

THE STATE OF NEW HAMPSHIRE  
PERSONNEL APPEALS BOARD

Appeal of Thomas Luksza  
No. 92-T-29  
(New Hampshire Hospital)

Decision and Order

The appellant, Thomas Luksza, was employed by New Hampshire Hospital, the agency, commencing in March of 1992, in the position of a Certified Nursing Assistant. He obtained his certification as a nursing assistant through his own initiative via the successful completion of a nine week course offered by the Red Cross. This evidenced some ability to "access the system," was unusual, and made the appellant an attractive applicant to Patricia Cutting, RN, Administrator of the Psychiatric Nursing Home facility of the agency, who selected him, and apparently appointed him to the position in question.

As part of the employment process, the appellant completed an application for employment (NHH 1), which in pertinent part, asked him if he had ever been convicted of a crime that has not been annulled by a Court. The form goes on to explain that conviction is not an automatic bar to employment, that each case is considered on its own merits. If convicted, one is asked to explain in the space provided below, and the applicant is admonished that a lack of explanation or a failure to answer the question about conviction

will be a basis for rejection of the application. The appellant answered "no" to the question. On the last page of the application the appellant signed the required affirmation appearing above the signature line, which reads:

"I certify that there are no willful misrepresentations of the above statements and answers to questions. I understand that should an investigation disclose such misrepresentations, my application may be rejected and, should I be employed, my services may be terminated."

The Board finds that clear notice of the consequences of willful misrepresentation on the employment application was communicated in writing to the appellant.

The issue in this case arises from a subsequent post-employment part of the employment process. The agency checked to see if the appellant had a criminal record. He did. This was communicated to Ms. Cutting, and this triggered two meetings leading to the appellant's termination from his position during his probationary period. (It is undisputed that the appellant was a probationary employee).

The first meeting occurred on June 9, 1992, between the appellant and Ms. Cutting and was held, as Ms. Cutting's testimony indicates, to determine whether the appellant willfully misrepresented facts regarding conviction of a crime on his application for employment so that a determination could be made, if indeed a willful misrepresentation had occurred, what to do about it.

By way of background, in May of 1991, the appellant was going through a difficult time with his domestic situation tending toward divorce. He indicates that the **tumult** of that situation left him having coffee one night, and upon leaving the site where he was having coffee, he passed a nursery and removed an undetermined **number** of potted plants which he intended to give to his wife, or former wife. This act was noted, the defendant was located and arrested. He cooperated with authorities and returned the plants. At his subsequent arraignment he pleaded **nolo** contendere, was convicted of theft by unauthorized taking, and was sentenced to 20 days in the House of Correction, and was committed to serve that time. He applied to his divorce lawyer for assistance, and she moved the Court to suspend the balance of the **appellant's** sentence and to amend the same to grant him a conditional discharge of the records of his criminal conviction. This motion was granted, the appellant regained his freedom after a few days, and his attorney explained to him what the court had done.

The appellant says that he learned that his record would be cleared if he was of good behavior for a year. He has been, apparently, and he had no prior criminal history and is unfamiliar with the criminal justice system. The conviction occurred on May 13, 1991, the motion was granted on May 15, 1991, the application for employment was completed on February 4, 1992, within one year of the conviction, suspension, and grant of the conditional discharge. The application was within the one year period that the appellant concededly knew he had to be of good behavior if his

record was to be cleared. By his own testimony, appellant concedes that his record would not, on February 4, 1992, have been "cleared." Nonetheless, ostensibly without thinking, or mistakenly believing that a year had passed, or otherwise unwillingly, as the appellant would have us believe from his testimony, he checked the "no" line in response to the inquiry about conviction history.

The conviction here would not have been conclusively disqualifying to continued employment according to Ms. Cutting. Rather, she wanted to get an explanation out of the June 9, 1992, meeting which would permit her to determine whether the appellant had willfully misrepresented a material fact on his employment application. Ms. Cutting testifies that the appellant gave her essentially the explanation hereinabove set forth. However, she seems not to accept it because the matter of record annulment should be of great importance to the appellant, who had taken no steps, with his attorney, or otherwise, to "**clear**" his record and obtain, and presumably have available to produce to Ms. Cutting, **documentation** of the "**cleared**" record, or at least the imminence of that end. Ms. Cutting decided to terminate the appellant after the meeting, reflection, and a conference with Mark Chittum, who is involved in the business operations of Ms. **Cutting's** unit. The termination was effected at a meeting on June 15, 1992, when a

termination letter was presented to the appellant. This appeal followed in a timely fashion.<sup>1</sup>

The appellant raises several arguments why his appeal should be granted and he should be reinstated.

First, the appellant argues that the pertinent statutory sentencing scheme set forth in RSA 651 provided that conditional discharges for misdemeanors, such as the appellant was convicted of, must be of a one-year duration, if granted by the Court. Thus, despite the two-year references in **appellant's counsel's** motion to the court, which appellant says he may not have seen until the instant hearing on December 9, 1992, his understanding of the one year period should be given great credence. The Board finds this argument to be of no relevance or persuasiveness because the application occurred within one year of the plea and conviction and initial sentencing.

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<sup>1</sup> Testimony was received without objection that the appellant had failed to arrive at work or to call in to notify his employer that he would not be coming to work, so-called "no show, no call" absences, on at least two occasions. Cutting says this had no effect on her decision to terminate the appellant except that she tried to do so a bit more quickly as a result. She had her staff tell him not to bother to return to work on Friday, June 12, the date of one such "no show, no call." A meeting to deal with the termination letter was scheduled for June 15. The termination letter does not deal with these absences which arguably are instances where the work standard has not been met. We do not consider them in connection with our analysis as they are not a basis for termination in the termination letter. Parenthetically, the Board notes that this is a close case. An agency seeking to discharge an employee maximizes its likelihood of success and fosters judicial economy by setting forth every ground it has which it can prove for its action.

Secondly, the appellant argues that his state of mind is paramount in deciding this case. In other words, if he **didn't** intentionally misrepresent the fact that he had indeed been convicted of a misdemeanor due to his own legitimate confusion on this technical point, then the termination should not stand. While the Board is inclined to believe that the appellant did not fully understand the nuances of his conditional discharge and various other technical matters, that did not constitute an annulment of his record, or a "clearing" of it, in his words, and on the instant facts is of no great relevance. It is undisputed on the evidence before us that the appellant knew that he had to be of good behavior for a year (from conviction or suspension of his sentence, although which date is of no practical importance here), in order that his record would be "cleared." Quite simply, eight or nine months later he applied for the NCA job and indicated that he had never been convicted of a misdemeanor which had not been annulled by a Court. The appellant seems to have known better by his own admission.

However, to some degree the question is to what extent we should require applicants to make sure that the answers to questions on state job applications are true. While state of mind of an applicant is legitimately a subjective matter, it will be reviewed by us objectively against a standard of reasonableness. On the testimony and evidence before us, as Ms. Cutting also found, it was unreasonable for the appellant to respond to the question about convictions as he did. He served three days in jail for his

**nolo** plea, but discounts the entire matter when asked about criminal convictions in connection with a job he very much wants, to the extent that he even got the training he needed for it on his own. He could have either responded carefully, fully and honestly, or applied a couple of months later when his record was "**cleared,**" or checked with his lawyer to clarify his status. On all the evidence, the Board finds that the applicant's answer was a misrepresentation. In that his explanation of how that answer came to pass was unreasonable on the evidence before us, it was a willful misrepresentation.

Thirdly, the appellant argues the novel proposition that discipline founded upon the instant application cannot occur under the current rules of the Division of Personnel because those self-same rules do not incorporate the former rules in any way and the application occurred when the old rules were the effective ones. The Board finds this contention to be without merit, if not preposterous on the facts herein. Initially, we do not believe that a different result would be likely to obtain under either set of rules. Moreover, the application herein, as noted above, clearly states the consequences of a willful misrepresentation thereon. The applicant, having actual notice of the **state's** requirements, cannot object to the application of the current personnel rules to a matter they expressly deal with both consistently with the former rules, and more clearly than the former rules did. This is a technical argument which appears intended only to defeat the application of a rational framework for

dealing with a real problem in a case where actual notice and the opportunity for a complete and fair hearing has assured due process.

Lastly, the appellant argues that Per 1001.02, under which he was ostensibly terminated, must be construed to mean that, during the probationary period, an appointing authority may dismiss an employee only if he fails to meet the work standard and the dismissal is not arbitrary, illegal, capricious or made in bad faith. There is a little appeal to this argument in that the completion of the application is arguably prior to the initial probationary period. Thus, the question arises as to whether or not a willful misrepresentation thereon can be seen to be a violation of the work standard pertinent to the initial probationary period. (Appellant makes no credible showing that the instant dismissal is arbitrary, illegal, capricious or made in bad faith.) The Board is of the view that, if an employee is hired, employment relates back to cover the completion of the application in a truthful manner, as all documentation should be completed. Accordingly, failure to do so is a violation of the work standard, possibly supporting termination. This is particularly reasonable when the rules are read as a whole to effectuate their purposes, and in light of the actual notice given the appellant of the consequences of a willful misrepresentation on his application.

Thus, we conclude that it was not unreasonable or unlawful for the appointing authority to terminate the appellant's employment under the facts of this case as adduced from the evidence presented

to us, 'because it could reasonably and lawfully be found by the appointing authority that he failed to meet the work standard and said termination was not arbitrary, illegal, capricious or made in bad faith.<sup>2</sup>

At this juncture it is appropriate to point out that, ordinarily, instances of willful misrepresentations in applications for employment should be dealt with under current rule Per. **1001.08(b)(6)(e)**, because that rule deals, of all of the extant Personnel Rules, most specifically with this issue. As we have found, it does not deal with it exclusively. In any case, the application form in the instant case, the letter of dismissal, and the testimony indicate that fair notice was given of the consequences of a willful misrepresentation in the instant application to the appellant. It is harmless that this rule was not cited in the termination letter, and our analysis thereunder would yield the same result for essentially the same reasons.

The agency has submitted requests for findings of fact and rulings of law which we address as follows:

Findings 1, 2, 4, 7 and 8, rulings 2 and 3 are granted.

Finding 3 is granted in part as the exact date of employment was not proved with certitude, only the month.

Finding 5 is neither granted nor denied.

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<sup>2</sup> In reaching this conclusion we are mindful of NHH-2, but put little weight in it as evidence of the work standard on this point. All documentation is expected to be reasonably accurate documentation.

Finding 6 is granted in part as it does not accurately reflect the sentencing on May 13, 1991.

Finding 9 is denied.

Finding 10 is denied as it misstates the standard to be "**purposefully**," otherwise it is granted.

Ruling 1 is granted in part in light of the last paragraph of the foregoing decision.

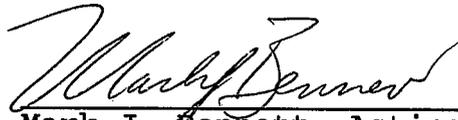
Ruling 4 is granted in part and denied with respect to the word "**knowing**" which is not the mental state at issue here.

Ruling 5 is denied.

Ruling 6 is granted in part. The instant termination was neither unlawful nor unreasonable on the evidence.

For the foregoing reasons the instant appeal is denied. So ordered.

The Personnel Appeals Board

  
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Mark J. Bennett, Acting Chairman

  
\_\_\_\_\_  
Robert J. Johnson, Commissioner

  
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Lisa A. Rule, Commissioner

This 21st day of December, 1992.

# State of New Hampshire



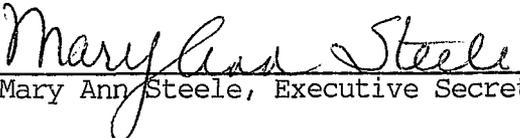
**PERSONNEL APPEALS BOARD**  
State House Annex  
Concord, New Hampshire 03301  
Telephone (603) 271-3261

## **APPEAL OF THOMAS LUKSZA**

Docket #92-T-29  
(New Hampshire Hospital)

December 21, 1992

The Decision and Order of the Personnel Appeals Board in the matter of Thomas Luksza's appeal of termination from employment at New Hampshire Hospital prior to completion of his probationary period as a Certified Nursing Assistant is attached herewith.

  
Mary Ann Steele, Executive Secretary

cc: Virginia A. Vogel, Director of Personnel  
Barbara Maloney, Director of Legal Services, New Hampshire Hospital  
Michael C. Reynolds, SEA General Counsel  
Marie Lang, Human Resource Administrator, New Hampshire Hospital

# State of New Hampshire



## PERSONNEL APPEALS BOARD

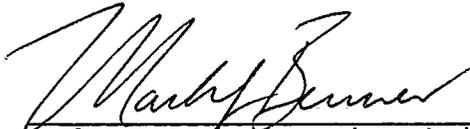
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APPEAL OF THOMAS LUKSZA  
Docket #92-T-29  
Response to Appellant's Motion for Reconsideration  
and  
State's Objection to Motion for Reconsideration

March 4, 1993

The New Hampshire Personnel Appeals Board (Bennett, Johnson and Rule) met Wednesday, January 20, 1993, to consider the Appellant's Motion for Reconsideration and the State's Objection to that Motion in the above-captioned appeal. Having reviewed the January 8, 1993 Motion and January 18, 1993 Objection in conjunction with the Board's decision in this matter, the Board voted unanimously to deny the Appellant's Motion. In so doing, the Board also voted to affirm its December 21, 1992 decision upholding Mr. Luksza's termination from employment.

THE PERSONNEL APPEALS BOARD

  
Mark J. Bennett, Acting Chairman

  
Robert J. Johnson, Commissioner

  
Lisa A. Rule, Commissioner

cc: Virginia A. Lamberton, Director of Personnel  
Michael C. Reynolds, General Counsel, State Employees' Association  
Barbara Maloney, Director of Legal Services, NHH  
Marie Lang, Human Resource Administrator, NHH