

State of New Hampshire



92-T-929

PERSONNEL APPEALS BOARD

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

APPEAL OF PHILIP SULLIVAN

Docket #92 - T - 16

Third Request for Rehearing
February 22, 1994

By letter dated December 23, 1993, received by the Personnel Appeals Board on December 29, 1993, Mr. Sullivan filed a third request for rehearing. As in the previous two requests, Mr. Sullivan claims not to have received copies of the proposed findings of fact and rulings of law at the conclusion of the hearing. In the current request, Mr. Sullivan claims there is no proof of his having received the proposed findings and rulings as he did not sign a receipt for same. Understanding that Mr. Sullivan is a *pro se* appellant, the Board shall provide a third and final response to the appellant's continuing requests for rehearing:

Per-A 204.06 (a) and (b) of the Rules of the Personnel Appeals Board provide that a properly filed motion for rehearing must be received by the Board within twenty (20) days of the date of the decision, and must set forth fully every ground upon which it is argued that the decision or order of the Board is unreasonable or unlawful.

On July 19, 1993, Mr. Sullivan submitted a letter to the Board in which he said he was "reappealing" his termination on the following three grounds:

1. That the Board never addressed the issue of Mr. Sullivan's alleged "contract" with his supervisor which would have allowed him to return to work with proper documentation of his illness;
2. That Mr. Sullivan needed a "break down" of the findings and rulings referred to in the Board's July 8, 1993 decision; and
3. That Mr. Sullivan wanted a copy of the tape recording of his hearing to review.

Mr. Sullivan's July 19, 1993 letter ended by stating that he would be in contact with the Board again after he received and reviewed the information he had requested.

Neither the appellant's request for further explanation of the decision, nor the pending request for a copy of the tape recording constitute grounds upon which to argue that the decision is unlawful or unreasonable. The only substantive issue raised by the appellant involved the alleged "contract" with Mr. Bixby, to which the Board responded as follows:

"With regard to the issue of a 'contract' between the appellant and Mr. Bixby, that matter is addressed in New Hampshire Hospital's proposed findings #9 and #10, which the Board granted. The Board did not use the term 'contract' in its July 8, 1993 decision. However, the issue of the appellant's agreement with Mr. Bixby, and his failure to comply with the terms of that agreement, are accurately summarized in New Hampshire

Hospital's proposed findings of fact, which the Board granted. Another copy of those findings is attached herewith." (See Response to Appellant's Request to Rehear Appeal - Docket #93-T-19, October 21, 1993, p. 1)

On November 4, 1993, the Board received the appellant's second request for rehearing. Because Mr. Sullivan was a pro se appellant, the Board responded, although there is no statutory authority to entertain further requests for rehearing. Specifically, NH RSA 541:6) states the following:

541:6 Appeal. Within thirty days after the application for a rehearing is denied, or, if the application is granted, then within thirty days after the decision on such rehearing, the applicant may appeal by petition to the supreme court.

As set forth in RSA 541:6, within thirty days of the denial of Mr. Sullivan's application for a rehearing, he might have filed an appeal by petition to the New Hampshire Supreme Court. No such appeal was filed within the statutorily authorized 30 day time frame. Instead, fourteen days after the date of the Board's October 21, 1993 order, Mr. Sullivan submitted a "second request for rehearing". In that request, Mr. Sullivan argued that he had never been provided with a copy of New Hampshire Hospital's proposed findings of fact and rulings of law at the conclusion of his hearing on the merits. Mr. Sullivan noted his continuing objection to the Board's findings relative to the issue of his "contract" with Mr. Bixby, and claimed that he was never told he would be contacted on Monday, March 9, 1992, by New Hampshire Hospital. Finally, he said he had not yet received a copy of the tape recording of his hearing.

The Board responded by order dated December 9, 1993, dismissing the second request for rehearing as untimely. However, the Board noted that even if the motion had been timely, it failed to establish good reason upon which to grant a rehearing. The "contract" issue had already been addressed in the original decision and response to the request for rehearing. Both commissioners had witnessed Mr. Sullivan receiving a copy of New Hampshire Hospital's proposed findings of fact and rulings of law from Attorney Maloney at the conclusion of the hearing, and the appellant had ample time to review them. Neither the statutes nor the administrative rules require the Board to provide appellants or agencies with copies of tape recordings. Delay in obtaining such a copy when requested does not establish a reason to claim the decision was unlawful or unreasonable.

Mr. Sullivan's third request for rehearing was received by the Board on December 29, 1993. Mr. Sullivan claimed that until the Board responded to his second request for rehearing, the Board had never advised him of his obligation to provide copies of such documents to New Hampshire Hospital. He further argued that Barbara Maloney, Director of Legal Services for New Hampshire Hospital, had asked that copies of all correspondence be directed to her, and that she therefore should have received same.

The appellant should review his own records in this matter. The parties were advised by docket notice dated April 16, 1992 to familiarize themselves with the Board's rules. Those rules specifically provide that, "Copies of all papers filed by any party shall, at or before the time of filing, be served by a party or person acting for him on all other parties to the case." [See Per-A 206.02 (c) of the Rules of the Personnel Appeals Board]

Mr. Sullivan's continuing claim that he did not receive a copy of New Hampshire Hospital's proposed findings of fact and rulings of law at the conclusion of his hearing on the merits, and his current claim that the Board lacks proof of his receiving a copy is unsupported by the record. Both commissioners who heard the case witnessed Mr. Sullivan and his representative

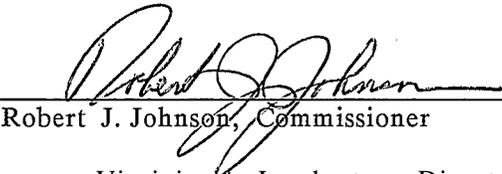
Mr. Ricker receiving a copy of the proposed findings and rulings from Attorney Maloney. No signed receipt is necessary.

Clearly, Mr. Sullivan disagrees with the conclusions reached by the Board in upholding his termination from employment. That disagreement, however, does not constitute "good reason" for rehearing. The Board weighed the evidence and the credibility of the witnesses, and found that New Hampshire Hospital was acting within its discretion when it discharged Mr. Sullivan from his position in the New Hampshire Hospital laundry.

THE PERSONNEL APPEALS BOARD



Mark J. Bennett, Acting Chairman



Robert J. Johnson, Commissioner

cc: , Virginia A. Lamberton, Director of Personnel
Barbara Maloney, Director of Legal Services, New Hampshire Hospital
Mr. Philip Sullivan, 6033 99th Court, Pinellas Park, Florida 34666

(Tim Ricker, representative of record for the appellant, has not provided the Board with a current mailing address.)

State of New Hampshire



92-T-929

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

APPEAL OF PHILIP SULLIVAN

Docket #93 - T - 19
Response to Appellant's Second Request for Rehearing

December 9, 1993

The New Hampshire Personnel Appeals Board (Bennett and Johnson) has reviewed Appellant's second request for rehearing of the Board's July 8, 1993 decision in the matter of his termination from employment at New Hampshire Hospital.

RSA 541:3 clearly sets forth the statutory requirements for the filing of motions for rehearing:

Within twenty days after any order or decision has been made by the commission, any party to the action or proceeding before the commission or any person directly affected thereby, may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order, specifying in the motion for rehearing the ground therefor, and the commission may grant such rehearing if in its opinion good reason therefor is stated in said motion.

On July 8, 1993, the Board denied Mr. Sullivan's appeal. On July 22, 1992, the Board received Mr. Sullivan's letter dated July 19, 1993, "reappealing" his termination, which the Board treated as a Request for Rehearing. In that letter, Mr. Sullivan argued that he had not been provided with copies of New Hampshire Hospital's proposed findings of fact and rulings of law, and that the Board had failed to address the issue of a "contract" between himself and his supervisor to continue his employment.

On October 21, 1993, the Board denied Mr. Sullivan's rehearing request, noting that he was provided with a copy of the proposed findings and rulings at the conclusion of his hearing on the merits, and that the "contract" issue had been properly addressed by the Board in its July 8, 1993 decision. The Board attached a second copy of New Hampshire Hospital's proposed findings of fact and rulings of law for the appellant's information and use.

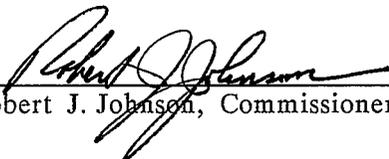
Mr. Sullivan has now filed a second request for rehearing, again claiming that he had never received the proposed findings of fact and rulings of law at the conclusion of the hearing, and that the notes signed by his doctor and submitted prior to his termination from employment were sufficient to satisfy the requirement for certification of his absences and thereby satisfy his "agreement" with his supervisor to avoid termination. As with Mr. Sullivan's original request for rehearing, there is no indication that a copy of the motion was submitted to New Hampshire Hospital and appears to constitute *ex parte* communication with the Board in violation of Per-A 206.01(a) of the Rules of the Personnel Appeals Board.

Even if the appellant's second motion had been timely, or received by the Board within twenty days of the date of the Board's July 8, 1993 decision, that motion also failed to establish any good reason upon which to grant a rehearing. While it is clear the appellant disagrees with the Board's findings of fact and conclusions of law, his disagreement with the Board's assessment of the evidence is not a compelling reason to rehear the case. On the facts, the Board found that Mr. Sullivan was properly terminated from his employment at New Hampshire Hospital and affirmed that decision when it denied the original request for rehearing. The Board considers this second request to be untimely and voted to dismiss it as such.

THE NEW HAMPSHIRE PERSONNEL APPEALS BOARD



Mark J. Bennett, Acting Chairman



Robert J. Johnson, Commissioner

cc: Virginia A. Lamberton, Director of Personnel
Barbara Maloney, Esq., Director of Legal Services, N.H. Hospital
Philip Sullivan, **6033** 99th Court, Pinellas Park, Florida **34666**

(Tim Ricker, as the representative of record for the appellant, did not provide a current mailing address.)

State of New Hampshire



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

92-T-929

APPEAL OF PHILIP SULLIVAN
Docket #93 - T - 19
Response to Appellant's Request to Rehear Appeal

October 21, 1993

The New Hampshire Personnel Appeals Board (Bennett and Johnson), having reviewed Appellants request for rehearing of the Board's July 8, 1993 decision in the matter of his termination from employment at New Hampshire Hospital, has voted to deny that request.

In his July 19, 1993 letter to the Board, in support of his request for rehearing, Mr. Sullivan argued that the Board did not provide him with an explanation of the numbered findings of fact and rulings of law which it had either granted or denied, and that the Board had neglected to consider the issue of his alleged "contract" with his supervisor concerning his return to work with proper documentation of his need for medical leave.

Mr. Sullivan was provided a copy of New Hampshire Hospital's proposed findings of fact and rulings of law at the conclusion of his hearing, and the appellant did not request clarification or explanation of those requests at the hearing on the merits of his appeal. His request for further explanation at this time does not constitute a ground upon which to allege that the Board's decision was unreasonable or unlawful.

With regard to the issue of a "contract" between the appellant and Mr. Bixby, that matter is addressed in New Hampshire Hospital's proposed findings #9 and #10, which the Board granted. The Board did not use the term "contract" in its July 8, 1993 decision. However, the issue of the appellant's agreement with Mr. Bixby, and his failure to comply with the terms of that agreement, are accurately summarized in New Hampshire Hospital's proposed findings of fact, which the Board granted. Another copy of those findings and rulings is attached herewith.

Accordingly, the Board voted to deny the appellant's request for rehearing.

APPEAL OF PHILIP SULLIVAN
Docket #93-T-19
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THE NEW HAMPSHIRE PERSONNEL APPEALS BOARD



Mark J. Bennett, Acting Chairman



Robert J. Johnson, Commissioner

cc: Virginia A. Lamberton, Director of Personnel
Barbara Maloney, Esq., Director of Legal Services, N.H. Hospital
Philip Sullivan, 6033 99th Court, Pinellas Park, Florida 34666

(Tim Ricker, as representative of record for the appellant, did not provide a current mailing address.)

STATE OF NEW HAMPSHIRE

PERSONNEL APPEALS BOARD

Appeal of Philip Sullivan (92-T-19)

Appointing Authority's Request for Findings of Fact and Rulings of Law

New Hampshire Hospital, the appointing authority, by and through its attorney, Barbara M. Maloney, requests the Personnel Appeals Board make the following findings of fact and rulings of law:

1. Philip Sullivan was a promotional probationary employee who had his promotional probationary period as a laundry foreman extended on November 14, 1991. See NHH #1.
2. Mr. Sullivan was absent from work on a regular basis commencing 1/17/92 and continuously from 2/7/92-3/4/92.
3. During this time, David Bixby, Director of Laundry Services, made two verbal requests for leave slips and a Doctor's note from Mr. Sullivan without success.
4. On February 20, 1992, after consultation with Mark Chittum, Director of Personnel and Financial Services, Mr. Bixby made a third request in writing to Mr. Sullivan with a deadline of noon, February 21, 1992, for Mr. Sullivan's reply. See NHH #2.
5. On February 21, 1992, Philip Sullivan provided two slips; the first did not address any of the following:
 - a. It did not identify the period being covered;
 - b. It did not document Mr. Sullivan's condition; and
 - c. It did not give an estimated date of return.

The second leave slip identified 2/7-2/20 as the space of time covered by the note but did not document why his condition prevented Mr. Sullivan's performance of his job nor did it give an estimated date of return.

6. A second letter dated February 24, 1992, indicating a deadline of 2/26 was given to Philip Sullivan detailing what would be required by Mr. Sullivan to comply with the hospital's request. Since Mr. Sullivan could not be reached, the letter was hand delivered to his home. See NHH #3.
7. On February 28, 1992, a first letter of warning was hand delivered to Philip Sullivan since he had made no response to the February 24, 1992 letter and he could not be contacted. The letter was given for willful insubordination, absence without approved leave and absence for 3 consecutive days without notifying his department. See NHH #4.
8. On March 4, 1992, a second letter of warning was hand carried to Philip Sullivan notifying him of his termination. It provided one more opportunity for Mr. Sullivan to provide the necessary documents. It gave a deadline of March 5, 1992. See NHH #5.

9. Immediately prior to the deadline, Philip Sullivan contacted David Bixby and requested a one-day extension reporting that he had a Doctor's appointment that afternoon.
10. On Friday, March 6, 1992, Philip Sullivan met with David Bixby and Mark Chittum and produced a note from a physician with a return to work date of March 10, 1992. The note only stated that Mr. Sullivan was ill with no specification of his condition. **When** questioned, Mr. Sullivan admitted that he had never asked the physician to provide a return to work date and never had any intention to provide the requested information. Mr. Sullivan was informed that he would be contacted on Monday, March 9th.
11. On Monday, March 9, 1992, Philip Sullivan was terminated from New Hampshire Hospital on the following grounds:
 - a. Willful insubordination for his deliberate and admitted refusal to comply with a direct request from the appointing authority for information on his employment status;
 - b. Exhausting his sick leave and failing to request a leave of absence; and
 - c. Being virtually unreachable for two weeks despite having no approved leave. See NHH #6.

Request for Rulings of Law

1. The rules of the N.H. Department of Personnel in effect prior to the adoption of the present rules govern this case since all events occurred prior to the effective date of the new rules.
2. Per. 308.03 of the Rules of the N.H. Department of Personnel states as follows:
 - (2) Optional discharge. In cases such as, but not necessarily limited to, the following, the seriousness of the violation may vary. Therefore, in some instances immediate discharges without warning may be warranted, while in other cases, one written warning prior to discharge may be indicated. Repetition of any of the following offenses after one written warning has been given makes the discharge of the offender mandatory.
 - a. Willful destruction of state property.
 - b. Willful insubordination.
 - c. Refusal to accept job assignments.
 - d. Absence for a **period** of three (3) consecutive working days without notification to his department unless adequate excuse is given.
 - e. Willful falsification of claims for **annual/sick** leave.
 - f. Inability to perform duty assignments due to being under the influence of drugs or alcohol.

3. The letter to Philip Sullivan dated February 28, 1992, constituted one written warning pursuant to the Optional Discharge section, Per. 308.03, for willful insubordination and absence for three (3) consecutive days without notifying his department, sections (b) and (d).
4. Absence without approved leave is cited as an "other offense." (It is the position of New Hampshire Hospital that the requirements for termination under this section are met also; however, that is not relevant since the termination was conducted pursuant to the Optional Discharge section.)
5. The letter to Philip Sullivan dated March 4, 1992, constituted a second written warning pursuant to Optional Discharge section, Per. 308.03 for willful insubordination and absence for three (3) consecutive days without notification to his department. The notation in paragraph 4, above, is again noted here.
6. The letter to Philip Sullivan dated March 9, 1992, substantiated the termination of Mr. Sullivan for deliberate and admitted refusal to comply with a request from the appointing authority for information on his employment status thus constituting willful insubordination in addition to absence without approved leave.
7. Philip Sullivan was counseled orally and in writing on at least four (4) occasions of the need to provide documentation for his leave time prior to disciplinary action being taken thus constituting adequate notice and opportunity to comply prior to disciplinary action being taken.
8. Per. 308.04 section (c) states:

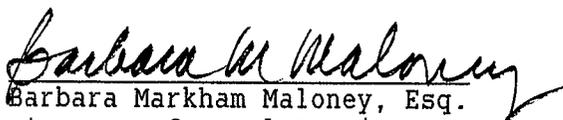
Nothing in this section shall be interpreted as preventing the commission from upholding the recommendation of the appointing authority since the burden of proof is upon the appellant.
9. Four written and oral counselings, two letters of warning and a letter of termination meet the standard for discharge pursuant to Per. 308.03.
10. The termination was lawful under the Rules of the Department of Personnel and appropriate under the circumstances.

Respectfully submitted,

NEW HAMPSHIRE HOSPITAL

By its attorney,

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92-T-929

APPEAL OF PHILIP SULLIVAN NEW HAMPSHIRE HOSPITAL DOCKET #92 - T-29

July 8, 1993

The New Hampshire Personnel Appeals Board (Bennett and Johnson) met Wednesday, May 26, 1993, to hear the appeal of Philip Sullivan, a former employee of New Hampshire Hospital. Mr. Sullivan was represented at the hearing by another former N.H.H. employee, Tim Ricker. Barbara Maloney appeared on behalf of New Hampshire Hospital.

Before receiving testimony and evidence, the Board heard oral argument on the State's Motion to Dismiss. The State argued that Mr. Sullivan had relocated to Florida immediately after his termination from employment and had made himself unavailable for full-time work. The State also argued the appellant had failed to give appropriate notice of appeal to the Hospital, that he had failed to provide timely notice of representation, and that Mr. Ricker was an inappropriate representative, having previously appealed his own termination from employment from New Hampshire Hospital. Mr. Ricker argued that the appellant had come all the way from Florida for the hearing and should be given the opportunity to present his appeal. After deliberating briefly, the Board denied the Motion to Dismiss and instructed the parties to proceed with presentation of their evidence.

In other preliminary matters, New Hampshire Hospital asked that its exhibits #1 through #7 be admitted into the record. After the appellant reviewed the proposed exhibits, they were entered into the record without objection. The parties also agreed that at the time of termination, Mr. Sullivan was a promotional probationary employee working in the laundry as a Laundry Foreman, and that his termination was subject to the provisions of the former Rules of the Department of Personnel.

Mr. Sullivan was promoted to a position of Laundry Foreman in July, 1991. David Bixby, Laundry Manager, testified that although the appellant had been enthusiastic about the promotion and performed reasonably well immediately after his promotion, he began to exhibit inconsistency in dealing with laundry personnel he supervised. Mr. Bixby testified that with some employees the appellant was very strict while he completely ignored others. Mr. Bixby also testified that the appellant was inconsistent in following laundry procedures.

In November, 1991, Laundry Manager David Bixby conducted an evaluation of Mr. Sullivan's performance as a promotional/probationary employee, and recommended that Mr. Sullivan's

probation be extended for an additional six months. Mr. Sullivan was notified of the extension of his probationary period by letter dated November 14, 1991, signed by Mr. Bixby. The appellant's performance was rated again in January, 1992, for the period of July 12, 1991 through January 12, 1992. His work was rated as "below expectations" in the areas of Quantity of Work, Quality of Work, Job Knowledge, Communications, Dependability, Cooperation and Initiative. Overall, his performance was rated "below expectations".

On or about January 7, 1992, the appellant requested time off for January 14 -16. January 12 and 13 were his regular days off. Mr. Bixby denied the leave request, advising the appellant that his work performance was not satisfactory and that he needed the time on the job to improve his performance. Beginning January 17, 1992, Mr. Sullivan would report to work, work for half an hour of his eight hour shift, then leave on sick leave. By February 7, 1992, the appellant was not reporting to work at all. He used sick leave until February 21, 1992, at which time his leave was exhausted. Mr. Sullivan was absent on unpaid leave until March 5, 1992.

On the issue of using sick leave generally, Mr. Sullivan said he had never felt comfortable asking Mr. Bixby for time off due to illness. However, he said that when he became ill in February, he called Mr. Bixby who told him to "Keep on truckin'". He said he believed that remark simply meant he was to let Mr. Bixby know when he felt better and was ready to come back to work.

Mr. Sullivan testified that he had worked for David Bixby in the New Hampshire Hospital laundry for approximately four years prior to his termination from employment. He testified that after his promotion from laundry worker to laundry foreman, he began having problems with Mr. Bixby. He admitted he had had some difficulties performing his work immediately after his promotion, but attributed them to Mr. Bixby's treatment of him. He testified that Mr. Bixby simply didn't want to hear about problems he had supervising his employees. He testified that he wasn't given the authority to supervise some employees and felt badly about having to supervise others. He alleged that conflict contributed to his having developed irritable bowel syndrome. Mr. Sullivan testified he felt fine those days he was working in the laundry by himself without other foremen on shift. Mr. Sullivan suggested that instead of terminating his employment, New Hampshire Hospital should have considered his prior work record and should have given him the opportunity for demotion into the position from which he had been promoted in July, 1991.

Mr. Sullivan had been apprised of the Hospital's concerns about his performance during his extended probationary period. When Mr. Sullivan requested leave in January, 1992, after having received an unsatisfactory performance appraisal, he was counselled by David Bixby that he needed to be at work demonstrating his ability to do the job to which he was promoted. Having been denied leave he had requested, Mr. Sullivan began using sick leave to cover 7.5 hours of his 8 hour shift, then absented himself from work completely.

Ultimately, Mr. Sullivan exhausted his available sick leave and was placed in leave without pay status. He was instructed, both verbally and in writing, that he needed to provide documentation from his health care provider certifying that he was incapacitated from working. He was also advised to secure from his health care provider a statement concerning the nature of his disability and his anticipated return to full duty. Not only did Mr. Sullivan fail to provide the required information in a timely fashion, but when Hospital security staff attempted to hand-deliver letters to the appellant on February 26 and February 28, 1992, the letters were received instead by Mr. Sullivan's girlfriend's mother who said she was out of town.

The appellant was not a new employee and therefore can not be excused for failing to maintain contact with the Hospital during his sick leave, or providing the information required by the Hospital concerning that leave. Although the appellant suggested that New Hampshire Hospital should have demoted him instead of terminating his employment, the appellant failed to maintain contact with the Hospital and never suggested to management at the Hospital that he was uncomfortable in his promotional capacity and would be interested in requesting a voluntary demotion. Instead of attempting to resolve his situation with Mr. Bixby or his superiors, the appellant avoided discussing the matter by making himself inaccessible. Therefore, the Board did not find the Hospital's conduct unreasonable in deciding to terminate his employment as a promotional/probationary employee.

After considering the evidence offered by the parties, the Board ruled as follows on the Appointing Authority's Requests for Findings of Fact and Rulings of Law:

Proposed findings 1 - 10 are granted.

Proposed finding 11 is granted in part, after deleting paragraph b., concerning the exhaustion of leave and failure to request a leave of absence.

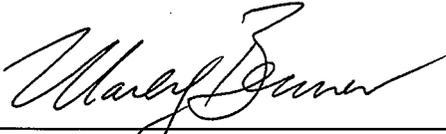
Proposed rulings 1 - 2 are granted.

Proposed rulings 3 and 4 are granted in part, by deleting the parenthetical statement concerning the State's position on relevancy of the offenses and number of warnings issued.

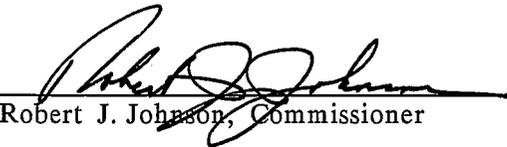
Proposed rulings 5 - 10 are granted.

Accordingly, the Board voted to uphold Mr. Sullivan's termination from employment as Laundry Foreman on the basis of the offenses specified.

THE PERSONNEL APPEALS BOARD



Mark J. Bennett, Vice-Chairman



Robert J. Johnson, Commissioner

cc: Virginia A. Lamberton, Director of Personnel
Barbara Maloney, Esq., Director of Legal Services, N. H. Hospital
Philip Sullivan, 6033 99th Court, Pinellas Park, Florida 34666

(Tim Ricker, as representative of record for the appellant, did not provide a current mailing address.)