

State of New Hampshire



PERSONNEL APPEALS BOARD

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

APPEAL OF STEPHANIE LANDRY

Docket #93-T-20

Division of Mental Health and Developmental Services

April 19, 1995

The New Hampshire Personnel Appeals Board (Bennett and Rule) met Wednesday, November 16, 1994, and Wednesday, February 8, 1995,¹ to hear the termination appeal of Stephanie Landry, a former probationary employee of the Division of Mental Health and Developmental Services. Ms. Landry was represented at the hearing by Attorney Paul Fitzgerald. Attorney John Martin appeared on behalf of the State. The record in this matter consists of the audio tape recordings of the hearing, documents and pleadings submitted by the parties prior to the hearing, and exhibits admitted into the record at the hearing. The following individuals gave sworn testimony: Rosemary Nitz, David Plummer, Bond Perry, May Goyette, Michael Fitts, Tammy Lord, Stephanie Landry, and James Mercier.

Ms. Landry was terminated from her employment as a Resident Care Assistant Trainee, effective February 10, 1993, for failing to meet the work standard. At the time of her termination, Ms. Landry was assigned to work in the home of a severely physically and mentally disabled client of the agency. Her duties included assisting the client in completing all the basic activities of daily living which the client was unable to perform for himself, including bathing, dressing, eating, drinking, toileting, taking medication, communicating, and ambulating. Ms. Landry was also responsible for keeping complete and accurate records of the client's food and fluid intake, medication, activities, mood, and behavior. When the client relocated to Thornton, New Hampshire, Ms. Landry's responsibilities also included daily household chores, including laundry, housekeeping, cooking, performing errands, and managing the household resources.

When Ms. Landry was first hired, she was assigned to work with the client at Fairview, a community residence of the Division of Mental Health and Developmental Disabilities, where she began a two month training period with instruction specific to the client and his needs. The training included using a G-tube (gastrostomy tube) for administering medications, fluids and nutritional supplements, which the client had an extremely hard time taking orally.

¹ At a prehearing conference convened by the Board on October 20, 1993, the matter was scheduled for a hearing on the merits on June 8, 1994. On June 3, 1994, the appellant requested a continuance. That request was granted on the conditions that there would be no further continuances, and that if Ms. Landry was successful in her appeal and was reinstated with an award of back pay, the award would not include any period of time after June 8, 1994.

Ms. Landry's 3-month probationary performance review, signed by John Craig and Bond Perry, showed the appellant as "meeting expectations" in each of the performance evaluation categories. Overall her supervisors were pleased with her progress, although there were suggestions for improvement in the general areas of quantity and quality of work, with specific reference to making sure the client remained her focus at all times, being careful with the client's personal appearance and that of his home, and being conscientious and diligent in ensuring that all work was completed accurately. In the section for communications, the evaluator commented that Ms. Landry needed "to be careful that she communicates her intent clearly, with co-workers in particular - a common problem at present, maybe due to the scheduling and set-up of [the] program."

Rosemary Nitz, the registered nurse responsible for over-seeing the client's care, testified that she spoke to Ms. Landry approximately 5 to 7 times between August, 1992 and September, 1992, about her work performance, specifically discussing that the client and not the television set needed to be her focus 100% of the time. She testified that by October, Ms. Landry's performance seemed to have improved significantly, and that she appeared to be doing a good job. Ms. Nitz testified that in October, 1992, the client moved from Fairview to his own home in Thornton, where he would be cared for around the clock by a rotation of five staff persons. She testified that she, Bond Perry and John Craig were all somewhat concerned about the move, since the Thornton home was isolated, and farther away from services than the Laconia residence.

Ms. Nitz testified that in November, 1992, the client began treating with a new physician who decided to change some of the medication the client was using. He elected to wean the client off regular doses of milk of magnesia (a bowel stimulant) in favor of Colace (a stool softener). Ms. Nitz testified that it was critical for all staff to follow the change in medication closely to ensure that the client did not develop an impacted bowel and become ill. She testified that all staff were informed of the seriousness of any medication errors. Ms. Nitz testified that on November 15, 1992, Ms. Landry failed to give the client his required dose of milk of magnesia, and also failed to report the medication error properly. Ms. Nitz testified that Ms. Landry made the same error on November 20, 1992, failing to give the client the dose of milk of magnesia prescribed for him. Although the appellant did document the medication error, Ms. Nitz testified that she was still very concerned that a staff person would make the same mistake with precisely the same medication twice in a period of less than one week.

Ms. Nitz testified that in December, 1992, she began to hear reports that Ms. Landry was spending more time with the client's brother than with the client himself. She said that she spoke with Ms. Landry, warning her that there was a risk in developing a personal relationship with the client's brother. She said she also told Ms. Landry she was very concerned that the client was not getting the amount of attention he needed. She testified that throughout the first two months of training, and in the months which followed, she had to speak with the appellant about ensuring that the client was "the focus 100% of the time."

Ms. Nitz testified that during the course of Ms. Landry's assignment in Thornton, she demonstrated extremely poor judgement by taking the client out for the entire day to ice races. Ms. Nitz described the extent of the client's disabilities, noting that because the client is not ambulatory and is confined to a wheelchair, he would be unable to warm himself by moving around or getting into warmer clothing. Because the client is non-verbal, he would be unable to make any of his specific needs known, such as asking for additional clothing or a hot drink. Ms. Nitz testified that through the course of the day, the client could not take sufficient fluids without use of the G-tube, and would need wet undergarments changed because he is unable

to toilet himself. She testified that performing either procedure in the cold could be very dangerous, particularly because of the client's fragile health.

Ms. Nitz testified that as serious as these incidents were, she, Mr. Craig and Mr. Perry still believed that on the whole, Ms. Landry was doing a fairly good job. However, Ms. Nitz testified that she began hearing complaints from other staff members that the client's many medical and dental appointments, as well as the necessary household errands, always seemed to be scheduled on Ms. Landry's days off, and that Ms. Landry always seemed to have an excuse why she couldn't participate in those activities with the client. Ms. Nitz heard complaints from other staff members that Ms. Landry was not taking proper care of the client's personal hygiene or nutrition. She also received a complaint from the client's mother and guardian that reports of the client's activities in the community were inaccurate.² Ms. Nitz also discovered that Ms. Landry had made a false report of taking the client out for the day when, in fact, she had taken the client's nephew instead.

David Plummer, one of Ms. Landry's co-workers at the Thornton residence, was among the first to discover Ms. Landry's possible falsification of records about the client. On February 1, 1993, Mr. Plummer advised Ms. Landry that she would need to purchase liquid Tylenol during her shift. The client had been scheduled to receive pain medication at 10:00 a.m. and 4:00 p.m. However, when Mr. Plummer had attempted to administer the medication during his shift, he discovered that there was only a half of a dose of liquid Tylenol left in the bottle. Mr. Plummer returned the liquid to the bottle and administered the medication via suppository, expecting the two staff persons on the next rotation to pick up the Tylenol during their shift. Neither Ms. Landry nor her co-worker went out to get the Tylenol, leaving responsibility for picking up the medication to the next shift.

When Mr. Plummer later looked at the client's records, he discovered that Ms. Landry had documented giving the client a full dose of the liquid by mouth. Ms. Landry testified that there had been a full dose available, that she had administered the medication orally, and that she had been unable to leave the residence to purchase more liquid Tylenol because it would have required her to leave the client alone with an inexperienced staff person. She testified that she had asked another staff person to pick up more medicine the following day.

After hearing a report of the Tylenol incident, Ms. Nitz and Mr. Luff met with Ms. Landry on February 3, 1993, in Laconia. Ms. Nitz testified that the appellant was "scared stiff and afraid she was going to lose her job." Ms. Nitz said she assured the appellant that she was not going to be fired at that time, but that there were some serious concerns about her performance. She testified that she spoke with Ms. Landry about falsifying records, and discussed the complaints she had received from other staff members that Ms. Landry was not taking good care of the client. She said that they discussed general hygiene issues, including bathing the client and washing his hair, and "site care" for the area of the ostomy where the client's feeding tube was inserted. Ms. Nitz said that Ms. Landry told her how sorry she was and said that she wanted to apologize to her co-workers. Ms. Nitz said she told Ms. Landry that it was the client who needed the apology and an assurance of proper care. She testified that Ms. Landry was told

² Ms. Landry's report said that she had taken the client into a Burger King, but the receipt showed that they had gone to the drive-thru. Ms. Landry also reported that she had taken the client into the Campton Cupboard, an old country store. However, the aisles are very small and the client's wheelchair would not have fit, leading the agency to believe that the report misrepresented her community activities with the client.

that she had received her final warning, and that without improvement she would lose her job.

Mr. Plummer testified that under normal circumstances, the client would urinate throughout the night, requiring as many as three diaper changes, if his intake of food and fluid had been sufficient during the day. He testified that after a sixteen hour shift with Ms. Landry, the client would often be dry, suggesting that he had not had enough fluids. Mr. Plummer testified that when he met with Rosemary Nitz, Paul Luff and Sally Divers on February 5, 1993, he shared his concerns about fluids not being given, and mentioned that after looking at the client's records, he also was afraid the client wasn't getting the prescribed dose of Colace for proper bowel function. Mr. Plummer testified that when he had spoken with Ms. Landry about those concerns, she told him she thought that people were teaming up against her. He said she also admitted to falsifying the report about giving the client Tylenol.

At that February 5, 1992 meeting with Mr. Plummer, Mr. Luff and Ms. Divers, Ms. Nitz directed the staff to count the tablets of Colace before Ms. Landry's next shift on February 6th; and to count them again afterward to see if he had received the correct dose. In addition to counting the Colace, Mr. Plummer decided to undertake his own investigation to produce evidence that Ms. Landry was not taking care of the client's needs. Mr. Plummer placed small pieces of bread in the G-tube and in the client's toothbrush to see whether or not they were used during Ms. Landry's shift. Mr. Plummer said that if the tube was used, the bread would have been flushed out when the tube was first rinsed, or if the tube had clogged, it would not have been usable. He testified that he had also rearranged the towels in the bathroom so he would know whether or not they had been used, which he believed would tell him whether or not Ms. Landry had bathed the client. He also put powder in the bathtub to see if it had been used.

When Mr. Plummer came on duty following Ms. Landry's sixteen hour shift, he checked both the toothbrush and feeding tube, and saw that both pieces of bread were still in place. Mr. Plummer testified that there were only 2 Colace tablets gone instead of the 4 which should have been given. Mr. Plummer reviewed the client's log and found that Ms. Landry had documented giving the client 50 ounces of fluid, 41 of which she claimed to have administered via the G-tube, even though the tube could not have been used without dislodging the bread.³ Mr. Plummer did not believe Ms. Landry had bathed the client, although he could not offer any proof to the contrary.

Mr. Plummer was quite upset. He telephoned Rosemary Nitz and left a message on her home answering machine, which she received at approximately midnight. Mr. Plummer testified that he administered small quantities of liquids to the client throughout the night. He also testified that he would have taken the client with him before he would have allowed him to spend another 16 hour shift with Ms. Landry.

Ms. Nitz called her supervisor, Bond Perry on Monday morning to apprise him of the situation in Thornton. Mr. Perry then sent Ms. Nitz to Thornton to dismiss the appellant. Ms. Nitz testified that when she arrived in Thornton on Monday, February 8, 1993, she took the appellant to the basement of the residence and told her what the other staff had told her regarding the client's care during the appellant's last sixteen hour shift. Ms. Nitz testified that when she told Ms. Landry that it appeared she had not bathed the client, Ms. Landry said it only appeared that way because she had cleaned the bathroom, done the laundry, and put the

³ The daily log shows that the client received 16 ounces of fluid via the G-tube at breakfast, 9 ounces via the G-tube at lunch, and 16 ounces via the G-tube at dinner.

towels away after bathing the client. When confronted with the issue of the piece of bread still in the toothbrush, Ms. Landry said she had used an electric toothbrush instead. When Ms. Landry was asked about the log showing food, medicine and fluids given to the client, Ms. Landry never denied failing to give the client fluids. Instead, she asked what proof Ms. Nitz had that fluids were not administered. Ms. Landry was immediately discharged from her position for failure to meet the work standard.

Mr. Fitzgerald argued that an investigation performed by Michael Fitts of the State Division of Elderly and Adult Services did not substantiate any allegations of either abuse or neglect by Ms. Landry. He further argued that an independent investigation performed by May Goyette, the investigator for the Lakes Region Community Services Council only resulted in a recommendation that Ms. Landry be prohibited from working with this client, not that Ms. Landry be disciplined or dismissed. Mr. Fitzgerald argued that Ms. Landry had grown very fond of the client, and while she admitted to certain errors in caring for him, none of her conduct warranted discipline more severe than either an oral or a written warning.

Standard of Review

Ms. Landry was a probationary employee, subject to the provisions of Per 1001.02 (a):

"At any time during the initial probationary period an appointing authority may dismiss an employee who fails to meet the work standard provided the dismissal is not: (1) arbitrary; (2) illegal; (3) capricious; or (4) made in bad faith."

In consideration of the testimony and evidence presented by both parties, the Board found that the Department of Health and Human Services acted within its discretion when it discharged Ms. Landry from her employment for failing to meet the work standard. Ms. Landry, a probationary employee, was subject to dismissal at any time during the initial probationary period for failure to meet the work standard. The record reflects that while the agency believed Ms. Landry's performance was improving over time, the appellant continued to make errors in client care reflecting poor judgment, improper record keeping, and poor working relationships with her peers. On February 3, 1993, after learning that Ms. Landry had failed to purchase liquid Tylenol for the client and had reported giving him a full dose of medication when only a half dose was available, Ms. Nitz warned Ms. Landry that her employment was in jeopardy, and that unless her performance improved immediately, she would be dismissed. On February 8, 1993, when discussion with other staff and review of client records persuaded Ms. Nitz that the appellant had falsified client care records and had failed to provide the necessary fluids and medication the client required, Ms. Nitz discharged Ms. Landry from her position of Resident Care Assistant.

That decision was neither arbitrary nor capricious. The agency reasonably relied upon client care records, personal observations and Ms. Landry's own admissions in determining that the appellant was not performing her responsibilities satisfactorily. Finding Ms. Landry's work performance to be unsatisfactory did not require an administrative finding by the Division of Elderly and Adult Services that she had either abused or neglected the client.

The termination was not illegal. Per 1001.02(a) authorizes an appointing authority to terminate probationary employees who fail to meet the work standard, provided that the appointing authority meets with the employee to discuss the reasons for termination, and provides notice of the termination to the employee in writing. The appointing authority met with Ms. Landry, informed her of the reasons supporting her termination, and provided written notice to her that

she had failed to meet the work standard.

The termination was not in bad faith. Ms. Landry was fully aware of her duties and responsibilities, and what was expected of her in providing satisfactory client care. In early February, 1993, Ms. Landry had clear warning that there were serious concerns about her performance, and that she was in jeopardy of losing her job if her work did not improve.

On the weight of the evidence, the Board voted unanimously to uphold the decision of the Division of Mental Health and Developmental Services to terminate Ms. Landry's employment prior to completion of her probationary period for failure to meet the work standard. The requests for findings of fact and rulings of law submitted by the Division of Mental Health and Developmental Services are all granted, to the extent that they are consistent with the Board's decision in this matter. Accordingly, Ms. Landry's appeal is denied.

THE PERSONNEL APPEALS BOARD



Mark J. Bennett, Acting Chairman



Lisa A. Rule, Commissioner

cc: Virginia A. Lamberton, Director of Personnel
John Martin, Esq., Division of Mental Health and Developmental Services
Paul Fitzgerald, Esq., Fitzgerald and Sessler, P.A., 11 Academy Sq., Laconia, NH 03246