

State of New Hampshire



**PERSONNEL APPEALS BOARD**  
25 capitol Street  
Concord, New Hampshire 03301  
Telephone (603) 271-3261

***APPEAL OF WHANITTA SHEETZ***  
***NEW HAMPSHIRE HOSPITAL***

***Appeal of Whanitta Sheetz (Letter of Warning) and/or Petition for Clarification and/or Petition  
for Order of Compliance with Docket #99-T-14***

June 30, 1999

On June 23, 1999, the New Hampshire Personnel Appeals Board received the State Employees Association's Appeal and/or Petition for Clarification and/or Petition for Order of Compliance with Docket #99-T-14. Having reviewed that pleading, the Board made the following ORDER:

The Order of the Personnel Appeals Board in the Appeal of Whanitta Sheetz dated June 3, 1999, shall be incorporated into and become a part of the letter of warning issued by the New Hampshire Hospital to Whanitta Sheetz dated June 14, 1999.

THE PERSONNEL APPEALS BOARD

Handwritten signature of Patrick H. Wood in cursive script.

Patrick H. Wood, Chairman

Handwritten signature of Robert J. Johnson in cursive script.

Robert J. Johnson, Commissioner

Handwritten signature of Lisa A. Rule in cursive script.

Lisa A. Rule, Commissioner

cc: Virginia A. Lamberton, Director of Personnel, 25 Capitol Street, Concord, NH 03301  
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## ***APPEAL OF WHANITTA SHEETZ***

***DOCKET #99-T-14***

***NEW HAMPSHIRE HOSPITAL***

June 3, 1999

The New Hampshire Personnel Appeals Board (Wood, Johnson and Rule) met on Wednesday, May 26, 1999, under the authority of RSA 21-I:58, to hear the appeal of Whanitta Sheetz, a former employee of New Hampshire Hospital. Ms. Sheetz, who was represented at the hearing by SEA General Counsel Michael Reynolds, was appealing her termination from employment as a Mental Health Worker, effective February 16, 1999, for failure to meet the work standard as a result of an alleged incident of Class I Neglect. Attorney John Martin appeared on behalf of New Hampshire Hospital.

The record of the hearing in this matter consists of the pleadings submitted by the parties, notices and orders issued by the Board, the audio tape recording of the hearing on merits of the appeal, Appellee's Proposed Findings of Fact and Rulings of Law, and documents admitted into evidence as follows:

### **APPELLEE'S EXHIBITS**

1. Statement of Leticia Conrad
2. Statement of Sally Darling
3. Complaint investigator's initial report
4. Statement of Kathryn Cate

5. Statement of Whanitta Sheetz
6. Complaint Investigator's final report
7. Letter from Tom Flynn to Whanitta Sheetz
8. NHH Abuse and Neglect Policy
9. February 16, 1999, letter of termination

APPELLANT'S EXHIBITS

- A. Precaution checklist dated 1/27/99

The following persons gave sworn testimony:

Leticia Conrad  
Sara J. Darling  
Thomas Flynn  
Roberta Vitale-Nolen  
John Andersch  
Lisa Fields  
Whanitta Sheetz

*Narrative Summary*

The incident giving rise to Ms. Sheetz's termination from employment occurred on the morning of January 28, 1999, when Ms. Sheetz was working as a Mental Health Worker assigned to the ECU (Elder Care Unit) at New Hampshire Hospital. The appellant arrived at work shortly before 11:00 p.m. on the night of January 27, 1999, to work her usual 11:00 p.m. to 7:00 a.m. shift. Instead of remaining on her own unit, she was sent to the ECU as a "float" to assist staff in that area.

Physicians at New Hampshire Hospital can order that a patient be assigned to a "precautionary level" for increased monitoring and care. Hospital staff may not place a patient on a precautionary level or remove a patient from a precautionary level without a physician's authorization. When a patient is placed on Level III precautions, the assigned staff person is required to look in on the patient every few minutes and record what the patient is doing. When

a staff person is assigned to a patient on Level II precautions, the staff person must maintain visual contact with the patient at all times. Staff assigned to a patient on Level I precautions must keep the patient within arm's reach at all times and must watch the patient constantly. During a Level I assignment, the staff person may not be assigned any other duties, and is prohibited from engaging in any other activity including reading, eating, drinking, watching television, using the telephone or conversing with anyone. Generally a Level I assignment should not exceed 30 minutes.

At approximately 2:45 a.m., the appellant was asked to relieve another employee to "sit a level" with Mert, a terminally ill patient in that unit. According to the witnesses, when Mert was in pain he would become very restless and might try to remove his catheter or climb out of bed over the bed rails. For that reason, his doctor(s) had ordered "Level III precautions" whenever he was sleeping and "Level I precautions" whenever he was awake.

Ms. Sheetz was assigned to sit with Mert on a Level I at approximately 2:50 a.m. on January 28, 1999. Certified Nursing Assistant Leticia Conrad testified that she came into the patient's room at approximately 3:00 a.m. and found the patient awake, waving his arms in the air and hallucinating. She testified that Ms. Sheetz was sitting in a chair at the bedside with her head down, chin on her chest and eyes closed. She testified that Ms. Sheetz gave no indication that she was aware of Ms. Conrad's presence in the room, and did not stir at all until Ms. Conrad loudly said, "Hey, Mert." She testified that Ms. Sheetz then lifted her head and said, "He's been opening and closing his eyes." Ms. Conrad testified that although she believed the appellant had been sleeping, she did not mention it to her and did not suggest that she should be relieved from the Level I assignment. However, she did tell Patricia Lavallee, another CNA working the unit, that she had caught Ms. Sheetz sleeping on duty. She testified that Ms. Lavallee immediately reported the incident to Kathryn Cate, the charge nurse on duty in the ECU.

Ms. Conrad testified that she went back to Mert's room with CNA Lavallee at 3:15 a.m. to check the patient's temperature and vital signs, and found the appellant awake, sitting with her head up

and her eyes open. She testified that when she went back to Mert's room with Ms. Lavallee at 3:30 a.m. to re-check his temperature, Mert was awake, eyes open, arms in the air, hallucinating, mumbling, pointing to things and talking to no one. She testified that Ms. Sheetz again appeared to be asleep and did not stir until she said, "Hi, Mert," and told the patient she was there to take his temperature. Ms. Conrad did not tell Ms. Sheetz that she appeared to have been sleeping. Instead, she reported it again to Ms. Lavallee. Shortly thereafter, Ms. Conrad was directed to relieve Ms. Sheetz on the Level I, and she did.

Ms. Darling testified that she was working as the supervising nurse for the entire hospital on the morning of January 28, 1999. She testified that she received a voice mail message from Kathy Cate some time between 3:00 a.m. and 5:00 a.m. indicating that Ms. Cate needed to speak with her. Ms. Cate met with Ms. Darling and reported that she and two CNAs had caught the appellant sleeping. Ms. Darling told Ms. Cate to ask all of the employees involved in the incident to fill out reports. She told Ms. Cate that if she were uncomfortable discussing it with Ms. Sheetz, she could direct the appellant to see Ms. Darling instead.

Ms. Darling testified that Ms. Sheetz came to the office as directed, and that when she was asked if she knew why she had been summoned, Ms. Sheetz replied, "For sleeping?" She testified that Ms. Sheetz repeatedly denied that she had been sleeping, but ultimately admitted that she might have dozed off. Ms. Darling testified that she told Ms. Sheetz that there were three witnesses, all of whom would report that they had seen the appellant asleep while she was assigned to a Level I. She testified that Ms. Sheetz asked if she should just quit. She said that she told Ms. Sheetz that resigning was an option, or she could fill out her own report of the incident and participate in the investigation. Ms. Sheetz was sent back to her unit to complete her shift and fill out an abuse and neglect report form.

Ms. Darling completed her own report of the incident at approximately 5:00 a.m., and wrote:

"Reported to me that Whanitta Sheetz fell asleep +2 between 3 - 3:30 while sitting level 1 [with] critically ill [patient]. Whanitta initially denied it happened, then [admitted] she did doze off - wanted to know if she should just quit. EOC notified. Staff person removed from level."

On cross-examination, Ms. Darling testified that Ms. Sheetz may not have said that she dozed off, but rather that she "might have dozed off."

Ms. Sheetz testified that when she was "floated" to the ECU, she put away patients' laundry and stocked towels, but otherwise had little to do because most of the patients were sleeping. She testified that she offered to "do the trip" checking on all the patients on the unit, but that her offer was declined. She testified that at approximately 2:50 a.m., she was asked to relieve a CNA named Kim who was sitting a Level I with Mert. She said that when she arrived at the patient's room, the room was dark, there was music playing, they were talking, and the patient was singing and clapping his hands. She testified that Kim said, "Thanks, Whanitta, it's a Level I." Ms. Sheetz testified that there was no entry in the Precaution Checklist for 2:45 a.m., so she noted that the patient was, "In bed, quiet."

Ms. Sheetz testified that at 3:00 a.m. a woman came in the room and looked in on Mert, but said nothing to her. She said that she told the woman, "He's really happy." She testified that although her head was down, she could see the patient at all times and that he was not agitated. She testified that two nursing assistants entered the room at about 3:15 a.m. and said nothing to her, and that later, about 3:25 a.m., the nursing assistants returned with Ms. Cate. She testified that she watched them take his temperature, change his position and give him fluid to relieve dryness in his nostrils. She testified that they told her that she could go back to the unit. She testified that she worked for a while, then asked to go outside for a minute. She testified that she came back onto the unit and was changing a client's diaper when she was asked to go see Sally Darling. She testified that if anyone had told her that she was about to be accused of sleeping on duty, she would not have gone to Ms. Darling's office alone.

Ms. Sheetz testified that she had arrived about two minutes late for work that evening, and that Marilyn, the second shift nurse, had wanted her to fill out a late slip. She testified that she wasn't sure what she was expected to put on the slip, and that when she was "floated" to ECU, she simply signed the slip and gave it to Greg. Ms. Sheetz testified that when she went to see Ms. Darling, she thought it had something to do with the late slip.

Ms. Sheetz testified that when she arrived in Ms. Darling's office, she was informed that three employees had caught her sleeping on duty. She testified that she denied having fallen asleep and asked Ms. Darling to identify the employees who had reported her. She testified that Ms. Darling refused to tell her. She testified that she asked Ms. Darling why anyone would say she was sleeping when she knew she was not, and she asked Ms. Darling how she could prove that she hadn't dozed off when there were three people who claimed that she had. She testified that she asked Ms. Darling, "What am I supposed to do? Am I supposed to quit? Do I just go home?" She said that Ms. Darling told her that she could fill out an abuse and neglect form and talk to the investigator, but that there were three witnesses who all would say that she was caught sleeping. Ms. Sheetz was returned to her unit where she completed her shift. She said she was told to report for work as usual, unless she got a call telling her not to come in. Ms. Sheetz received a call the next day telling her that she was on administrative leave.

Ms. Sheetz was interviewed initially by hospital security personnel because Mr. Flynn, the hospital's investigator was unavailable. Ms. Sheetz was interviewed by Mr. Flynn early the next week. Ms. Sheetz took SEA Steward John Andersch with her to the meeting. They asked Mr. Flynn to identify the employees who had accused Ms. Sheetz of sleeping on duty. He refused to tell them, saying that he could not disclose that information because the investigation was in progress.

Ms. Sheetz received a letter dated February 8, 1999, from Investigator Flynn outlining the allegation that Ms. Sheetz had fallen asleep while assigned to patient care. In his letter, Mr.

Flynn referred to reports of witnesses who had observed the appellant with her head down on her chest and her eyes closed. Mr. Flynn also wrote that one of the witnesses said that Ms. Sheetz had admitted that she had dozed off. He did not identify any of the witnesses, disclose how many witnesses there were, or provide copies of the witness statements.

Subsequently, Ms. Sheetz received a letter from Patricia Cutting advising her that the investigation had substantiated the charge of neglect. She was instructed to meet with Roberta Vitale-Nolen for further disciplinary action. Neither the report of the investigation nor the statements of witnesses were included in the letter.

On February 16, 1999, Ms. Sheetz and SEA Steward John Andersh met with Roberta Vitale-Nolen, the Nurse Coordinator for Unit G, and Ms. Sheetz was allowed an opportunity to respond to the allegations contained in a prepared letter of termination. Ms. Vitale-Nolen had reviewed the investigator's report and his summary of the witness statements before assisting in drafting the termination letter. She did not provide a copy of the report to Ms. Sheetz, nor did she identify the witnesses who were interviewed during the investigation. Ms. Vitale-Nolen testified that the purpose of the meeting with Ms. Sheetz was to allow her to tell her side of the story before any final decision was made with respect to the charges supporting her termination. Ms. Vitale-Nolen testified that under the hospital's procedures, termination was mandatory in all cases of Class I Abuse or Neglect.

*Findings of Fact and Rulings of Law*

State's Proposed Findings:

Proposed Findings #2, #3, #5, #6, #7, #8, #9, #10, #13, #15, #18, #19, #20 are granted  
Proposed Finding #1 is granted in part. Ms. Sheetz worked as a laundry worker at the hospital prior to her promotion to Mental Health Worker.

Proposed Finding #4 is not granted. The Level I Precautions Resource Sheet was not offered into evidence, and neither the appellant nor any person(s) responsible for orientation offered direct testimony on the substance of the Level I Precautions Resource Sheet.

Proposed Findings #11 and #14 are not granted.

Proposed Findings #16 is denied. Ms. Darling testified that Ms. Slietz said, "I might have dozed off." Not, "I might have dozed off twice, but I wasn't sleeping." Her written statement says that after denying that she'd fallen asleep, Ms. Slietz "...admitted she did doze off." Neither Ms. Darling nor Ms. Sheetz testified that there was discussion about Ms. Sheetz being observed "sleeping on several occasions by several different staff persons." Both Ms. Sheetz and Ms. Darling testified that Ms. Darling had said there were three people who reported that they'd seen Ms. Sheetz sleeping.

Proposed Finding #17 is granted in part. The investigator never informed the appellant that it was Ms. Darling who had accused the appellant of having admitted that she "dozed off."

Proposed Finding #21 is granted in part. The last clause, "...when she was first observed sleeping..." is not granted.

The Board made additional factual findings as follows:

1. None of the individuals who allegedly observed the appellant asleep on duty confronted her with their observations.
2. When Ms. Darling summoned the appellant to her office to discuss the allegation that the appellant had been found sleeping on duty, she refused to disclose the names of the witnesses.
3. The statement Ms. Darling completed after her meeting with Ms. Slietz makes no mention of her subsequent allegation that she asked Ms. Sheetz if she knew why she had been called to the office, and that Ms. Slietz replied, "For sleeping?"
4. During the investigation, Investigator Flynn denied Ms. Sheetz's and SEA Steward Andersch's requests for specific information about the witnesses who allegedly saw Ms. Sheetz sleeping on duty.

5. During her meeting with the appellant prior to termination, Ms. Vitale-Nolen did not disclose the names of the witnesses to the alleged neglect, and she did not provide a copy of Investigator Flynn's report of his investigation.
6. Investigator Flynn's summary of the investigation was not provided to the appellant until after she had been notified of termination.

State's Proposed Rulings of Law

State's Proposed Rulings of Law #1, #2 and #3 are not granted.

State's Proposed Ruling #4 is granted to the extent that the policy calls for termination when an employee has committed an act of Class I Neglect.

State's Proposed Ruling #5 is 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 1001.08 (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

Although the Board is not bound by the rules of evidence and can accept hearsay evidence, the Board will not accept the investigator's summaries of witness interviews as reliable evidence, especially where there has been no showing that those witnesses would be unavailable to testify and be subjected to cross-examination. New Hampshire Hospital asserted that there were three witnesses who independently observed the appellant sleeping on duty. However, the State offered the testimony of only one of those witnesses. While the Board found sufficient evidence to conclude that the appellant was inattentive to her duties and should have been disciplined, there was insufficient, reliable evidence to prove that the appellant was asleep on duty and therefore guilty of Class I Neglect. Therefore, the Board voted unanimously to order the State to convert the letter of termination to a letter of warning for failure to meet the work standard.

Mr. Flynn did not have the authority to order the appellant's dismissal; however, he clearly understood that the findings contained in his report and his conclusion that the appellant had committed Class I Neglect would result in the appellant's termination from employment. Those persons authorized to dismiss the appellant conducted no independent review of the information Mr. Flynn had collected during his investigation. They simply treated the summaries, findings and conclusions as evidence sufficient to support termination under the Class I Neglect standard contained in the Hospital's Abuse and Neglect policy. Ms. Vitale-Nolen then presented the investigator's conclusions to the appellant and asked her to respond. Despite the appellant's request, Ms. Vitale-Nolen did not provide any of the written witness statements or summaries of the witnesses' discussions with Investigator Flynn so that Ms. Sheetz might have an opportunity to refute that evidence.

Contrary to the State's position, giving the appellant an opportunity to respond to allegations of misconduct does not satisfy the State's obligations under Per 1001.08 (c) of the Rules of the Division of Personnel to "discuss whatever evidence the appointing authority believes supports the decision to dismiss the employee." 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).<sup>1</sup> 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 present and to discuss with Ms. Sheetz the evidence the State believed supported 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.<sup>2</sup>

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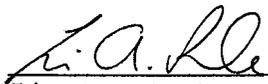
<sup>1</sup> The rule cited in Boulay that required the appointing authority to list the evidence upon which it relied in effecting a termination was revised in the current Rules, effective April 28, 1998. It appears as Per 1001.08 (c).

<sup>2</sup> 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]

THE PERSONNEL APPEALS BOARD

  
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