

State of New Hampshire



PERSONNEL APPEALS BOARD

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APPEAL OF DONNA POST

(DONNA AMYOT)

NEW HAMPSHIRE HOSPITAL

DOCKET #99-T-13

June 7, 1999

The New Hampshire Personnel Appeals Board (Rule, Wood and Barry) met on Wednesday, May 12, 1999, under the authority of RSA 21-1:58, to hear the appeal of Donna Amyot, a former employee of New Hampshire Hospital, concerning her termination from employment as a Certified Nursing Assistant, effective February 4, 1999. SEA General Counsel Michael Reynolds represented Ms. Amyot at the hearing. Attorney John Martin appeared on behalf of New Hampshire Hospital.

The record of the hearing consists of pleadings submitted by the parties, orders and notices issued by the Board, the audio tape recording of the hearing on the merits, and documents entered into evidence as follows:

Appellee's Exhibits

1. Abuse/Neglect Report Form completed on January 11, 1999, by Rosemary Nitz
2. NHH Policy and Procedure, effective 1/29/99, titled: Abuse & Neglect, Procedures to Investigate Allegations
3. Undated, unsworn statement of Sharon Richard
4. Complaint Investigator's Initial Report dated 1/14/99
5. Abuse/Neglect Report Form completed on January 8, 1999, by Rosemary Costanzo

6. January 13, 1999, unsworn statement signed by Nancy McGorry, RN
7. January 21, 1999, letter from Danielle Perdikes to Tom Flynn re: Arthur B ____
8. Abuse/Neglect Report Form dated January 16, 1999, completed by Donna Post
9. Witness List and Complaint Investigator's Final Report, Post B Investigation
10. February 4, 1999, letter of termination from Rosemary Costanzo and Joyce Crucitti to Donna Post

Mr. Reynolds stated that he had been advised of a letter that the Board of Nursing had sent to New Hampshire Hospital on the date of the hearing, and that the letter might have some bearing on the outcome of the appeal. He asked the Board to hold open the record of the hearing for ten days in order for him to determine if such a letter had any bearing on the practices or procedures at New Hampshire Hospital, or upon the facts of the instant appeal. Mr. Martin indicated that neither he nor management at New Hampshire Hospital were aware of such correspondence, but that he would have no objection to the Board holding the record open as the appellant had requested. The Board granted the appellant's motion. Neither party offered any additional documents into evidence, and the record of the hearing was closed.

The following persons gave sworn testimony:

Rosemary Nitz

Joyce Crucitti

Sharon J. Richard

Kathleen A. Dudley

Thomas Flynn

Donna Amyot

The incident giving rise to Ms. Amyot's termination occurred on January 7, 1999, when she was assigned to assist in transitioning a Psychiatric Nursing Home patient named Arthur from New Hampshire Hospital to the Hillsborough County Nursing Home (HCNH). Ms. Amyot was working the 7:00 a.m. to 3:00 p.m. shift on One-East in the Nursing Home, where the patients are suffering from the advanced stages of dementia, are completely dependent, and require total care from staff. She reported to her floor at approximately 6:45 a.m., and began her normal work routine. Some time between 8:30 a.m. and 9:00 a.m., Ms. Amyot learned that a co-worker had

been assigned to travel to the Hillsborough County Nursing Home to transfer a resident, and that the co-worker was frightened about driving in the snow and had refused the assignment. Ms. Amyot volunteered to go in her place, making that offer to Rosemary Nitz between 9:00 am. and 9:15 a.m., shortly before the transfer was to have been taken place. Before agreeing to the staffing change, Ms. Nitz discussed the matter with her own supervisor, Rosemary Costanzo, because she had concerns about Ms. Amyot taking on the assignment. Ms. Nitz described the appellant as "a quiet person" who could "have difficulty communicating with staff" at the new facility. Nonetheless, Ms. Nitz and Ms. Costanzo agreed that in spite of those concerns, "it would be better for Donna to go than have no one."

Ms. Nitz testified that she told the appellant that she would be responsible for introducing Arthur to other staff and residents, getting him settled in, making him as comfortable as possible and telling the staff at the new facility how he had been cared for at NHH. Ms. Nitz stressed the importance of explaining Arthur's needs in terms of skin care for "open areas on his buttocks," and difficulties involved in feeding Arthur. Although Ms. Nitz gave no specific instructions for the appellant to remain with Arthur until 3:00 p.m., Ms. Amyot understood that she was expected to remain at the HCNH until the end of her shift.

The resident was transported by van to the Hillsborough County Nursing Home. One NHH employee drove the van while another monitored Arthur. Ms. Amyot followed them in her personal vehicle. When they arrived at the home, the other two NHH staff took the resident inside. Once inside the building, Ms. Amyot pushed Arthur in his wheelchair to the reception area, where she was told that the guardian had already arrived and was signing him in. The receptionist called for the nurse, Danielle Perdites, who came to show Ms. Amyot the location of Arthur's room. Ms. Amyot followed Ms. Perdites into Arthur's room, where she was introduced to Sharon Richard who would be the CNA in charge of Arthur's care. Ms. Amyot introduced herself and said she was there to explain Arthur's care, assist in his transition, and make him comfortable while explaining to the staff any problems particular to the patient. She explained to Ms. Perdites and Ms. Richard that Arthur had "open areas" from poor nutrition, and that he had

problems with feeding. She said that he had little or no gag reflex and had suffered from aspiration pneumonia. She said that he took a long time to feed, and needed special cues to encourage swallowing. She then demonstrated on the patient's face and neck the cues they had used at New Hampshire Hospital to encourage him to swallow. They asked Ms. Amyot if Arthur could do without side rails on his bed, because at the HCNH, bed rails were considered too restrictive. Ms. Amyot said she believed it would be all right because Arthur was unable to move about. Ms. Perdikes left and said that if there were other instructions, they should be given to Ms. Richard, who would be primarily responsible for Arthur's care. Ms. Perdikes left, and Ms. Amyot and Ms. Richard began introducing Arthur to the other three patients in the room.

Ms. Richard showed Ms. Amyot to an alcove referred to as the day room. Once they were there, Ms. Richard left to attend to her other duties. Ms. Amyot remained there with Arthur until some time shortly after noon. During that time, she introduced herself to the dietician and discussed Arthur's diet. She said that Arthur had a problem eating and gets aspiration pneumonia easily. The dietitian said she was aware of that because it was in his chart, and they were aware of the fact that his meals needed to be the consistency of baby food.

Shortly thereafter, Arthur's family, including his wife, his sister and his brother-in-law, came into the day room and asked Ms. Amyot to show them where Arthur's room was. Once there, she helped them sort through Arthur's clothing and belongings, and helped them decide what to take with them since there was so little storage space in his room.

They went back to the day area and Arthur's wife said that Ms. Amyot could leave and get some lunch. Ms. Amyot said that she wasn't hungry and would stay with Arthur, so the family left to get some lunch. When they returned around 12:30 p.m., they again told Ms. Amyot that she could leave. Ms. Amyot said she was planning to stay with Arthur to feed him. The family insisted they were going to stay with Arthur through the day and that they would feed him when

his lunch arrived.' Ms. Amyot believed that the family wanted her to leave and that she was intruding on family time.

Ms. Amyot testified that she went to the desk and asked the nurse to allow her to use the phone to call Concord. The nurse said she thought that it was a toll call and told Ms. Amyot that she would need to use a pay phone. Instead of finding or using a pay phone to telephone New Hampshire Hospital and advise staff there of the situation, she left the facility. She did not return to New Hampshire Hospital to complete her shift.

At approximately 1:30 p.m., Ms. Perdikes called New Hampshire Hospital because staff at the HCNH were having difficulty rousing Arthur to feed him. Ms. Nitz asked where the appellant was, and Ms. Perdikes informed her that Ms. Amyot had left for lunch around 12:30 p.m. and had not returned. Ms. Nitz reported that fact to Ms. Costanzo, who dispatched another staff member to HCNH to assist.

The following day, Ms. Amyot reported to work as scheduled. When Ms. Nitz came on the floor, the appellant approached her and told her what had happened the previous day. Ms. Nitz said that when they found out she had not retyped after lunch, they were worried that she might have had an accident. Ms. Amyot explained that when the family insisted that she could leave, she didn't believe it was appropriate for her to stay. Later that same day, Ms. Costanzo questioned Ms. Amyot about what had happened. After hearing her explanation, Ms. Costanzo told the appellant that the problem sounded like "miscommunication." Ms. Amyot continued working and heard nothing more about the incident until she was contacted on January 20, 1999, by Investigator Thomas Flynn who gave her a report to complete by the end of that day

¹ Neither party offered the testimony of Arthur's family members who were present that day. Investigator Flynn testified that he did not interview any of the family as part of his investigation, despite the fact that they were witnesses to events at the HCNH.

Discussion

When Ms. Amyot volunteered to assist with Arthur's transfer, she understood that her employer expected her to remain with him until the end of her shift.² She also understood that she was expected to remain with Arthur through meal time. Despite that understanding, Ms. Amyot left her assignment without notifying her employer or obtaining her employer's permission. Ms. Amyot did not return to New Hampshire Hospital to complete her shift.

Mr. Martin argued that by leaving Arthur at Hillsborough County Nursing Home without demonstrating for staff how to feed him, Ms. Amyot created a substantial threat to his health and safety, and therefore was guilty of Class I Neglect. He argued that while it was clear from the testimony that there had been some communication between Ms. Amyot and Ms. Richard about Arthur's needs, their brief conversation did not satisfy the appellant's duty and responsibility to stay and assist in feeding Arthur. He argued that the potential for harm was extremely significant, and all parties were very lucky that no actual harm had come to the patient.

Mr. Reynolds conceded that the appellant was wrong in leaving HCNH without getting approval from NHH, and agreed that Ms. Amyot should have been disciplined accordingly. However, he argued that Ms. Amyot's conduct could neither support a finding of Class I Neglect nor form a sufficient basis to warrant her immediate termination. The Board agrees.

The State failed to persuade the Board that Ms. Amyot's unexpected departure prior to the end of her shift placed the patient at so great a risk as to constitute Class I Neglect. Further, when Arthur's transfer to the Hillsborough County Nursing Home was completed, he became a patient of the Hillsborough County Nursing Home and Ms. Amyot could no longer be held accountable for his care or treatment under the New Hampshire Hospital Policy on Abuse and Neglect.

² The Board makes no specific finding with respect to when the shift would have ended. Ms. Amyot was normally scheduled to work until 3:00 p.m., although it is unclear whether the parties believed travel time was to have been treated as part of her normal work schedule or an authorized work assignment beyond the normal work day.

The evidence reflects that the CNA originally assigned to accompany Arthur to Hillsborough County Nursing Home refused the assignment because of inclement weather and potentially poor driving conditions. Ms. Arnyot volunteered to go in her place. Rosemary Nitz, the nurse in charge, testified that she had concerns about Ms. Arnyot's abilities to carry out the assignment because Ms. Post is "a quiet person" who might have difficulty communicating with the staff at HCNH. Ms. Nitz testified that after consulting with her immediate supervisor, Rosemary Costanzo, RN, they decided that, "...it would be better for Donna to go than to have no one." That testimony is difficult to reconcile with Ms. Nitz's later testimony that she couldn't believe that the appellant had "walked out on a resident who had such great needs." Equally difficult to reconcile is the fact that Ms. Nitz placed such emphasis on the critical elements of patient care that she expected Ms. Arnyot to review with HCNH staff; yet she has no recollection of having reviewed the discharge plan herself, or of discussing any portion of that plan with Ms. Arnyot prior to the transfer. She also admitted that none of her expectations were transmitted to Ms. Arnyot or to HCNH staff in writing.

Reviewing the evidence, it is clear that New Hampshire Hospital never conveyed its expectations about Ms. Arnyot's role during the discharge and transfer to any of the staff at the Hillsborough County Nursing Home who were expected to provide direct care at the time of transfer. Danielle Perdikes, the Head Nurse at the receiving facility, wrote in her letter dated January 21, 1999 (Appellee Exhibit 7):

"...On admission, the aide indicated to me that she was here to 'sit with Mr. ___' for a little while. I then introduced the NH Hospital aide to Sharon Richards who is currently [his] primary caregiver (aide). The three of us spoke briefly regarding [Arthur's] care. She did state that he was total care and difficult to care for. She also spoke about skin integrity, and then nutrition. She mentioned that he chokes easily and takes about 30 minutes to feed. After this conversation I then told her that if she had any advice for Sharon to give it to her and then I left the room. The next time I saw her I was on my way to the cafeteria for my lunch at approximately 12:00 p.m. At that time she left the building. I was at no time informed that she

was being paid to be here to advise staff on Mr. _____ care and feeding issues. I simply assumed she was here on her own time. My Unit Coordinator did inform me that she did request to use the phone to make a long distance call and my Unit Coordinator, not aware of who she was directed her to the pay phone. I also know that she spoke briefly to Darla Barss, our Registered Dietitian, and to Antonia Moor who is my Activities Aide. She told Antonia that her facility sends staff to accompany their residents to other facilities to assist the staff in their care. This is all I know in regards to this matter."

The evidence reflects that neither Ms. Perdites, her Unit Coordinator, the Dietitian, nor the Activities Aide at Hillsborough County were aware of Ms. Amyot's expected role in the patient's admission and transition to care at Hillsborough County. Ms. Richard corroborated Ms. Amyot's testimony that she had demonstrated on the patient the various cues used to encourage him to swallow. In fact, the evidence supports Ms. Amyot's assertion that she did what Ms. Nitz had instructed her to do: "...ensure that he was introduced to other residents and staff, unpacked and settled into his room and most importantly - the techniques used for feeding him and skin care to prevent breakdown on his buttocks." (Appellee's Exhibit 1)

Both Ms. Richard and Ms. Amyot testified that when they were introduced, Ms. Amyot explained the difficulties that Arthur had swallowing, that it might take half an hour to feed him, that he choked easily and had little or no gag reflex, that he was prone to aspiration pneumonia, that he was difficult to dress because he was stiff and rigid, and that he had specific skin care needs related to position and nutrition.

Were it not for the fact that Ms. Amyot said that she would be staying with Arthur that day, none of the staff at Hillsborough County appeared to have any expectations of her. Once Ms. Amyot had taken Arthur to his room, had unpacked his clothing, had introduced him to staff and residents, had helped his family sort through his belongings, and had discussed his needs with the aide, head nurse and dietician, the patient's guardian allegedly told Ms. Amyot she could leave.

The family reportedly told Ms. Amyot that they would be staying with him throughout the day and would feed him his meal when it arrived. Ms. Amyot gave uncontroverted testimony that whenever Arthur's family had visited at New Hampshire Hospital and wanted to feed him, they did so without any staff present to assist. There was no reason to believe that a similar situation would not be treated similarly in the new facility.

Ms. Amyot testified that when she worked at New Hampshire Hospital, she was instructed not to disregard the wishes of the family and/or guardian. For purposes of deciding this appeal, it is immaterial whether Ms. Amyot's understanding of the guardian's right to direct any portion of the patient's care was accurate or inaccurate. In the course of the State's abuse and neglect investigation, no one spoke with Arthur's wife or family members who were present at the nursing home to confirm or refute the appellant's version of events.

New Hampshire Hospital's Abuse and Neglect Policy defines Neglect as:

"An act of omission which results or could result in the deprivation of essential services necessary to maintain the minimum mental, emotional or physical health and safety of a patient/resident."

Class I Neglect is defined as:

"The most serious act of neglect and at times may be life threatening. It shall include, but not be limited to:

- (1) failure to provide and maintain proper and sufficient food, clothing, hygiene/health care;
- (2) sleeping while on duty;
- (3) failure to provide for the personal safety of patients/residents, such as failure to intervene or call for available assistance when a patient/resident is in danger of injury including incidents where one patient/resident is harming another."

The evidence in this case does not support a finding of Class I Neglect, because the conduct did not create a substantial risk of harm to Arthur and he ceased to be a patient in the appellant's control as soon as his transfer to Hillsborough County Nursing Home had been completed.

Findings of Fact and Rulings of Law

Appellant's proposed findings of fact, #1 - #13 are granted.

Appellant's proposed rulings of law #1, #3, #8 are granted.

Appellant's proposed rulings of law #2, #4, #5 - #7, #9, and #10 - #14 are requests for conclusions based on the facts in evidence and the relevant statutes, administrative rules and policies. To the extent that they are consistent with the decision below, they are granted.

Otherwise they are denied.

The Board made additional rulings of law as follows:

- A. "No appointing authority shall dismiss a classified employee under this rule until the appointing authority:
- (1) Offers to meet with the employee to discuss whatever evidence the appointing authority believes supports the decision to dismiss the employee;
 - (2) Offers to provide the employee with an opportunity to refute the evidence presented by the appointing authority ..." [Per 1:001.08 (c) (1) and (2)]
- B. "... If the personnel appeals board finds that the action complained of was taken by the appointing authority for any reason related to politics, religion, age, sex, race, color, ethnic background, marital status, or disabling condition, or on account of the person's sexual orientation, or was taken in violation of a statute or of rules adopted by the director, the employee shall be reinstated to the employee's former position or a position of like seniority, status, and pay. 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. In all cases, the personnel appeals board may reinstate an employee or otherwise change or modify any order of the appointing authority, or make such other order as it may deem just. [RSA 21-I:58, I]

Decision and Order

Ms. Amyot's termination was unjust. Although the appellant should have notified her employer of circumstances at the Hillsborough County Nursing Home, once the patient had been formally transferred to the care of staff at the Hillsborough County Nursing Home, he ceased to be a patient of New Hampshire Hospital and she ceased to be his caregiver. Therefore, her departure prior to the end of her shift did not constitute an act of neglect under the NHH Policies and Procedures relating to investigations of allegations of Abuse and Neglect, and should not have resulted in her termination from employment. Moreover, the appellant did not create so substantial a risk of harm to Arthur as to support a finding of Class I Neglect. Accordingly, the Board voted unanimously to order that the letter of termination be converted to a letter of warning for absence without approved leave.

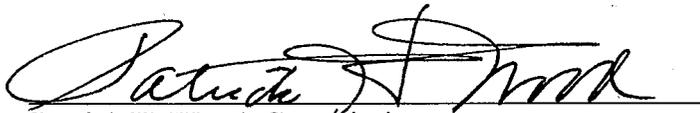
As indicated in the granted Requests for Findings of Fact, the State did not present to and discuss with Ms. Amyot the evidence the State believed supported her termination from employment, and the State failed to provide a meaningful opportunity for her to refute that evidence prior to her termination. By terminating Ms. Amyot without reviewing the actual evidence supporting the decision to dismiss her, and giving her an opportunity to refute the evidence, New Hampshire Hospital violated Per 1001.08 (c) of the Rules of the Division of Personnel. In a decision dated March 5, 1998, in the Appeal of Edward A. Boulay, the New Hampshire Supreme Court wrote that:

"[The State] withheld several documents containing important details of the investigation, including names of complainants, dates, and specific details of the alleged misconduct. [The State] did not release these documents to the petitioner until just prior to his hearing before the [personnel appeals] board. [The State's] failure to provide the petitioner with this information prior to his dismissal

violated Per 1001.08(f)(1) and (4).³ See Ackerman v. Ambach, 530 N.Y.S.2d 893,894 (App. Div. 1988) ("The dates and nature of the alleged misconduct must be sufficiently precise, when considered with information available to the charged individual, to allow the presentation of an intelligent defense.").

The instant appeal presents the same issue, and the Board must reach the same conclusions. By failing to discuss with Ms. Amyot the actual evidence supporting her termination from employment, and by failing to provide a meaningful opportunity for her to refute that evidence, New Hampshire Hospital violated Per 1001.08 (c) of the Rules of the Division of Personnel. Therefore, in ordering the appellant reinstated, the Board also must order that the reinstatement be made without loss of pay as required by RSA 21-I:58, I.⁴

THE PERSONNEL APPEALS BOARD


Patrick H. Wood, Commissioner


James J. Barry, Commissioner


Lisa A. Rule, Commissioner

³ The rule cited in Boulay that required the appointing authority to list the evidence upon which it relied in effecting a termination was revised in the current Rules, effective April 28, 1998. It appears as Per 1001.08 (c).

⁴ 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. In all cases, the personnel appeals board may reinstate an employee or otherwise change or modify any order of the appointing authority, or make such other order as it may deem just. [RSA 21-I:58, I]

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