

State of New Hampshire

February 1, 1990



PERSONNEL APPEALS BOARD

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

APPEAL OF RICHARD PEARL New Hampshire Hospital Docket #89-T-25

The New Hampshire Personnel Appeals Board (Commissioners McNicholas, Cushman and Rule) met Thursday, December 14, 1989, to consider the termination appeal of Richard Pearl, a former employee of New Hampshire Hospital. Appellant was represented at the hearing by SEA General Counsel Michael C. Reynolds. New Hampshire Hospital was represented by Attorney Barbara Markham Maloney.

Mr. Pearl had been terminated from his employment as a Building and Grounds Utility Person by letter dated September 25, 1989, from Wayne Crawford, Director of Food Services. The grounds for termination cited in the discharge letter were: 1) refusal to accept job assignments and, 2) lack of cooperation.

Mr. Pearl's request for a hearing before the Board was originally filed by Attorney Reynolds on October 10, 1989, citing several grounds for his appeal. First, Appellant argued that termination for "lack of cooperation" could only occur upon receipt of a third letter of warning for the same offense, and that **Mr.** Pearl had not received prior warnings for lack of cooperation. Second, Appellant contended that "refusal to accept job assignments" did not mandate immediate discharge, that the assignment he had allegedly refused was given by an employee **Mr.** Pearl did not believe to be his supervisor, and that the assignment conflicted with the task in which he was involved at that time. Finally, Appellant argued that he has a medical condition which affects his attitude, and that he was in the process of seeking treatment at the time of his termination.

On October 24, 1989, Attorney Maloney filed with the Board a Motion to Dismiss on behalf of the Hospital. In that motion, she argued that Per 308.03(2) allowed for optional discharge for willful insubordination and/or refusal to accept job assignments, and that **Mr.** Pearl had received letters of warning for insubordination on August 15, 1989 and August 29, 1989. Further, the Hospital contended that even if two written warnings had not been given, the Optional Discharge provisions of the Rules of the Division of Personnel still provide sufficient basis for termination in the face of continued willful

insubordination and Mr. Pearl's own admission that he had refused to complete a job assignment. The cover letter to the Board noted that the Motion to Dismiss was late because the letter of appeal filed by Mr. Pearl "was erroneously sent to the Food Service Department of New Hampshire Hospital, which is not the appointing authority".

On November 13, 1989, SEA General Counsel Reynolds filed with the Board a Motion for Summary Judgment, claiming that Attorney Maloney's October 24, 1989 letter to the Board "admitted that the 'appointing authority' did not terminate Mr. Pearl". Arguing that Mr. Pearl's termination was illegal, Attorney Reynolds requested that the Board, without hearing, summarily find in Mr. Pearl's favor and order his immediate reinstatement with back pay and benefits.

The Board held these motions in abeyance, noting that it would rule on them in its final order.

Based upon the record before it, the Board made the following findings of fact:

On February 1, 1989, Mr. Pearl was issued a letter concerning his attendance record. In that letter, Mr. Pearl was notified that in a period of roughly 6 months, he had been unexpectedly absent from work on 12 separate occasions, and that the majority of the absences were in conjunction with other days off or weekends following a pay day. He was reminded in that letter that the previous November, he had been ordered to provide certification from his attending physician for any absences due to illness or injury.

On June 12, 1989, Mr. Pearl was issued another counselling letter concerning his excessive absenteeism. In that letter, Mr. Pearl was cautioned that failure to produce a physician's certificate documenting his need for sick leave would be deemed an act of insubordination and would result in disciplinary action. On August 15, 1989 and August 29, 1989, Mr. Pearl received letters of warning for insubordination, both stemming from his refusal to provide certification documenting his need for sick leave.

The actual termination stemmed from an incident on September 18, 1989, when Mr. Pearl was instructed by a new employee in the dietary department to empty water from a steam table. Mr. Pearl, who was loading meals onto carts, refused. He confirmed that he had refused this assignment in a statement to the Assistant Director of Food Services shortly thereafter, but noted that he did not believe the employee who issued the order to be his supervisor.

A meeting was held the following day with Food Service Director Crawford, supervisors in the dietary unit, and staff from the Hospital Personnel office to discuss Mr. Pearl's attitude and job assignment refusal. During the course

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of the meeting, Mr. Pearl admitted that he is an alcoholic and that this problem was affecting his ability to work cooperatively with his co-workers. The Hospital offered to help him make contact with the Employee Assistance Program to seek treatment. Mr. Pearl indicated he preferred to seek treatment through the Veterans Administration Hospital in White River Junction.

Mr. Pearl was then instructed to provide, within three days, documentation that he had made arrangements to enter a alcohol rehabilitation program. Mr. Pearl did make a four minute telephone call to the Veterans' Hospital at White River Junction, but could not document that he had actually made arrangements to enroll in a substance/alcohol abuse treatment program.

When Mr. Pearl reported to work on Friday, September 22nd, he claimed he would be unable to provide the required documentation until the following Wednesday. He testified at the hearing that he planned to travel to the V.A. Hospital in White River Junction on Wednesday, his scheduled day off, to make arrangements for treatment. He said he did not want to participate through the Employee Assistance Program which was offered by the Hospital Personnel Officer, and was not able to participate in local alcohol abuse treatment programs because of his work schedule. He indicated that the V.A. Hospital in White River Junction no longer has a free-standing alcohol and drug abuse program, but would treat patients for substance abuse problems in conjunction with other medical treatments.

At the start of his shift on Sunday, September 24, 1989, Mr. Pearl called the dietary office reporting that he would be an hour late for work. He offered no explanation for his absence and was, in fact, approximately two hours late instead. Upon reporting to work Sunday, September 24th, and having failed to offer a reasonable explanation for his absence, Mr. Pearl was sent home.

On Monday, September 25, 1989, Mr. Pearl again met with Food Service Director Crawford. When questioned concerning the reason for his tardiness the previous day, he was uncooperative and made derogatory remarks about his supervisor. Mr. Crawford then told him that his "name calling and inability to work cooperatively" with his co-workers would no longer be tolerated, and he would be discharged from his employment.

Mr. Pearl initially was late reporting to work on Sunday, September 24, 1989, because his mother's car had been struck and damaged during the night, and he had to complete a report of the accident with an officer from the Concord Police Department. The police report of that accident (State's Exhibit A) indicated that the officer taking the report had returned to the Concord Police Department at 11:28 am. When asked why Pearl was 2 hours late since the accident report apparently took less than one half hour, he responded that he "had some errands to run".

Looking to the letters of warning issued to Mr. Pearl in August, 1989, from which no appeals were taken, the Hospital could have warned Mr. Pearl on August 4th and August 25th for absenteeism without approved leave, in addition to the warnings for willful insubordination on August 15th and August 29th. Mr. Pearl could have also been warned for absenteeism without approved leave for the hour and one half in which he was "running errands" following his car accident.

It is obvious to the Board that Mr. Pearl has a long history of chronic absenteeism, abuse of sick leave, tardiness, lack of cooperation and insubordination. While the Board believes that those problems stem in large part from his abuse of alcohol, the Board would caution the appellant that simply admitting to abuse of alcohol does not release him from his obligations to the employer, nor does it provide him with protection from legitimate disciplinary action which the agency might order.

Similarly, the agency has had ample opportunity to discipline Mr. Pearl for a variety of reasons on a number of different occasions. Although the agency did issue two letters of warning to Mr. Pearl in August of 1989 for willful insubordination, it has apparently chosen not to discipline him for lack of cooperation, absenteeism without approved leave, and tardiness, any of which could be supported by the record before this Board.

The Board found that the seriousness of Mr. Pearl's "refusal to accept a job assignment" was minimal, and certainly not of so serious a nature as to warrant his immediate discharge under the optional discharge provisions of Per 308. Further, the Board did not find that "lack of cooperation" and "willful insubordination" are synonymous, or could be considered the "same offense" for the purposes of progressive discipline and eventual discharge. Finally, the Board must assume that Mr. Crawford, under the terms of his contract as Food Service Director, has the authority to hire and fire employees in the dietary unit. The Hospital presented no evidence to substantiate this claim, however.

New Hampshire Hospital had the opportunity to discharge Mr. Pearl from his employment on August 29, 1989, when he was warned the second time for willful insubordination. The agency chose not to discharge him at that time, and can not now expect the Board to uphold the discharge on the basis of "continued willful insubordination as demonstrated by Mr. Pearl" (NH Motion to Dismiss, October 24, 1989) when the termination letter itself cites "refusal to accept job assignments" and "lack of cooperation".

RSA 21-I:58 provides, in pertinent part, "In all cases, the personnel appeals board may reinstate an employee or otherwise change or modify any order of the

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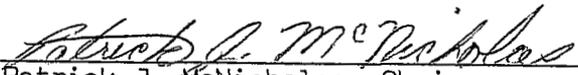
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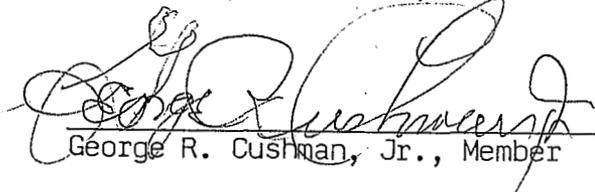
appointing authority, or make such other order as **it** deems just." While the Board enjoys broad statutory authority to amend or modify the orders of the appointing authority, **it** will not exercise its full statutory authority when the agency has failed to carry its burden in dealing with its own personnel.

Based upon the foregoing, the Board voted unanimously to reduce the September 25, 1989 termination to a four week suspension without pay. Mr. Pearl is to be reinstated effective October 23, 1989, with back pay and benefits accruing from that date. The amount of pay upon reinstatement shall be reduced by the amount of any unemployment compensation received by **Mr.** Pearl between September 25, 1989 and the date of his return to work.

The Board further orders that **Mr.** Pearl enroll immediately in an alcohol abuse treatment program to be approved by the Office of Alcohol and Drug Abuse Prevention, and shall show proof of such enrollment to both the Appointing Authority and the Personnel Appeals Board not later than fifteen calendar days from the date of this order. If for good cause the appellant can not comply with these terms, he shall so notify the Board within ten calendar days of the date of this order and seek amendment thereof. Failure to provide proof of enrollment in an approved alcohol rehabilitation program will be deemed a third instance of willful insubordination and will result in **Mr.** Pearl's immediate discharge from employment.

THE PERSONNEL APPEALS BOARD


Patrick J. McNicholas, Chairman


George R. Cushman, Jr., Member


Lisa A. Rule, Alternate

cc: Michael C. Reynolds, SEA General Counsel
Barbara Markham Maloney, Attorney, New Hampshire Hospital
Virginia A. Vogel, Director of Personnel
David S. Peck, Assistant Attorney General