

State of New Hampshire

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

1989-T-101

APPEAL OF MARY HALL

Response to Appellant's Motion
for Rehearing and Special Scheduling

April 25, 1990

On April 20, 1990, the Personnel Appeals Board received from George Watson, Jr., a private detective representing Mary Ventura Hall, a Motion for Rehearing and Special Scheduling with regard to the Board's February 26, 1990 decision in Ms. Hall's appeal of discharge from employment at the Glencliff Home for the Elderly. On April 23, 1990, the State, through the Office of the Attorney General, filed its Objection, asking that the Board deny the request on the basis of Appellant's failure to timely file.

NH RSA 21-I:58 Appeals specifies that "Any action or decision taken or made under this section shall be subject to rehearing and appeal as provided in RSA 541".

NH RSA 541:3 Motion for Rehearing provides:

"Within twenty days after any order or decision has been made by the commission, any party to the action or proceeding before the commission or any person directly affected thereby, may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order, specifying in the motion for rehearing the ground therefor, and the commission may grant such rehearing if in its opinion good reason therefor is stated in said motion."

Insofar as the Board's decision in the instant appeal was dated and forwarded to the parties on Monday, February 26, 1989, any motion for rehearing must have been filed with the Personnel Appeals Board within twenty days, or not later than March 18, 1990. Whereas March 18, 1990 was a Sunday, the Board would have accepted a Motion for Rehearing on the twenty-first day following the decision, or not later than Monday, March 19, 1990.

APPEAL OF MARY HALL
Response to Appellant's Motion
for Rehearing and Special Scheduling

Appellant's undated Motion, addressed to Ms. Susan Geiger, [Assistant] Attorney General, Civil Bureau, State House Annex, Concord, New Hampshire, was received by the Personnel Appeals Board at 9:40 a.m., April 20, 1990. Said Motion, received by the Board fifty-three (53) days after the date of the Board's decision in this matter, is therefore denied as untimely within the meaning of NH RSA 541:3.

THE PERSONNEL APPEALS BOARD

Mark J. Bennett, Acting Chairman
George R. Cushman, Jr.
Robert J. Johnson



Mary Ann Steele, Executive Secretary
For the Personnel Appeals Board

cc: Mary Hall Ventura
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George Watson, Jr.
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Emily Gray Rice, Assistant Attorney General
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Virginia A. Vogel, Director of Personnel

Ms. Sandra Knapp, Superintendent, Glencliff Home for the Elderly
Glencliff, New Hampshire 03238

State of New Hampshire



89-T-101

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THE STATE OF NEW HAMPSHIRE

DIVISION OF PERSONNEL

PERSONNEL APPEALS BOARD

Appeal of Mary Hall

I. General and Procedural Backaround

Mary Hall is a registered nurse who was a probationary employee of the Glencliff Home for the Elderly until her termination or resignation from that employment on November 28, 1988.

This appeal comes to us with a complex procedural history. The manner of the prosecution of the appeal by the appellant and her representative has made clarification and review of the issues and pertinent evidence presented herein more difficult for the Board than is the norm, or than as is contemplated by the process set forth in our rules.

Rules have not been uniformly followed by the appellant and her representative and numerous motions have been made by the appellant before, during and after the hearing in this matter,

which was held on May 31, 1989. Some of the preliminary motions and motions made at the hearing have been ruled upon previously and others taken under advisement. A number of motions by the agency have also been taken under advisement and are also pending at this time. All outstanding motions are dealt with herein.

Owing to the nature of this case and the undue complexity that has been infused into it, we deal primarily with the hearing on the merits and the issues and evidence as we see them under our rules and those of the Division of Personnel. We believe that all other matters are essentially extraneous and can be understood in the context of this case by a review of the record and our decisions, findings and comments herein.

In essence, the appellant contends that she was either forced to resign or terminated from the Glencliff Home for the Elderly due to "discrimination" against her. She contends that this "discrimination" is comprised of conduct constituting "violations of title seven" in her letter of appeal of December 8, 1988. (See, 42 USC 2000e, et seq.) She expands upon this in a document entitled "Amendment to Complaint" dated February 28, 1989, and received by the Board on April 21, 1989, and presumably submitted in response to our order for a more definite statement made on April 3, 1989, in response to the agency's motion therefor.

In that same order the Board noted that each party had had one continuance of a scheduled hearing by that time, and set the

hearing on the appellant's alleged forced resignation for May 31, 1989, when it was indeed held. Oral argument on the agency's Motion to Dismiss, to precede the scheduled hearing on the merits, was also scheduled for that date.

Ms. Hall seeks reinstatement and such other relief as may be appropriate in light of the evidence.

II. Appearances and the Record

A. Appearances. The agency, Glenclyff Home for the Elderly, was represented by Assistant Attorney General Susan S. Geiger. The appellant, Mary Hall, was represented by a representative of her choice, Mr. George Watson, Jr., a private investigator, pursuant to our rule Per-A 202.06.

We note at the outset that the Board wishes appellants to have every opportunity to be represented by an attorney, or a person of good moral character, of the appellant's choice in accordance with the referenced rule. We want appellant's to feel comfortable with the process and proceedings before the Board, and with their selected representatives, in whom they must naturally repose confidence. Thusly, we want appellants to have every opportunity to present their cases fully and to have them considered fairly so that a just result can be obtained.

When a representative fails to file an appearance, or does not timely do so, or engages in conduct which is disruptive, disrespectful or otherwise improper, as prohibited by Per-A 202.06(d), and/or simply fails to follow our rules or those of

the Division of Personnel, the process and proceedings before the Board can be hampered or impaired, and the aforementioned objectives compromised to everyone's detriment.

We find the appellant's representative, Mr. Watson, to have violated Per-A 202.06(d), as the record demonstrates, in such ways as failing to file a timely appearance, failing to exchange documents and pleadings with the agency, and in downright disruptive, disrespectful and abusive conduct at the hearing on the merits. The irrelevant grandstanding of an asserted position will never assist in the formulation of a proper decision as much as the level-headed presentation of persuasive evidence and reasoned, researched legal and factual argument.

The Board admonished Mr. Watson on several occasions to conform his conduct to the requirements of the rules, both in writing regarding procedural matters outside the hearing (i.e. service of papers under our rules), and orally on the record at the hearing. Mr. Watson was admonished during the hearing to conform his conduct to the rules or he would be excluded under Per-A 202.06(d), yet he did not do so, accusing both the agency's counsel, and the Board, of racism.

Throughout the hearing, deliberations and review of this appeal, the Board has endeavored to the best of its ability to take time and insure that its obligations to review the evidence fairly, and to be impartial in its actions and decision making, have been met.

Mr. Watson was not excluded, as aforesaid, as the Board wished the appellant to have the services of her chosen representative. We wish to give notice that the conduct observed by us in the context of this appeal cannot and will not generally be tolerated. Although every case may be different, the objectives set out above must be met in all of them.

B. The Record. The record in this appeal consists of the taped hearings held on May 31, 1989, exhibits received at the hearing, and the written file of the Personnel Appeals Board containing all correspondence, exhibits, orders, pleadings and related documentation pertinent to this appeal. The record has been reviewed and considered by the Board in deciding this appeal.

III. The Hearing and Factual Findings

The hearing in this appeal lasted approximately five hours. No requests for special scheduling had been made. Accordingly, the facts adduced from the testimony and documents received are summarized in pertinent part herein. Evidentiary rulings, unless noted herein, appear in the record and are considered to have been made for reasons clearly appearing in the record, and generally in accord with the New Hampshire Rules of Evidence. All testimony considered was given under oath.

Various preliminary motions were made. The Motion to Strike the agency's communication of May 22, 1989, regarding witnesses to be presented was denied. The Motion for Relief filed as a

result of the absence of witnesses allegedly subpoenaed by Nelson Ortega, a Private Investigator not present at the hearing, said witnesses not subpoenaed by request to the Board, as contemplated by Per-A 203.08, and other related motions, were taken under advisement, and the hearing proceeded.

Mary Hall, the appellant, testified that she graduated from the four-year program of the University of Rhode Island with the degree of Bachelor of Science. She is a registered nurse. She does not recall ever receiving any formal evaluation by her supervisors during her employment at Glencliff.

On November 28, 1988, she received a telephone call that she characterizes as intimidating, summoning her to Mr. Robert Nystrom's office, and she went. Mr. Nystrom, Glencliff's Director of Nursing, told her there were problems with her job performance and that he and Sandra Knapp (Glencliff's Administrator) had elected to terminate her probationary employment. She claims that Nystrom said he would not have done so himself, and that he gave her the option to resign instead. She says she did not know the purpose of the meeting beforehand or that she could bring a representative.

Ms. Hall indicates that she worked on the third shift with 127 patients under her care, and with no one who was actually physically present supervising her during her work. She was employed approximately sixty (60) days by Glencliff. Mr. Nystrom and Ms. Knapp were her supervisors in an organizational way. Ms.

Hall was the only RN on duty when she worked, and she supervised one LPN half the time, and between six to eight aides.

She thought the facility was understaffed and that there were many problems, from access to keys, to drugs being left around. She felt the aides dispensed various medications that only a RN could dispense. Ms. Hall says the aides did not respond to her, and that she was there for the patients at this geriatric/psychiatric facility. She felt the aides did not check on the patients often enough, and were not otherwise sufficiently attentive to their needs.

3 Ms. Hall received an orientation to her duties, but her only evaluation by Mr. Nystrom or Ms. Knapp was during the time of the orientation. She says the orientation was of approximately ten days' duration, effected by one nurse who subsequently left Glencliff's employ, and some day nurses. She indicates she oriented one new employee while at Glencliff, and that all of the staff were CPR certified.

○ On cross examination, Ms. Hall indicated that she had prepared a letter of resignation after the "intimidating" phone call but before the meeting with Mr. Nystrom. She contended that she had had opposition from staff to responding to patient calls (bells) except at predesignated times. She says Nystrom had called her for the meeting at 8:45 a.m. and she met with him at 9:30 a.m., that her letter of resignation was drafted without specific expectations of being terminated, and that she was not

warned when he telephoned that she would be asked to resign or be terminated. The resignation letter, so-called, was received into evidence.

Ms. Hall feels that Ms. Knapp told Mr. Nystrom to fire her. She says Knapp lives on the grounds and had called her at least once and encouraged her, and the other nurses, to telephone her, if she was ever needed.

She complains about the administration by aides of a spray intended to inhibit bed sores on patients. Ms. Hall is concerned that the nurses aides respond to patient needs only as scheduled, rather than as necessary. She felt that this was Glencliff's policy or practice.

She contends that she never reported an incident during which a patient was made fun of, that she had counseled the staff herself, and that she never belittled, became angry with, or mistreated a patient herself.

She was engaged in a custody battle respecting her children while employed at Glencliff. She spoke to others about it, and on one occasions brought tape recordings of her children's voices to work and played it while on break, which was overheard by a co-worker, who left the room.

Ms. Hall relates that she asked Nystrom if he'd accept her resignation, and he allegedly said he would give her a "benign" employment recommendation indicating resignation. She contends that Nystrom wanted to talk to Knapp first, because Knapp wanted

her terminated, and she contends that, when contacted by the Professional Nurses Service of Burlington, Vermont, Glencliff spoke to that service of the child custody and divorce matters.

A redirect examination of Ms. Hall was permitted, the upshot of which was that she had had no conversations with Nystrom about her job performance prior to the telephone call summoning her to the meeting discussed above. She related various incidents about the child custody matters and her relations with co-workers at Glencliff, and the child custody aspects of her divorce. The contention asserted by the foregoing testimony is that Glencliff was in some way prejudicing Ms. Hall in her child custody case, or maligning her in her efforts therein.

On re-cross, Ms. Hall indicated that she was denied custody of her children (two boys then under age 5) prior to the termination of her employment at Glencliff.

Ms. Hall's father, Mr. Carl Ventura of South Dartmouth, Massachusetts, a retired educator, testified that he has always found his daughter to be a responsible person.

Mr. George Watson, Ms. Hall's representative, was permitted to testify without objection. This practice is considered irregular by the Board, and we frown upon it.

Mr. Watson feels that Ms. Hall's attorneys had been paid for services, yet performed no work. He believes that there is a connection between Glencliff and Attorney Barbara Hill, and referred us to his reports. He contends that New Hampshire State

Police Trooper Marshall found a complaint regarding Ms. Hall seeking to obtain a weapon unfounded, and that Tom Mock and Sue Hall, employees of Glencliff, had expressed the view that Mary Hall had received a "raw deal" from Glencliff. He alluded to certain psychiatric reports regarding Ms. Hall, to which an objection was received and sustained, as these pertain to the divorce action. Mr. Watson contends that there are overtones of discrimination present in this case.

On cross-examination, Mr. Watson clarified his testimony. He feels that discrimination as to sex, race and national origin occurred in this case. He says Ms. Hall is a person of Portuguese descent. He contends that Mr. Nystrom sexually harassed Ms. Hall, and he indicated that he has no idea whether Glencliff employs other persons of Portuguese descent.

At this point, Glencliff argued that the case should be dismissed as the appellant had produced insufficient evidence having factual specificity bearing on the applicable standard to permit the finding that Ms. Hall has met her burden. (Note, Per-A 207.04, 202.04). Mr. Watson contends that there have been violations of the New Hampshire Whistleblowers Act. The motion was taken under advisement. The Board wished to hear at least a part of the agency's evidence in order to permit it to evaluate this unusual appeal, and determine the factual basis for the agency's action.

Glenclyff first called Robert Nystrom, a 20 year veteran employee. He testified that Mary Hall was employed by Glenclyff a total of 72 days. Mr. Nystrom testified that he performs probationary evaluations at the fifth month of employment. Accordingly, he had not prepared one on Ms. Hall. He says he did not know that she was of Portuguese descent. Mr. Nystrom provided orientation to Ms. Hall himself. At the time of the hearing, Mr. Nystrom had been the Director of Nursing for one year, prior to that he was the In-Service Director at Glenclyff. He writes policies, supervises staff, hires and fires.

Specific complaints about a nurse or nursing practices could come to him in his position. He received complaints about Ms. Hall, a little at a time at first, then more. She had started work on September 16, 1988, and he had received complaints about her performance by October 5, 1988. One such complaint was that she was wearing logger style boots that were quite noisy on the ward. Another pertained to the way she had handled one of the residents. He received a report from a 3 - 11 staff member that Ms. Hall would break off from reporting on patients and would make comments to the staff about her ex-husband, children or God.

Mr. Nystrom says he discussed the above-referenced problems with Ms. Hall around October 5, 1988. He thought she did not relate well or get along well with her co-workers. He thought her approach to residents was inappropriate. He relates the example of an agitated man who was acting out and was very likely

in need of his prn medication (standing order). Ms. Hall had approached the patient then backed away. This signifies fear and loss of control, and was considered by Nystrom to be poor nursing practice. Nystrom says that there were several staff members with her and no danger. The resident was Stanley N.

Nystrom describes another incident where he believed that a resident was in a manic phase, and needed his prn. Ms. Hall decided not to administer the medication and let the patient act out his fantasies, telling him it was all right to do so. (This patient was Gerry D.)

Mr. Nystrom has had occasion to discuss Ms. Hall's performance with nearly all of her co-workers on the 11 - 7 shift. He spoke with five of them on November 26, 1988. He had asked them what Hall's behavior was like. The upshot of Nystrom's inquiry was that the feeling existed that Hall did not use good judgment in assessing patients and that she would go on tirades talking about her husband, children, the courts and God. This hindered the aides' ability to understand or relate to her.

Nystrom met with Sandra Knapp, Glencliff's Director, and reviewed the situation with her. The decision was made that it was in Glencliff's interest to terminate Ms. Hall. Nystrom called Hall in to discuss "serious problems" at a predetermined time on November 28, 1988. He told Hall that he felt she had serious personal problems. He says he told her she was terminated. He says he never told her to resign or she would be

terminated. He contends that Hall had a resignation letter with her, and that she tendered it. This was identified by Nystrom.

He indicates that he told her that if she wished to resign, he would accept the resignation in lieu of terminating her employment as a professional courtesy. He says he talked with her about her job performance and obvious personal problems. He says Hall was "tangential" about this. The conversation proceeded, including a discussion of Hall's alleged misuse of granulux spray (used to prevent bed sores). Hall never asked for her resignation letter back, and Nystrom never knew she had intended to withdraw it. He says the November 28, 1988 meeting was cordial, that he had never previously terminated another female RN but has spoken with, or disciplined, other female staff in private, as most of Glencliff's employees are female.

Cross examination testimony was that Nystrom is married and has never dated Glencliff's employees. It is customary to put the reasons for termination in writing in most cases. Nystrom says he had no religious bias, but had had complaints as previously noted. Hall had two weeks of orientation from Nystrom and there was a period of about one month when there was no nursing supervision on the 11 - 7 shift, when Hall worked.

He indicated that "clean street clothes" are the attire that nurses are expected to wear at Glencliff. Nystrom says he had talked to Hall about the footwear problem, but did not feel at the time that it was a big enough deal to document. He says Hall

had played some tape recordings of her children's voices at high volume at work.

He says that one day she was to work 10:00 p.m. to 8:00 a.m., but arrived early at 6:30 p.m. and commenced to work without invitation or approval, and became embroiled in an argument with another employee as a result. (John Oakes, RN). He says that the staff were made afraid by Hall and that there was concern that staff couldn't rely on her in an emergency.

Nystrom says a certain amount of security is in place at Glencliff to protect the residents and that virtually all of these elderly residents have secondary diagnoses of a mental disorder. Hall had had a year of prior experience out of state at the Cotton Forensic Unit. Nystrom received a "benign" reference from that facility when he checked. Nystrom indicated he had served as the acting Director of Nursing some years back and had terminated a nurse for insubordination at that time.

Nystrom relates that Trooper Michael Marshall had spoken with him on December 1, 1988. He says he talked with Marshall about Glencliff's employee Sue Hall's report that Mary Hall had tried to purchase a gun and that there was concern that she was angry and sought retribution. Sue Hall is the Nursing Assistant on the 11 - 7 shift.

As the hearing in this matter was rather long, and often acrimonious, the Board, at this point, asked for and received offers of proof regarding what the testimony that other witnesses

present for Glencliff would be if they testified. (No other witnesses were present for the appellant.) The testimony was not received, hence no opportunity for cross examination was afforded Ms. Hall. Accordingly, we accord little weight to the offers of proof. The offers suggest that the testimony would largely track that of Mr. Nystrom, especially insofar as certain incidents leading to complaints or concerns about Ms. Hall's performance are concerned. The offers and arguments of the parties are fully set forth in the tape recording of the proceedings, and need not be further summarized here.

A number of post hearing motions have been filed. Glencliff has filed Requests for Findings of Fact and Rulings of Law to which the appellant has responded by document dated June 16, 1989, entitled "Susan Geiger's Request for Findings of Fact and Rulings of Law."

III. Rulings, Orders and Further Comments by the Board.

It is unquestioned that the appellant has left state service, and that she has done so either due to her resignation or on account of having been terminated from her status as a probationary employee. See Per-A 207, Per 101.16, 101.27, 302.23, note subsection (c).

The appellant was an employee of the agency for less than three months. Accordingly, no performance evaluation relating to her probationary employment was required pursuant to Per 302.23 (a) (1), (c) and (d). However, this certainly could have been

done in connection with attempts to bring about improvements in Hall's performance (note testimony of Nystrom), and the practice is favored by the Board.

Generally, it is better to have too many performance evaluations rather than too few. The purpose of these evaluations is to provide feedback to employees, which may facilitate correction of deficiencies in performance and improve performance consistent with or exceeding the applicable work standard. However, pertinent rules did not require such an evaluation in the instant case. Per 302.23 (c).

There have been various allegations of racial, ethnic or other discriminatory animus on the part of the agency, officials or the Board, which of course, if true, are prohibited by law. Note, Per 102.01 (f), 302.23 (c). The Board has commented upon these allegations in its decision and the record reveals the context in which these are raised. The testimony suggests that Ms. Hall's co-workers did not know that she was of Portuguese descent, and that was not apparent, or of significance, to the Board until raised at the hearing. Ms. Hall's representative presses this and contends, we perceive, that the Board is in some way biased against him on account of his race, also unknown to us prior to the hearing. On the record, we find the foregoing allegations to be wholly without merit.

It is apparent to the Board from the evidence that Mary Hall was, at the time of her employment, a person suffering from

considerable stresses in her private life and it appears that these were evident in her work. It is not clear to us that Ms. Hall was able to function as she otherwise would. However, she did obtain employment at Glencliff, received job orientation and is a registered nurse trained for the position she held.

We are inclined to believe that, under the circumstances, Ms. Hall's resignation tendered to Mr. Nystrom, was sufficiently voluntary under all the evidence that we need look no further than that in evaluating her separation from state service. We find that Mary Hall resigned, without coercion, from state service at the Glencliff Home for the Elderly and deny her appeal on that ground.

We believe that Ms. Hall, whether faced with the Hobson's choice of resignation or termination, or not, acted with sufficient premeditation and voluntariness, and under circumstances that we believe did not unduly influence her choice, to resign. We note Mr. Nystrom's testimony that her resignation letter was all ready to be tendered at their interview. We do not see the circumstances of the interview to contain the nefarious forces of coercion and manipulation advanced upon us. We do not conclude from the evidence that the situation at Glencliff was so divergent from what may be reasonable for such an institution that the appellant was forced to resign, or did so, as a result of any rational protest warranting consideration of the matter as an enforced

termination. We also hope, that in some way, this view will assist Mary Hall in the ultimate furtherance of her chosen career.

Notwithstanding the foregoing, the Board considers it appropriate to discuss the matter of termination in this matter. Assuming arguendo that Mary Hall was indeed terminated from her probationary employment at Glencliff in this appeal, we find that decision sustainable on the evidence and at law.

On the evidence received, we find that Mary Hall's performance during her short tenure at Glencliff did not meet the required work standard, and that Per 302.23 (c) was complied with by Glencliff in any case. (The removal was reported to the Director and known, of course, to the employee.)

Ms. Hall, a registered nurse, was hired to fulfill a responsible position involving the care of persons, and perhaps, their lives. For whatever reason, and through no fault of Glencliff, she was unable to meet the required work standard, and reasonably called into question in the minds of her superiors, and this Board, her ability to effect that duty during the time of her employment at Glencliff.

We note at this juncture that we have afforded great latitude to the appellant and her representative under Per-A 207. While we may not do so in every case, the equities here have warranted that latitude in our attempt to fully and fairly consider this matter.

Glenclyff has filed Requests for Findings of Fact and Rulings of Law. Numbers 1, 2, 3, 4 (there is no request numbered "5"), 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, the foregoing being all of the requests for findings, are granted as to their general substance in accordance with our decision, hence granted in part. Numbers 17, 18, 19, being three of the requests for rulings are granted. Number 20 is stated in such a manner as to be overly broad. Accordingly, the Board takes no action on that request for a ruling. The Board is aware of the holding in Appeal of Czeslaw Pawlas, 121 NH 273 (1981), and we view that case as having some relevance to the instant appeal.

The Board believes that it has addressed the appellant's response to the Agency's Requests for Finding and Rulings adequately above. Accordingly, it does not attempt to explain that response, or rule further upon it here. Similarly, in light of the foregoing, and the equities herein, all outstanding motions are denied.

The appeal of Mary Hall is denied.

19 December, 1989

The Personnel Appeals Board

By: Mark J. Bennett (mas)
Mark J. Bennett, Esquire
Chairman for the Hearing

By: Robert Johnson (mas)
Robert Johnson, Commissioner

By: George Cushman
George Cushman, Commissioner

cc: Susan Geiger, Assistant Attorney General
Civil Bureau

George Watson, Jr.

Virginia A. Vogel
Director of Personnel

Sandra K. Knapp, Superintendent
Glenclyff Home for the Elderly

David S. Peck, Assistant Attorney General
Civil Bureau

DATED: February 26, 1990