

State of New Hampshire



PERSONNEL APPEALS BOARD

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APPEAL OF EDWARD WARE

New Hampshire Hospital

Docket #96-D-7

August 15, 1996

The New Hampshire Personnel Appeals Board (Miller, Rule and Barry), met Wednesday, July 17, 1996, under the authority of RSA 21-I:58, to hear the appeal of Edward Ware, an employee of the Transitional Housing Unit at New Hampshire Hospital. Mr. Ware was represented at the hearing by SEA Field Representative Margo Steeves. Marie Lang, New Hampshire Hospital Human Resources Administrator, appeared on behalf of the State. Mr. Ware was appealing his December 20, 1995, indefinite suspension without pay pending the outcome of a criminal investigation. The appeal was made on oral argument and offers of proof by the representatives of the parties.

Ms. Lang argued that in his capacity as a Mental Health Worker assigned to Transitional Housing, Mr. Ware provided services to mentally ill and mentally retarded patients awaiting community placement. His responsibilities required him to possess "medical certification" to enable him to administer medication, including controlled substances, to patients residing in the unit. When Mr. Ware was arrested in December, 1995, on charges of possessing and intending to distribute one or more controlled substances, New Hampshire Hospital determined that the alleged criminal wrongdoing was in conflict with his assigned duties as a Mental Health Worker. Furthermore, New Hampshire Hospital determined that allowing Mr. Ware to continue working, after having been charged for offenses involving controlled substances, would violate Division of Mental Health rules and regulations and would jeopardize the program's certification and funding. Ms. Lang acknowledged that Mr. Ware's past work performance had been acceptable, but argued that past work performance was irrelevant in light of the evidence of possible criminal wrongdoing.

Ms. Sreeves argued that New Hampshire Hospital's notice of suspension violated the Rules of the Division of Personnel. She argued that there was no evidence that the Director of Personnel had approved a suspension of more than twenty days. She also argued that the notice of suspension failed to comply with the requirement for notifying an employee of corrective action which the employee must undertake to avoid additional disciplinary action.

Ms. Steeves argued that New Hampshire Hospital had failed to demonstrate that being arrested on drug charges conflicted with Mr. Ware's assigned duties as a Mental Health Worker. She also argued that not all Mental Health Workers are required to administer medication to patients on the unit, and that New Hampshire Hospital failed to make a reasonable accommodation to allow Mr. Ware to continue working pending the outcome of the criminal investigation.

Ms. Steeves argued that the Personnel Rules provide for suspension with pay pending the outcome of an investigation, and argued that if New Hampshire Hospital intended to suspend Mr. Ware, that suspension should have been with pay. She asked the Board to note that in a similar case, county nursing home workers who had been arrested on cocaine charges had been suspended with pay pending the outcome of their criminal cases.

Findings of Fact

1. Mr. Ware is employed as a Mental Health Worker assigned to the Transitional Housing Unit at New Hampshire Hospital.
2. Mr. Ware's job duties include distributing medication, some of which may be classified as controlled substances, to patients in Transitional Housing.
3. The Transitional Housing unit at New Hampshire Hospital provides care to New Hampshire Hospital patients who have been discharged and are awaiting community placement. The patients include both mentally ill and mentally retarded clients.

4. In each of his evaluations since 1991, Mr. Ware was rated as "meeting expectations" for his position as a Mental Health Worker. They described him as compassionate, patient-centered and cooperative, polite, and sensitive to the needs of the clients.
5. On December 20, 1995, New Hampshire Hospital learned through an article in the Manchester Union Leader that Mr. Ware had been arrested in Manchester, New Hampshire, earlier that week on drug charges, including possession of crack cocaine with intent to distribute, as well as possible possession of marijuana. The article stated that Mr. Ware was in possession of more than \$400 worth of crack cocaine at the time of his arrest, and that he may have been in the same apartment with four teenagers, including one who was an escapee from the Youth Development Center.
6. Although Mr. Ware had notified New Hampshire Hospital that he would not be able to report to work following his arrest, he did not report the fact of his arrest to his employer.
7. Virginia Lamberton, Director of Personnel, provided verbal approval to proceed with an indefinite suspension without pay pending the outcome of the drug investigation, since Mr. Ware's duties included distribution of controlled substances to patients in Transitional Housing.
8. Mr. Ware was notified by letter dated December 20, 1995, signed by Dennis D'Ovidio, Director of Transitional Housing Services, that Mr. Ware had been suspended immediately for an indefinite period of time pending the outcome of an investigation into possible criminal wrongdoing which was in conflict with his assigned duties as a Mental Health Worker.
9. On January 18, 1996, Mr. Ware was indicted on charges of possession of a controlled substance, and was facing indictment on charges of possession of cocaine.
10. Mr. Ware, who plead "not guilty" to the first charge, was subsequently found guilty and received a 6 month suspended sentence. He appealed that conviction, and was awaiting indictment and trial on charges of possessing cocaine.

Rulings of Law

1. Per 1001.05 (a) provides for disciplinary suspensions of up to twenty days, provided that the employee has received at least one prior warning for the same offense within the previous two years, Suspensions in excess of twenty days may be authorized, with the approval of the

director, when the employee's job function in relationship to the offense warrants a suspension in excess of twenty days.

2. Per 1001.05(b)(2) provides that, "The appointing authority, with the approval of the director, may suspend an employee indefinitely pending the outcome of an investigation of alleged criminal wrongdoing which is in conflict with the assigned duties of the employees position."

Decision and Order

On the evidence, argument and offers of proof, the Board voted unanimously to deny Mr. Ware's appeal. The evidence supports the State's position that Mr. Ware's arrest and subsequent conviction on charges of possession of a controlled substance, as well as pending charges on possession of a controlled substance with intent to distribute, warranted his immediate removal from his position as a Mental Health Worker. The Rules clearly authorize an appointing authority to indefinitely suspend an employee, without pay, pending the outcome of an investigation into criminal wrongdoing which is in conflict with the employee's assigned duties. In the Board's opinion, arrest and conviction on drug related charges is clearly in conflict with Mr. Ware's duties as a direct care provider in the State's psychiatric hospital.

While the appellant has offered some interesting technical arguments in support of his claim that his suspension violated the Rules of the Division of Personnel, that interpretation is inconsistent with any reasonable reading of the rule as a whole. Per 1001.05 of the Rules of the Division of Personnel specifies the circumstances under an agency may impose a disciplinary suspension. Mr. Ware's suspension was not disciplinary in nature. It was clearly effected for the purpose of removing the appellant from the workplace until criminal charges, which were in conflict with his assigned duties, could be resolved.

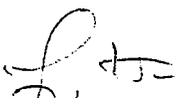
Ms. Steeves argued that the agency's failure to satisfy all the conditions of Per 1001.05 (c) and (d) rendered the suspension invalid. Again, the Board does not agree. The Board found that New Hampshire Hospital complied with the provisions of Per 1001.05 (b) 2 by seeking the approval of

the director of personnel to suspend Mr. Ware indefinitely pending the outcome of the investigation into drug charges.

Finally, the Board found Ms. Steeves' argument that Mr. Ware should have been suspended with pay to be without merit. The appellant failed to offer any persuasive argument that Mr. Ware was entitled to receive salary and benefits from his employer pending appeal of his conviction on drug charges. Although Ms. Steeves offered some evidence that county employees charged with offenses involving possession of cocaine had been suspended with pay, she offered no compelling evidence or argument to persuade the Board that State employees should receive the same treatment when the charged offense conflicts with the duties and responsibilities of their positions.

For the reasons set forth above, the Board voted unanimously to deny Mr. Ware's appeal. In so doing, the Board voted to uphold New Hampshire Hospital's decision to suspend Mr. Ware without pay pending the outcome of the investigation of criminal wrongdoing which was in conflict with the assigned duties of his position.

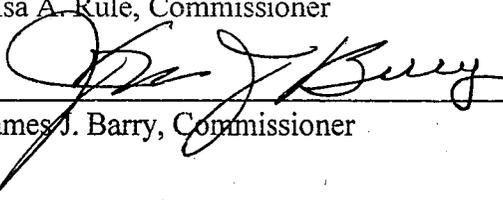
THE PERSONNEL APPEALS BOARD



Lawrence H. Miller, Chairman



Lisa A. Rule, Commissioner



James J. Barry, Commissioner

cc: Virginia A. Lamberton, Director of Personnel
Marie Lang, New Hampshire Hospital Administrator of Human Resources
Margo Steeves, SEA Field Representative