

# State of New Hampshire

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## PERSONNEL APPEALS BOARD

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### APPEAL OF DEBORAH BAILEY New Hampshire Hospital Docket #90-T-2

December 6, 1990

The New Hampshire Personnel Appeals Board (McNicholas, Johnson and Bennett) met Wednesday, October 24, 1990, to hear the termination appeal of Deborah Bailey, a former probationary employee of New Hampshire Hospital (hereinafter "Hospital"). Ms. Bailey, who was represented at the hearing by SEA General Counsel Michael C. Reynolds, was employed as a Certified Nursing Assistant at the time of her discharge on Sunday, January 7, 1990. The notice of appeal filed on her behalf was dated, and received by the Board, on January 24, 1990.

New Hampshire Hospital was represented at the hearing by Barbara Maloney, Director of Legal Services for the Hospital. Also testifying on behalf of the Hospital were Flora Lawler and Marcia Harmer.

In her original notice of appeal, Ms. Bailey argued that she should not have been discharged for "abuse of time" as reported in her letter of termination. She admitted that she "did miss a number of days", but argued that over half those days were due to work related injuries, and that another extended absence was due to acute bronchitis and sinusitis as documented by a note from her physician. Ms. Bailey argued that at the time of her employment, she was never informed that missing a specified number of days might be considered "abuse" or that such absenteeism would result in her discharge.

The appellant then referred to Per 307.04(a)(j) of the Rules of the Division of Personnel, arguing that it provides for retroactive compensation for absences due to illness or injury during an employee's probationary period. Mr. Reynolds, addressing the Board on Ms. Bailey's behalf, pointed to this provision in the rules as proof that the State understands that certain absences during the probationary period are unavoidable, otherwise the State would not be willing to compensate the employee for those absences at a later date.

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The Rules of the Division of Personnel do make reference to probationary employees accruing sick leave during the probationary period. The current Collective Bargaining Agreement, however, specifically prohibits the accrual of sick leave by any employee in the first six months of service. Specifically, Article 11.1 states:

"Employees in their first six (6) months of service do not accrue sick leave. Upon completion of six (6) months of service, employees will be credited with 7.5 days of sick leave. Employees will accrue additional sick leave in accordance with the accrual schedule listed above beginning with the first completed month of service following completion of six (6) months of service."

As counsel for the appellant is aware, whenever the Rules of the Division of Personnel and the Collective Bargaining Agreement differ on issues of compensation and benefits, the Agreement controls. Since the Collective Bargaining Agreement prohibits the accrual of sick leave during the first six months of service, and makes no provision for retroactive approval of sick leave absences within the first six months of an individual's employment, the Board finds the appellant's reliance upon and interpretation of Per 307.04 to be in error. Even if the Collective Bargaining Agreement made provision for sick leave to be granted and compensated retroactively, the Board would not consider it an adequate defense for the level of absenteeism reflected by Ms Bailey's attendance record.

The probationary period, by definition, is "a work test period during which an employee is required to demonstrate his fitness to perform the duties of the class of position to which he is appointed by actual performance of those duties" (Per 101.27, Rules of the Division of Personnel). Reliability and punctuality can reasonably be considered among the criteria by which an appointing authority assesses an employee's fitness to perform the duties of a position. As the record reflects, Ms Bailey's absences were not all due to illness. The applications for leave she submitted during the period of July 27, 1989 through December 31, 1989 include such reasons as "on the road at toll booth", "personal", "picking up meds", "flat tire", "to get car repaired", and "overslept this morning". The Board found that Ms Bailey's attendance record did not meet the work standard. As such, the Board found that the Hospital's decision to discharge her from her employment was neither arbitrary, illegal, capricious, nor made in bad faith.

With regard to her actual duties, Ms Bailey argued that she had not received an unsatisfactory performance evaluation, and pointed to her 3 month competency review as being satisfactory in almost all regards. Upon review of

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the record, the Board found that the 3-month evaluation to which Ms. Bailey referred was not a performance evaluation, but rather a clinical competency evaluation used as part of the Certified Nursing Assistant Training Program. The Board found it unremarkable that Ms. Bailey's competency evaluation was generally acceptable in light of the fact that Ms. Bailey was previously trained and certified as a Nursing Assistant in the State of New Jersey.

Ms. Bailey argued that the Hospital had no "clearly articulated work standard" against which to judge her performance. In her notice of appeal she stated that "her performance was indeed meeting the work standard, other than some problems with spelling, which Ms. Bailey was able to correct. Ms. Bailey was told orally that some of her note taking was not acceptable; however, she believes and therefore alleges that her note taking was acceptable and was at least up to the work standard." The fact that Ms. Bailey believed her work to be satisfactory constitutes an opinion, not evidence of inappropriate or unauthorized action by the appointing authority.

Ms. Bailey did admit that she had been warned verbally on several occasions concerning resident care issues including proper "toileting" and performing "lifts" without assistance. She insisted that the toileting issue(s) had not been witnessed by Marcia Harmer and had been misrepresented by her supervisor. When questioned about admitting to her supervisor that she had failed to properly "toilet" a resident, Ms. Bailey stated she made such admissions only "To get everyone off [her] back". She offered no evidence or corroborative testimony, however, to persuade the Board that the alleged incident did not occur, or that her performance met the required work standard.

With regard to performing "lifts" single-handedly, Ms. Bailey stated that she did not get along with her co-worker and that when patient transfers needed to be made, her co-worker would leave the room. She said she had been forced to lift residents alone or risk being behind on her schedule. Again, Ms. Bailey's explanation for ignoring the appropriate procedures and neglecting to discuss the problem with her supervisor failed to persuade the Board that her performance was satisfactory.

The appellant admitted having refused on one occasion to take charge of a group of patients, but argued that she'd refused only because that particular supervisor always assigned her the "lifters", patients who required more physical assistance. She claimed that the supervisor in question always took the "walkers" for himself, knowing they would not require as much help. She testified that she had eventually taken the group assigned to her, however.

Ms. Bailey admitted to allowing one of the self-care residents to clean out

the bathtub after use, although she knew that tub cleanings were part of her job responsibility. She explained that this particular resident enjoyed the task, and used to clean out the tub for all the aides. Again, the Board did not find Ms. Bailey's explanation to be persuasive or supportive of her allegation that the agency improperly dismissed her.

In consideration of the testimony and evidence presented, the Board voted to uphold the Hospital's decision to discharge Ms. Bailey from her position of Certified Nursing Assistant. The Board considered the evidence sufficient to support a finding that Ms. Bailey's performance, in both the areas of attendance and patient care, did not meet the required work standard. Therefore, the Board found that Ms. Bailey's discharge from employment was neither arbitrary, illegal, capricious, nor made in bad faith.

The parties should be reminded that the Board employs a substantially narrower standard of review in appeals by probationary employees. The Rules of the Personnel Appeals Board specifically provide that:

- "(a) The probationary employee shall have the burden to produce evidence and prove facts sufficient for the Board to find a violation of the applicable standard.
- "(b) Accordingly, unless otherwise ordered by the Board, the probationary employee shall have the duty to proceed first; and the Board may dismiss any case at the close of the probationary employee's case where the employee has failed to establish sufficient credible facts to support his position."

[See Per-A 207.05 Hearing. (Rules of the Personnel Appeals Board)]

The appellant failed to establish sufficient credible facts to support her allegation that the Hospital violated the applicable standard, and that her discharge was arbitrary, illegal, capricious and/or made in bad faith.

The Board, pursuant to Per-A 207.05 of its Rules, could have dismissed the appeal at the conclusion of the appellant's presentation, prior to receiving any testimony or evidence from the appointing authority. The Board instead required the Hospital to proceed with its case in order to provide the appellant an opportunity to cross-examine the State's witnesses. The Board notes with some concern that had the Hospital needed to rely upon its own presentation in defense of its discharge decision, the outcome of the hearing might have been substantially different.

In termination appeals by probationary employees, Per-A 207.05 of the Rules of the Personnel Appeals Board requires the appellant to present his/her evidence

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first. In the instant appeal, the appellant's response to the appointing authority's written allegations provided sufficient proof of her failure to meet the required work standard to warrant upholding the discharge. Except in appeals by probationary employees, the appointing authority presents its case first (See Per-A 203.03 of the Rules of the Personnel Appeals Board). Had the agency been required to submit its evidence before hearing the appellant's testimony, or had the appellant chosen not to testify in her own behalf, the propriety of the discharge could only have been considered on the basis of those allegations reported in the undated, unsigned "documentation" submitted by the Hospital, and upon the testimony of persons not directly responsible for daily supervision of the appellant.

Agencies commit a grave error in judgment when they rely upon the testimony of the appellant to support their discharge decisions. In the instant appeal, were it not for the appellant's admissions that she had been verbally warned by her supervisor about patient care and attendance issues as discussed above, the agency would have had nothing more than vague allegations to support its discharge decision. While this Board is unwilling to vacate the discharge decision simply because of the manner in which that decision was documented and defended, the Board is equally unwilling to condone the rather off-handed manner in which the agency has presented itself in this case.

The agency should understand that notices of disciplinary action (i.e., letters of warning, suspension, demotion, termination) have no evidentiary value in and of themselves. They are merely the tools by which an agency notifies an employee and the Division of Personnel of the action it has taken, and the circumstances which it believes to have occurred to warrant the level of discipline described therein. The agency still has an obligation to provide some evidence that its allegations are true. Similarly, written arguments submitted in the form of a Motion to Dismiss have little bearing upon the outcome of an appeal except in those cases where there are no material facts in dispute.

The hospital appeared completely unprepared at Ms. Bailey's hearing to offer credible evidence to support its decision to discharge her. Except for the testimony of the appellant and the leave slips submitted as exhibits, the agency would have had little or no substantive information or documentation to offer in support of its decision to terminate Ms. Bailey's employment.

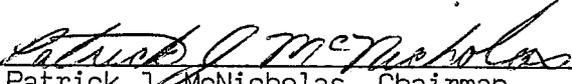
The Board recommends that New Hampshire Hospital take immediate steps to secure training to strengthen supervisory skills in the area of human resource management. Although New Hampshire Hospital is charged with the care and treatment of the mentally ill, the supervisory staff must also be cognizant of its responsibilities to train, direct and discipline its staff in accordance with accepted human resource practice and the Rules of the Division of Personnel.

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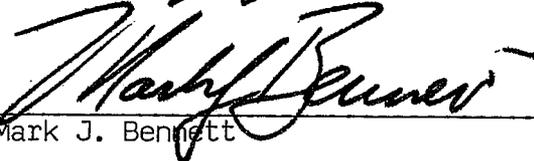
Many agencies appearing before the Personnel Appeals Board do not have access to legal counsel during the appeals process, and their occasional failure to produce the appropriate witnesses or exhibits in support of their position can usually be attributed to lack of experience and/or training. New Hampshire Hospital, however, can not use inexperience or the need to rely upon untrained staff as an excuse for failing to provide a cogent presentation of its position on appeal. A review and assessment of recent Board decisions, particularly those involving the Hospital, should illustrate the potential liability of a poorly prepared or documented defense of an agency decision which later becomes the subject of an appeal.

The Board advises New Hampshire Hospital to require staff appearing before this Board to avail themselves of training which is, or may be offered through the Division of Personnel and the Office of the Attorney General in order to become more familiar with the Rules of the Division of Personnel, Rules of the Personnel Appeals Board, and the administrative appeals procedures of N.H. RSA 541-A. Failure to take such measures will undoubtedly result in the agency routinely finding its decisions overturned on appeal.

THE PERSONNEL APPEALS BOARD

  
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