

State of New Hampshire

WPPID747



PERSONNEL APPEALS BOARD

State House Annex
Concord, New Hampshire 03301
Telephone (603) 271-3261

APPEAL OF ROBERT CUNNINGHAM Docket #91-T-2 Response to State's Motion for Reconsideration

May 17, 1991

The New Hampshire Personnel Appeals Board (McNicholas, Johnson and Bennett) met Wednesday, May 1, 1991, to review the April 30, 1991 Motion for Reconsideration of the Board's Order dated April 11, 1991, filed by New Hampshire Hospital Director of Legal Service, Barbara Maloney on behalf of the State.

In her Motion, Ms Maloney argues that "The Board found that Mr. Cunningham should have been more forthcoming about his medical problems and acknowledged that there had been difficulty getting full clearances from Mr. Cunningham's physicians. Mr. Cunningham's own testimony was that he was in such pain that he had to leave work". She therefore asked that the Board order Mr. Cunningham's back-pay award stayed until he can persuade his physicians to produce releases for duty which might be acceptable to New Hampshire Hospital.

New Hampshire Hospital has offered no argument to suggest that the delay in securing a full release for work has been the result of any action or inaction on the part of the appellant, and the Board sees no reason why he should be penalized for delay over which he may have no control. The mere fact that the appellant has filed suit as a result of his hospitalization should alert New Hampshire Hospital to the difficulty Mr. Cunningham may experience in trying to secure acceptable releases for duty from the physicians who treated him during his hospitalization.

The Board's decision stated:

"Although Mr. Cunningham should have been more forthcoming with his supervisor(s) about his medical problems or his level of distress at either his job assignment or degree of training, the supervisory staff was certainly aware that a problem was brewing and elected to do little or nothing about it. The staff knew that Mr. Cunningham had had surgery for repair of a hernia, and also knew that his knee had been injured during hospitalization. The supervisory staff knew that there had been difficulty in getting clearance from his treating physicians for Mr. Cunningham's return to work, and admitted that he was a 'good employee for all other practical purposes'." (Emphasis added)

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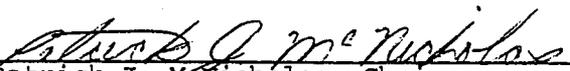
If the Hospital believes that the employee should not be returned to duty because of his physical condition, and that significant delay in securing an acceptable release for full-time work is unavoidable, it should take the same steps it would take in dealing with any other full-time employee whose physician(s) fail to comply with a request for a release for duty; the Hospital should arrange for the appellant to be examined by another physician, without the employee suffering a loss of leave or pay.

Per-A 204.06 (b) of the Rules of the Personnel Appeals Board provides that any motion for rehearing "... shall set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable." If the Hospital believes that the appellant has intentionally delayed the process of securing a release for duty, it should have made such allegation, and provided a competent offer of proof. In the absence of such an allegation, the Board finds no reason to penalize the employee for the failure of his physicians to provide the Hospital with releases which the Hospital might find acceptable.

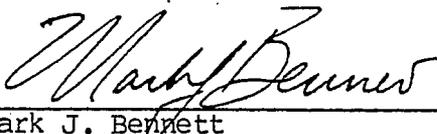
New Hampshire Hospital has failed to provide grounds upon which to argue that the Board's decision in this matter, in light of the testimony and evidence, was either unreasonable or unlawful. Accordingly, the Board finds no basis upon which to grant State's Motion for Reconsideration.

Upon review of the record of this appeal, the Board voted unanimously to deny that Motion and to affirm its decision of April 11, 1991.

THE PERSONNEL APPEALS BOARD


Patrick J. McNicholas, Chairman


Robert J. Johnson


Mark J. Bennett

cc: Virginia A. Vogel, Director of Personnel
Michael C. Reynolds, SEA General Counsel
Barbara Maloney, Director of Legal Services, New Hampshire Hospital
Sharon Sanborn, Director of Human Resources, New Hampshire Hospital

State of New Hampshire

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APPEAL OF ROBERT CUNNINGHAM
Docket #91-T-2
New Hampshire Hospital

April 11, 1991

The New Hampshire Personnel Appeals Board (McNicholas, Johnson and Bennett) met Wednesday, March 13, 1991, to hear the termination appeal of Robert Cunningham, a former employee of New Hampshire Hospital. The appellant was represented by SEA General Counsel Michael C. Reynolds. Barbara Maloney, Director of Legal Services, represented New Hampshire Hospital.

The appellant alleged that he was a permanent, not a probationary employee at the time of his discharge for "walking off the job". He also alleged that even if the Board were to find his employment status to have been probationary, his discharge was arbitrary, capricious, illegal and/or made in bad faith.

Mr. Cunningham was originally hired by New Hampshire Hospital as a part-time Food Service Worker on October 10, 1989. He began working on October 13, 1989, and alleges that in spite of his part-time status, he worked a full 40 hour week from his original date of hire. He was transferred into a full-time position effective October 27, 1989. Both the appellant and his wife, who testified on his behalf, believed the transfer to a full-time position had occurred on October 19, 1989.

During the course of his employment with New Hampshire Hospital, Mr. Cunningham's performance appeared to have been more than satisfactory. The performance evaluation conducted prior to the expected completion of his probationary period, dated February 1, 1990, listed his work as commendable or exceptional in all areas, and recommended that he attain permanent status effective April 27, 1990. On April 5, 1990, however, Mr. Cunningham had surgery for repair of a hernia. When he awoke in the recovery room, he discovered that he had suffered a dislocated patella. His anticipated return to work following the hernia surgery was complicated by the newly sustained knee injury. Mr. Cunningham returned to work on July 19, 1990.

Before being allowed to return to work, Mr. Cunningham was instructed to provide two physician's releases for full-time duty. Initially, Mr. Cunningham returned with two notes from Dr. Moser, the physician treating his knee injury. Ms. Sanborn, the Human Resource Director at New Hampshire

Hospital, told him he could not return to work without clearance from both Dr. Moser and Dr. Clutterbuck, the surgeon who performed the hernia repair surgery. When questioned about the delay in obtaining permission to return to work from Dr. Clutterbuck, Mr. Cunningham explained that he was difficult to reach. Later in the hearing, the appellant admitted that he was suing Dr. Clutterbuck because of the knee injury he sustained while being treated for a hernia, and that he had experienced some difficulty in getting Dr. Clutterbuck to prepare any kind of a release for work.

Mr. Cunningham testified that approval for his return to work "without restrictions" was given only after he assured Dr. Moser and Dr. Clutterbuck that he would be assigned to the regular kitchen and would not be doing any pushing, carrying or heavy lifting. Prior to his leave he had been training to run the grill in the main kitchen, and he believed he would be assigned to similar duty upon his return to work. After his return from leave, however, he was assigned to the dietary kitchen and was required to fix lunch bags, push food carts and deliver snacks twice a day to the wards, with up to twenty persons per ward. Mr. Cunningham testified that when he had been hired as a Food Service Worker in 1989, he'd been promised that he would not be sent into the wards or given unfamiliar assignments without specific training. He testified that he had only received one day's training prior to the assignment he had on the day he walked out.

On August 6, 1990, the date Mr. Cunningham walked off the job, it was common knowledge among the kitchen staff that Cunningham was upset and angry, although he admittedly did not inform anyone specifically that he was in pain. At approximately 11:00 a.m. that morning when one of the cooks, Steve Stylianou, asked him how he was, Cunningham responded "Don't ask". Stylianou testified that he didn't press for additional information. He added that he was not actually on shift at the time, and he assumed he'd get more of the details when he "was on the clock".

Arnold Liane, another of the cooks on duty, testified that he saw Cunningham at about 11:30 a.m. or noon, and that Cunningham was visibly shaken. Although he didn't say he was in pain, he was obviously very upset. When questioned about the possible reason for Cunningham's anger and distress, Liane responded "In my mind, he wasn't given the time he needed to learn this [job]." When Cunningham told him, "I'm quitting" and handed him his keys, Liane had little doubt he was serious.

Dana Lancaster, Director of Food Services at New Hampshire Hospital (formerly Assistant Director of Food Services) testified that he'd sat down to talk with Cunningham and Sharon Sanborn prior to Cunningham's return to work. He stated that normally an employee would not be allowed to take more than 90 days without pay, but that Cunningham was being allowed to return after 117 days of leave because he was a "good employee". When Cunningham was originally hired, the Hospital was still located in the old facility. Cunningham had been in the new facility only one day before he left for surgery, and had spent that

day training to work on the grill. Mr. Lancaster indicated that upon his return to work, Cunningham had been assigned to work downstairs in the dietary kitchen because the Hospital "put [its] better, more reliable people there". He also stated that the working conditions in the dietary kitchen were preferable because the main kitchen tends to be a little wet and a little hazardous,

Mr. Lancaster testified that all Food Service Workers are cross-trained, and that "Most food service workers would be able to do any and all jobs" in the Hospital related to food preparation and service. He argued that Cunningham would have no reason to expect the same duty assignment upon his return to work as that which he had prior to his leave of absence. He did, however, admit that "There are people who have more or less worked into permanent positions in the cafeteria".

Mr. Lancaster stated that he'd been approached on August 6, 1990 at about noon by Arnold Liane. Liane informed him that he believed Cunningham would be coming up in a few minutes to quit his job. Lancaster said he caught up with Cunningham on his way out the door and asked him to come back and sit down to talk about it. He testified that he informed Mr. Cunningham that walking out would constitute giving his notice he was quitting. He said he also reminded him that he hadn't filled out any of the required termination paperwork.

The following morning, August 7, 1990, Cunningham's wife called Lancaster at the Hospital to report that he was ill and would not be coming in to work. She then drove him to Elliot Hospital Emergency Room where he was advised by a physician to stay out of work and rest for three days, and to make a follow-up appointment with his surgeon. After the call from Mrs. Cunningham, Lancaster contacted N.H. Director of Human Resources, Sharon Sanborn, who advised him to call Cunningham back. When he did call, Cunningham advised him that he wanted a change of job assignment. Lancaster said he would not make assignments based on threats that an employee would quit. He testified that the discussion began to get out of hand, at which point he advised Cunningham he would give him a chance to resign rather than be discharged. He reminded Cunningham that he'd walked off in front of three witnesses, and that if he didn't submit a written resignation, he'd be discharged for walking off the job. Cunningham responded that the Hospital would have to discharge him; he would not resign. He was discharged by letter dated August 7, 1990.

The Hospital argued that Mr. Cunningham was a probationary employee on August 6, 1990, and that he walked off the job even after being cautioned that to do so would be deemed his "notice" that he'd quit. The notice of discharge, signed by Dana Lancaster and Wayne Crawford, simply states:

"This letter is to notify you of your termination of employment, effective this date [August 7, 1990], from New Hampshire Hospital for walking off the job on Monday, August 6, 1990."

By its own admission, the Hospital discharged Mr. Cunningham for walking off the job. The letter of discharge did not apprise him of his right to appeal his termination, nor did it cite the authority under which the discharge had been effected.

If the Board were to consider Mr. Cunningham to have been a probationary employee at the time of his discharge as the Hospital contends, his discharge must first be considered in light of then Per 302.23 (c). Dismissal during probationary period.

"At any time during the probationary period an appointing authority may remove an employee whose performance does not meet the required work standard, provided that he shall report such removals to the director and to the employee. Such dismissal shall not be arbitrary, illegal, capricious, or made in bad faith."

With the exception of his unauthorized departure from work on August 6, 1990, Mr. Cunningham had been meeting the work standard. His performance evaluations show his work to be commendable or exceptional in all aspects, and he received a recommendation to attain permanent status prior to his absence for surgery. The appointing authority has failed to demonstrate that his work, in general, warranted his discharge. In fact, the Food Service Director described Cunningham as a "good employee" and insists that his assignment to the dietary kitchen was made because the Hospital "put [its] better, more reliable people there".

On August 6, 1990, Mr. Cunningham had expressed his anger and frustration to a number of supervisory personnel, only one of whom initially made any attempt whatsoever to ascertain the nature or extent of the problem causing him such distress. Neither party disputes the fact that Mr. Cunningham walked off the job. However, there is some dispute concerning the circumstances under which he left, and whether walking off the job under those circumstances warranted his immediate dismissal, whether the Board considers him to be a probationary or a permanent employee.

Walking off the job is perhaps best defined as an optional discharge offense within the meaning of Per 308.03 (2)(c), Refusal to accept job assignments. Per 308.03 (c) provides that:

"In cases such as, but not necessarily limited to the following, the seriousness of the violation may vary. Therefore, in some instances immediate discharge without warning may be warranted, while in other cases one written warning prior to discharge may be indicated. Repetition of any of the following offenses [including Refusal to accept job assignments] after one written warning has been given makes the discharge of the offender mandatory."

The Board believes this rule most adequately addresses the offense for which Mr. Cunningham was discharged, giving rise to this appeal. Although **Mr.** Cunningham should have been more forthcoming with his supervisor(s) about his medical problems or his level of distress at either his job assignment or degree of training, the supervisory staff was certainly aware that a problem was brewing and elected to do little or nothing about it. The staff knew that **Mr.** Cunningham had had surgery for repair of a hernia, and also knew that his knee had been injured during his hospitalization. The supervisory staff knew that there had been difficulty in getting clearance from the treating physicians for Mr. Cunningham's return to work, and admitted that he was a "good employee" for all other practical purposes. None of the supervisory staff recalled "emotional outbursts" by Mr. Cunningham in the past, but admitted their awareness of his level of frustration and distress on the day he walked off the job. Supervisory staff had also informed him he was on a fourteen day "trial period" and that if he didn't do his work he'd be "let go".

In consideration of the evidence and testimony, as well as oral argument by counsel for the appellant and for the Hospital, the Board voted unanimously to grant Mr. Cunningham's appeal in part. His discharge from employment shall be reduced to a written warning under the optional discharge provisions of Per 308.03 (2)(c) for walking off the job. Such warning shall be presented to **Mr.** Cunningham in writing, shall be dated August 7, 1990, and shall clearly inform him that any further incident of walking off the job or refusing a job assignment will result in his discharge from employment. That warning shall remain on file, but shall expire as a basis for discharge on August 6, 1992. Mr. Cunningham shall be reimbursed for all lost wages and benefits, provided however that those wages shall be reduced by any unemployment compensation or interim earnings he may have had between the date of discharge and the effective date of his reinstatement.

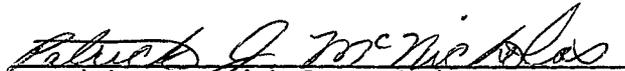
Although in appeals of disciplinary matters the appellant bears the burden of proof, the agency bears the burden of production. The agency must demonstrate that it has carefully and thoughtfully applied the Code of Administrative Rules in managing its employees. In the instant appeal, New Hampshire Hospital failed to produce competent evidence to support its decision to discharge the appellant.

The Hospital failed to document any discussions which may have taken place with the appellant, the appellant's physicians, or the appellant's supervisors. The witnesses appearing on the Hospital's behalf essentially confirmed that it was not uncommon for employees to work their way into "permanent" assignments, leading the Board to conclude that **Mr.** Cunningham could reasonably expect the same job assignment he'd left prior to surgery. In the absence of any documentary evidence to the contrary, the Board must find that the appellant had no reason to believe he would be assigned to the dietary kitchen or made to work on the wards upon his return to work. The Hospital's witnesses essentially agree that Mr. Cunningham had received insufficient training to carry out his assignments upon return to work in

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light of his extended leave. Further, in spite of his obvious distress over a period of several hours, none of the employees claiming supervisory responsibility for the appellant attempted to resolve the problem other than notifying *Mr.* Lancaster that the appellant appeared ready to quit.

THE PERSONNEL APPEALS BOARD


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Sharon A. Sanborn, Human Resource Director, New Hampshire Hospital
Barbara Maloney, Director of Legal Services, New Hampshire Hospital
Dr. Paul Gorman, Superintendent, New Hampshire Hospital
Michael C. Reynolds, ~~SEA~~ General Counsel
Civil Bureau, Office of the Attorney General