

State of New Hampshire

WPPID1068



PERSONNEL APPEALS BOARD

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

APPEAL OF ELLEN WARREN Docket #93-T-1 Department of Corrections

June 8, 1993

The New Hampshire Personnel Appeals Board (McNicholas and Rule) met Wednesday, March 31, 1993, to hear the appeal of Ellen Warren, a former employee of the Women's Prison in Goffstown, New Hampshire. Ms. Warren was represented at the hearing by SEA General Counsel Michael C. Reynolds. Attorney John E. Vinson appeared on behalf of the Department of Corrections.

The parties agreed there were few factual disputes. Ms. Warren, who had been employed as a Correctional Officer at the Women's Prison, was seriously injured at work on January 15, 1992, when a maximum security inmate struck her in the knee with a fire extinguisher. She was granted Workers' Compensation benefits and remained out of work for approximately 9 weeks, after which she returned to the prison and was temporarily assigned to perform clerical work in the Superintendent's Office. On June 1, 1992, Ms. Warren was cleared for return to full duty, and she did return to her position of Correctional Officer. Ms. Warren worked for three days, then suffered another injury to her knee while she was off duty. Ms. Warren reported the injury as a recurrence of the original work-related injury.

Although the appellant was allowed to use her accrued leave, Superintendent Edda Cantor advised her that once her accumulated leave was exhausted, additional unpaid leave would not be considered. Nonetheless, Ms. Cantor advised the appellant that she could submit documentation from her physician and request a leave. Ms. Cantor's letter to the appellant dated June 19, 1992 stated:

"On June 17, 1992 I contacted you regarding your status due to an injury you sustained away from work. Due to the report you gave me, over the phone, and due to the fact that your leave will be exhausted, I am providing you this notice that I will not be considering a leave of absence without pay.

"You can submit a request for leave along with supporting documentation from your physician and I will respond to you in writing of my decision." (State's Exhibit #1)

In a follow-up letter dated June 22, 1992, Ms Cantor notified the appellant that she had exhausted all accumulated leave and needed to report to duty with a full medical release certifying that she could perform all of the duties of a Correctional Officer. The letter also advised the appellant that effective June 23, 1992, she was on unauthorized leave.

By letter dated June 25, 1992, Ms Warren requested approval to return to work in a light duty status. In a second letter dated that same day, Ms Warren asked the Department of Corrections to grant her at least three months approved leave without pay beginning on June 23, 1992, if her request to return in a light duty capacity was going to be denied. Ms Cantor denied the request for leave, advised the appellant that there were no light duty positions available in the Women's Prison, and discharged Ms Warren from employment for being medically unable to perform her work and failing to report to work promptly at the conclusion of an approved leave.

Ms Cantor's letter of June 30, 1992 to Ms Warren stated:

"Upon receipt of your letter on 6/25/92 requesting a leave of absence without pay, I am officially notifying you that I am denying your request.

"In speaking to you on 6/17/92, I advised that the NH State Prison/Women would not be in a position to grant an extended leave of absence without pay. Based upon what you have told me, it appears as though you have a medical condition as a result of an incident that occurred on your personal time which now prevents you from returning to full duty. Prior to this incident, you had sustained a work related injury which resulted in your absence from work for nine weeks. You did show a good faith effort in attempting to return to duty, but in light duty capacity. At that time, I was able to accommodate you and assigned you non-corrections officer duties with the understanding that I could not continue this status on an extended basis.

"On June 1, 1992 you returned to full duty, worked three days and then sustained this recent injury. I approved your paid leave time to assist you with your recovery (three weeks). On 6/22/92, I notified you that you were out of all accumulated leave and that you needed to report to duty with a full medical release. . . . I am terminating your employment based on the fact you have failed to report to work promptly after the expiration of your approved leave of absence Per 1205.02(e) regarding unpaid leave, as well as, Per 1002.03 authorizing removal from state service due to a medical condition." (State's Exhibit #4)

Initially, the appellant argued that the State had an obligation to delay taking any action until all the outstanding Workers' Compensation issues had

been resolved. By the conclusion of the hearing, the appellant stipulated that employers are not barred from discharging employees absent due to a work related injury, provided that the employer follows the appropriate procedures to effect the termination. The Board agrees. An employee can not expect blanket protection from termination simply because Workers' Compensation benefits have been requested or received. However, before an agency can effect a lawful termination under such circumstances, the agency must abide by the administrative rules which allow for such removal.

With regard to the charges specified in the letter of termination, the Board found the following:

I. FAILURE TO REPORT BACK PROMPTLY AT THE EXPIRATION OF AN APPROVED LEAVE

Per 1205.02(e) of the Rules of the Division of Personnel states, "Failure on the part of an employee to report promptly at the expiration of the leave of absence shall be a cause for termination." This rule appears to provide State agencies a relatively expeditious means of discharging an employee who is capable of returning to work after an approved leave, but fails to do so. However, the Board does not believe an agency can rely on the provisions of Per 1205.02(e) simply to evade the requirements of Per 1002 when an employee is willing, but medically unable to return to full duty. The Board found that a discharge predicated upon failure to report back to work promptly at the expiration of an approved leave of absence was not a valid cause for termination in this instance.

II. REMOVAL FROM STATE SERVICE DUE TO A MEDICAL CONDITION

First, Per 1002.03 does not authorize "removal from state service due to a medical condition" as Ms. Cantor asserted in her letter of June 30, 1992. Per 1002.01 provides for the removal of an employee for non-disciplinary reasons when the employee is unable to perform the required duties and responsibilities of the position to which appointed.

Per 1002.03 of the Division of Personnel states:

(a) An appointing authority shall not remove an employee under the provisions of Per 1002.01 until the appointing authority has received a medical assessment which supports the removal of the employee.

(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):

(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.

The Department of Corrections gave Ms. Warren no reasonable opportunity to avoid removal from her position and ultimately termination from employment. As the rule specifies, an employer is responsible for seeking alternatives to discharge when an employee is medically unable to perform the essential functions of the position to which the employee was appointed.

There is ample evidence that Ms. Warren was unable to return to work and perform the essential functions of her Correctional Officer position, and the agency was well within its rights to initiate "removal" procedures as set forth above. However, the agency was obligated to determine what work Ms. Warren might have performed. Ms. Warren testified that she could have worked in a light duty capacity, and that even though she would have been on crutches, she could have worked in the Control Room. Based on Ms. Warren's own description of control room duties, however, the Board found that Ms. Warren's physical condition, coupled with her use at that time of prescription pain medication, made her unsuitable for assignment to the Control Room.

Although Ms. Warren testified that she would have been able to work in a clerical capacity in the prison, the record reflects there were no clerical vacancies in the Women's Prison to which she might have been assigned. The Department needed Ms. Warren's Correctional Officer position filled as a Correctional Officer, not as a clerical employee. The Department of Corrections would not have been able to amend the duties of the position to accommodate Ms. Warren's known medical condition(s) without altering the essential duties and responsibilities of Ms. Warren's position. The department was under no obligation to create a position solely for the purpose of providing work for Ms. Warren until she was well enough to return to her regular duties. However, the Department never took the steps which the Rules require by attempting to transfer or demote Ms. Warren to a position for which she qualified so as to avoid having to discharge her.

Ms. Cantor testified there were no other positions available at the Women's Prison for which Ms. Warren could have qualified for transfer or demotion. However, the rule may not be read so narrowly as to limit opportunities for transfer or demotion to the particular work unit or site as the Department of Corrections would suggest. If the Department of Corrections wished to have

the appellant removed from her position for non-disciplinary reasons, it was obliged to satisfy the requirements of the rule to determine what other work the appellant might have been able to perform, and to investigate opportunities for transfer or demotion to vacancies throughout the department, not just within the Women's Prison. Therefore, the Board found that the Department of Corrections improperly terminated Ms. Warren's employment under the procedures for non-disciplinary removal. On the evidence, the Board voted to grant Ms. Warren's appeal in part.

As a remedy, the appellant had requested reinstatement of her employment retroactive to the date of termination, retroactive payment of her Blue Cross/Blue Shield premiums from the date of termination of coverage, and the right to contribute to the retirement system.

The Board found that Ms. Warren could not have functioned as a Correctional Officer upon exhaustion of her available leave. Further, although Ms. Warren testified that she could have performed the duties of a Correctional Officer in January 1993, and had applied for a Correctional Officer vacancy, she said she could not have performed those duties three months later at the time of her hearing before this Board. In any case, Ms. Warren offered no medical evidence to support her claim that between January and March, 1993, she was medically able to return to her job at the Women's Prison. The Department of Corrections is under no obligation to reinstate Ms. Warren as a Correctional Officer.

Insofar as the Department failed to properly remove Ms. Warren from her position under the provisions of Per 1002, the Department of Corrections shall amend its records to reflect that Ms. Warren was absent due to a work related injury effective June 6, 1992. Ms. Warren shall be permitted to make contributions to the Retirement System consistent with her status as an employee of the Department of Corrections who is absent due to a work related injury. This decision shall serve as notice that the appellant is considered medically unable to perform the required duties and responsibilities of her position [Per 1002.01(a)].

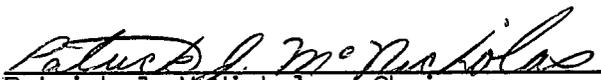
Within seven calendar days of the date of this order, the appellant shall provide the names and addresses of her licensed health care practitioner(s), as well as an authorization for release of information from those practitioners to the Department of Corrections. The Department of Corrections will immediately forward to the appellant and her licensed health care practitioners a list of all current position vacancies within the Department of Corrections for which she qualifies by virtue of education and experience, into which she might be transferred or demoted. The Department shall forward to the appellant's licensed health care practitioner(s) a copy of the class specification, supplemental job description, work schedule, and written description of the work location and environment for each such position. This

information shall be provided to the appellant's licensed health care practitioners within 10 calendar days of the date of receipt of the information detailed above.

The appellant shall be responsible for assuring that her licensed health care practitioner(s) respond to the Department of Corrections, providing an assessment of the appellant's general state of health as well as an assessment of which jobs the appellant would be able to perform. In the event that there are no vacancies for which the appellant qualifies, that the appellant refuses to be transferred or demoted into an appropriate vacancy, or the appellant is unable to secure a release from her licensed health care practitioner to return to full-time employment, the Department shall be authorized to remove her for non-disciplinary reasons pursuant to Per 1002.03 of the Rules of the Division of Personnel.

RSA 21-I:58 1 authorizes the board to change or modify any order of the appointing authority, or make such other order as it may deem just. That authority does not extend to contractual agreements between a private insurer and an appellant, and the Board has no intention of ordering Blue Cross and Blue Shield of New Hampshire to retroactively enroll the appellant in a plan. Therefore, it shall be the responsibility of the parties to settle on the most equitable method for payment of medical costs incurred by the appellant from the date of termination to the present which have not been paid through Workers' Compensation, provided however, that the State shall not be liable for payment of any costs in excess of those which the carrier actually would have paid as a benefit to the appellant or her service providers.

THE PERSONNEL APPEALS BOARD


Patrick J. McNicholas, Chairman


Lisa A. Rule, Commissioner

cc: Virginia A. Lamberton, Director of Personnel
Michael C. Reynolds, SEA General Counsel
John E. Vinson, Esq., Commissioner's Office, Dept. of Corrections
Lisa Carrier, Human Resources Administrator, Dept. of Corrections