

State of New Hampshire



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

APPEAL OF JOHN CUSANO

Docket #98-T-15

New Hampshire Hospital

ORDER ON MOTIONS FOR REHEARING

August 25, 1998

The New Hampshire Personnel appeals Board has reviewed the Motions for Rehearing filed by the New Hampshire Hospital and by Mr. Cusano in which both parties have asked the Board to reconsider its decision of July 2, 1998, reinstating Mr. Cusano to his position as a Mental Health Worker at New Hampshire Hospital.

The Board agrees with the New Hampshire Hospital that sleeping on duty is not an acceptable behavior and an employee is subject to discipline for doing so. While not agreeing with Mr. Cusano's assertion that his constitutional rights were violated, the Board believes that relationships between employers and employees should be governed by some basic principals of equity, recognizing that each case must be viewed on its own merits. The Board does not agree with the very restrictive interpretation given by the New Hampshire Hospital to the last sentence of RSA 21-I:58, I. Instead, the Board relied on the clear language of the Personnel Rules and the Policies of the New Hampshire Hospital which indicate that termination "may" be appropriate and that sleeping on duty is "grounds" for termination in determining what disciplinary order would be "just."

Accordingly, both Motions for Rehearing are DENIED.

THE PERSONNEL APPEALS BOARD



Lisa A. Rule, Acting Chairperson



Robert J. Johnson, Commissioner



Patrick H. Wood, Commissioner

cc: Virginia A. Lamberton, Director of Personnel, 25 Capitol St., Concord, NH 03301
Kerry Barnsley, Staff Attorney, New Hampshire Hospital, 105 Pleasant St., Concord, NH
03301
Michael Reynolds, SEA General Counsel, State Employees Association, PO Box 3303,
Concord, NH 03302-3303

State of New Hampshire



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

APPEAL OF JOHN CUSANO

Docket #98-T-15

New Hampshire Hospital

July 2, 1998

The New Hampshire Personnel Appeals Board (Rule, Wood and Johnson) met on Wednesday, May 27, 1998, under the authority of RSA 21-I:58, to hear the appeal of John Cusano. Mr. Cusano, who was represented at the hearing by SEA General Counsel Michael Reynolds, was appealing his termination from employment as a Mental Health Worker, effective January 20, 1998, for sleeping on duty. Attorney Kerry Barnsley appeared on behalf of New Hampshire Hospital.

The record in this matter consists of the pleadings submitted by the parties prior to the hearing, the tape recording of the hearing on the merits, notices and orders issued by the Board, the Appointing Authority's Request for Findings of Fact and Rulings of Law, and documents admitted into evidence as follows:

State's Exhibits

1. Memo dated October 15, 1997 from Geraldine Hurst
2. Diagram of the area where the incident occurred
3. New Hampshire Hospital Policy and Procedure, Vol. I, Abuse and Neglect, Procedures to Investigate Allegations, Effective 6/17/95
4. State of New Hampshire Department of Health and Human Services, Division of Behavioral Health, New Hampshire Hospital Employee Handbook

5. Redacted copy of Complaint Investigator's Final Report - Abuse/Neglect Investigation at New Hampshire Hospital re: John Cusano dated January 20, 1998
6. January 30, 1998, notice of termination to John Cusano

Appellant's Exhibits

- A. Copies of Performance Evaluations for John Cusano between 1994 and 1996, with attached correspondence
- B. Handwritten statement signed by John Cusano, dated 1/9/98

The following persons gave sworn testimony:

Micheline Tirrell
Charlene Farmer
Geraldine Hurst

Susan Cusano
John Cusano

Findings of Fact

The Appointing Authority's Requests for Findings of Fact #1 - 16 are granted. The Board made additional findings as follows:

1. At the time of the incident on the morning of January 8, 1998, none of the patients on Robin Unit were on "a level," and Mr. Cusano had not been assigned to provide direct care or supervision for any individual patient or patients.
2. Other staff who have fallen asleep while assigned to direct patient care, including those required to "sit a level" with the patient, have received lesser discipline when there were mitigating circumstances for the infraction. Such mitigating circumstances have included illness or fatigue from working mandated over-time hours.
3. During the shift on which the incident occurred, Mr. Cusano asked Ms. Tirrell if he could leave early if he were not feeling well.

4. Ms. Tirrell did not give Mr. Cusano permission to leave and instead asked him to try to make it through the fire drill that was scheduled for that shift.
5. Ms. Tirrell assigned additional work for the shift, to include cleaning out the filing cabinets containing games. Mr. Cusano said that it was not on the assignment sheet for the shift and he would rather not do it.
6. Although Mr. Cusano felt tired, instead of engaging in active work, he sat at the desk on the unit and worked on a newspaper Word Jumble and fell asleep.
7. Mr. Cusano was aware that he would be subject to discipline, up to and including termination from employment, for any acts of Class I or Class II Abuse or Neglect.
8. Mr. Cusano met with New Hampshire Hospital staff prior to his termination to review the allegations and evidence supporting his dismissal on a charge of Class I Neglect.
9. At the meeting, Mr. Cusano offered no compelling evidence to refute the allegations that he was sleeping on duty, nor did he suggest at the time that his sleeping on duty had been improperly classified as Class I Neglect.
10. By failing to stay awake during his assigned shift, Mr. Cusano engaged in conduct that posed a risk of harm to patients and staff.
11. Mr. Cusano committed an act of Class II Neglect by falling asleep on duty when he was not actively involved in direct patient care activities.

Rulings of Law

The Appointing Authority's Request for Rulings of Law #1 is granted. The Board made additional rulings as follows:

- A. Per 1001.05 (b)(3) of the Rules of the Division of Personnel states that, "The appointing authority shall be authorized to immediately suspend an employee without pay, without prior warning, when the offense in question involves: a. Threatening the safety of another employee or client."
- B. Per 1001.08 (b) states that, "In cases such as, but not necessarily limited to, the following, the seriousness of the offense may vary. Therefore, in some circumstances immediate discharge

without warning may be warranted while in other cases one written warning prior to discharge may be warranted." The listed offenses include Per 1001.08 (b)(3): "Violation of a posted or published agency policy, the text of which clearly states that violation of same may result in immediate dismissal."

- C. RSA 21-I:58 provides, in pertinent part, that, "...In all cases, the Board may reinstate an employee or otherwise change or modify any order of the appointing authority, or make such other order as it may deem just."

Decision and Order

Under the provisions of New Hampshire Hospital's Policy on Abuse and Neglect, a substantiated finding of Class I Neglect will result in termination, whereas a substantiated finding of Class II Neglect will result in at least the issuance of a written warning, and may result in more severe discipline including either suspension or termination. In this case, the Board found sufficient evidence that others who have committed similar offenses have not been subjected to immediate termination without warning in all cases.

Clearly, Mr. Cusano was sleeping, and in doing so, he compromised the professional care to which the patients on his assigned unit were entitled. However, the evidence also reflects that there were no patients on "a level" at the time and the appellant's supervisor condoned, at least tacitly, his declining a physically active duty assignment. Instead, he was allowed to sit down with a newspaper to work on a Word Jumble, an activity that hardly could be construed as delivery of patient care. The Board found that his conduct did not rise to the level of Class I Neglect.

By his own admission, Mr. Cusano knew he was tired. When he was unable to obtain permission for an early release from duty, he made no particular efforts to stay awake. Instead, he sat down with a newspaper to work a Word Jumble. Further, when asked to perform an active task such as cleaning out the cabinets, something that might have prevented him from falling asleep, he declined to do so, asserting that it was not on the assignment sheet and therefore not required of him.

Accordingly, the Board found that Mr. Cusano's conduct was a serious instance of Class II Neglect.

Under its policies and procedures, New Hampshire Hospital also had the authority to dismiss the appellant upon a finding of Class II Neglect under the provisions of Per 1001.08(b)(3) of the Rules of the Division of Personnel. However, in light of all the circumstances in this case, and the uncontroverted evidence that falling asleep on duty does not always result in immediate termination, the Board found that discipline short of termination would have been more appropriate.

Accordingly, the Board voted to order Mr. Cusano suspended without pay from the date of separation to the date of this order. For the period of suspension, Mr. Cusano shall not be entitled to any compensation or benefits, including accumulation of seniority credit or accrual of leave.

The appeal is therefore granted in part. The appellant shall be reinstated within 30 days of the date of this order at a time that is mutually agreeable to the parties.

THE PERSONNEL APPEALS BOARD



Lisa A. Rule, Acting Chairman



Patrick H. Wood, Commissioner



Robert J. Johnson, Commissioner

cc: Virginia A. Lambertson, Director of Personnel, 25 Capitol St., Concord, NH 03301
Michael Reynolds, SEA General Counsel, PO Box 3303, Concord, NH 03302-3303
Kerry Bamsley, Staff Attorney, Office of Client and Legal Services, 105 Pleasant St.,
Concord, NH 03301

**THE STATE OF NEW HAMPSHIRE
PERSONNEL APPEALS BOARD**

In Re: Appeal of John Cusano
Docket #: 1998-T-15

APPOINTING AUTHORITY'S REQUEST FOR
FINDINGS OF FACT AND RULINGS OF LAW

Now comes New Hampshire Hospital, the appointing authority in the above-captioned matter and respectfully requests that the Personnel Appeals Board make the following Findings of Fact and Rulings of Law:

1. That John Cusano was rehired by New Hampshire Hospital as a full-time mental health worker assigned to the Anna Philbrook Center on July 31, 1992.
2. That on January 30, 1998 John Cusano was terminated from New Hampshire Hospital for "sleeping on duty" during his regular 11pm to 7am shift commencing at 11pm on Wednesday, January 7th, 1998 on Robin Unit at Anna Philbrook Center, pursuant to **Per 1001.08(a)(3) of the Rules of the Division of Personnel.**
3. That from 11pm on Wednesday, January 7th, 1998 through 7am on Thursday, January 8th, 1998, John Cusano was on duty as a mental health worker, assigned to patient care, on Robin Unit at Anna Philbrook Center.
4. That on January 8th, 1998 at approximately 3:50am Micheline Tirrell, RN, acting in her capacity as Charge Nurse for Robin Unit at Anna Philbrook Center heard and observed John Cusano snoring while on duty as a mental health worker at Anna Philbrook Center.
5. That on January 8th, 1998 at approximately 3:50am Micheline Tirrell, RN, acting in her capacity as Charge Nurse for Robin Unit at Anna Philbrook Center observed that John Cusano was unresponsive to sound, including the sound of a filing cabinet being closed from several feet away, and the sound of a chair being pushed in at the desk where he was sitting and the sound of his name being called in a normal tone of voice from a few feet away.
6. That on January 8th, 1998 at approximately 3:50am Micheline Tirrell, RN, acting in her capacity as Charge Nurse for Robin Unit at Anna Philbrook Center aroused John Cusano from what appeared to her to be a sound sleep, at which time he appeared groggy and disoriented.
7. That on January 8th, 1998 at approximately 5:40am Micheline Tirrell, RN, acting in her capacity as Charge Nurse for Robin Unit at Anna Philbrook Center, reported her observations

directly to Charlene Farmer, acting in her capacity at that time as the complaint investigator for New Hampshire Hospital.

8. That on January 8th, 1998, prior to her departure from the unit at approximately 7:00am Micheline Tirrell, RN, acting in her capacity as Charge Nurse for Robin Unit at Anna Philbrook Center, notified John Cusano that she had made an Abuse & Neglect regarding report his sleeping on duty to Charlene Farmer, the complaint investigator for New Hampshire Hospital on that date.
9. That on the morning of January 9th Charlene Farmer, acting in her capacity at that time as the complaint investigator for New Hampshire Hospital, interviewed John Cusano regarding the Abuse & Neglect report of "sleeping on duty" as made by Nurse Tirrell.
10. That during this interview John Cusano had the opportunity to hear the evidence against him regarding the Abuse & Neglect report of "sleeping on duty" as made by Nurse Tirrell, and had the chance to refute the evidence.
11. That during this interview John Cusano stated to Charlene Farmer that he was aware of the New Hampshire Hospital policy regarding sleeping on duty, as set out in Exhibit 4, which states in pertinent part, at #17 on page 24 "You shall not sleep on duty or at any time on Hospital grounds.", and on the same page just above #17 in bold, capitalized letters **"DISCHARGE FROM EMPLOYMENT MAY RESULT IF YOU VIOLATE ANY ONE OF THE FOLLOWING PROVISIONS. IT IS NO DEFENSE THAT A PATIENT MIGHT HAVE CONSENTED TO YOUR DOING ANY OF THE ACTS DESCRIBED BELOW OR THAT YOU DID ANY ONE OF THEM WITH GOOD INTENTIONS. THE FOLLOWING PROVISIONS MUST BE STRICTLY OBEYED. (This applies to all employees, not just those in direct care.)"**
12. That during this interview John Cusano stated to Charlene Farmer that he was aware of the memo dated October 15, 1997 from Anna Philbrook Center Nurse Coordinator to the 11-7 shift, as set out in Exhibit 1, which states in pertinent part, "1. At NO time is sleeping an acceptable behavior while on duty. Sleeping on duty is always grounds for dismissal."
13. That based on her investigation, Charlene Farmer, acting in her capacity at that time as the complaint investigator for New Hampshire Hospital, made a finding of Class I Neglect and reported that finding to the supervisory staff at Anna Philbrook Center on or about January 20, 1998. (Exhibit 5)
14. That the definition of Class I Neglect as set out in New Hampshire Hospital Policy and Procedure, Volume 1, Patient Rights Section entitled "Abuse & Neglect, Procedures to Investigate Allegations", Effective Date: 6/7/95 at paragraph II(B)(2) includes "sleeping while assigned to patient care". (Exhibit 3)

15. That on January 30, 1998 Geraldine Hurst, acting in her capacity as Anna Philbrook Center Nurse Coordinator, and her Supervisor met with John Cusano and informed him verbally and/or in writing of the extent and nature of the offense he was found to have committed, and the disciplinary action to be taken, and his right to appeal such action under the provisions of RSA 21-I:58. (Exhibit 6).
16. That John Cusano acknowledged receipt of the termination letter by way of his signature thereon.

Request for Rulings of Law

1. Per 1001.08(a) of the Rules of the **Division** of Personnel states that "An appointing **authority shall** be authorized to take the most severe form of discipline by immediately dismissing an employee without warning for offenses such as ... (3) Violation of a posted or published agency policy, the text of which clearly states that violation of same will result in immediate dismissal; ..."

Respectfully submitted,
NEW HAMPSHIRE HOSPITAL
By its attorney,

Dated: May 27, 1998

Kerry D. Barnsley
Staff Attorney
Office of Client and Legal Services
Office of Program Support
Department of Health and Human Services
105 Pleasant Street, Concord, NH 03301
(603) 271-6991