

State of New Hampshire



PERSONNEL APPEALS BOARD

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Appeal of Robert Ehlers

Docket #2008-O-006

Department of Health and Human Services

July 17, 2008

By letter dated April 29, 2008, received by the Board on April 30, 2008, Robert Ehlers, an employee of the Department of Health and Human Services, appealed the Personnel Director's April 15, 2008 decision not to approve a 20% salary enhancement for positions #14753 and #30318.

In support of his appeal, Mr. Ehlers offered several arguments, which are briefly summarized below:

- (1) Contrary to the rationale offered in the Director's denial of the request for a salary enhancement, the size of the class of positions under review has not mattered in previous instances when determining the validity of a salary enhancement request.
- (2) Although the appellant's supplemental job description does not include an accountability for conducting compliance surveys, the appellant has performed the same work as those he supervises because of insufficient staffing. As a result, the appellant has "...had to act in the capacity of a Licensing & Evaluation Coordinator," a class of positions whose salaries were enhanced, particularly when responding to crisis situations.
- (3) The requirement for a Registered Nurse license for Licensing and Evaluation Coordinators within the bureau "is an artificial requirement" which was imposed because it "provided face value to the request in case questions were asked by the Governor and Executive Council."

(4) The Director of Personnel has been inconsistent in her application of the rules and has misapplied the standard for evaluating enhancement requests.

The Board reviewed the information provided by Mr. Ehlers in his appeal, the language of PART Per 904, Increasing Compensation to Enhance Recruitment, and the language of RSA 99:8, Increases for Recruitment Purposes. The Board also reviewed a letter from Director Hutchins¹ dated May 12, 2008, in which Ms. Hutchins wrote:

"Personnel Rule 904.01 exists to bring attention to RSA 99, Adjustment of Salaries of State Employees, specifically RSA 99:8, Increases for Recruitment Purpose. Specifically, the rule ensures a consistent submission and review process and does not address the outcome. The rule provides broad discretion to the Director of the Division of Personnel. In this case, the process was appropriately followed so there is no basis for the appeal. In addition, it is important to note that there is not a statute, rule or article that addresses or guarantees that classified employees at the level of supervisor receive more in salary than those that they supervise."

Per-A 206.06 of the Board's rules (NH Code of Administrative Rules) provides for disposition of an appeal when the material facts are not in dispute. Specifically, the rule states:

“(a) If at any time the board determines that there are no material facts in dispute, the board shall decide the appeal on the undisputed facts as presented by the parties.

(b) Either party may file a motion for reconsideration or rehearing of such decision in accordance with Per-A 208.03.”

After considering the appellant's arguments and reviewing all the documents submitted by the appellant in support of his appeal, the Board found that there are no material facts in dispute.

¹ There is no indication in the Director's letter that a copy of the document was forwarded to Mr. Ehlers. Similarly, there is no indication in Mr. Ehlers' appeal that copies were provided to either the incumbent of the second Bureau Chief position or to the Department of Health and Human Services itself.

1. By letter dated February 20, 2008, the Department of Health and Human Services requested a 20% salary enhancement for positions #14753 and #30318, stating:
"On April 17, 2007, the Department requested a 30% increase in compensation for the Licensing and Evaluation Coordinators and their direct line supervisors within HFA-C and HFA-L. This salary enhancement was necessary in allowing the Department to successfully recruit and retain qualified individuals in many vacant positions. The Director of the Division of Personnel and the Governor and Council approved that request. As a result, HFA-C has been able to recruit several qualified Licensing and Evaluation Coordinators and both HFA-C and HFA-L are actively recruiting to fill other vacant positions."
2. The Department's request, submitted by then Director of Human Resources Karen McCabe, indicated that, "Supervisors who were enhanced are 'working supervisors' in that they spend a considerable amount of time in the field with the Licensing and Evaluation Coordinators. The same is true for the Bureau Chiefs." In her letter, Ms. McCabe stated that the Bureau Chiefs "are regularly in the field conducting surveys and providing direct supervision to field supervisors and Licensing and Evaluation Coordinators," and that because of short-staffing, the Bureau Chief in HFA-C conducts some special surveys in order to comply with deadlines outlined in 42 CFR 489.20 and 489.24.
3. The Department's request included salary data for private and public sector positions that the Department considered comparable to HFA-C and HFA-L Bureau Chiefs, along with an explanation of why the Department felt the enhancement for those positions was appropriate.
4. As part of its rationale, the Department indicated that a previous decision of the Director of Personnel recommending salary enhancements for Licensing and Evaluation Coordinators and their direct line supervisors within the Bureaus of Health Facilities Administration (Certification and Licensing) had the "unintended consequence" of creating a wage disparity, and that without a 20% salary enhancement, Bureau Chiefs would earn less than the staff they supervise.
5. By letter dated April 15, 2008, Personnel Director Hutchins replied, denying the request. In doing so, the Director indicated that the statute and applicable rules provided for salary

enhancements for recruitment purposes, not for the purpose of correcting wage disparities between the public and private sector positions, or for correcting the "unintended consequences" of change affecting other positions in the classified system. She also indicated that the requirements on the supplemental job descriptions for Bureau Chief did not include the same licensing requirements or minimum qualifications that appeared on the SJDs for Licensing and Evaluation Coordinators, nor did they indicate that the Bureau Chiefs were responsible for conducting surveys.

The Board found that RSA 99:8 and Per 904.01 provide no mechanism for adjusting salaries based on organizational structure, pay disparity or supervisory relationships. The statute and the administrative rule are limited to salary enhancements within the classified service for purposes of recruitment.

RSA 99:8 Increases for Recruitment Purposes states:

"Upon request of the appointing authority, the governor and council are hereby authorized and empowered, notwithstanding any other provisions of the law to the contrary, upon a finding by them and a recommendation from the director of personnel that a substantial number of vacancies exist in any class of authorized positions which vacancies require an increase in salaries for recruitment of qualified personnel therefor, to increase salaries of such classified positions, any such increases to be a charge against the salary adjustment fund."

Per 904.01 (a) of the NH Code of Administrative Rules states, "An appointing authority may request an increase in the compensation of a class for recruitment purposes under RSA 99:8 by filing a request with the director..." The request must include various supporting documents including:

"(1) A comparison of salaries in the appropriate industry and geographic location, including:

- a. Occupations which are comparable to the state classification for which the increase is sought; and

- b. A comparison of benefits as a percentage of salary;
- “(2) A recommended percentage increase over the current salary grade assignment of the class title, based on the data compiled by the appointing authority under (1);
- “(3) A detailed plan explaining how the appointing authority intends to adjust the salaries of all class members; and
- “(4) The number of positions affected by an increase for recruitment purposes and the overall cost of the proposed increase.”

In reviewing both Per 904.01 and RSA 99:8, the Board found that recruitment is presented as the only valid reason for requesting or recommending a salary enhancement. Per 904.01 (b) specifically states, "If the director concurs with an increase in compensation for recruitment purposes [emphasis added] based upon the information provided in (a) or the director's own market studies conducted under RSA 21-I:42, VI, the appointing authority's recommendation to governor and council shall be in the form of a suggested percentage increase in the hourly wages of the class, for a period not to exceed 24 months."

Although the appeal is presented as a dispute concerning the Director's application of a rule regarding salary enhancements for purposes of recruitment, many of Mr. Ehlers' arguments address the accountabilities on his supplemental job description, his performance of duties that are similar to duties performed by staff in his bureau, and his contention that, "The requirement for a Registered Nurse license is an artificial requirement place[d] on all of the unit's Licensing and Evaluation Coordinators by the Director," so it would "...provide face value to the request in case questions [about the salary enhancement for Licensing and Evaluation Coordinators] were asked by the Governor and Executive Council."

According to the documents submitted by Mr. Ehlers in support of his appeal, the request for salary enhancements in the classification of Licensing and Evaluation Coordinator was predicated upon the number of vacancies in those positions and difficulty the Department was experiencing in filling those positions or retaining qualified staff. As Per 904.01 clearly states, salary enhancements are meant for purposes of recruitment when, "...a substantial number of vacancies exist in any class of authorized positions which vacancies require an increase in

salaries for recruitment of qualified personnel therefor..." [RSA 99:8, emphasis added.] The instant appeal does not involve a substantial number of vacancies. In fact, it appears that neither of the subject positions is vacant. As such, it would appear that the provisions of RSA 99:8 would be inapplicable in this instance.

According to Mr. Ehlers, salaries for positions within his bureau were enhanced based upon newly imposed minimum qualifications and position requirements that were not necessary in all cases and did "...not fit the business model of the unit." Although that assessment may be accurate, neither the agency nor the position incumbents appealed the establishment of those qualifications or the effect that it would have on their positions. Further, even if Mr. Ehlers' assessment of the situation is accurate, that fact would not provide a basis upon which to recommend salary enhancements for positions of Bureau Chief.

Although salary enhancements for positions of Licensing and Evaluation Coordinator and their direct line supervisors may have created a wage disparity, the Board is unaware of any provision of law or any personnel rule that either requires or provides for an adjustment. State law² provides a method for correcting wage disparities between classified and unclassified employees. The Board is unaware of any similar provision requiring adjustments when all the positions in question are classified.

² Officials named in this section shall be placed in the corresponding steps in the new salary ranges as their length of service justifies and in accordance with RSA 94:3. Lottery commissioners who are members of a multi-state lottery commission and who are authorized to be compensated for such services shall be compensated in addition to their salary under RSA 94:1-a, II, provided, that such additional salary equals no more than \$50 per actual day worked plus reasonable expenses for duties performed as a multi-state lottery commissioner. Racing commissioners, lottery commissioners, and the state entomologist only excepted, any official whose salary upon placement in the new salary range is less than that of a subordinate classified employee shall be placed at the next higher step in range above said classified employee and shall be entitled to any increase provided for herein until the maximum provided herein is reached. However, in the event that the maximum of the unclassified position is less than the salary of said subordinate classified employee, the governor and council is authorized to increase the maximum of the unclassified position in an amount to provide a differential of not more than \$1,000. [RSA 94:2-A, III]

Whereas the instant appeal involves the appellant's contention that the Director of Personnel misinterpreted and misapplied Per 904 regarding salary enhancements, the Board makes no specific findings with respect to the accountabilities listed on his supplemental job description, or his current classification as a Supervisor VII. If the appellant believes that his duties and responsibilities have been understated or misrepresented, the appropriate remedy would be a request for reallocation or reclassification of his position.

Therefore, for all the above reasons, the Board voted unanimously to DENY Mr.Ehlers' appeal, but without prejudice to his right to request reallocation or reclassification of his position.

THE PERSONNEL APPEALS BOARD

/s/

Patrick Wood, Chair

/s/

Robert Johnson, Commissioner

/s/

Joseph Casey, Commissioner

/s/

Philip Bonafide, Commissioner

cc: Karen Hutchins, Director of Personnel, 25 Capitol St., Concord, NH 03301
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