

State of New Hampshire



PERSONNEL APPEALS BOARD

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

Appeal of Glenn Haggerty

Docket #2012-T-004

New Hampshire Hospital

April 5, 2012

The New Hampshire Personnel Appeals Board (Wood, Bonafide and Johnson) met in public session on Wednesday, March 21, 2012, under the authority of RSA 21-I:58 and Chapters Per-A 100-200 of the NH Code of Administrative Rules, to hear the appeal of Glenn Haggerty, a former employee of New Hampshire Hospital. Mr. Haggerty, who was represented at the hearing by SEA General Counsel Michael Reynolds, was appealing his November 18, 2011, termination from employment as a Mental Health Worker II after receiving three written warnings for absenteeism. Attorney Lynne Mitchell appeared on behalf of the agency.

The record in this hearing consists of pleadings submitted by the parties, notices and orders issued by the Board, the audio recording of the hearing on the merits of the appeal, and numerous documents admitted into evidence, described below.

State's Exhibits

1. Performance Summary signed by the Appellant on 10/11/02
2. Performance Summary signed by the Appellant on 2/23/03
3. FMLA letter from Sandra Davis dated 12/15/03
4. Performance Summary signed by the Appellant on 2/3/04
5. FMLA letter from Jayne Cantara dated 3/8/04
6. Performance Summary signed by the Appellant on 2/26/05
7. Performance Summary signed by the Appellant on 3/1/06
8. Performance Summary signed by the Appellant on 3/14/07

9. Performance Summary signed by the Appellant on 4/16/08
10. exhibit withdrawn
11. Letter of Warning issued to the Appellant dated 1/29/09
12. NH Policy & Procedure "Employee Attendance"
13. exhibit withdrawn
14. Performance Summary signed by the Appellant on 4/9/09
15. Letter of Warning issued to the Appellant on 6/8/09
16. exhibit withdrawn
17. Performance Summary signed by the Appellant on 5/7/10
18. Performance Summary that Appellant refused to sign on 4/4/11
19. Letter of Warning issued to the Appellant on 4/20/11
20. Step I Response to Letter of Suspension Grievance dated 4/20/11
21. exhibit withdrawn
22. exhibit withdrawn
23. FMLA letter from Lydia Gagnon dated 10/4/11
24. Medical Certification dated 10/28/11
25. Supplemental Job Description for Mental Health Worker II/APS
26. (a) October 31, 2011 letter from Diane Allen (b) October 25, 2011 letter from Diane Allen concerning intent to dismiss
27. November 1, 2011 letter from Diane Allen concerning intent to dismiss
28. FMLA letter from Lydia Gagnon dated 11/3/11
29. November 18, 2011 Notice of Dismissal
30. November 30, 2011 notification of FMLA rights
31. Leave slips dated 7/16/11, 7/11/11, 8/22/11 and 9/27/11
32. exhibit withdrawn
33. Staffing reports
34. GHRS leave report
35. ANSOS report (page 4 admitted, pages 1-3 withdrawn)

Appellant's Exhibits

- A. Copy of Article 11, Collective Bargaining Agreement

Among the pleadings submitted prior to the hearing was the State's March 16, 2012, Motion to Amend and/or Strike, in which the State asked the Board to amend the

November 18, 2011, letter of termination by striking references to the October, 2011, dates when the Appellant was absent. In support of that Motion, Attorney Mitchell argued that three days after the Appellant was dismissed, he received approval for FMLA benefits commencing on October 1, 2011, covering the periods from October 1, 2011, to October 10, 2011, and October 14, 2011, to October 30, 2011. Attorney Reynolds argued that the Motion should be denied, saying that while the agency may now say it had sufficient evidence to dismiss the Appellant prior to October 1, 2011, the October dates appearing in the letter of termination were clearly part of the evidence upon which the agency relied when it terminated the Appellant's employment. After a brief discussion, the Board voted to deny the Motion.

At the Appellant's request, the witnesses were sequestered. The following persons gave sworn testimony:

Anita Downs, RN, Nurse Coordinator

Diane Allen, RN, Assistant Director of Nursing

Glenn Haggerty, Appellant (Former Mental Health Worker)

Having carefully considered the evidence and argument offered by the parties, the Board made the following findings of fact and rulings of law.

Findings of Fact

- 1) On or about January 29, 2009, the Appellant received a written warning for, "repeated unauthorized and unscheduled absences from work and [an] unsatisfactory and unacceptable attendance pattern in violation of the Hospital Employee Attendance Policy." The letter of warning was not appealed to this Board, is not now subject to removal or amendment, and remains a part of the employee's file. (Exhibit 11)
- 2) On or about June 8, 2009, the Appellant received a letter of warning for, "repeatedly [engaging] in unauthorized and unscheduled absences from work. [This] unsatisfactory and unacceptable attendance pattern is a violation of the Hospital Employee Attendance policy." The letter of warning was not appealed to this Board, is not now subject to removal or amendment, and remains a part of the employee's file. (Exhibit 12)

- 3) On or about April 20, 2011, the Appellant received a written warning, which was amended by the agency as a result of a Step I Appeal. The warning was issued for, “[engaging] in repeated, unauthorized, and unscheduled absences from work, and [an] unsatisfactory and unacceptable attendance pattern [] in violation of the New Hampshire Hospital Employee Attendance policy.” The letter of warning was not appealed to this Board, is not now subject to removal or amendment, and remains a part of the employee’s file. (Exhibit 19)
- 4) Instead of dismissing the Appellant by issuance of a third written warning for the same type of offense within a period of five years, Ms. Allen issued the third written warning dated April 20, 2011, instructing the Appellant to take the following corrective action in order to avoid additional disciplinary action.
 1. Report to work when scheduled, on time, and ready to work.
 2. Review and sign the New Hampshire Hospital Employee Attendance policy by April 30, 2011. A copy of the signed policy will be placed in your personnel record located in Human Resources.
 3. Do not exceed the number of allowable uses of sick leave for absences as defined and outlined in the Collective Bargaining Agreement and the Personnel Rules. (CBA 11.2 and Personnel Rule 1204.05)
 4. File a written application for sick leave stating the basis of your request as being an illness, injury, FMLA, dependent care, medical/dental appointment, bereavement, or a request to donate sick leave to another employee. Prior approval must be granted for medical and/or dental appointments.
 5. File a written application for annual leave requests two weeks in advance of the request, to allow management to determine if the staffing schedule can accommodate your request.
- 5) The amended letter of warning issued to the Appellant on or about April 20, 2011, stated, in part, “This is your third Letter of Warning for Dependability/Absenteeism since January 29, 2009. Please be advised that per Personnel Rule 102.08(c)(1) Dismissal: An appointing authority may dismiss an employee pursuant to Per 1002.04 by issuance of a third written warning for the same type of offense within a period of 5 years.” The Appellant was advised in the warning, “Your attendance will continue to be monitored on a regular basis. Please understand that failure to take corrective actions outlined or any recurrence of this behavior could result in further

disciplinary action up to and including your termination from employment.” (Exhibit 19)

- 6) Between May 12, 2011, and September 23, 2011, the Appellant had eight unscheduled absences. (Exhibit 29) With the exception of leave taken on May 12, 2011, and May 14, 2011, all of the Appellant’s remaining requests for sick leave were approved. (Exhibit 31)
 1. The leave slip that the Appellant signed and dated May 16, 2011, requesting leave for May 12, 2011, and May 14, 2011, was signed by the Appellant’s supervisor as “Not recommended, Not approved, W.P. [with pay].”
 2. The Appellant’s leave request dated July 9, 2011, requesting 21 hours of sick leave from July 5, 2011, through the end of his shift on July 7, 2011, was marked “Not Recommended” but “Approved.”
 3. A leave slip signed by the Appellant on August 19, 2011, requesting leave for August 12, 2011, was signed by the Appellant’s supervisor as “Not recommended,” but “Approved.”
 4. A leave slip submitted by the Appellant on September 27, 2011, was signed by the Appellant’s supervisor as “Recommended” and “Approved.”
- 7) In late September, 2011, Anita Downs, the Appellant’s supervisor, was scheduled to be away on leave. On or about September 28, 2011, Susan Belanger, the Nurse Coordinator who was assigned to supervise the Appellant during Ms. Downs’ absence, informed Diane Allen, the Assistant Director of Nursing, that the Appellant’s attendance continued to be a problem. Ms. Belanger recommended action, and sent Ms. Allen a draft of a fourth letter of warning for review. She also asked Ms. Allen if they should consider sending an intent to dismiss letter instead, noting that the Appellant already had three warnings for the same type of offense. (Diane Allen’s testimony)
- 8) On or about October 4, 2011, the Bureau of Human Resource Management sent a letter to Mr. Haggerty requesting certification of his possible need for FMLA leave for a serious health condition. The letter stated, “We have been advised that your FMLA leave should begin no later than October 2, 2011.” (Exhibit 23) That letter was returned to the agency as undeliverable. (Testimony of Diane Allen)
- 9) Ms. Allen testified that she had several meetings with the Appellant toward the end of October, including a meeting with the Appellant on October 27, 2011, when she presented the Appellant with a list of dates between May 12, 2011, and October 24,

2011, when he was unexpectedly absent from work. The Appellant informed Ms. Allen that his repeated absences were the result of personal health issues. Ms. Allen informed the Appellant that the agency had sent him an application for FMLA, but that the correspondence had been returned. The Appellant said that he had moved recently. He also told Ms. Allen that he was not familiar with the process of applying for FMLA leave. Ms. Allen told him to go to the human resources office immediately to speak with staff about FMLA leave. She also recommended that he contact the Employee Assistance Program. (Testimony of Diane Allen)

- 10) The Appellant attempted to return to work on October 29, 2011, but because he did not have a full release from his healthcare provider, he was instructed to return on October 31, 2011, and bring the release with him. When Ms. Allen met with the Appellant on October 31, 2011, she again reviewed with him a letter listing his unexpected absences since May 12, 2011, and explained her intent to dismiss him from employment for continued absenteeism and lack of dependability. At the time, Ms. Allen knew that she was scheduled to be out of state on business for a couple of different periods, and she told the Appellant that he had until November 17, 2011, to get FMLA paperwork in place for his absences. Ms. Allen testified, "I told him you're really getting a bye here, because I can't meet with you until November 17th. I gave him until that time to get the [FMLA] information from his health care provider to make this all go away." Ms. Allen further testified, "I'm concerned with absences. We look for patterns. All of the days off were next to a day off, the dates from September back, in fact, they all were, through October 10. And so, based on the fact that he continued after three letters of warning to not come to work as scheduled, routinely, and even after being prompted to seek out protection under the FMLA, and he did not, I moved forward with dismissal." (Testimony of Diane Allen)
- 11) By letter dated November 3, 2011, the Bureau of Human Resource Management informed the Appellant that they had received his physician's certification of the Appellant's need for leave due to a serious health condition. The Appellant was advised that although he had been approved for FMLA leave from October 14, 2011, to October 29, 2011, changes noted on a second set of documents were not initialed by the healthcare provider and could not be accepted. Another certification form was provided for the health care practitioner to complete, and the Appellant was instructed to be sure that the medical provider returned the required information

within ten days. (Exhibit 28) That information was not provided by the date specified.

- 12) After May 12, 2011, none of the Appellant's direct supervisors questioned him about whether or not he was legitimately ill, nor was there any request until the FMLA certification request dated October 4, 2011, for the Appellant or his healthcare provider to certify his need for sick leave. (Testimony of Anita Downs)
- 13) Ms. Downs and Ms. Allen believed that the Appellant usually followed the Hospital's required procedure for calling the nursing office whenever he was not going to report for work as scheduled. There was no evidence that anyone ever questioned the Appellant about calling in and informing the nursing office that he would not be reporting for work. (Testimony of Anita Downs and Diane Allen)

Rulings of Law

- A. Per 1204.05 of the NH Code of Administrative Rules, and Article 11 of the Collective Bargaining Agreement describe the purpose of sick leave as full-time employee's means of, "protection against lost income from absences due to illness or injury and, in particular, long-term disability due to catastrophic illness or injury." Article 11 of the CBA also indicates that, "Sick leave is not intended to supplement other leave provisions of this Agreement and is intended to be used only for the purpose set forth herein."
- B. The "Application for Leave" process is defined by Per 1202.02 (a) through (c) of the NH Code of Administrative Rules, which states, "(a) Written leave requests from an employee shall be accepted by the appointing authority at reasonable times. (b) The appointing authority shall return one copy of the leave application to the employee, either approving or disapproving the request. (c) No employee shall be compensated unless the employee has first obtained an approved application for leave from the appointing authority."
- C. According to Per 1204.07, "(a) The appointing authority may require the employee to furnish a certificate from an attending physician or other licensed health care practitioner when the appointing authority has reason to believe 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."

D. Requirements for certification of leave also appear in the Collective Bargaining in Article 11, which states, in pertinent part, "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 for sick leave use set forth in this Agreement. Such certificate shall contain a statement that in the practitioner's professional judgment sick leave is necessary. 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."

Position of the parties

Attorney Mitchell argued that although Mr. Haggerty's work performance was not an issue, his frequent absences over an extended period of time disrupted operations and created havoc. As a result of his continuing problems with attendance, she argued, the agency had issued three written warnings for continued absenteeism. Ms. Mitchell argued that the appellant could have, and should have, initiated discussions with EAP as his supervisors had recommended. Ms. Mitchell also argued that the Appellant should have gone to the agency's human resources office for information about the Family and Medical Leave Act, but that he failed to do so. Ms. Mitchell argued that the State's decision to dismiss the Appellant was not illegal, unjust, unlawful, or unwarranted, and that the decision was supported by multiple written warnings and the Appellant's record of continued absenteeism.

Attorney Reynolds argued that It was illegal and unjust for New Hampshire Hospital to dismiss the Appellant because he chose not to seek counseling through the Employee Assistance Program, because he failed to initiate a request for FMLA certification for all of his absences, or because he used approved sick leave. Attorney Reynolds argued that the Appellant may or may not have qualified for FMLA leave prior to October, 2011, as there was no evidence that the Appellant was out for more than three days in a row, or that his absences were all for the same medical reason. Attorney Reynolds argued that the agency had the right to request certification of the Appellant's need for leave

under the FMLA, or if the agency doubted whether or not the Appellant was actually sick, there was a process in both the Personnel Rules and the Collective Bargaining Agreement that the agency could have used to make the Appellant certify his need for individual absences. Attorney Reynolds argued that the Appellant's dismissal boiled down to a single issue: Ms. Allen believed that employees have a right to be paid, but not the right to be absent.

Attorney Reynolds also argued that the State violated Per 1002.08 (c) and failed to provide him all the evidence upon which it relied in deciding to dismiss him, as it did not provide him with copies of his leave slips, agency leave reports, or information about input it received from Ms. Leeming, Ms. Belanger and Ms. Downs. As a result, he argued, the Appellant was automatically entitled to reinstatement without loss of seniority, status or pay.

Discussion of the evidence and arguments

The written Notice of Intent to Dismiss dated November 1, 2011, states, in part, "Over the past five months, you have had unscheduled absences from work, not covered by FMLA, on sixteen days, all in conjunction with your scheduled days off. Your pattern of unscheduled absences causes your co-workers to work overtime and is detrimental to the agency's ability to provide services."

Without considering any of the dates of absence during the month of October, which the State ultimately treated as "protected" after receiving certification from the Appellant's health care provider, the record reflects that the Appellant had eight unscheduled absences between May 12, 2011, and September 23, 2011. A significant pattern of absenteeism, particularly when the absenteeism is in conjunction with other scheduled time off, would ordinarily provide ample grounds to dismiss an employee who has already received three prior written warnings for repeated, unauthorized and unscheduled absences from work. However, the evidence reflects that the Appellant was never disciplined in May, 2011, for taking leave unauthorized leave. Leave slips submitted for the remaining six absences listed in the notice of dismissal were marked "approved."

Leave slips are not merely accounting documents; they are the means by which an employee requests approval to be absent from work and to be paid from an available accrual of leave during the period of absence. If an employee is absent without appropriate notice or without appropriate reason, the agency can sign the leave slip, "Unauthorized use of leave." The agency also can determine whether or not it will allow an employee to receive compensation for such unauthorized absences. However, when a leave request is marked "approved," the employee reasonably can conclude that the absence has been excused, and that he or she will not be disciplined for using that leave. Disciplining an employee for using leave that has been "approved" is simply unfair.

The Board fully appreciates the frustration that managers experience, and the disruption of services that can occur, when employees are frequently and unexpectedly absent from work. However, before New Hampshire Hospital can discipline an employee for absenteeism as defined by their policy, the agency must have sufficient evidence that one or more absences qualify as "absenteeism" under the terms of that policy.

According to New Hampshire Hospital's Employee Attendance policy (Exhibit 12), absenteeism is defined as, "the habitual failure to report and/or to remain at work without good reason on scheduled work days whether or not the employee has called and has leave time available." (Emphasis added.) The agency has failed to provide evidence that the leave taken was "without good reason."

The evidence reflects that the employee requested, and received approval, to use sick leave on July 5, July 6, July 7, August 12, September 22, September 23, 2011.

Although the agency continued to argue that those absences were not "protected" by the FMLA, the fact remains that not all sick leave absences are the result of serious health condition that would be FMLA qualifying, and the employee would be unable to obtain approval for FMLA job-protected leave for any such absences. That does not mean, however, that the need for sick leave might not be legitimate. In those instances, if the employer doubts the legitimacy of the need for leave, both the Rules and Collective Bargaining Agreement allow the employer to obtain certification from the employee's physician or other licensed health care provider, of the need for leave.

Assuming that the need for leave is legitimate, in some cases, even when an employee does not suffer from a serious or chronic health condition, an employee's general state of health may make it impossible for the employee to maintain a regular schedule of work. In those cases, when the employee is medically unable to perform the essential functions of the position, including the requirement to maintain a regular work schedule, an agency may take those steps necessary to remove the employee for non-disciplinary reasons. The agency may not, however, discipline an employee for taking sick leave when there is what appears to be a legitimate need for sick leave, and the employee's requests for sick leave have been approved.

Decision and Order

The Board found that the Appellant did, in fact, have the evidence upon which the agency relied in deciding to dismiss him for continued absenteeism, and that there was no violation of Per 1002.08 (c). However, having carefully considered the evidence and argument offered by the parties, the Board found that the Appellant's absences should not have been considered "habitual failure to report and/or to remain at work without good reason." As such, the Board found that the agency misapplied the Rules and that Appellant should not have been dismissed for "absenteeism," regardless of his prior warnings, and his termination under the circumstances of this case was unjust.

The Board voted to order New Hampshire Hospital to reinstate the Appellant to his former position as a Mental Health Worker. As set forth in the provisions of RSA 21-I:58, I, "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. "Any other source" shall not include compensation earned from continued casual employment during the period if the employee held the position of casual employment prior to the period, except to the extent that the number of hours worked in such casual employment increases during the period."

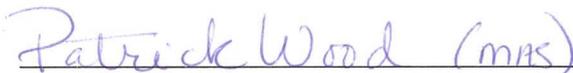
New Hampshire Hospital and the Department of Health and Human Services are directed to remove letters from the Appellant's file referring to the intent to dismiss him, and the notice of dismissal. Any absences noted in the November 18, 2011, letter of

dismissal shall not be treated as "absenteeism" as defined by New Hampshire Hospital policy, and shall not be considered in any future disciplinary action.

Although the Board has ordered the Appellant's reinstatement, the Appellant is reminded that his file still contains three written warnings for absenteeism resulting from the Appellant's absences, particularly as they relate to time taken in conjunction with other scheduled time off. Because none of the three warnings were appealed to this Board, they are not now subject to removal or amendment. Therefore, they remain a part of the employee's file, and may be included as a basis for future disciplinary action .

As set forth above, the appeal of Glenn Haggerty is GRANTED.

THE NEW HAMPSHIRE PERSONNEL APPEALS BOARD



Patrick Wood, Chair



Philip Bonafide, Vice Chair



Robert Johnson, Commissioner

cc: Karen Hutchins, Director of Personnel, 25 Capitol St., Concord, NH 03301
Michael Reynolds, SEA General Counsel, State Employees Association, 207 N.
Main Street, Concord, NH 03301
Attorney Lynne S. Mitchell, Department of Health and Human Services, 129
Pleasant St., Concord, NH 03301