

State of New Hampshire



PERSONNEL APPEALS BOARD

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APPEAL OF ROBERT LECLAIR

New Hampshire Hospital

Docket #96-T-20

August 9, 1996

The New Hampshire Personnel Appeals Board (Bennett, Johnson and Rule) met Wednesday, May 1, 1996, under the authority of RSA 21-I:58, to hear the appeal of Robert LeClair, a former employee of New Hampshire Hospital. Mr. LeClair, who appeared *pro se*, was appealing his January 5, 1996, termination from employment as a Certified Nursing Assistant for allegedly leaving his unit without permission or authorization from his supervisor, and for willful insubordination. John Martin, Esq., appeared on behalf of New Hampshire Hospital. The following persons gave sworn testimony: Joyce Crucitti, Wary Loughee, Debra Brough, Anita Clark, Melvin Neary and Robert LeClair. At the close of the hearing, Mr. Martin submitted New Hampshire Hospital's proposed findings of fact and rulings of law.

In support of its decision to terminate Mr. LeClair's employment, New Hampshire Hospital alleged that on January 2, 1996, the appellant left his unit without notifying his charge nurse or receiving permission from supervisory staff. New Hampshire Hospital further alleged that the appellant was observed on the ramp with another employee outside of Thayer I West, smoking a cigarette. New Hampshire Hospital alleged that Mr. LeClair's unauthorized absence from the unit created a potentially dangerous situation for patients and staff. The Hospital argued that Mr. LeClair had received prior warnings that smoking in an undesignated area constituted a violation of a posted policy. New Hampshire Hospital also argued that Mr. LeClair had received prior warnings that

leaving the unit without authorization was a serious offense for which he could be dismissed from his employment.

Mr. LeClair admitted that he had been outside of the unit without permission on January 2, 1996, but he argued that he had been standing within earshot of the day room where the patients were. He insisted that he would have been available immediately if a problem had arisen. Mr. LeClair asserted that his leaving the unit briefly had not jeopardized either patients or staff, and that it was a common practice among staff to step outside for air. Mr. LeClair said that his supervisor was not on the unit at the time, and he felt he had given appropriate notice when he informed another staff person that he was stepping outside for a moment. Mr. LeClair argued that the offense in question was not sufficiently serious to warrant his termination from employment.

Joyce Crucitti, the Acting Assistant Director of Nursing, testified that Thayer is a 6 unit, 100 bed facility providing care for elderly psychiatric patients. Ms. Crucitti testified that at the time of his termination, the appellant was assigned to Thayer 1 West, one of two total care units in the facility. She said each unit provides 24 hour nursing care, including assistance with all the activities of daily living, for up to 25 patients. Ms. Crucitti testified that the patients on 1-West suffer from varying degrees of dementia, with some in the last stages of Alzheimer's disease. She testified that staffing on the unit is critical, as many patients need two staff members to assist them with getting in and out of bed, toileting, and preparing for meals. She testified that any unexpected reduction in staffing on the unit creates a risk of harm to both patients and staff.

Ms. Crucitti testified that in 1994, New Hampshire Hospital had adopted a posted policy (State's Exhibit 2) prohibiting patients and staff from smoking in any area that had not been specifically designated as a smoking area. The policy provides that if a New Hampshire Hospital employee violates that policy, the employee will receive a verbal warning. In the event of a documented second offense, the employee will receive a written warning. Should a third offense occur, the employee will receive notice of termination for violation of a posted policy [Per 1001.08 (b) (3)].

Ms. Crucitti testified that on April 14, 1995, Mr. LeClair had been counseled after leaving his unit without permission for a cigarette break. She testified that the appellant was counseled that leaving the unit without permission, as well as smoking anywhere other than a designated smoking area, were serious violations of Hospital policy and would result in disciplinary action. She testified that on May 9, 1995, the appellant was discovered on the north side of Thayer, smoking a cigarette in a no-smoking area. She testified that the appellant had left his unit without permission, and was not on a scheduled break. Ms. Crucitti testified that Mr. LeClair's unauthorized absence from the unit on May 9, 1995, occurred during meal time when staffing issues are most critical. She said that many of the patients are at risk from choking, and all assigned staff need to be present, alert and vigilant. She testified that the appellant received a written warning on May 18, 1995 (Stale's Exhibit 5), as a result of the offense. She testified that the warning, which was issued under the optional dismissal provisions of Per 1001.08(b), cited Mr. LeClair for leaving his unit without authorization from his supervisor, and for violation of the New Hampshire Hospital Policy on Smoking. That warning advised him that failure to take immediate corrective action would result in further discipline, up to and including his termination from employment.

Ms. Crucitti testified that on January 2, 1996, when Mr. LeClair again left the unit without permission, the two nurses assigned to the unit were in a team meeting and the Nursing Assistant II was attending an in-service program. Another staff person also had left the unit without permission, leaving only two staff persons to care for all the patients. She said that the other individual received a written warning. Ms. Crucitti noted that the appellant was an excellent nursing assistant who always provided high quality, compassionate care to the patients. However, she said that when he and the other staff person left the unit without permission or proper notice, they created an unacceptable risk to the patients. She testified that New Hampshire Hospital had used all available means, including counseling and discipline¹, in its efforts to make the appellant understand the seriousness of his prior offenses. She said that in light of Mr. LeClair's prior warnings, including the May, 1995, warning

¹ New Hampshire Hospital Exhibits 3 and 4 are written warnings issued to Mr. LeClair on March 2, 1995, and December 20, 1993, respectively. While these letters were admitted into evidence and serve to document past counseling and discipline on issues related to dependability and attendance, both letters were issued more than two years before the date of Mr. LeClair's termination from employment. As such, they were no longer effective as a basis for further discipline. New Hampshire Hospital Exhibit #6 is a written warning issued to Mr. LeClair on

under the optional dismissal provisions of Per 1001.08 (b), New Hampshire Hospital had no option but to terminate his employment.

Mr. LeClair said that the ramp outside of Thayer 1-West is attached to the unit, and therefore he should not have been considered to have left the unit on January 2, 1996. He said that there was not another staff person with him at the time, and therefore he had been falsely accused of leaving the unit with another staff person. Mr. LeClair testified that he had stepped outside onto the ramp just outside the door to the day room. He said he was within earshot of everything that was happening in the day room, and therefore created no risk to the patients or staff. He noted that during break times, there could be as many as three employees off the unit at one time.

Mr. LeClair testified that the unit can become very hot and stuffy, and that it was not uncommon for employees to step outside briefly. He said that from where he was standing, he could see into both wings of the unit and therefore would have been aware if any problem had developed. He testified that he told another nursing assistant where he would be, and no one objected to his stepping outside for a moment. He argued that termination was too severe a punishment for the offense he had committed.

Mr. LeClair also argued that New Hampshire Hospital handled the incident poorly. He testified that his supervisor had not discussed the incident with him on January 2nd, and he was unaware that there was a problem until the following day. He testified that when he came to work the following day, everyone on the unit knew that he was in trouble. He said that he approached his supervisor, Anita Clark, to ask her what was happening. He testified that she instructed him to make a written statement describing what he had done. He said that he complied with her request, informing her that he had gone out on the ramp to get some air. He said he was unaware that the statement would be used as evidence to support dismissing him.

December 5, 1995. It addresses the appellant's attendance. However, it is unrelated to his leaving his assigned unit during work hours, or violation of posted policies.

Findings of Fact

1. Mr. LeClair was employed by New Hampshire Hospital as a Certified Nursing Assistant assigned to Thayer Building, the hospital's psychiatric nursing home.
2. The patients on Thayer 1-West are elderly psychiatric patients requiring total care 24 hours per day, including assistance with all the activities of daily living. Many suffer from severe dementia or final stage Alzheimer's disease, and require assistance from 2 staff persons when being moved or toileted.
3. New Hampshire Hospital endeavors to enforce a strict policy on attendance and leave in order to ensure adequate staffing levels in the various units of the hospital.
4. Prior to his termination, Mr. LeClair had been counseled on several occasions concerning hospital policy on attendance and leave, the New Hampshire Hospital Policy on Smoking, and requirements for employees to remain on the units to which they were assigned unless supervisory personnel authorized their absence. He received a written warning, under the optional dismissal provisions of Per 1001.08(b) of the Rules of the Division of Personnel, on May 18, 1995, for being absent from his unit without authorization, and for violation of the New Hampshire Hospital Smoking Policy.
5. On January 2, 1996, Mr. LeClair left the unit to which he was assigned without permission or authorization from his supervisors. He was observed on the ramp outside of Thayer 1-West on January 2, 1996, on an unauthorized break, smoking a cigarette in a no-smoking area. Those offenses violated New Hampshire Hospital policies on attendance and leave, as well as the New Hampshire Hospital Smoking Policy.

To the extent that New Hampshire Hospital's Proposed Findings of Fact are consistent with the narrative and findings of fact as set forth above, they are granted. Otherwise, they are denied.

Rulings of Law

1. Per 1001.08(b)(3) of the Rules of the Division of Personnel provides that an employee may be dismissed without prior warning for violation of a posted or published agency policy, the text of which clearly states that the violation of same may result in immediate dismissal.
2. Per 1001.08(c) of the Rules of the Division of Personnel provides that an employee may be dismissed without additional warning if the employee has been warned for the same offense as provided in Per 1001.08(b) during the previous 2 years.
3. Per 1001.08(d) of the Rules of the Division of Personnel provides that an employee may be dismissed immediately if an employee commits more than one of the offenses listed in Per 1001.08(b) during the previous 2 years.

Decision and Order

The evidence reflects that over the years, New Hampshire Hospital made a continuing effort to apprise Mr. LeClair of the possible consequences of leaving his assigned work unit without proper notice or authorization. He received counseling and written warnings advising him that continued failure to take corrective action would result in his termination from employment. However, he failed to heed those warnings.

The evidence also reflects that Mr. LeClair was apprised of New Hampshire Hospital's Smoking Policy, and he knew that repeated violations could result in his dismissal from employment. New Hampshire Hospital enforced its Smoking Policy by giving Mr. LeClair a verbal warning as a result of his first documented offense, a letter of warning as a result of his second documented offense, and notice of termination as a result of the third documented offense. His violation of the Smoking Policy, coupled with repeated warnings for leaving his unit without authorization, resulted in his termination from employment.

The record reflects that New Hampshire Hospital considered Mr. LeClair's patient care skills to be outstanding. Unfortunately, Mr. LeClair's apparent inability to abide by New Hampshire Hospital's

rules and regulations posed the risk of coinpromising staffing, safety and patient care. While there was no evidence that Mr. LeClair's violation of those regulations caused harm to any patient or any employee, the risk was present nonetheless. Therefore, in consideration of the evidence and argument offered by the parties, the Board voted unanimously to deny Mr. LeClair's appeal. In so doing, the Board voted to uphold New Hampshire Hospital's decision to dismiss Mr. LeClair from his employment as a Certified Nursing Assistant

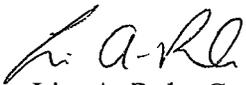
THE NEW HAMPSHIRE PERSONNEL APPEALS BOARD



Mark J. Bennett, Acting Chairman



Robert J. Johnson, Commissioner



Lisa A. Rule, Commissioner

cc: Virginia A. Lamberton, Director of Personnel
Robert LeClair
John Martin, Esq.