

State of New Hampshire



PERSONNEL APPEALS BOARD

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APPEAL OF ELAINE FUGERE

89-T-17

January 2, 1989 90

The Personnel Appeals Board (McNicholas, Cushman and Scott) met on Wednesday, September 13, 1989, to consider the appeal of Elaine Fugere. The appellant, Ms. Fugere, was represented by Attorney Jon Meyer. Assistant Attorney General Robert Dunn, Jr., represented the State.

Appellant was an Associate Professor in the Dental Auxiliaries Program, a part of the New Hampshire Technical Institute ("NHTI"). She was hired by NHTI in 1981, and was promoted several times. She was promoted to Associate Professor in 1985.

A. Initial termination.

The promotion put Appellant in a higher salary grade, thereby making her eligible for salary increases. On July 13, 1987, Dr. David Larrabee, President of NHTI, gave Appellant a written letter of warning and notified Appellant that she would not receive an annual salary increment for which she would have been eligible in August, 1987. Appellant appealed that denial.

On March 31, 1988, Arthur Harris, Dean of Academic Affairs for NHTI, gave Appellant "notification of an intent not to award an increment increase". He, also informed Appellant that, "according to the requirements of this section [Per 304.04(a)], I shall recommend that you be discharged as of August 21, 1988". Appellant appealed this notification, and later appealed the resulting termination.

After a hearing, the Board, by order dated May 22, 1989, reinstated Appellant, because it ruled that an Appointing Authority may not terminate an employee under the rules relating to annual increments, but must use the rules relating to discipline. The Board denied Appellant back-pay from the date of her termination through March 8, 1989. Following a Motion for Reconsideration, however, the Board on June 26, 1989, ordered Appellant "reinstated without loss of pay". See RSA 21-I:58:I.

B. Second termination.

Following the May 22 order for reinstatement, NHTI sent Appellant notice of her teaching assignment. See Affidavit Exhibit B (May 25 letter, Larrabee to Fugere). That schedule included three days per week of dental assisting work, and two days per week of dental hygiene work. Upon receiving the schedule, Appellant told NHTI that she had very serious reservations about performing her scheduled duties.

In order to understand the objections raised by Appellant, it is necessary to understand the programs at NHTI. NHTI offers a two-year program in dental hygiene leading to an associate's degree, and a one-year program in dental assisting leading to a certificate. NHTI apparently now offers a three-year dental hygiene program, as well. While some subject matter will necessarily overlap, students from the two programs do not seem to mix in the same class.

A dental hygienist has direct patient care, primarily involving oral prophylaxis. A dental assistant will typically assist a dentist by keeping the instruments sterile, and providing assistance in what is known as "four-handed dentistry", handing the dentist required instruments, keeping a "dry field" in the patient's mouth, and adjusting the light at the work area. Although both can have some involvement with similar jobs, such as x-rays and sealants, there is apparently little practical overlap in responsibility. Dental assistants do not have to maintain any licensing, but dental hygienists must register biennially with the State. A dental hygienist typically earns a good deal more than a dental assistant.

Until 1986, the two programs at NHTI were substantially separate. In 1986, the faculty were placed in the newly created dental auxiliaries department. The student body, however, remained separate. Nevertheless, even prior to the merging, faculty within one program would occasionally teach in courses listed in the other program.

Appellant was initially hired as a member of the dental assisting program. Although she was trained as a dental hygienist (NHTI '78), Appellant had little or no practical or academic experience in dental hygiene since shortly after joining the faculty in 1981. Nevertheless, Appellant maintained her New Hampshire certification as a dental hygienist, representing to the State in 1988 application for renewal that she was actively engaged in the practice of dental hygiene.

At the time of her second termination, Appellant was referred to as an Associate Professor of Dental Auxiliaries. Up until the merger of the two departments, and apparently for a time after the merger, Appellant was referred to as an Associate Professor of Dental Assisting. The Board attaches no significance to this carry-over terminology from past practice.

Appellant feared that she would not be capable of adequately performing the dental hygiene component of her teaching assignment. She expressed her concerns to NHTI staff at her first day back, June 2. She asked for a refresher course in dental hygiene procedures, or in the alternative a leave

of absence. Instead, she was offered the services of Department Head Carolyn Hartnett and Division Chair Cheryl Dorfman, who would "be working with you and will be able to update you on clinical instruction procedures". Inter-Department [sic] Communication, Hartnett to Fugere, June 2, 1989.

Appellant's first day of teaching in the dental hygiene clinic, Tuesday, June 6, apparently did not go well. Appellant declined to perform her teaching assignment and was given a non-teaching assignment to occupy her time. The following day, June 7, Dean Harris sent Appellant a strongly worded letter warning her that her reluctance to perform her duties could not be tolerated.

June 7 also saw the filing of a Motion for Contempt by Appellant with the Board. In that Motion, Appellant claimed that her teaching assignment violated the Board's reinstatement order of May 22.

On her second scheduled day of teaching in the dental hygiene clinic, Thursday, June 8, Appellant called in sick. On the same day, NHTI received a letter from Appellant's attorney, dated June 5, in which he states that he had advised Appellant "to perform all her other responsibilities but not to perform supervision of dental hygiene students". Given these mixed signals, NHTI was skeptical of the genuineness of Appellant's claimed illness. See letter, Harris to Fugere, June 8, 1989.

Wednesday, June 7, turned out to be Appellant's last day of work at NHTI. Appellant did not show up for work on the next four work days: June 8, 9, 12 and 13. On Wednesday, June 14, Dr. Larrabee sent a letter to Appellant notifying her that she had exhausted her sick leave, and that she should be back at work by Monday, June 19 or face termination.

Appellant did not return to work. On June 22, Dr. Larrabee gave Appellant a letter of warning for being absent without leave beginning June 9. Dr. Larrabee issued a second letter of warning on June 23 for the same offense. On June 26, Dr. Larrabee issued a third and final letter of warning and notice of termination for being absent without approve leave.

C. Analysis.

1. Propriety of teaching assignment.

The Board treats the Motion for Contempt as raising substantially the same issue presented initially by the Appeal: whether NHTI acted properly in assigning Appellant to a schedule which included two days in the dental hygiene program. For the reasons stated below, the Board finds nothing improper with the assignment.

Quite a lot was made about whether NHTI knew or should have known the Appellant was unqualified to perform her job assignment. NHTI points to Appellant's State certification and her prior training plans. Appellant points out that she had requested an opportunity to refine her skills in the past but was denied. Based on the evidence presented at the hearing, the Board finds no bad faith on the part of NHTI in giving Appellant her assignment or insisting that she perform her duties.

Appellant's replacement was unfortunately only qualified to perform teaching assignments in the dental assisting program. This left NHTI with few options. The Board finds that NHTI could not reasonably have known that Appellant would react so negatively to her assignment. The Board further finds that NHTI acted reasonably, given the short period of time between the Board's May 22 decision to reinstate Appellant and the beginning of the summer term.

2. Issue of sick leave

Appellant argues that proper reinstatement of her leave under the terms of the Board's June 26 order would have provided for paid sick leave to cover at least a portion of her absence during the period of June 8, 1989 and September 13, 1989, the date of her hearing before this Board. She further argues that she could have been granted a leave of absence without pay once such reinstated leave had been exhausted.

Appellant must hold a fine line of argument. Appellant herself testified that she would not have been able to return to work until fairly shortly before the date of the hearing, September 13th. Appellant presented no evidence that she would have been able to return to work, and perform her duties prior to that hearing. Moreover, if Appellant would have been able to return to work within the limits of her sick leave, it casts doubt on the reasonableness of her actions in refusing to do so at the beginning.

Article 11.1. of the Collective Bargaining Agreement (July 1, 1987 through June 30, 1989) provides in pertinent part, "The purpose of sick leave is to afford employees protection against lost income from absences due to illness or injury... and is intended to be used only for the purposes set forth herein..." The Agreement, Article 11.4., further provides that, "An employee may be required by the Employer to furnish the Employer with a certificate from the attending physician or other licensed health care practitioner when, for reasonable cause, the Employer believes that the employee's use of sick leave does not conform to the reasons and requirements for sick leave use set forth in this Agreement. Such certificate shall contain a statement that in the practitioner's professional judgment sick leave is necessary..."

The record of this matter before the Board provides ample evidence to support a finding that NHTI questioned the legitimacy of Appellant's absence from work, and was therefore well within its right to require Appellant to produce certification by a licensed health care practitioner that her leave conformed to the uses set forth in the Agreement. Whether or not Appellant had accrued sick leave available to her at that time is irrelevant to the question of the legitimacy of her absence.

Having been reinstated per the Board's May 22, 1989 Order, Appellant was assigned a teaching schedule which she found objectionable. By letter dated June 5th, addressed to NHTI President Larrabee, Appellant's attorney informed NHTI that he believed her "assignment of supervision in the dental hygiene program [was] not in conformity with the Board's order and unacceptable to [his] client. Accordingly, [he had] advised her to perform all her other responsibilities but not to perform supervision of dental hygiene students".

Appellant reported to work in the dental hygiene clinic on June 6th, but refused to undertake the supervisory duties involving dental hygiene students to which she was assigned. She was then notified by letter dated June 7, 1989, that failure to assume her assigned duties would result in his "[recommendation for] disciplinary action as outlined in the State of New Hampshire Rules of the Department of Personnel Section 308.03 and/or 308.04." He concluded, "I shall expect that you will report to the dental clinic on Thursday, June 8, 1989, by 8:00 a.m. prepared and willing to accept the assignment as given to you". The following day, June 8, Appellant called in sick.

On June 8, 1989, NHTI Dean Arthur Harris wrote to Appellant stating, "I was disturbed to learn that you called the Institute this morning to inform us that you would be absent from your responsibilities because of illness. Later this morning, we received at the Institute, a letter from your attorney indicating that he had advised you not to accept the teaching responsibilities in the Dental Hygiene Clinics. As a result of these two events, I can only wonder about the validity of the illness. Therefore, pursuant to the current Collective Bargaining Agreement... I am requiring you to furnish the Institute with a certificate from an attending physician stating that in the practitioner's professional judgment, the sick leave was necessary. This certificate from your physician must be submitted no later than 4:00 p.m. on Friday, June 16, 1989."

Appellant did not comply with Dean Harris' directive to provide certification from an attending physician by the date specified. It was not until receipt of a letter dated June 26, that Appellant's attorney forwarded a letter dated June 20, from an emergency services clinician at the Manchester Mental Health Center who treated Appellant for emotional distress and exhaustion. The clinician "recommended that [Appellant] be excused from working for an undetermined period of time". Even if that letter had been received at the beginning of Appellant's absence, however, it would have been insufficient for a number of reasons. First, the letter was not from an attending physician as required by Per 307.04(k). Indeed, no evidence was presented that Appellant was under the care of a physician, either at the time of her initial visit to the Center or at anytime thereafter.

Second, the letter does not state even the clinician's opinion that Appellant continued to be unable to return to work, as of the date of the letter, or that "extended leave is necessary" as required by Per 307.04(k). While the Board does not doubt the seriousness of the crisis for Appellant on June 9, Appellant should have presented both NHTI and the Board with more compelling evidence that her illness extended through the date of termination.

Finally, there is no evidence in the record that Appellant even attempted to provide timely certification that her initial or continued absence was due to illness. While Appellant contends "that she made diligent efforts to secure a medical certificate", the record provides no evidence to support that assertion. Given the physical symptoms described by Appellant, it is reasonable to believe that any licensed health care practitioner could have examined her and found her unable to perform her duties if that had been the case. Appellant had ample opportunity to visit any other licensed health care practitioner and secure certification of her illness, since no requirement was

made by NHTI that she provide documentation from the Manchester Mental Health Center. Accordingly, the Board finds that NHTI acted reasonably in requiring Appellant to offer some justification for her absence, and when she produced none treating her as absent without approved leave. See Per 307.04(o).

D. Ruling on Requests.

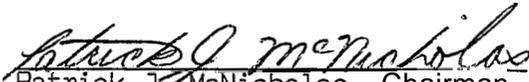
1. Appellant's requests.

The Board grants the following requests for findings of fact: 2, 3, 4, 6, 7, 8, 9, 11, 14, 15, 16, 17, 18, 20, 21, 24, 25, 26, 37, and 38. The remaining requests for finding of fact are either denied in whole, denied in part, or dealt with in the opinion. The Board denies all the requests for rulings of law.

2. State's requests.

The Board grants the following requests for findings of fact: 1-17, 20-35. With respect to requests 18 and 19, the Board grants the so much of each of them as follows the comma, but denies the rest. The Board grants all the requests for rulings of law.

The Personnel Appeals Board


Patrick J. McNicholas, Chairman


George R. Cushman, Jr.

Peter C. Scott

cc: Virginia A. Vogel, Director
Robert Dunn, Assistant Attorney General
Jon Meyer, Esquire

State of New Hampshire

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PERSONNEL APPEALS BOARD

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APPEAL OF ELAINE FUGERE

Docket #89-T-17

Response to Appellant's Motion to Reconsider
and Appellee's Objection to Motion for Reconsideration

March 15, 1990

The New Hampshire Personnel Appeals Board (McNicholas, Cushman and Johnson) met on Wednesday, March 14, 1990, to review the Motion to Reconsider and Affidavit of Jon Meyer filed with the Board on January 22, 1990, in the above-captioned matter. The Board also reviewed the State's Objection to Motion for Reconsideration filed with the Board on February 1, 1990.

Appellant presents for the Board's review twelve reasons for the requested reconsideration, and asks that the Board schedule a hearing on the motion, order NHTI to produce all records relative to Appellant's accrued sick leave, reverse its decision of January 2, 1990, and order Appellant's reinstatement.

The State, in its Objection, argues that the Board's detailed findings of fact and rulings of law were reasonably and lawfully made, and supported by the evidence. The State further objects to the motion on the grounds that Appellant has already had ample opportunity to present her arguments, both through a lengthy hearing and extensive pleadings filed with the Board.

Appellant has raised no arguments which were not addressed in the Board's order of January 2, 1990, nor has Appellant provided sufficient basis for further hearing. Additionally, Appellant has offered no new evidence which could not have been presented in the hearing or pleadings.

In her Motion and attached Affidavit of Jon Meyer, Appellant asks the Board to reconsider and reverse its findings on the issue of sick leave. Specifically, Appellant argues that she made a diligent effort to secure adequate certification that her use of sick leave was legitimate, and was within the purpose defined by the Collective Bargaining Agreement. Attorney Meyer states in part, "On June 9, 1989, I received a phone call from Cher Mason, a nurse

and emergency technician at the Greater Manchester Mental Health Center, who stated that she was in the process of interviewing Elaine Fugere who was in a condition of medical crisis and was not able to return to work. She advised against Elaine having any contact with NHTI. I asked her at that time to provide a letter stating her unavailability for work to be submitted to NHTI."

The record demonstrates that Appellant failed to provide the required certification to the school, even though she and her attorney were fully cognizant of the inevitable consequences. In regard to the approximately three weeks which elapsed between Appellant's visit to Manchester Mental Health Center and the date of her notice of termination, the record contains no evidence of attempts by the appellant, her attorney, or any licensed health care practitioner to notify the Technical Institute that Ms. Fugere was unavailable for work because of illness. The record also contains no evidence of any attempts to apprise the Institute of any difficulty Ms. Fugere might have been having in securing the required documentation.

The Board answers Appellant's Motion, as presented and numbered, as follows:

1. The clear preponderance of the evidence points to NHTI's legitimate need to staff certain educational curricula, and that the employee who was hired to replace Ms. Fugere in the dental assisting curriculum, after Appellant's initial termination, did not possess a license as a dental hygienist, and could not therefore have been assigned to the dental hygiene curriculum after Ms. Fugere's reinstatement. Therefore, the Board reaffirms its finding that NHTI acted reasonably in assigning Ms. Fugere, who held an active license as a dental hygienist to the appropriate program. (See Board order, APPEAL OF ELAINE FUGERE, 89-T-17, January 2, 1989, p.4.)

Additionally, contrary the Appellant's assertion, while NHTI did not grant her request for a "refresher course", it did offer her on-site supervision and guidance, further supporting the Board's conclusion that the Institute acted reasonably in its choice of assignment. (See Board order, APPEAL OF ELAINE FUGERE, 89-T-17, January 2, 1989, p.3.)

- 2., 3. Appellant, when reinstated, was returned to a position of Professor. She was given assignments in the dental hygiene curriculum, being deemed qualified by virtue of her education and her possession of a current license as an active dental hygienist. (See Board order, APPEAL OF ELAINE FUGERE, 89-T-17, January 2, 1989, p.2, 3.)
- 4., 5. Appellant's notice of termination was provided in a third letter of warning for absenteeism without approved leave. Available leave and approved leave are not synonymous.

The adequacy of and requirement for a medical certificate were both raised when the Institute noted, "I was disturbed to learn that you called the Institute this morning to inform us that you would be absent from your responsibilities because of illness. Later this morning, we received at the Institute, a letter from your attorney indicating that he had advised you not to accept the teaching responsibilities in the Dental Hygiene Clinic. As a result of these two events, I can only wonder about the validity of the illness." The letter then went on to cite those provisions of the Collective Bargaining Agreement which authorized the Institute to require certification for the absence due to illness, and the requirement that it be submitted no later than 4:00 p.m. on Friday, June 16, 1989. (See NHII letter of Harris to Fugere, June 8, 1989)

6. Although Appellant argues that the Board erred as a matter of law in requiring that she furnish a letter from her attending physician, the Board's order clearly states that it held Appellant accountable for provision of a certificate from "a physician or other licensed health care practitioner". (See Board order, APPEAL OF ELAINE FUGERE, 89-T-17, January 2, 1989, p.4.) The record reflects that Appellant provided no certification of any kind until after her termination for absenteeism without approved leave.
7. The Institute was authorized under the provisions of Article 11.4 to require certification for Appellant's absence. "An employee may be required by the Employer to furnish the Employer with a certificate from the attending physician or other licensed health care practitioner when, for reasonable cause, the Employer believes the employee's use of sick leave does not conform to the reasons and requirements for sick leave set forth in this Agreement. Such certificate shall contain a statement that in the practitioner's professional judgment sick leave is necessary."

Having received notice from Appellant's attorney that he had advised her not to accept any assignments in the dental hygiene curriculum on the same date that Appellant called in sick, the Institute certainly had "reasonable cause" to believe the employee's use of sick leave did not conform to the uses set forth in the Collective Bargaining Agreement.

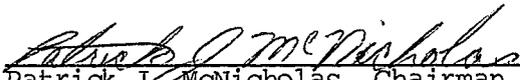
The Board notes that the Agreement provides specifically that the certificate must state that use of sick leave is necessary, not that it was necessary. Therefore, the Board concluded, both reasonably and lawfully, that the certification may be required prior to the conclusion of the requested leave, or the employee's return to work.

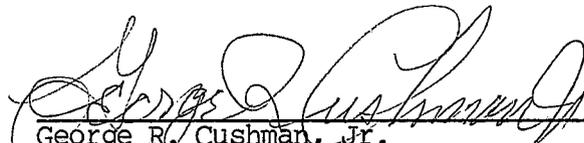
8. The Board's decision to uphold the termination of Elaine Fugere did not turn upon the adequacy of Cher Mason's assessment of Appellant's emotional state. Nor did it turn solely upon Ms. Mason's statement that "it is recommended that she be excused for an undetermined period of time". The Board's decision rested upon Appellant's failure to provide adequate and timely certification, in compliance with Per 307.04(k) and CBA Article 11.4, that her request for sick leave was legitimate and that she should not be discharged for absenteeism without approved leave.
9. Appellant argues that she was not properly warned of the specific nature of the offense or the corrective action required to avoid additional discipline, up to and including termination. On the contrary, NHTI's letter of June 22, 1989 specifically cites absenteeism without approved leave. The obvious corrective action would be to return to work, or to secure approved leave. That letter also explains that "Unless immediate corrective action on your part is taken, you shall be subject to additional disciplinary action which will result in your termination from employment." Nearly identical language is found in NHTI's second and third letters of warning to Ms. Fugere.
10. Again, Appellant argues that the Board erred as a matter of law in upholding the termination premised upon absenteeism. The Board can only reiterate that the termination was not for absenteeism, but specifically for absenteeism without approved leave. (See Board order, APPEAL OF ELAINE FUGERE, 89-T-17, January 2, 1989, p.4-7.)
11. Appellant argues that NHTI violated Per 308.03 by terminating her on June 19, 1989, prior to sending her warnings dated June 22 and June 23. The record indicates that Appellant was discharged June 26, 1989, upon issuance of a third and final letter of warning for absenteeism without approved leave.

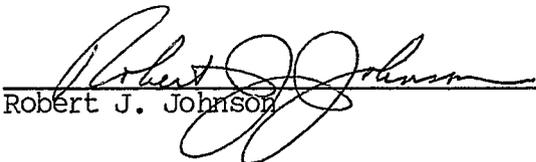
12. Appellant again argues that the Board erred in interpreting Per 307.04 to require the filing of an application for use of sick leave prior to the employee's return to work. That was not the case, as the Board notes in its order of January 2, 1990, and as has been addressed in this order, paragraphs 4 - 8.

Based upon the foregoing, and in careful consideration of all the evidence, testimony, and pleadings by the parties, the Board voted unanimously to deny Appellant's motion, affirming its decision of January 2, 1990.

THE PERSONNEL APPEALS BOARD


Patrick J. McNicholas, Chairman


George R. Cushman, Jr.


Robert J. Johnson

cc: Jon Meyer, Esq.
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