The statute permits employers to discharge a disabled person if such discharge is based upon a bona fide occupational qualification. RSA 354-A:7, I (Supp. 1993).

The petitioner does not specify his disabling condition. As the petitioner's cardiovascular complaints were unsubstantiated, we assume he considers his "extreme stress" to be the relevant disability for purposes of the statute. The petitioner maintains that his stress does not interfere with his ability to work, but that it interferes with his ability to work with Dr. Nuttelman.

Because the contested dismissal did not relate to the petitioner's "extreme stress," we need not decide whether stress generated by contact with one's supervisor "substantially limits" a "major life activity," nor whether an ability to work with one's supervisor is a bona fide occupational qualification.

( The petitioner does not attribute his dismissal to prejudice against people suffering from extreme stress. Rather, the petitioner asserts that RSA 21-I:58, I, requires reinstatement not only when a dismissal is a product of illegal discrimination, but also whenever a dismissal relates in any way to a disabling condition. Thus, the petitioner concludes that because this case

involves a dispute over the existence of a disabling condition, he must be reinstated. This argument is unpersuasive. If the petitioner were correct, falsifying a disability on a sick leave application could never justify dismissal. Common sense dictates that we reject the petitioner's interpretation of the statute. Accordingly, we uphold the board's determination that RSA 21-I:58, I, does not require the petitioner's reinstatement.

Finally, the petitioner argues that the board did not fairly consider his appeal. He contends that the board's "disingenuous finding that Per 307.06(c)(1) supports the termination" warrants reversal. Per 307.06 sets forth the requirements for requesting a leave of absence without pay. The rule instructs employees that failure to report to work upon the expiration of leave time, "except for satisfactory reasons submitted in advance, shall be cause for dismissal." N.H. Admin. Rules, Per 307.06(c)(1) (1985) (current version at Per 1205.02(e) (1992)). The petitioner complains that the rule cannot form the basis of his dismissal because it contemplates that leave be granted and then expire, and the NHBN never granted him leave. Nevertheless, we disagree with the petitioner's contention. Whether the board found the rule to further justify the NHBN's actions is irrelevant because other sections of the personnel rules amply support the dismissal. Moreover, we do not find the board's determination to be so erroneous as to evince partiality toward the NHBN.

Affirmed.

All concurred.

# Memorandum

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**To:** Paul Brodeur  
**From:** Mary Ann Steele, Personnel Appeals Board  
**Date:** 03/08/01  
**Re:** Appeal of George Gielen

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You called this morning on Mr. Manning's suggestion for information about a case or cases that the Personnel Appeals Board may have decided with respect to falsification of agency records. I referred you to the Appeal of George Gielen, a case that included falsification of agency records (a leave slip) as one of the grounds for the employee's dismissal. I have enclosed for your information and use a copy of the Board's decision in that matter, as well as a copy of the opinion issued by the New Hampshire Supreme Court in the subsequent appeal.

Other cases involving willful falsification of agency records relate primarily to false information provided on employment applications, including omission of information related to a prior criminal conviction (Appeal of Thomas Landry and Appeal of Susan Curtis) and willful misrepresentation of the employee's work history (Appeal of Lisa Szanto). Although the Curtis decision is readily available, the Landsy and Szanto cases are in the Board's "archives" and may be somewhat more difficult to locate. If you decide you need them, however, let me know and I'll try to retrieve them for you.

*Mary Ann Steele*

