

State of New Hampshire



PERSONNEL APPEALS BOARD

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APPEAL OF PEARL B. LITTLE

Division of Human Services - Portsmouth District Office
Docket 89-T-13

DATED: January 19, 1990

The New Hampshire Personnel Appeals Board (Commissioners McNicholas, Johnson and Bennett) met Wednesday, December 13, 1989, to hear the termination appeal of Pearl B. Little, a former employee of the Portsmouth District Office, Division of Human Services. Ms Little was represented at the hearing by SEA General Counsel Michael C. Reynolds. Human Resource Coordinator Jan D. Beauchesne appeared on behalf of the Division of Human Services.

Ms Little was discharged from her employment, effective June 8, 1989, by letter dated May 23, 1989 from Robert V. Pliskin, Director of the Division of Human Services. The Division cited Per 308.03(j) as the basis for the termination, stating that Ms Little was deemed physically unable to perform her duties as Edit and Review Clerk.

At the outset of the hearing, Chairman McNicholas asked if either party any objection to the composition of the Board. Neither party objected.

In other preliminary matters, Attorney Reynolds objected to introduction of State's Exhibit 2, a copy of the supplemental job description for the position of Edit and Review Clerk. Ms Beauchesne responded that the supplemental job description did outline Ms Little's duties and responsibilities, but agreed that it is part of the proposed classification plan, and was not actually in effect at the time of Ms Little's termination. The Board sustained Mr. Reynolds' objection, striking State's Exhibit 2 from the record.

Additionally, one of Appellant's arguments in the initial letter of appeal concerned efforts which should have been made by the Division of Human Services to transfer or demote Ms Little to less physically demanding position for which she qualified in lieu of terminating her employment. Mr. Reynolds stated that after review of the Division's submissions, he would stipulate that the Division of Human Services had made a good faith effort to transfer or demote in lieu of termination.

Appellant argued that she could satisfactorily perform her duties if some simple job assignment changes were made; that she had been doing the same job since 1981 with the same physical limitations; and that the Division of Human Services had, until shortly before her termination from employment, made

certain accommodations for her physical limitations without any complaint that the quantity or quality of her work was unsatisfactory. Further, Appellant argued that her rights to due process had been violated since the termination had occurred after a single letter of warning for unsatisfactory work rather than the minimum of three letters of warning for the same offense.

The State offered the testimony of three witnesses: Grace Mucci, Portsmouth District Office Supervisor; Eileen Shatinski, Clerk IV; and Sandra Weld, Administrative Assistant I. The State's witnesses testified that Ms Little was only able to perform 25% to 30% of her assigned duties, and that her inability to complete all of her assigned tasks in a timely fashion had disrupted the work flow throughout the office. Ms Little's duties included receiving, opening and distributing the contents of the "red pouch"; tearing off printouts from the computer, sorting them, and stapling them to case files for distribution to the office's thirteen case managers; and providing coverage for the front office receptionist on a rotating schedule. The receptionist coverage included unlocking and locking the front office doors, and handling the daily mail pouches. Ms Little was also expected to change the printer ribbon, to change paper at the printer, and clear printer jams as they occurred.

Ms Little was absent from her place of employment between August 15, 1988 and December 8, 1988, and was treated by Dr. Michael Boone, who reported he had been treating her for injuries sustained on the job on May 25, 1988. Dr. Boone filed a report on September 3, 1988 stating that Ms Little could not return to work for 30 to 60 days. By notice dated October 12, 1988, Ms Little was informed she had been denied Workers' Compensation benefits with an explanation stating "No documentation that injury arose out of and in the course of employment".

Upon the advice of Dr. Boone, Ms Little was returned to "light duty" on December 8, 1988. Ms Little was deemed physically unable to perform some of her assigned duties, and the Division asked for a further medical assessment of her current condition. In a letter dated January 13, 1989, Dr. Boone stated, "The added function of Edit and Review Clerk are stressful to her condition i.e. filling computer binders, bracing heavy doors, printer insertion of paper, etc., and further repetitive motion will exacerbate her condition."

Ms Mucci testified that employees who had covered for Appellant during her absence could complete approximately twice as much work during the course of a day as Ms Little. She stated that because of Ms Little's physical condition, Appellant could not lean over to change the printer ribbon or paper, could not file computer print-outs in the hanging files, could not staple reports to their case files, could not carry out the mail pouches when required, and could not open or lock the main doors to the office when covering for the receptionist. Ms Mucci also testified that the office had

made efforts to accommodate Ms. Little's condition by breaking the larger computer reports into several smaller runs so she would not have as much weight to carry. She also indicated that Ms. Little's condition had deteriorated to the point that she was unable to pull open the ladies' room door, and would have to wait occasionally for someone to come along and open the door for her so that she could return to her work station.

The State argued that the physicians' reports which had been requested by the Division of Human Services generally confirmed that Ms. Little's Edit and Review Clerk's duties, as described by the Division of Human Services, were too stressful for her, and that her condition was unresponsive to therapy. It was recommended by the treating physician that she assume less physically demanding secretarial duties such as would be assigned to a typist or word processor operator.

Finally, the State argued that under the terms of the Board's January 27, 1989 decision in the appeal of Steven M. Miller, the Division was only required to issue one letter of warning for unsatisfactory work due to a physical inability to perform job duties. In her closing arguments, Ms. Beauchesne quoted the Miller decision wherein the Board had ruled that,

"...it would serve no purpose to require prior warnings in situations that fall within the scope of subsection (j) [Per 308.03(j)]. The main purpose of warnings is to point out the specific nature of the offense to the employee in order to permit the employee to take corrective action in the future. See Per 308.03(4)(a) and (b). Subsection (j), however, by its own terms applies to employees who are of such physical condition as to make it impossible for them to satisfactorily perform their work assignments... Because it is impossible for the employee to satisfactorily perform his or her work assignments, the employee could not take corrective action after receipt of a warning about his or her unsatisfactory work. Thus, it would serve no purpose to require that such an employee receive two prior written warnings for unsatisfactory work before discharge. The Board is reluctant to construe a rule as requiring the doing of useless acts."

Ms. Little testified that she had never been disciplined for unsatisfactory work. She also contended that she had suffered from scoliosis at the time of hire, that the Division was well aware of her physical limitations, and that throughout her employment certain accommodations were made for her in consideration of physical condition. She believed she was completing 90% to 95% of her duties, and that the Division had made her work more difficult by placing a sound screen around the computer printer which was impossible for her to lift when the ribbon or paper needed changing, or when the printer jammed. She also indicated that when the Division decided to break the computer generated quarterly reports into smaller runs and place them in hanging files, it had made her work more difficult and therefore could not have been intended as an accommodation. She testified that in the past, her co-workers were always available to assist her and that she had received no complaints from them or from her supervisor when she had asked for help.

Based upon the record before **it**, the Board concurred in part with the State's position that Ms. Little was not performing all the duties associated with her position. However, the Board also found that supervisory staff in the Portsmouth District Office had not, throughout Ms. Little's seven years of employment, required her to perform all the Edit and Review Clerk duties. Ms. Little was never disciplined for unsatisfactory work, or warned that her employment could be terminated **if** she were physically unable to complete her assignments. Although there had never been a specific plan of accommodation, whenever Ms. Little had complained that certain tasks were too painful for her to perform, she was provided assistance.

The Board found that the Division's decision to discharge Appellant by issuance of a single letter of warning under the provisions of Per 308.03(4)(j) clearly exceeded the discretionary authority of the Appointing Authority, and violated Ms. Little's procedural rights under the terms of the Rules of the Division of Personnel.

The State, in its reliance upon Miller, failed to contemplate the parameters established by the Board's January 27, 1989 decision. In Miller, the Board stated, "For the purposes of ruling on this motion only, the Board assumed that the employee was of such physical condition as to make **it** impossible for him to satisfactorily perform his work assignments... the issue decided was whether the employee could properly have been so discharged absent prior written warnings" (emphasis added).

The Board found that after Ms. Little's return to work on December 8, 1988, the Division of Human Services had decided to make Appellant accountable for a range of duties which, while inherent in the specification for Edit and Review Clerk, were never fully imposed in the past. The Division of Human Services failed to establish that Ms. Little had previously performed or could perform all those duties, but had become of such physical condition as to make **it** impossible for her to satisfactorily perform her work assignments.

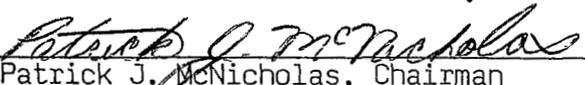
Procedurally, Ms. Little should have been informed that the Division intended to impose all of the Edit and Review Clerk duties, and that failure to perform all of those duties would result in disciplinary action described in Per 308.03. Given the weight of the evidence, the Board would have been inclined to uphold the termination had the Division issued prior letters of warning for unsatisfactory work, and could document that Appellant had relied upon her inability to perform such work as an excuse for unsatisfactory performance. In this instance, however, the record can not support such a conclusion.

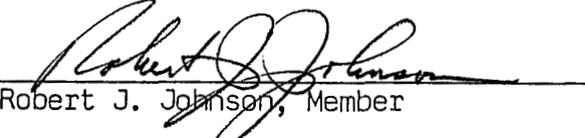
The Board hereby orders that the termination of Pearl B. Little be rescinded, and that Appellant be reinstated with back pay and benefits, less any compensation received by the Appellant from other employment or unemployment compensation. Further, the Board orders that the letter of termination be revised and reissued as a first letter of warning for unsatisfactory work under the provisions of Per 308.03(j).

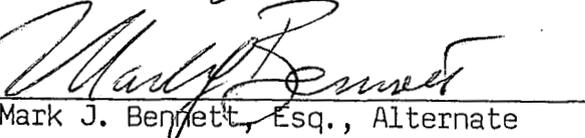
Should the appellant believe herself to qualify as a handicapped person under Section 504 of the Rehabilitation Act, she should so notify the Division of Human Services, stating the basis upon which her claim is made. If she is deemed to qualify as a handicapped person under the provisions of Section 504, Ms. Little and the Division of Human Services shall immediately enter into discussions leading to a plan of reasonable accommodation.

Nothing in this decision shall be construed as to prevent the Division of Human Services from imposing disciplinary action allowable, under the Rules of the Division of Personnel.

THE PERSONNEL APPEALS BOARD


Patrick J. McNicholas, Chairman


Robert J. Johnson, Member


Mark J. Bennett, Esq., Alternate

cc: Michael C. Reynolds, General Counsel
State Employees' Association

Jan D. Bcauchesne, Human Resource Coordinator
Division of Human Services

Virginia A. Vogel
Director of Personnel

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