

# State of New Hampshire



## PERSONNEL APPEALS BOARD

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

### Appeal of Steven Searles Docket #95 - T - 17

#### Department of Health and Human Services

July 12, 1995

The New Hampshire Personnel Appeals Board (Bennett, Johnson and Rule) met Wednesday, July 5, 1995, to hear the appeal of Steven Searles, a former employee of the Department of Health and Human Services, who was appealing his January 6, 1995 termination from employment under the procedures for non-disciplinary removal, following a determination that Mr. Searles was medically unable to perform the essential duties of his position. Sandra Platt, Administrator, appeared on behalf of the Department of Health and Human Services. M. J. Mickey Busca, SEA Legal Intern, appeared on behalf of the appellant. The record in this matter consists of the parties' pleadings, exhibits admitted into the record, and the audio tape recording of the hearing.<sup>1</sup> The parties also stipulated that Mr. Searles was totally disabled from performing the essential functions of his Youth Counselor position at the Youth Development Center.

#### Standard of Review

##### PART Per 1002 'REMOVAL FOR NON-DISCIPLINARY REASONS

Per 1002.01 Purpose. The purpose of this Rule shall be to provide for the removal of an employee for non-disciplinary reasons, when:

- (a) The employee is medically unable to perform the required duties and responsibilities of the position to which appointed;
- (b) The employee's medical condition creates a hazard for the employee, the employee's co-workers or clients of the agency; or
- (c) The employee's presence in the workplace, because of the medical condition, is deleterious to the employee's health.

Per 1002.03 (b) Prior to removal of an employee under the provisions of Per 1002.01, the appointing authority shall determine if any of the following adjustments can be made to allow the employee to avoid removal for non-disciplinary reason(s):

---

<sup>1</sup> In preliminary matters, Ms. Platt advised the Board that the parties wished to proceed on offers of proof, and to have the Board decide the case on those offers and the documentary evidence admitted into the record.

- (1) Amend the duties of the position to accommodate the employee's known medical **condition(s)** provided, however, that such amendment does not alter the essential duties and responsibilities of the employee's position;
- (2) Transfer the employee to a position for which the employee qualifies which will not require removal under the provisions of Per 1002.01; or
- (3) Demote the employee to a position for which the employee qualifies which will not require removal under the provisions of Per 1002.01.

### **Findings of Fact**

1. Mr. Searles was a permanent, full-time employee of the Youth Development Center when, on December 29, 1993, he suffered a work related injury which disabled him from performing his duties and responsibilities as a Youth Counselor II.
2. Mr. Searles was placed on an approved, extended medical leave of absence without pay from his position of Youth Counselor II at the New Hampshire Youth Development Center. His original three month leave of absence without pay was extended, with Governor and Council approval, through December 28, 1994.
3. By memo dated August 23, 1994, addressed to Y.D.C. (Youth Development Center) the appellant's physician, Dr. Gerard Hevern, advised that Mr. Searles had reached the maximum recovery from his work related injury of 12/29/93 and that because of weakness in his right arm, he was unable to conduct himself safely in the position of Youth Counselor II. Dr. Hevern declared him permanently disabled from that position.
4. By letter dated August 31, 1994, signed by Y.D.C. Superintendent Ronald Adams, Mr. Searles was advised that effective November 1, 1994, he would be terminated from his Youth Counselor II position for non-disciplinary reasons. The letter referred to Dr. Hevern's August 23, 1994 assessment of the appellant's inability to safely perform the duties of his position. The letter also advised that while consideration had been given to accommodations which might be made to allow the appellant to remain employed as a Youth Counselor, the superintendent found it was impossible to establish conditions wherein Mr. Searles would not be required to perform tasks which he was physically unable to perform.
5. Superintendent Adams' letter of August 31, 1994 to Mr. Searles advised him that Sandra Platt of the Department of Health and Human Services' Human Resources section would be available to assist him in identifying alternative positions if he wished to continue his employment with the State. He was also informed that he could be eligible for Disability Retirement Benefits under the provisions of RSA 100-A:6, and should contact the New Hampshire Retirement System.
6. Mr. Searles met with Ms. Platt on September 16, 1994, to review possible employment options within the Department of Health and Human Services. Ms. Platt suggested transferring Mr. Searles into an available Case Technician Trainee position, assuring

him that he would be provided with sufficient training to successfully perform the duties and responsibilities of the position.

7. Mr. Searles declined to be considered for transfer into any of the available Case Technician positions, asserting that he is "computer illiterate", has no clerical skills, and prefers a job where he can "move around" rather than working in an office at a desk.
8. By letter dated October 21, 1994, Comprehensive Rehabilitation Associates Inc., requested information from Mr. Searles' treating physician about the appellant's ability to return to work in one of four possible position openings. Dr. Hevern's October 25, 1994 reply indicated that Mr. Searles could return to work for four hours a day, with a possible increase in his work schedule by one hour a week, in all but one of the four positions which had been identified and described to him. Those positions were floor technician, patient room technician and food service worker.
9. On October 30, 1994, Mr. Searles was transferred to New Hampshire Hospital to a position of Health Facilities Cleaner, in a "work hardening program" which would allow him to work part-time, gradually increasing his hours to full-time.
10. On November 14, 1994, Dr. Hevern notified New Hampshire Hospital that Mr. Searles was unable to continue working as a Health Facilities Cleaner, and that both his work assignment and work schedule should be readjusted.
11. On November 15, 1994, the Department of Health and Human Services again attempted to place Mr. Searles in a position for which he might qualify. Mr. Searles had expressed some interest in a Stock Clerk II position. However, after reviewing the specification and speaking with Michelle Harrington, the Human Resources Assistant, on December 6, 1994, Mr. Searles expressed his uncertainty about being able to do the work, as it appeared there could be a great deal of physical labor involved.
12. Lists of available positions in the Department of Health and Human Services, dated December 12, 1994, December 16, 1994, December 23, 1994 and December 30, 1994, were forwarded to Mr. Searles at his home as they became available. Mr. Searles did not pursue a transfer into any of those listed.
13. In a letter from Y.D.C. Superintendent Ronald Adams, dated December 23, 1994, Mr. Searles was advised that in order to remain in an approved, unpaid leave status, he would have to make proper application in writing for an extension of his leave of absence. Mr. Adams also advised that as the appointing authority for the Youth Development Center, he could only approve a leave of absence for 3 months, and that any further approval must be received from the Governor and Council. Mr. Searles was advised that if he did not anticipate returning to work at the Youth Development Center by February 15, 1995, he would need to request additional time for his leave of absence. He was instructed to submit a request for extension of his leave by Wednesday, January 11, 1995, so that it could be processed through Governor and Council.

14. By letter dated December 29, 1994, signed by Superintendent Adams, Mr. Searles was informed that his request for extension of his leave of absence through August 15, 1995, had been granted by Mr. Adams, and that "Barbara Cotton will be processing this request for Governor and Council approval."
15. Throughout the Department of Health and Human Services, requests to Governor and Executive Council for extended leaves of absence must first be approved by the appropriate Division Director and the Commissioner's Office.
16. A letter to the Governor and Executive Council, dated December 29, 1994, requesting an extension of Mr. Searles' leave of absence, was prepared by the Youth Development Center for signature by Lorrie Lutz, Director of the Division for Children, Youth and Families and Kathleen Sgambati, the Acting Commissioner for the Department of Health and Human Services. Neither Ms. Lutz nor Ms. Sgambati approved the request for extension of Mr. Searles' leave, or submitted it for G&C approval.
17. Mr. Searles was notified by letter dated January 6, 1995, signed by Sandra Platt, Human Resources Director for the Department of Health and Human Services, that his employment was terminated effective that date under the procedures for non-disciplinary removal because he was physically unable to perform the duties of the position to which he had been assigned, and because he had not accepted any other position into which he could be transferred or demoted.

#### Rulings of Law

- A. Under the provisions of PART Per 1002 of the Rules of the Division of Personnel, Mr. Searles was subject to removal from his position of Youth Counselor II for non-disciplinary reasons.

PART Per 1002 provides for removal of an employee from a position for non-disciplinary reasons when, for medical reasons, an employee is unable to perform the required duties and responsibilities of the position to which the employee is assigned, the employee's medical condition creates a hazard for the employee, the employee's co-workers or clients of the agency; or the employee's presence in the workplace, because of the medical condition, is deleterious to the employee's health.

- B. The parties stipulated that Mr. Searles, who suffers from pain and weakness in his right arm and shoulder, is permanently disabled from performing the duties of his Youth Counselor II position. There was no dispute that Youth Counselors may be required in the normal course of their duties to restrain residents, and that restraining them requires the full use of both arms. Medical information received by the Department of Health and Human Services through Comprehensive Rehabilitation Associates and Suncook Family Health Center, as described by Per 1002.02 supported the Department's decision to remove this employee from his Youth Counselor II position, as set forth in Per 1002.02 (a) of the Rules of the Division of Personnel. Due to the nature of Mr.

Searles' medical condition, the agency was acting within its authority in determining that Mr. Searles was subject to the provisions of PART Per 1002 which allow for the removal of an employee whose medical condition prohibits the employee from performing the required duties and responsibilities of the position to which assigned.

- C. In order to satisfy the provisions of Per 1002.02, before removing Mr. Searles from his position the Department of Health and Human Services had an obligation to either: (1) amend the duties of Mr. Searles' Youth Counselor II position to accommodate his known medical condition provided, however, that such amendment would not alter the essential duties and responsibilities of his position; (2) transfer Mr. Searles to a position for which he qualified which would not require his removal under the provisions of Per 1002.01; or 3) demote Mr. Searles to a position for which he qualified which would not require removal under the provisions of Per 1002.01.
- D. The Department complied with the provisions of Per 1002.02 in an effort to avoid terminating Mr. Searles employment for non-disciplinary reasons. The Department asserted, without dispute, that it could not amend the position of Youth Counselor II sufficiently to permit Mr. Searles to remain in that position and safely perform the required duties and responsibilities. The Department attempted to transfer Mr. Searles to a Case Technician Trainee position; however, Mr. Searles declined to consider such a transfer, asserting that he lacked the skills to perform in that capacity. The Department demoted Mr. Searles to a position of Health Facilities Cleaner, and initiated a work hardening program intended to allow him to gradually increase his working hours from part-time to full-time. However, after occupying the position briefly on a part-time basis, Mr. Searles complained that he was medically unable to perform the duties of that position, and was ordered out of the position by his physician.
- E. Per 1205.02 (c) of the Rules of the Division of Personnel provides that "Extension of leave for additional periods [beyond the 3 months which an appointing authority may approve] may be granted by the governor and council if recommended by the appointing authority but, other than in exceptional cases, the total period shall not exceed 12 months." The unfortunate circumstances of the appellant's injury do not necessarily make his case exceptional, nor do they require that the appointing authority request an extension of the appellant's leave of absence beyond 12 months.

### **Decision and Order**

In his original notice of appeal (Reynolds letter, January 20, 1995), the appellant asserted that, "...the appointing authority was obligated to make further efforts to find positions within the department of health and human services and/or attempt accommodations/changes in his old job or new ones." He also asserted that he had reasonably relied upon Superintendent Adams' approval of a leave of absence through August 15, 1995, and had made important decisions on the basis of that assurance.

At the hearing, Mr. Busca argued that although the Department of Health and Human Services

attempted to accommodate Mr. Searles' disability, once it had determined that Mr. Searles was disabled from performing the duties of a Youth Counselor II, the Department did not go far enough or do enough in attempting to provide alternative employment options for Mr. Searles. Mr. Busca also argued that the Department did not fully understand the appellant's medical condition or work limitations, and therefore attempted to make accommodations which were not appropriate, involving work which the appellant either could not perform physically, or for which he was not qualified by virtue of education and experience.

Ms. Platt argued that the Department of Health and Human Services had made every effort to preserve Mr. Searles' status as a permanent, full-time employee, but that the appellant was either unwilling or unable to take advantage of the accommodations being offered. Ms. Platt argued that Mr. Searles was angry about his injury, and had expressed his belief that he should not be required to return to work until he was "pain free". She argued that although the appellant was ordered out of the Health Facilities Cleaner position by his physician, it was the appellant, not the Department, who had insisted upon seeking alternative employment in positions which could require physical labor. She asserted that the Department allowed Mr. Searles to attempt such alternative employment only after Comprehensive Rehabilitation Associates had evaluated his physical capabilities and the potential benefits of a work hardening program. Ms. Platt argued that in attempting to place Mr. Searles in a position which did not require physical exertion, the Department made every effort to address the appellant's lack of education or experience for certain office occupations by offering to provide whatever training he would need to work successfully in an office occupation.

Ms. Platt argued that the Department of Health and Human Services was not bound by Superintendent Adams' "approval" of Mr. Searles' request for an additional extension of his leave of absence without pay. Ms. Platt argued that there was nothing "exceptional" about the circumstances of the case to persuade the Director of the Division for Children, Youth and Families or the Commissioner of the Department of Health and Human Services that Mr. Searles should receive approval for an additional eight months of leave.

On the evidence, argument and offers of proof, the Board found that the Department of Health and Human Services did not violate the Rules of the Division of Personnel or abuse its discretion when it terminated Mr. Searles' employment under the provisions of PART Per 1002 of the Rules of the Division of Personnel. The appellant failed to persuade the Board that he suffered any injury by relying upon Mr. Adams' preliminary approval of his request for an extended leave of absence. Further, while he alleged that he had made "important decisions" in anticipation of additional leave being approved, he failed to indicate what decisions those might have been. The Board found that in spite of the unfortunate circumstances of Mr. Searles' injury, his medical condition and subsequent absence from work did not present any exceptional circumstances which might warrant a finding that the Department acted unjustly or improperly in declining to request approval for additional unpaid leave beyond one year through the Governor and Executive Council.

The Board found that the State made reasonable efforts to carry out its obligations under the provisions of Per 1002. Furthermore, the State was under no obligation to guarantee Mr.

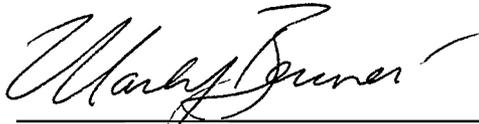
Appeal of Steven Searles  
Docket #95-T-17

---

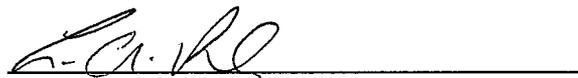
Searles' future employment, particularly in light of Mr. Searles' resistance to re-training in office occupations and the very limited likelihood that he would be able to perform the type of physical labor to which he was accustomed, with or without an accommodation, at any time in the foreseeable future.

Accordingly, the Board voted to deny Mr. Searles' appeal, thereby upholding the Department of Health and Human Services' decision to terminate Mr. Searles' employment under the provisions for non-disciplinary removal.

THE PERSONNEL APPEALS BOARD

  
\_\_\_\_\_  
Mark J. Bennett, Acting Chairman

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

  
\_\_\_\_\_  
Lisa A. Rule, Commissioner

cc: Virginia A. Lamberton, Director of Personnel  
Sandra Platt, Administrator, Department of Health and Human Services  
M.J. Mickey Busca, SEA Legal Intern