

State of New Hampshire



PERSONNEL APPEALS BOARD

25 Capitol Street
Concord, New Hampshire 03301
Telephone (603) 271-3261

APPEAL OF ROCKY ANDRUS

Docket #93 -T-14
New Hampshire Hospital

Response to Appellant's Motion for Reconsideration

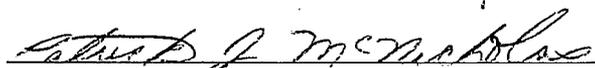
January 11, 1994

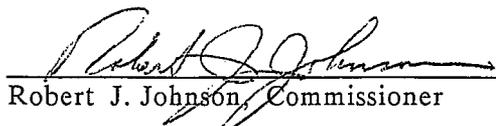
On December 28, 1993, the Personnel Appeals Board received the above-titled Motion from SEA Legal Intern Linda Chadbourne, requesting that the Board reconsider its December 9, 1993 decision upholding New Hampshire Hospital's discharge of Mr. Andrus. In support of that Motion, Ms. Chadbourne has attempted to advance an equal protection argument, claiming that Mr. Andrus was being penalized for incorrectly interpreting a rule which other "similarly situated employees "...appeared unable to interpret".

Per-A 204.06 (b) of the Rules of the Personnel Appeals Board provides that motions for rehearing "...shall set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable". In her motion, Ms. Chadbourne raised no argument or issue which was not raised already in the appellant's hearing on the merits, and considered by the Board in reaching its decision to deny Mr. Andrus' appeal.

As Ms. Chadbourne noted, "Mr. Andrus is, at most, guilty of an error in judgment by neglecting to notify security that the hunting rifle [and live ammunition] was in his vehicle and that he was unable to lock the vehicle because he had misplaced the keys". Contrary to the appellant's assertion, this behavior constitutes a blatant failure to meet the work standard, particularly in light of the recency and applicability of Mr. Andrus' training at New Hampshire Hospital.

THE NEW HAMPSHIRE PERSONNEL APPEALS BOARD


Patrick J. McNicholas, Chairman


Robert J. Johnson, Commissioner


Lisa A. Rule, Commissioner

cc: Virginia A. Lamberton, Director of Personnel
Linda Chadbourne, SEA Legal Intern
Barbara Maloney, Esq., Director of Legal Services, New Hampshire Hospital

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APPEAL OF ROCKY ANDRUS

Docket #93-T-14
New Hampshire Hospital

December 9, 1993

The New Hampshire Personnel Appeals Board (McNicholas, Johnson and Rule) met Wednesday, November 17, 1993, to hear the appeal of Rocky Andrus, a former probationary employee of New Hampshire Hospital. Mr. Andrus was discharged from his position of Buildings and Grounds Utility Person on November 25, 1993, for carrying a firearm on hospital grounds in violation of hospital policy. Mr. Andrus was represented at the hearing by SEA Legal Intern Linda Chadbourne. Barbara Maloney, Director of Legal Services at New Hampshire Hospital, appeared on behalf of the State.

New Hampshire Hospital Rule #20 states the following:

While on Hospital grounds, you shall not carry intoxicants or drugs unless you have first received signed permission from a staff physician or your Unit Director, and shall not carry weapons or items intended to be used as weapons unless you have first received signed permission from the Superintendent. The rule applies to any such carrying, whether the material carried would be for your own use, a patients use, or anyone else's use.

In her opening statement, Ms. Chadbourne argued that the Hospital's rule fails for vagueness in that it does not define "carry" with regard to weapons or firearms, and that "reasonable" persons could disagree on the actual meaning of the rule. She said the evidence would prove that Mr. Andrus was not "carrying" a weapon, but rather that he had an unloaded hunting rifle inside his parked vehicle, a practice common at the Hospital during hunting season. She also argued that Mr. Andrus was meeting the work standard at the time of his termination from employment, and that his discharge must therefore be considered arbitrary, illegal, capricious or in bad faith.

Matt Ruddy, an automotive mechanic at New Hampshire Hospital, testified that many of the employees carry rifles in their vehicles during hunting season. He said he recalled being told at orientation some years earlier that no firearms or weapons were allowed in the workplace. However, he said he believed that meant that employees should not be carrying knives or guns around with them. Mr. Ruddy said he had a hunting rifle in his vehicle on the Hospital grounds, and that he did have a waiver to have the gun in his vehicle.

Marge Colby, a former employee of the New Hampshire Hospital transportation garage,

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testified that she had not read the Hospital's Employee Handbook in years, and believed it had been rewritten after her retirement. As requested by the appellant, she read "Rule 20" into the record, and said she believed the rule meant that employees shouldn't be carrying weapons around with them on the grounds of the hospital. She said she did not believe it referred to hunting rifles, as many of the employees carry guns with them and hunt on their way to and from work during hunting season.

The appellant, Mr. Andrus, testified that when he was carrying his shotgun in his vehicle during hunting season, he kept it on the passenger side of the car between front seat and the door. He said that it was not easily visible from outside of the vehicle, although a portion of the stock could be seen in the front and a portion of the barrel in the back behind the seat if one were to look carefully. He also testified that although there were shotgun shells visible on the console of the car, they were spent shells.

Mr. Andrus testified that on the day in question he had locked his vehicle in the morning when he arrived at work, that he had gone to his car during his morning break, and discovered that he had lost his keys, both to his vehicle and to the various buildings on the Hospital grounds, which was why he was unable to relock his car. He testified that he later discovered the key to his vehicle in his own pocket, although he never located the Hospital's keys.

Mr. Andrus testified that when he was called by Security about why he had a gun in car, he knew from the tone of the question that there must be something wrong, even though he had no idea that having a gun in his car would be considered a policy violation. He said that he made up a story about having left the gun in the car from the night before and simply forgetting to take it out of the car when he drove to work the next morning. Mr. Andrus said he had attended a new employee orientation when he was first hired at New Hampshire Hospital and recalled hearing a presentation by Security at the orientation. However, he said he had no recollection of any discussion during the Security presentation about employees needing waivers to carry hunting rifles in their vehicles.

David Bixby, Laundry Manager at New Hampshire Hospital, testified that the laundry truck drivers are issued key rings with keys to all the buildings on the Hospital grounds to give the delivery persons access to all the units and work areas on the grounds. He testified that he received word from his Linen Supervisor on November 24, 1992, that Rocky Andrus had lost key ring #7. He said he immediately called Security, Maintenance, Housekeeping and the Thayer building to let them know that a set of keys was lost, and he immediately dispatched his employees to start looking for the lost keys. He said that the loss of the keys was a very serious matter and that it was critical to make sure the keys didn't end up in the hands of one of the patients.

Mr. Bixby said he started searching the maintenance and laundry carts and the seat of the truck the appellant had been driving. When he failed to find the keys there, he extended his search to outside of the laundry building. He said that he recalled seeing Mr. Andrus at his car during the morning break and went there to look for the keys. Although he didn't find the keys, he did see a gun in the appellant's vehicle. He said the weapon was out in plain sight and was not at all difficult to see. He said he also saw live shells on the console of the vehicle. He said he immediately returned to the laundry to call Security, and kept the vehicle in sight from inside the building. Mr. Bixby testified that when he later confronted Mr. Andrus about the gun and ammunition being in the car, Mr. Andrus told him that he had forgotten about having the gun in the car, and that the ammunition was spent.

Chief of Hospital Security, Charles Goodale, reported that he had received a report in his office on November 24, 1992, that Mr. Andrus had lost a set of Hospital keys. He said he sent staff to the various locations where the laundry had made deliveries to look for the keys. He then received a report that David Bixby had spotted a shotgun in the appellant's car. He testified that he immediately sent out a request to have Mr. Andrus report to his office. Security Chief Goodale testified that when he first asked the appellant why he had a gun in his car, Mr. Andrus responded, "What gun?". Then he said he had forgotten about the gun being in his car.

Security Chief Goodale testified that during new employee orientation at the Hospital, he routinely reviews the list of "Do's and Don'ts" (NHH Exhibit #2). Two of the items on that list are as follows:

Do not bring any weapon onto grounds.

Do lock your car, secure your valuables in the trunk (cameras, etc.)

He testified that he always makes it very clear what sorts of things can be used as weapons, and specifically tells all new employees not to bring weapons onto the grounds. Chief Goodale testified he specifically remembered Mr. Andrus from orientation because of his appearance and his demeanor. He testified that because of the way Mr. Andrus had been sprawled out across his desk, he had quipped, "I'm sorry if I'm keeping you awake." He said it got a chuckle out of the class and seemed to get Mr. Andrus' attention. Chief Goodale testified that the system of granting waivers for employees to carry hunting rifles during the hunting season had been in place for years, both as a way to assure that weapons were secured and to alert Security to their presence on the grounds.

N.H. Hospital Security Officer Donald Clark testified that he had been dispatched to the appellant's car when it was reported that there was a gun in a vehicle on the grounds. He said that he had followed the appellant to the car and realized that the car was unlocked. He saw the ammunition in the vehicle and realized that it was live. He told the appellant that the gun needed to be removed from the Hospital grounds. He said he did not see the appellant remove the gun from the vehicle, nor did he recall seeing Mr. Andrus take the shells with him. Mr. Andrus did have keys to his vehicle and was able to drive it off the grounds.

STANDARD OF REVIEW

At all relevant times, Mr. Andrus was a probationary employee of New Hampshire Hospital, subject to the provisions of Per 1001.02 (a) of the Rules of the Division of Personnel:

At any time during the initial probationary period an appointing authority may dismiss an employee who fails to meet the work standard provided that the dismissal is not: (1) arbitrary; (2) illegal; (3) capricious; or (4) made in bad faith.

DISCUSSION OF THE EVIDENCE

There is no dispute that Mr. Andrus had a gun in his vehicle, that the gun was not loaded, that the gun could be seen from outside of the vehicle, and that the vehicle was unlocked when the gun was discovered by Laundry Manager David Bixby. There is also no dispute that there were

shotgun shells clearly visible on the console, although the parties disagree on whether the ammunition was live or spent. The parties also disagree on the meaning of N.H. Hospital Rule #20, and whether an employee can be disciplined for "carrying" a firearm in his vehicle. Finally, the parties disagree on what constitutes "the work standard" in this instance.

Although Mr. Andrus insisted that the ammunition in his vehicle was spent, the Board found the testimony of Mr. Bixby and Mr. Clark to be more credible. Security Chief Goodale credibly testified that he had dispatched Officer Clark to investigate the report of a gun in an employee's vehicle, and was unaware at the time Clark was sent there that the car was unlocked. He made no reference to ammunition in the vehicle. When Officer Clark arrived at the scene, behind Mr. Andrus, he arrived at the vehicle to find it unlocked. He saw the shotgun, and also noticed live ammunition in the front of the vehicle.

Mr. Andrus contended that he was not discharged because he had a weapon on Hospital grounds, but because Mr. Bixby was angry with him for planning to transfer to another work unit at the Hospital. Chief Goodale and Officer Clark would have had no such personal involvement with the appellant, and the appellant offered no reason to believe that Officer Clark would have lied about finding live ammunition in the vehicle. The appellant admitted that he lied to both his supervisor and Hospital Security when he was questioned about the presence of the gun, seriously damaging his credibility with regard to when and if his vehicle was ever locked on the date in question, as well as whether the ammunition in his vehicle was live or spent.

Mr. Andrus had attended new employee orientation approximately 4 months before the incident and should have been familiar with the content of the Hospital's policies and regulations. Even if the Hospital's policy is not as clear as it might be on the issue of carrying weapons on the grounds of the facility, it takes little more than common sense to realize the significant threat created by having a weapon and ammunition visible and accessible in an unlocked vehicle on the Hospital grounds. While it can be argued that New Hampshire Hospital's Rule #20 is somewhat vague and does not specifically differentiate between carrying weapons on one's person and carrying weapons in one's vehicle, careless disregard for the safety of staff and patients certainly constitutes a failure to meet the work standard. There can be little question that the presence of a weapon and live ammunition in an unlocked vehicle on the grounds of the Hospital endangers the staff and the patients at the facility. If Mr. Andrus had been a regular full-time employee at the time of the incident, rather than a probationary employee with less than 6 months of service, his conduct could have resulted in his immediate demotion under the provisions of Per 1001.07 (b)(2)a. Clearly an offense which would warrant the immediate demotion of a regular full-time employee is sufficiently serious to establish cause for dismissal of a probationary employee.

On the evidence, the Board voted unanimously to deny Mr. Andrus' appeal, finding that New Hampshire Hospital properly exercised its discretion in discharging Mr. Andrus prior to completion of his probationary period for failure to meet the work standard. In so doing, the Board ruled as follows on New Hampshire Hospital's proposed findings of fact and rulings of law:

PROPOSED FINDINGS:

1 - 6 A are granted

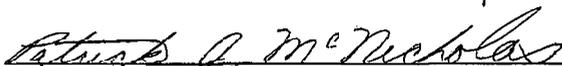
6 B is denied

6 C - 7 are granted

PROPOSED RULINGS:

1 - 2 are granted
3 is denied
4 is granted
5 is denied
6 - 8 are granted

THE NEW HAMPSHIRE PERSONNEL APPEALS BOARD



Patrick J. McNicholas, Chairman



Robert J. Johnson, Commissioner



Lisa A. Rule, Commissioner

cc: Virginia A. Lamberton, Director of Personnel
Linda Chadbourne, SEA Legal Intern
Barbara Maloney, Esq., Director of Legal Services, New Hampshire Hospital

STATE OF NEW HAMPSHIRE

PERSONNEL APPEALS BOARD

Appeal of Rocky Andrus (93-T-14)

Appointing Authority's Request for Findings of Fact and Rulings of Law

New Hampshire Hospital, the appointing authority, by and through its attorney, Barbara M. Maloney, requests the Personnel Appeals Board make the following findings of fact and rulings of law:

1. Rocky Andrus was a probationary employee hired on July 31, 1992, and terminated on November 25, 1992.
2. During first day orientation, Rocky Andrus trained by Chief Charles Goodale on New Hampshire Hospital Policies and Procedures including the proper conduct of firearms on the grounds of New Hampshire Hospital.
3. During first day orientation, Rocky Andrus acknowledged his training in this subject as well as other New Hampshire Hospital policies by his signature on file in the New Hampshire Hospital Office of Personnel (See Attached!).
4. While looking for keys that Rocky Andrus reported missing, a search of the area of Rocky Andrus' car was conducted by David Bixby.
5. David Bixby saw in plain view a rifle and ammunition in an unlocked vehicle belonging to Rocky Andrus.
6. In a meeting with David Bixby on November 25, 1992, Rocky Andrus admitted:
 - A) having the gun in his car;
 - B) knowing hospital rules about having a weapon on grounds; and
 - C) having his car unlocked.
7. Mr. Andrus knowingly failed to abide by N.H.H. policy and posted rule which warned of termination for violation.

Rulings of Law

1. Per. 1001.02 the standard for terminating a probationary employee is failure to meet the work standard provided the dismissal is not:
 - A) arbitrary;
 - B) illegal;
 - C) capricious; or
 - D) made in bad faith.

2. The work standard includes not violating New Hampshire Hospital policy and procedure.
3. By failing to lock his vehicle, Mr. Andrus violated New **Hampshire Hospital** policy.
4. By having a rifle and shells in his car without permission, Mr. Andrus violated New Hampshire Hospital policy.
5. Violations by Mr. Andrus, #3 and #4 above, were knowing and willful.
6. The meeting of November 25, 1992, between the Director of Laundry Services, David Bixby, and Rocky Andrus fulfills the requirement of Per. 1001.02 **(b)(1)**.
7. The letter of termination dated 11/25/92 fulfills the requirements of Per. **1001.02 (c)(1), (2) & (3)**.
8. The termination was lawful under the rules of the Department of Personnel and appropriate under the circumstances.

Respectfully submitted,

NEW HAMPSHIRE HOSPITAL

By its attorney,

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