

State of New Hampshire



PERSONNEL APPEALS BOARD

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Appeal of Paul Higgins

Docket # Docket # 01-0-4

NH Community Technical College System

June 6, 2001

The New Hampshire Personnel Appeals Board (Wood, Rule, and Johnson) met on Wednesday, May 9, 2001, under the authority of RSA 21-I:58 and Chapters Per-A 100-200 of the NH Code of Administrative Rules (Rules of the Personnel Appeals Board) to hear oral argument and offers of proof on Mr. Higgins request for a hearing to appeal what he alleged to be an unlawful disciplinary suspension with pay. Attorney Shawn J. Sullivan appeared on behalf of the appellant. Sara Sawyer, Human Resources Administrator, appeared on behalf of the Technical College System.

The record of the hearing in this matter consists of pleadings submitted by the appellant prior to the hearing, notices issued by the Board, and the audio tape recording of the oral argument offered by the parties at the hearing.

Attorney Sullivan argued that the Community Technical College violated the Rules of the Division of Personnel when it placed the appellant on a paid administrative leave and ordered him to submit to an assessment of his fitness for duty before he would be permitted to return to work. Attorney Sullivan argued that neither the Personnel Rules nor the Collective Bargaining Agreement provide for administrative leave. He argued that by placing the appellant on paid leave, the State exceeded its authority in order to avoid its responsibilities to conduct an

appropriate investigation and allow the appellant to confront his accusers if it believed he had engaged in misconduct, or to consult with the appellant's health care providers if the agency believed that the appellant was medically unable to perform his assigned duties and responsibilities.

Ms. Sawyer argued that the agency's authority to place the appellant on paid administrative leave is not conferred by the Personnel Rules, but derives instead from Article II of the Collective Bargaining Agreement between the State of New Hampshire and the State Employees Association which provides, in pertinent part:

2.1. Rights Retained: The Employer retains all rights to manage, direct and control its operations in all particulars, subject to the provisions of law, personnel regulations and the provisions of this Agreement, to the extent that they are applicable. These rights shall include but not be limited to:

2.1.1. Directing and supervising employees;

2.1.2. Appointing, promoting, transferring, assigning, demoting, suspending, and discharging employees;

2.1.3. Laying off unnecessary employees due to lack of work, for budgetary reasons or for other like considerations;

2.1.4. Maintaining the efficiency of governmental operations;

2.1.5. Determining the means, methods and personnel by which such operations are to be conducted;

2.1.6. Taking whatever actions may be necessary to carry out the mission of the department in situations of emergency, the determination of such situations to be the prerogative of the Employer.

2.2. "Emergency" Defined: For purposes of this section "emergency" is defined as any condition or situation out of the ordinary which requires immediate action to avoid danger to life, property, or to prevent losses affecting the Employer, the employee or the general public.

Ms. Sawyer described the appellant as a competent, well-respected member of the college faculty. She explained that a tragic, accidental death in the appellant's family in March, 1999, triggered a period of profound grief, and ultimately the need for Professor Higgins to take a leave of absence. Eight months later when he returned from leave, the appellant returned as instructor/director of CAP (Chrysler Automotive Program). However, in August, 2000, the appellant indicated that because of stress, he needed to resign that assignment. Having done so, Ms. Sawyer contended, Professor Higgins appeared unwilling to relinquish his authority, creating a conflict with his department chair, the new program coordinator, and others in the department. Ms. Sawyer argued that when co-workers began to complain about the appellant, the college believed that the behaviors they were describing might still be related to the emotional trauma that the appellant had experienced.

Ms. Sawyer argued that administrative leave is distinctly non-disciplinary. She said that it is not subject to law, the Personnel Rules, or specific provisions of the Collective Bargaining Agreement. As such, she requested that the Board dismiss the appeal as a matter outside the Board's subject matter jurisdiction. Ms. Sawyer described it as a managerial assignment used solely at the discretion of management, and said that while the appellant's behavior might have warranted discipline, none was applied out of concern for his career, his health, his well-being, and the management of the college. Ms. Sawyer argued that if management erred, it erred on behalf of the employee. She said that it was and is the college's desire to address the problem with respect and dignity while gathering information about the appellant's ability to return to work and communicate effectively with other staff at the college. Ms. Sawyer indicated that the college placed the appellant on paid leave without disturbing any of his benefits, seniority or accumulated leave, and directed him to participate in an evaluation to determine his fitness for duty at that time. She said that when Dr. Albert Drukteinis, released the appellant as fit to return to duty, the college immediately set about establishing a teaching schedule consistent with the appellant's training, education and experience.

Ms. Sawyer argued that the appeal was untimely as well. She argued that Professor Higgins was notified of his administrative leave by letter dated November 15, 2000. On November 29, 2000,

SEA Steward Donald Vallerand filed an appeal on the appellant's behalf. She argued that President Lucille Jordan replied on November 30, 2000, requesting clarification of the basis for the appeal, but received no response. She argued that instead, the agency received a letter dated December 29, 2000 from SEA Field Representative Linda Chadbourne acknowledging the administrative leave and requesting an update on fitness for duty evaluation. She argued that no further request for an appeal was filed, and as such, the appellant failed to file a complete, timely appeal. Ms. Sawyer also noted that the December 29, 2000 letter from Mr. Vallerand refers to administrative leave, not a disciplinary suspension.

Ms. Sawyer argued that although Attorney Sullivan's letter refers to a January 9, 2001 meeting with President Jordan to discuss the appellant's return to duty, that meeting did not constitute a step in the informal settlement process and therefore was not an event which could trigger a timely appeal to Commissioner Dubois.

Attorney Sullivan argued that the appeal was timely. He argued that having timely filed his appeal of the so-called administrative leave, the appellant preserved his rights to pursue an appeal. He argued that the agency failed to provide any actual decisions that might have moved the process forward, and that the agency could not hold the appellant at fault for electing to wait for a response from the college rather than pursuing additional steps in his appeal.

Attorney Sullivan argued that regardless of what it's called, when an agency sends someone home because the agency believes the employee can not perform the requirements of the employee's position, and they can't do their job, it is a suspension. He argued that the agency used the term "administrative leave," knowing that if they described their actions as discipline, they would be required to comply with the disciplinary rules. He also argued that the Rules only permit a suspension with pay when the Director of Personnel approves such a suspension for purposes of conducting an investigation. He argued that there is no rule permitting a suspension pending a medical assessment. In the alternative, he suggested, if the agency believed that the employee was medically unable to perform the duties of his position, the agency was obligated to employ the provisions of Per 1002, and should have been required to obtain information from the

appellant's treating physician. He said that the agency would only be permitted to obtain an independent medical evaluation if the agency questioned the information provided by the appellant's own physician.

Attorney Sullivan asked the Board to find that the agency is now "caught in a bit of a bind" because they removed the appellant from the workplace illegally by failing to comply with either the rules for suspension and or the rules for removal for non-disciplinary reasons. Attorney Sullivan argued that although the Board could schedule the matter for an evidentiary hearing on the college's allegations of misconduct, the better remedy would be for the Board to review the state of the record, overturn the use of "administrative leave," and purge the personnel file of any information related to it.

Rulings of Law:

- A. "The personnel appeals board shall hear and decide 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" [RSA 21-I:46, I].
- B. "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" [RSA 21-I:58, I].
- C. "If, upon inspection of his personnel file, an employee disagrees with any of the information contained in such file, and the employee and employer cannot agree upon removal or correction of such information, then the employee may submit a written statement explaining his version of the information together with evidence supporting such version. Such statement shall be maintained as part of the employee's personnel file and shall be included in any transmittal of the file to a third party and shall be included in any disclosure of the contested information made to a third party" [RSA 275:56, II].

Decision and Order

I. The appeal is timely.

The Board found that Professor Higgins timely filed a request for informal settlement of the agency's decision to place him on administrative leave. Although he failed to provide the requested clarification of the basis for his appeal, President Jordan neither dismissed nor denied the appeal. Therefore, his rights to appeal were preserved and his appeal remained timely.

II. The decision of the agency to place the appellant on administrative leave pending the outcome of an assessment of his fitness for duty is a matter within the Board's jurisdiction.

Although the agency is correct in its assertion that administrative leave is not specifically addressed in the Personnel Rules or the Collective Bargaining Agreement, the agency's authority to place information pertaining to the appellant's administrative leave in the appellant's personnel file is subject to CHAPTER Per 1500 of the Personnel Rules and therefore is a matter within the Board's subject matter jurisdiction.

III. The agency's decision to place the appellant on paid administrative leave was neither a decision to suspend him with pay pending the outcome of an investigation, nor was it an attempt to remove him from his position.

Contrary to the appellant's assertion that the agency violated the Personnel Rules related to suspension with pay and removal for non-disciplinary reasons, the evidence and argument reflect that the agency did precisely what it claims to have done. It recognized that workplace problems associated with the appellant's behavior toward his associates could still be related to the emotional trauma that he had suffered with the loss of his son. By placing the appellant on administrative leave while arranging for an independent assessment of the appellant's fitness for duty, the agency protected the appellant's salary, seniority, status, and benefits. In essence, the agency exercised its managerial discretion under the authority of Article 11 of the Collective Bargaining Agreement and temporarily re-assigned the appellant.

IV. The appellant is not entitled to demand removal from his personnel file of those documents describing his administrative leave.

According to RSA 275:56, III, if an employee disagrees with any of the information contained in the employee's personnel file, and the employee and employer cannot agree upon removal or correction of such information, the employee is entitled to submit a rebuttal and evidence supporting that rebuttal to become part of the personnel record. The appellant's rebuttal is, in fact, attached to the notice of administrative leave, in compliance with RSA 275:56.

For all the reasons set forth above, the Board voted unanimously to DENY Mr. Higgins' appeal.

THE PERSONNEL APPEALS BOARD



Patrick H. Wood, Chairperson



Lisa A. Rule, Commissioner



Robert J. Johnson, Commissioner

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