

# State of New Hampshire



## PERSONNEL APPEALS BOARD

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

88-0-121

### Appeal of Charles Cleveland

January 27, 1989

On September 14, 1988, the Personnel Appeals Board, Commissioners Cushman and Platt sitting, considered the Motion for Reconsideration and Rehearing filed on behalf of Charles Cleveland.

In his motion, the employee argued that he did intend to challenge the October 8, 1984 termination in his appeal (filed December, 1984), despite his counsel's statements to the Board on February 14, 1985 that Mr. Cleveland:

wishes to appeal...the decision of the New Hampshire Hospital not to allow him to return to his former position after having been away from the Hospital for eight weeks on Worker's Compensation. This is the issue in front of this Commission today, not the issue of whether the Hospital has the ability to self-terminate someone or not.

As explained in the Board's decision of July 13, 1988, the employee's December 13, 1984 appeal from the notice given to the employee on December 10, 1984 that he would not be allowed to return to his former position<sup>1</sup> was not untimely filed. However, as explained in the Board's July 13, 1988 decision, that appeal lacked merit.<sup>2</sup>

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<sup>1</sup> See Board decision dated December 31, 1985 at p. 1.

<sup>2</sup> Indeed, given that the employee was terminated as of October 8, 1984, it may well be that the Board was without jurisdiction to entertain an appeal filed by a former employee regarding the State's failure to rehire him.

Assuming, arguendo, that the employee did intend to challenge his October 8, 1984 termination at the February 14, 1985 hearing, it is not clear that his appeal on that issue was untimely. The employee had the opportunity to produce evidence after the remand from the Supreme Court, but he failed to show that he took any action to appeal his October 8, 1984 termination within the 15-day appeal period.<sup>3</sup>

A review of the February 14, 1985 transcript reveals that the employee's arguments appear to have rested upon the assumption that the November 8, 1984 decision granting him workers' compensation benefits automatically voided his October 8, 1984 termination. In essence, the employee argues that his workers' compensation appeal made it unnecessary for him to file an appeal from his October 8, 1984 termination. The Board does not agree. One purpose of the appeal period is to allow both parties to know when a decision is final, so that they may act accordingly. For example, the employer may wish to hire a person to fill a position only after the employer knows that its decision to discharge the previous occupant of that position is final. Thus, if the employee does not appeal from his termination in timely fashion, the termination becomes final and is not subject to collateral attack. It is unreasonable to assume that proceedings involving workers' compensation benefits, which are independent of the personnel system, obviate the requirement that an employee timely appeal from the termination of his employment.

The motion for reconsideration or rehearing is denied.

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<sup>3</sup> Although the employee argues that not all relevant facts are before the Board, the record shows that following the remand from the Supreme Court, the Board held a pre-hearing conference on February 17, 1987. At that conference, the parties agreed to submit stipulations, after which a hearing would be held for the purpose of hearing legal arguments. Board Order dated February 27, 1987. An agreed statement of facts was submitted by the parties. Thus, the employee agreed to the procedure followed by the Board, and cannot now complain that additional, undisclosed evidence should have been introduced.

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FOR THE PERSONNEL APPEALS BOARD



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# State of New Hampshire

PERSONNEL APPEALS BOARD

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88-0-121

## APPEAL OF CHARLES CLEVELAND

July 13, 1988

On May 5, 1987, the Personnel Appeals Board, Commissioners Haseltine and Platt sitting, heard the appeal of Charles Cleveland, a former employee of the New Hampshire Hospital.

The procedural history of this case is rather lengthy. Mr. Cleveland filed an appeal with the Personnel Commission on December 13, 1984 seeking reinstatement to his former position at New Hampshire Hospital (hereinafter "the State"). The State subsequently filed a Motion to Dismiss based on the timeliness of Mr. Cleveland's appeal, and a hearing was held thereon on February 14, 1985. By order dated December 31, 1985, the Commission granted the Motion to Dismiss and Mr. Cleveland filed an appeal with the Supreme Court. After briefing and oral argument, the Supreme Court remanded the case to the Personnel Appeals Board "for its determination, complete with findings of fact and rulings of law on the issue of petitioner's employment or separation status as of November 8, 1984," the date of the N.H. Review Commission order granting Mr. Cleveland's Workmen's Compensation claim. Appeal of Charles Cleveland, N.H. Supreme Court, No. 86-105, December 2, 1986.

The Personnel Appeals Board scheduled a prehearing conference on February 17, 1987, at which time the parties agreed to submit stipulations of fact to the Board and requested a half-hour hearing for the presentation of legal argument. An agreed statement of facts was prepared by the parties and the Board heard legal arguments on the matter on May 5, 1987. At that hearing, the Board agreed to review the entire file on this matter in the course of reaching its decision.

Having considered all of the evidence and legal arguments presented, the Board made the following findings of fact and rulings of law.<sup>1</sup> On August 8, 1984, Charles Cleveland submitted a leave slip for sick leave taken the previous day. On that same date, Mr. Cleveland was counselled by his supervisor regarding his excessive number of absences. On August 23, 1984, Mr. Cleveland did not report for work, nor did he call in. On Monday, August 27, 1984, the Appellant's mother brought an application for Worker's Compensation to the

<sup>1</sup> The findings of fact are based on both the agreed statement of facts and the remainder of the record.

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Hospital Personnel office on behalf of her son. On August 29, 1984, the Appellant's mother delivered to the Hospital a medical certificate indicating that the Appellant would not be able to return to work until September 14, 1984. On August 29, 1984, the Hospital obtained written permission from the appellant to utilize all accrued leave (sick, annual and compensatory time) until paid leave was exhausted pending resolution of his Worker's Compensation claim.

Pursuant to the appellant's request, the hospital compensated him for all of his accrued leave. On September 14, 1984, the appellant returned to work and worked through September 19, 1984. On September 20, 1984, the appellant did not report to work nor did he contact the hospital to report his absence and the reason therefor. At 10:00 am. on September 26, 1984, the appellant exhausted all of his leave. On September 28, 1984, the appellant's mother presented the hospital with a disability certificate from Dr. Jones indicating that the appellant was totally incapacitated until further notice. On October 1, 1984, the appellant was denied Worker's Compensation benefits pursuant to Par V, RSA 281:2.

On or about October 3, 1984, Virginia Vogel telephoned SEA Field Representative Chris Henchey and notified him that his client, Mr. Cleveland, would be terminated if he did not report to work. On October 3, 1984, the appellant was notified in writing that he would not be granted any additional leave without pay beyond October 5, 1984, due to staffing needs within the laundry; that if he wished to continue his employment he would be required to report to work no later than October 8, 1984; that if he did not report to work he would no longer be employed by New Hampshire Hospital. The appellant did not report to work as instructed, nor did he communicate with his employer in any manner.

No further communication was received by the hospital on behalf of the appellant until mid-November when his mother telephoned the Hospital Personnel office to inform them that her son had been approved for Worker's Compensation and as such he should be reinstated retroactively. On November 14, 1984, the Hospital received correspondence from the Workers' Compensation Review Commission indicating that Mr. Cleveland had been approved for Worker's Compensation for the period beginning August 6, 1984 and ending October 21, 1984. In early December, 1984, Attorney William Briggs, SEA General Counsel, contacted Ms. Vogel and requested that Mr. Cleveland be reinstated to his former position because he had successfully appealed on behalf of Mr. Cleveland for Worker's Compensation. Ms. Vogel repeatedly informed Attorney Briggs that the Hospital was not required by the Rules of the Department of Personnel nor the Labor Laws to hold positions for injured employees pending their appeals of denials of requests for Worker's Compensation.

Based on the foregoing facts, the Board found that the appellant was discharged from State service as of October 8, 1984, when he failed to report to work and had exhausted all his accrued leave. His supervisor provided him with prior notice that he would not be granted a leave of absence without pay due to staffing needs at the Hospital and that he would no longer be employed at the Hospital. The supervisor's refusal to grant a leave of absence without

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pay was also within his discretion. Rules of the Division of Personnel, Per 306.03(a)(5); Per 307.06. The appellant did not file an appeal from the termination within 15 days thereafter. Appellant's counsel conceded at the February 14, 1985 hearing that appellant was not appealing from the October 8, 1984 termination and was not contesting "whether the Hospital has the ability to self-terminate someone or not." Transcript at 3-4. Counsel made it clear that the only issue was whether the Hospital erred by deciding "not to allow him to return to his former position after having been away from the Hospital for eight weeks on Worker's Compensation." id. (emphasis added); see id. at 5 ("[the appeal] was not in any way being made in response to a self-termination, it was being made in response to the Hospital's decision not to allow Charles to return to work after his Worker's Compensation claim had been approved.") Thus, the termination became final and is not here subject to collateral attack.

This finding is consistent with the Supreme Court's order of December 2, 1986. The Supreme Court reversed this Board's earlier order; that order dismissed the appeal because of untimely filing. This Board erred in dismissing the appeal precisely because the appeal is not an appeal from the October 8, 1985 termination. The appeal was therefore not untimely filed; thus the Supreme Court reversed our earlier order. But because the appeal is not an appeal from the October 8, 1985 termination, that termination is final, and not subject to collateral attack. The issue now before the Board is whether, in November and/or December of 1984, the employer erred by refusing to reinstate appellant to the position from which he was discharged on October 8, 1984. The success of his Worker's Compensation appeal did not require that the appellant be reinstated in his former position at the Hospital. The State personnel system and the worker's compensation structure established by the legislature are separate entities with independent rules, procedures and forms of relief. By qualifying for worker's compensation, the appellant availed himself of the relief provided under RSA Chapter 281. Nothing contained therein, however, required his automatic reinstatement to his former position.

Therefore, in accordance with the Supreme Court's December 2, 1986 Order remanding this matter to the Board for further consideration, the Board found that the appellant was no longer employed by the State on November 8, 1984, the date of the NH. Review Commission order granting the appellant's claim and that the success of that appeal did not require his reinstatement. The Board voted unanimously to deny the appeal.

FOR THE PERSONNEL APPEALS BOARD



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N.H. Personnel Appeals Board

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