

# State of New Hampshire

WPPID788



## PERSONNEL APPEALS BOARD

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APPEAL OF REBECCA BOUDREAU  
Docket #91-T-10  
New Hampshire Hospital

August 28, 1991

The New Hampshire Personnel Appeals Board (McNicholas, Bennett and Rule) met Wednesday, July 17, 1991, to hear the appeal of Rebecca Boudreau, a former employee of New Hampshire Hospital who was denied an extended medical leave of absence and failed to report to duty on December 11, 1990, with full medical clearance to return to duty. Ms. Boudreau was represented at the hearing by SEA General Counsel Michael C. Reynolds. New Hampshire Hospital was represented by Barbara Maloney, Director of Legal Services for N. H. Hospital.

In her opening statement, Attorney Maloney argued that Ms. Boudreau's separation from service was not a disciplinary matter, but a question of the employee failing to report back to duty after being denied a leave of absence without pay. She noted that New Hampshire Hospital had already raised this issue in its July 8, 1991 Motion to Dismiss. In that Motion, the Hospital argued that Ms. Boudreau had failed to report to duty with a full medical release from her doctor after having exhausted all of her accrued leave time. The Hospital argued that since the appeal arose from the refusal of the appointing authority to grant a leave of absence without pay, the Board lacked the statutory jurisdiction to hear such an appeal. /1

Attorney Maloney asked that the Board defer ruling on the Hospital's Motion to Dismiss until the close of the hearing. The appellant concurred, and the Board granted that request.

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/1 Per-A 201.02 Proceedings excluded. "...the jurisdiction of the Board shall not extend to appeals by any person of the following matters: ... (b) the refusal of an appointing authority to grant a leave of absence without pay."

Attorney Reynolds, on the appellant's behalf, made a verbal Motion for Summary Judgment, claiming that New Hampshire Hospital did not have the authority to discharge the appellant merely for having exhausted all leave, and that the Hospital therefore could not meet its burden of production. The Board also voted to take that Motion under advisement until the close of the hearing.

### Review of Testimony and Evidence

For all practical purposes, there are no material facts in dispute. Ms. Boudreau was employed by New Hampshire Hospital as a Training and Development Therapist assigned to the Philbrook Center following her transfer in lieu of lay-off from Laconia Developmental Services on April 13, 1990. Approximately two months later, Ms. Boudreau fell at work and sprained her ankle. She was treated by Dr. Brown for an acute ankle sprain and placed in an Aircast supportive brace. Dr. Brown reported that she should be able to return to duty approximately two weeks later. Ms. Boudreau did not return to work until August 28, 1990, a little more than two months after her injury. During the period of her absence, she received Workmen's Compensation Benefits, supplemented by payment of accrued sick leave.

It is unclear how much sick leave or other accrued leave Ms. Boudreau utilized between August 28, 1990, the date of her return following her injury, and December 5, 1990, the date she requested a medical leave without pay. When she made the request for leave without pay, Ms. Boudreau knew she had little or no paid leave available. By letter dated December 5, 1990, addressed to Nancy Johnson, the Director of Rehabilitation Services at the Hospital, she asked for an extended, emergency leave of absence. In the letter, she said she had been suffering from migraine headaches, severe diverticulitis and depression. She noted that her available leave would be exhausted by Sunday of that week. In support of her request for an emergency leave, she submitted a letter from Dr. Hartman /2 (New England Family Health Associates) which stated that Ms. Boudreau had had recurrent hospitalizations for migraines and colitis, and had a severe underlying depression. He "suggested she take medical leave for 90 days to allow sufficient time to resolve these problems." He concluded, "She is currently unable to work".

Nancy Johnson responded to the appellant by letter dated December 7, 1990, that Boudreau's request for leave of absence was denied due to staffing and program needs. Ms. Johnson had relayed the same message to the appellant in

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2/ The letter from Dr. Hartman is dated December 14, 1990. It was date-stamped as received by N.H. Hospital Rehabilitation Services, however, on December 5, 1990.

a telephone conversation which the appellant initiated on December 7, 1990. Johnson informed the appellant that she would be required to report to work with clearance for full duty on December 9, 1990. Ms. Boudreau understood the requirements and agreed to report to work on December 9th.

Ms. Boudreau did not report to work as promised on December 9, 1990, but called in sick. She called in sick again on December 10, 1990. Ms. Johnson telephoned the appellant at home on December 10th to discuss her absence, at which time the appellant informed her that she had been unable to secure a release for duty from Dr. Hartman, but that she had an appointment with him on Tuesday morning and would secure the release at that time. She agreed to bring it to work with her on Tuesday afternoon.

Johnson and Boudreau spoke a second time by telephone on December 10th. During that call, Ms. Johnson told the appellant that failure to report to work with the agreed upon release would be considered an act of insubordination.

The appellant did not report to work on Tuesday, December 11th. She telephoned the Hospital and reported that she had been unable to secure a release for duty, but believed she was able to return and perform her duties. Ms. Johnson refused to allow her to return to work without the appropriate release and, in her follow-up letter that same date, stated, "As we agreed, the termination paperwork is enclosed. Also, you agreed to come in within the next two weeks to return your keys and ID badge".

When the appellant failed to report for duty, the Hospital never issued a warning for insubordination. Further, the Hospital never issued a formal letter of discharge for either insubordination, or for any other offense.

On December 14, 1990, the appellant filed a "Notice of Accidental Injury or Occupational Disease", claiming that she had "developed increased migraines, diverticulitis, colitis with an [sic] depression once transferring in March 1990 from LSS&TC. Also severe injury to left leg thru [sic] fall into Rodent Hole on June 17 sustaining permanent pain and limited function." The Memo of Denial of Workers' Compensation Benefits listed the date of accident as 12/14/90, the date the first report was received as 12/24/90, and date of denial as 1/5/91.

The appellant, in the Motion for Summary Judgment, argued that the instant appeal must be judged in light of the appeals of Mary Daly and Elaine Fugere, and that, accordingly, she must be immediately reinstated with full back pay and benefits retroactive to December, 1990. The Board does not agree. Although each of the appeals involves the refusal of the appointing authority to authorize leave without pay, the circumstances in each appeal are not sufficiently similar to reach a decision merely on the basis of precedent. Therefore, Appellant's Motion is denied.

The record in both the Petition of Mary C. Daly and the Appeal of Elaine Fugere, reflects that the appellants had paid leave of some form available to them. In their cases, they were denied the use of such paid leave. Ms. Boudreau, on the other hand, had no leave of any kind available. Superficially, that distinction may appear inconsequential. However, the Board finds a distinct difference between absence without approved leave, when paid leave is available, and absence without leave because no paid leave is available. Accordingly, the remedies available to the agencies when those employees failed to report to work may be different from those which the Hospital might have chosen.

In the Daly appeal, the employee was discharged on the basis of an improperly promulgated "rule" issued by the Department of Personnel which said that an employee who was absent by virtue of illness who had exhausted all accrued sick leave would be deemed to have "voluntarily resigned". Daly received no warnings to that effect prior to notice of termination. The Department could have refused her the use of annual leave, and warned her for being absent without approved leave. Instead of initiating discharge provisions under Per 308.03, however, the Department notified her of discharge without prior warning under the newly created "policy".

In the Fugere case, the appellant had requested the use of accrued sick leave, and further claimed entitlement to more sick leave than the agency believed she had to her credit. She was denied sick leave, however, based upon the agency's belief that her use of sick leave might not be legitimate. She was informed that before such leave could be granted, she would have to provide certification of her illness, injury or disability.

Prior to receiving certification of Fugere's illness, the agency determined that she had exhausted her sick leave and warned her that failure to report to work would result in discharge. The agency then issued three letters of warning for absenteeism without approved leave, with the third warning serving as notice of discharge.

The Court, in reviewing the Fugere appeal, found that the warnings themselves were technically deficient in that they failed to apprise the employee of the specific corrective action she must have taken in order to avoid discharge. The letters were issued by the agency in such rapid succession that the Court determined there would have been no opportunity for the employee to take corrective action before the third warning was issued. The Court also found that each of the warning letters lacked a place for the employee's signature to acknowledge receipt.

Another significant difference between the appeals of Daly, Fugere and Boudreau involves the ability of each of these employees to return to work. Both Daly and Fugere maintained that they were physically unable to return to work, and both argued that they had at least some form of leave available to them, even for a limited period of time. Boudreau, on the other hand, first

alleged that she was unable to work and supported that request with a letter from her physician clearly advising that she be placed in a medical leave status. Dr. Hartman stated, "She is currently unable to work."

Boudreau was informed by letter dated December 7, 1990, that the Hospital would not grant her request for a leave of absence. Being fully aware that she was about to exhaust all available leave (sick and annual), she then notified her employer that she actually was able to return to work, and assured her employer that she could procure a full release for duty from her doctor. In support of her appeal, Boudreau now alleges that she would have reported to duty to avoid separation from service, but was refused the opportunity to return to work by her employer because she failed to submit a medical release.

The refusal of Ms. Boudreau's physician to provide her with full clearance to return to duty is consistent with his certification four days earlier that she was unable to work and should be placed in a medical leave status because of recurring migraines and diverticulitis. Contrary to her doctor's assessment, Ms. Boudreau claimed that she could have worked without restriction or limitation, stating that the only person she would be hurting by working would be herself.

On December 11, 1990, when she failed to report to work as scheduled with the appropriate release, she was verbally informed that she would be expected to complete "termination paperwork". On December 14, 1990 the appellant completed a report of injury or occupational disease in which she claimed to be suffering from a variety of illnesses related to stress arising from her transfer to the Hospital from Laconia Developmental Services. She also claimed to be suffering "permanent pain and limited function" as a result of her fall on June 17, 1990, for which she had received Workers' Compensation until August 28, 1990. Her December 14, 1990 notice of injury, illness or disability completely contradicts her earlier assertion that she could return to duty without limitation or restriction.

#### Relevant Policies and Procedures

The Hospital represented this appeal as arising solely from the refusal of the appointing authority to grant a leave of absence without pay, thereby arguing that the Board, lacking jurisdiction to hear such an appeal, should dismiss the matter. Clearly, the issue is not that straightforward. While the Board agrees that it does not have jurisdiction to hear an appeal arising solely out of an appointing authority's refusal to grant a leave of absence without pay, it does not believe itself to be precluded from hearing appeals by that employee related to actions which follow such denial. Accordingly, the Hospital's Motion is denied.

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In the instant appeal, the Hospital's refusal to grant a leave of absence without pay was fully within the agency's discretion. The agency was only required to "consider" such a request. Having considered the request, the agency found that its staffing and program requirements would not allow for such leave to be granted. Accordingly, the request was denied.

Having denied the request for extended leave, and having refused to allow the employee to return to duty without clearance, the Hospital claimed that Ms. Boudreau was "separated from service" rather than "discharged". The Hospital argued that the separation was not disciplinary in nature and therefore was not subject to the provisions of Per 308.03 of the Rules of the Division of Personnel. Again, the Board does not agree.

The first question which arises concerns the propriety of discharging an employee who is physically unable to return to work. In Daly, the Court did not find it illegal to discharge an employee who was physically unable to work. It did, however, find that such employees could not be discharged solely on the basis of a personnel "policy" adopted outside of the scope of rulemaking. That policy addressed only absences due to illness when sick leave was exhausted, regardless of what other leave might be available to the employee. Therefore, the only lawful application of that policy would be disciplinary action for "absenteeism without approved leave", requiring the issuance of three letters of warning for such offense before the employee could be discharged.

In the case of Ms. Boudreau, the appellant had exhausted all available leave. Her absence, therefore, went beyond the simple "absence without approved leave". Further, in light of her request for a 90 day leave of absence without pay, and her physician's certification that she was unable to return to work, the Hospital could have discharged the employee for being physically unable to perform her duties as provided in Per 308.03(4)j.:

"At the discretion of appointing authorities, permanent employees who are of such physical condition as to make it impossible for them to satisfactorily perform their work assignments can be discharged for unsatisfactory work. Opportunity shall be given, however, if possible, for transfer or demotion in lieu of discharge to a type of employment the employee can perform."

The Rules are silent on the issue of cumulative warnings for being of such physical condition as to make it impossible to satisfactorily perform work assignments. The Board did address that issue in the Appeal of Steven M. Miller (P.A.B Decision, January 27, 1989):

"The appellant contested whether his physical condition was such as to make it impossible for him to satisfactorily perform his work assignments. The employee further contended, however, that regardless of whether he was physically able to satisfactorily perform his work assignments, he could not be discharged pursuant to Per 308.03(4) until after he had received at least two prior written warnings.

"... First, a review of Per 308.03(4) reveals that only subsections (a) through (h) relate to procedures for handling 'other offenses.' Subsections (i) and (k) on their face clearly do not relate solely to how 'other offenses' were to be handled. Thus, the placement of subsection (j) in Per 308.03(4); does not necessarily require its application solely to 'other offenses' as defined in Per 308.03(3).

"Second, it would serve no purpose to require prior warnings in situations that fall within the scope of subsection (j). The main purpose of warnings is to point out the specific nature of the offense to the employee in order to permit the employee to take corrective action in the future. See Per 308.03(4) (a) and (b). Subsection (j), however, by its own terms, applies to employees who are of such physical condition 'as to make it impossible for them to satisfactorily perform their work assignments...' Because it is impossible for the employee to satisfactorily perform his or her work assignments, the employee could not take corrective action after receipt of a warning about his or her unsatisfactory work. Thus, it would serve no purpose to require that such an employee receive two prior written warnings for unsatisfactory work before discharge. The Board is reluctant to construe a rule as requiring the doing of useless acts."

In the instant appeal, Ms Boudreau offered the Hospital conflicting information concerning her physical ability to return to work and perform her duties. Although she claimed on December 10, 1990, that she would be able to return to work with medical clearance to perform all her duties, she neither reported to work nor provided the certification. On December 14, 1990, she filed a claim for compensation, alleging that she suffered permanent pain and limited function in one of her limbs.

The Hospital might have first warned the employee for being absent without approved leave, in light of her assertion that she would be able to return to work with full medical clearance. In that warning, the Hospital could have prescribed as specific corrective action that the employee report to work immediately with a full release for duty. When the employee did not return, and subsequently filed her claim for compensation alleging permanent pain and limited function, the Hospital might have discharged her by a second warning

under the provisions of Per 308.03(4)j., for being of such physical condition as to make it impossible for her to perform her duties. Consistent with the Board's earlier ruling in Miller, cumulative warnings for being physically unable to perform the work would have served no useful purpose, as the employee would have been unable to take corrective action to avoid discharge.

When an employee requests leave and is refused such leave, whether paid or unpaid, the appointing authority obviously expects the employee to report to work as scheduled. The Board believes that agencies must address an employee's failure to return to work by applying the provisions of either Per 308.03 (3) b., 308.03 (4) j., or 307.06 (c)(1) and Per 308.03 (a)(1).

In comparing the instant appeal to those of Daly and Fugere, the appellant argued that in order to be discharged, she must have received three warnings for being absent without approved leave. Clearly, when the appellant did not return to work as scheduled, the agency could have issued a letter of warning under the provisions of Per 308.03 (3) b., notifying her that she was absent without approved leave, and that in order to avoid discharge for this offense, she must report to work immediately with full medical clearance to perform all her required duties.

Since the appellant had indicated that she would return to work on December 9, 1990, with certification that her physician had cleared her to return to full duty without restriction or limitation, her failure to report as scheduled would constitute an absence without approved leave. Three warnings for that offense, issued within a reasonable time frame, would have formed the basis for a sustainable discharge from employment. The appellant had no paid leave available to request, however, and the Board therefore finds that the provisions of Per 307.06 are more clearly applicable.

Per 307.06 (c)(1) provides:

"(c) Leave of absence, with or without pay, is counted as state service for the purposes of computing longevity.

"(1) Restoration to position. At the expiration of such leave, or if approved by the appointing authority before the expiration of the leave, the employee shall be reinstated in the service without loss of any of his rights. Failure on the part of an employee to report promptly at the expiration of the leave of absence except for satisfactory reasons submitted in advance, shall be a cause for dismissal."

The Rules themselves provide for discharge when an employee fails to return from a leave of absence (with or without pay), except for satisfactory reasons submitted in advance. Failure to report back from a leave as specified above might be deemed a violation of a published or posted rule warning of automatic discharge.

"308.03 (a) (1) Mandatory discharge. Immediate discharge is mandatory without warning in cases such as, but not necessarily limited to, those listed below, provided that the offense in question is clearly established. . . .

"c. Violation of a posted or published rule that, in itself, warned of automatic discharge."

The facts of this appeal would support such a discharge, if properly executed. The appellant was fully aware that her leave was exhausted, and that she had been denied an extended leave without pay. In spite of the fact that her physician had certified her as unable to work, the appellant insisted that she would return to work with full medical clearance on December 11th.

The agency, upon receiving the appellant's request for an extended leave of absence, could have notified her that her request for additional leave had been denied, and that failure to report to work promptly with full medical clearance would be deemed a violation of Per 307.06 (c)(1), a published or posted rule which would allow for her immediate discharge without prior warning. Particularly in light of the appellant's verbal representations that she would be returning to work and that she could produce certification from her physician that she was fully able to assume her duties, her failure to return as scheduled would constitute a basis for discharge under Per 307.06(c)(1). Having so warned her of impending discharge if she failed to return as scheduled with the required certification, the agency would have then been able to effect a lawful discharge.

Rather than availing itself of any of the provisions of the Rules, and notifying the employee of its intention to effect her discharge under the provisions of those Rules, the Hospital relied on a 'self-termination' policy which has long been deemed invalid by the Court. As such, the discharge must be deemed invalid.

Response to Appointing Authority's  
Requests for Findings of Fact and Rulings of Law

Proposed findings of fact:

1 - 9 and 11 - 12 are granted.  
10 is denied as unsupported by the evidence.

Proposed rulings of law:

1 and 3 are granted.  
2, 4 and 5 are denied.

Decision and Order of the Board

Ms. Boudreau's appeal is hereby granted in part.

Inasmuch as the Hospital had argued that it did not discharge the appellant, and that it would have allowed her to return to work with full clearance from her physician, and inasmuch as the appellant had requested a 90 day leave of absence without pay, which her physician had certified as necessary for her full recovery, the initial separation from service shall be deemed a leave of absence without pay for 90 days, commencing on December 11, 1990 and ending on March 12, 1991. Ms. Boudreau shall be reinstated to her position on the first date following March 12, 1991 that she can demonstrate that she would have been able to return to work with a full medical release for duty without restriction or limitation. The agency shall provide to the appellant such benefits as would ordinarily accrue to an employee with like seniority who has been absent on an unpaid leave of absence.

If, on the date of this order, the appellant is not deemed fit for duty by her treating physician, then the Hospital shall notify her in writing that, pursuant to the provisions of Per 307.06 (c)(1), she will be subject to dismissal for failure to return from a leave of absence without pay.

"(1) Restoration to position. At the expiration of such leave, or if approved by the appointing authority before the expiration of the leave, the employee shall be reinstated in the service without loss of any of his rights. Failure on the part of an employee to report promptly at the expiration of the leave of absence except for satisfactory reasons submitted in advance, shall be a cause for dismissal."

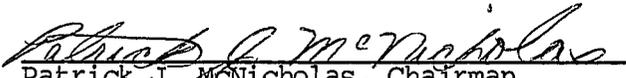
The Hospital shall notify her in writing that failure to report promptly at the expiration of the leave of absence shall be deemed cause for dismissal. The Hospital shall inform the employee in writing that in order to avoid discharge under the provisions of Per 307.06 (c)(1), the employee shall, within fifteen days, report to work with full medical clearance to return to duty, or shall be considered to be in violation of a posted or published rule that, in itself, warns of automatic discharge. Therefore, failure to take such corrective action will result in her formal discharge from employment pursuant to Per 308.03 (a) (1) Mandatory discharge.

"Immediate discharge is mandatory without warning in cases such as, but not necessarily limited to, those listed below, provided that the offense in question is clearly established. . . .

. "c. Violation of a posted or published rule [Per 307.06 (c)(1)] that, in itself, warned of automatic discharge."

The Hospital shall provide a space for the employee to sign such warning, if such warning is issued, shall forward two copies to the employee, requesting that the employee return a signed copy of the letter to the appointing authority. If the employee fails to take the required corrective action within fifteen calendar days, the employee shall be discharged.

THE PERSONNEL APPEALS BOARD

  
Patrick J. McNicholas, Chairman

  
Mark J. Bennett

  
Lisa A. Rule

cc: Virginia A. Vogel, Director of Personnel  
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