

State of New Hampshire



PERSONNEL APPEALS BOARD
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Appeal of Pamela Shiner
Docket #01-T-14
New Hampshire Veterans Home

November 15, 2001

The New Hampshire Personnel Appeals Board (Wood, Bonafide and Urban) met on Wednesday, October 17, 2001, under the authority of RSA 21-I and Chapters Per-A 100-200 to hear the appeal of Pamela Shiner, a former employee of the New Hampshire Veterans Home. Neither party objected to the members of the Board convened to hear the appeal.¹

Ms. Shiner, who was appealing her termination from employment effective April 30, 2001, for alleged excessive absences, was represented at the hearing by SEA General Counsel Michael Reynolds. Louise Paquette, Human Resources Coordinator, appeared on behalf of the State.

The record of the hearing in this case consists of pleadings submitted by the parties prior to the hearing, the audio tape recording of the hearing on the merits of the appeal, and documents admitted into evidence as follows:

State's Exhibits

1. April 27, 2001 from Anne Howe to Louise Paquette concerning Ms. Shiner's absences
2. March 21, 2001 letter from Anne Howe to Pamela Shiner notifying her of non-selection for full-time employment
3. March 19, 2001 letter from Anne Howe to Pamela Shiner notifying her of non-selection for the position of Float Nursing Assistant III

¹ Before taking up the merits of the appeal, Commissioner Bonafide disclosed that he and one of the State's witnesses reside in the same town and he knows that she works as a nurse. He indicated that they are not personal friends, however, and prior to this hearing he did not know that she worked at the Veterans Home. After an opportunity to consider this information, both parties agreed to proceed.

4. February 5, 2001 letter from Anne Howe to Painela Shiner notifying her of non-selection for the Restorative Aide position
5. February 12, 2001 "Rapid Letter" from Pamela Shiner to Anne Howe indicating that Ms. Shiner had quit her second job and wished to go back to full-time employment
6. Copy of Chapter Per 1001, Rules of the Division of Personnel
7. Print-out dated 9/12/01 of 12/15/2001 GHRS screen-print indicating Ms. Shiner's employment status as temporary, part-time
8. November 20, 2000 "Rapid Letter" from Painela Sliiner to Anne Howe indicating that Ms. Sliiiner wished to "go part time, 32 hours"
9. Confidential Report of Occurrence signed by JoAnn Keller, dated August 13, 2000
10. Fiscal Year 2001 Absentee Calendar for Pamela Sliiner
11. A highlighted portion of Exhibit 12
12. Pamela Shiner's Performance Evaluation for the period 2/1/99 through 1/31/00
13. Notation of Counseling Session issued by JoAnn Keller to Pamela Sliiner on February 16, 2000 concerning "absenteeism in conjunction with weekends and days off"
14. January 13, 2000 "Rapid Letter" from Pamela Shiner to Anne Howe indicating that Ms. Shiner wished to retract her resignation
15. January 12, 2000 note from Pamela Shiner resigning her position effective February 4, 2000
16. Fiscal Year 2000 Absentee Calendar for Pamela Shiner
17. October 20, 1999 letter from Anne Howe to Pamela Shiner notifying her of non-selection to the position of Nursing Assistant II
18. September 15, 1998 notation of counseling session issued to Pamela Shiner
19. July 27, 1998 notation of counseling issued to Pamela Shiner
20. April 15, 1998 memo from Anne Howe to Ms. Shiner about her attendance
21. January 2, 1998 Notation of Counseling issued to Ms. Sliiner for unauthorized leave
22. December 18, 1997 Notation of Counseling issued to Ms. Sliiner
23. August 28, 1997 letter from Ms. Howe to Ms. Sliiner advising her of non-selection to the position of CNA II
24. Pamela Shiner's Performance Evaluation for the period of 3/1/96 through 2/28/97
25. December 30, 1996 letter from Anne Howe to Pamela Shiner notifying her of non-selection to CNA II
26. December 13, 1997 letter from Anne Howe to Pamela Shiner notifying her of non-selection to the position of CNA II
27. July 24, 1996 Notation of Counseling issued to Pamela Shiner
28. June 10, 1996 Notation of Counseling issued to Pamela Sliiner
29. Performance Evaluation for Pamela Shiner for the period May 1, 1995 to April 30, 1996

30. February 5, 1996 Notation of Counseling issued to Painela Shiner
31. January 16, 1996 Notation of Counseling issued to Painela Shiner
32. December 15, 2000 request from Pamela Shiner to the New Hampshire Retirement System requesting a return of member contributions

At the hearing, the following persons gave sworn testimony:

Anne Howe, RN, Director of Nursing
John Loranger, Scheduling Coordinator
Jo-Ann Keller, RN, Nurse Manager
Ed Colby, Business Administrator
Linda Anderson, RN
Pamela Sliiner

The appellant argued that at the time of termination, she was a permanent full-time employee working part-time hours who was entitled to the same protections as any other classified employee. She argued that the New Hampshire Veterans Home had never disciplined her alleged misuse of sick leave, and that by dismissing her without any prior warning, the State violated the Rules of the Division of Personnel. She argued that the State failed to provide any evidence supporting the allegation that she had excessive absences or that her absences showed a pattern of being out the day before or after scheduled time off. Finally, she argued that the State violated her right to due process by failing to provide an opportunity for her to refute the allegations supporting her termination from employment. The appellant asked the Board to find that her termination was unfair and was effected in violation of the rules adopted by the Director of Personnel. Therefore, the appellant argued, the Board should order the Veterans Home to reinstate her without loss of pay under the provisions of RSA 21-I:58.

The State argued that because Ms. Shiner was a part-time employee at the time of termination, the provisions of Per 1001.08 did not apply to her separation from service. The State argued that when Ms. Sliiner asked to "go part-time," she realized that she was giving up a number of benefits available only to full-time employees. The State acknowledged that Ms. Sliiner was never disciplined for poor attendance or misuse of leave. However, the State argued, Ms. Sliiner did receive notations of counseling and performance evaluations that warned of disciplinary action if her attendance did not improve.

On the evidence, the Board found that Ms. Shiner began working for the Veterans Home in 1994 as a part-time employee, and received a probationary appointment to a full-time position as a

Certified Nursing Assistant I in the spring of 1995. Although absenteeism and tardiness were recurrent problems identified in counseling notations and performance evaluations throughout Ms. Shiner's employment as a full-time Nursing Assistant at the Veterans Home, she never received any formal discipline. Anne Howe, Director of Nursing, recalled that when she counseled Ms. Shiner about problems with her attendance, the appellant usually responded that "she had lots going on."

On January 12, 2000, Ms. Shiner unexpectedly resigned from her position. Ms. Howe believed that the resignation might have been prompted by a conflict between the appellant and one or more of her co-workers. Nevertheless, the resignation surprised her. Ms. Howe believed that once the appellant had taken the time to consider the actual consequences of resigning, she had a change of heart. The following day, Ms. Howe allowed the appellant to withdraw her resignation.

Ms. Shiner's supervisors continued to find her attendance record unacceptable. Eventually Ms. Howe and Ms. Keller, the appellant's immediate supervisor, suggested that the appellant consider working part-time instead of full-time. On November 20, 2000, Ms. Shiner sent a note to Ms. Howe stating, "As of Dec. 15, 2000 I [sic] like to go part time, 32 hours." Ms. Howe agreed to the request, and asked Ms. Paquette, the agency's Human Resources Coordinator, to arrange for the reduction to part-time. She relied on Ms. Paquette to explain what converting from full-time to part-time would entail.

Ms. Shiner's employment status was converted from permanent to part-time temporary effective December 15, 2000. She understood that as a part-time employee, she was no longer entitled to fully-paid medical or dental insurance, nor was she eligible to earn or use leave. Ms. Shiner knew that she could not continue contributing to the NH Retirement System, and she signed a form dated January 16, 2001 titled "Application of Member for Return of Accumulated Contributions" which indicated that the appellant had terminated her membership in the Retirement system "...by leaving [her] position as...Nursing Assistant II..."

In a February 12, 2001 note addressed to Anne Howe, Ms. Shiner stated, "I'd like to thank you for your support and understanding re: the issue that were [sic] going on. I'm glad to say issues have been resolved and all is well. I have quit my 2nd job and would like to go back full-time." Ms. Howe testified that because there were still significant concerns about Ms. Shiner's attendance, she did not select the appellant for any of the full-time positions that were available.

On April 27, 2001, Ms. Howe sent a note to Ms. Paquette advising her that, "Pam continues to call in on weeltends and in conjunction with days off. She also has a pattern for calling in on Mondays." On Ms. Howe's recommendation, the agency decided to dismiss the appellant for excessive absences.

Commandant Barry Conway met with Ms. Shiner and her SEA representative Denise Ouellette on April 30, 2001 to inform the appellant that as a result of her absences, the agency had decided to terminate her employment. Ms. Howe and Ms. Paquette were present at the meeting as well. At the termination meeting, the only document provided for the appellant's review was the notice of termination, which stated, in part, "You have had excessive absences; many of them show a pattern of being out the day before or after a scheduled day/days off. You were also late on Saturday, February 3, 2001 and April 20, 2001. Botli of these were before or after time off."

When the appellant had aslted to change from full-time to past-time, she understood that slie' was giving up a significant number of benefits. She may not have realized that the agency might refuse to return her to a full-time position at some later date, and she may not have been aware of the fact that by becoming a part-time employee, she could be subject to termination without prior warning for offenses such as lateness, absenteeism, or failure to meet the work standard.

Having considered the evidence and argument offered by the parties, as well as the applicable laws and administrative rules, the Board made the following findings of fact and rulings of law.

Findings of Fact

1. Despite the absence of formal discipline while she was employed full-time, Ms. Shiner was aware of the agency's dissatisfaction with her attendance record and the possibility that she could be disciplined as a result.
2. Although Ms. Shiner's supervisors were the ones who originally suggested that she consider working part-time, the appellant's decision to request part-time rather than full-time employment was made for her own convenience.
3. The agency was not required to advise Ms. Shiner of the possible consequences of relinquishing her status as a full-time einployee.
4. Before asking to "go part time," the appellant never aslted the agency what steps would be necessary before she could be restored to full-time.
5. Ms. Shiner was a temporary, part-time employee at the time of her termination from employment.

Rulings of Law:

- A. Per 1001.01 of the Rules of the Division of Personnel provides that "The following disciplinary measures [as defined by Chapter Per 1000] exist for full-time employees within the state system."
- B. RSA 98-A:1, IV, defines "Full-time basis" as "employment calling for not less than 37-1/2 hours work in a normal calendar week or calling for not less than 40 hours work in a normal calendar week with respect to positions for which 40 hours are customarily required."
- C. RSA 98-A:1, V, describes work performed on a "part-time basis" as "employment calling for less than 37-1/2 hours work in a normal calendar week or calling for less than 40 hours work in a normal calendar week with respect to positions for which 40 hours are customarily required."
- D. According to RSA 21-I:58, I, "Any permanent employee who is affected by any application of the personnel rules, except for those rules enumerated in RSA 21-I:46, I and the application of rules in classification decisions appealable under RSA 21-I:57, may appeal to the personnel appeals board within 15 calendar days of the action giving rise to the appeal."
- E. RSA 98-A:3 provides that, "Any person appointed under a temporary appointment or any person appointed under a seasonal appointment who works the equivalent of 6 months or more, not necessarily consecutively, in any 12-month period shall be deemed to be respectively a permanent temporary employee or a permanent seasonal employee and entitled to all the rights and benefits of a permanent employee in the classified service of the state."
- F. Per 102.41 of the Rules of the Division of Personnel defines "permanent employee" as "a full-time employee who has satisfactorily completed a probationary period and whose continued employment in a position is contingent upon the recommendation of the appointing authority."
- G. The agency was not required to restore Ms. Shiner to a full-time position or to select her for any of the full-time positions that became available prior to her termination.

H. The agency was under no obligation to explain to Ms. Shiner that the disciplinary measures outlined in CHAPTER Per 1000 of the Personnel Rules apply "exist for full-time employees within the state system."

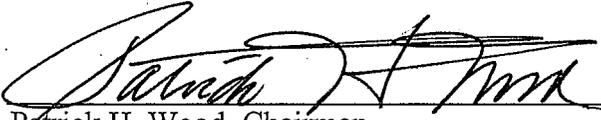
The appellant acknowledges the fact that Per 1001 says it applies to full-time employees. The appellant also argues that a more equitable interpretation would be that regardless of the language, the rules apply to full-time and part-time employees, particularly those who have attained permanent status but who are working part-time. The question here is not whether the rule should have been written to apply to both full-time and part-time employees but whether or not the rule, as written applies to part-timers. In this case, the rule clearly states that the disciplinary provisions of the rules "exist for full-time employees within the State system." Ms. Shiner was not a full-time employee at the time of termination. Therefore, the provisions of Per 1001 would not apply to her dismissal, and the agency would not be required to comply with those rules in effecting her termination.

The appellant argued that even if the Board were to find that the rule only applied to permanent employees, the Board should find that Ms. Shiner was a full-time employee working part-time hours, had attained permanent status, and was entitled to the protection of Per 1001 and RSA 21-I:58. Neither the evidence nor the argument support the appellant's claim that she should be considered a full-time employee working part-time hours, or that she should be considered a "permanent part-time" employee.

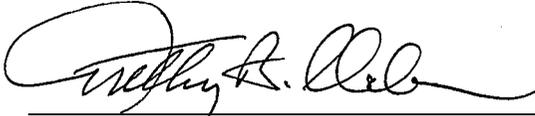
The Board found that Ms. Shiner's termination was not governed by the provisions of Per 1001 or any other specific provision of the Rules of the Division of Personnel. Although RSA 21-I:46 may not distinguish between part-time and full-time employees for purposes of determining standing to file an appeal, the language of the law does limit the Board to hearing appeals "...as provided by RSA 21-I:57 and 21-I:58 and appeals of decisions arising out of application of the rules adopted by the director of personnel..." Ms. Shiner's appeal does not involve a classification decision appealable under RSA 21-I:57. Because of her part-time status, and because the provisions of Per 1001 do not apply to part-time employees, Ms. Shiner does not qualify as a "permanent employee who is affected by any application of the personnel rules" as

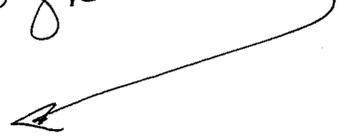
defined by RSA 21-I:58. Therefore, the Board found that the appeal was outside the Board's subject matter jurisdiction. Accordingly, the Board voted to DISMISS the appeal.

THE PERSONNEL APPEALS BOARD


Patrick H. Wood, Chairman

Philip P. Bonafide, Commissioner


Anthony B. Urban, Commissioner

awaiting original
signature


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