

State of New Hampshire



PERSONNEL APPEALS BOARD

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

To: Attorney Brian Stern
88 Locust Street
Dover, NH 03820

Senior Assistant Attorney General Anthony Blenkinsop
Department of Justice
33 Capitol Street
Concord, NH 03301

Sandra Adams, HR Administrator
Department of Resources and Economic Development
72 Pembroke Road
Concord, NH 03301

Re: PAB Decision on Pending Motions, Objections and Supplemental Correspondence
Appeal of Daniel Ryan, Docket #2009-D-004

From: Mary Ann Steele, Executive Secretary to the NH Personnel Appeals Board

Date: October 29, 2009

A handwritten signature in cursive script that reads "Mary Ann Steele".

Enclosed is a copy of the NH Personnel Appeals Board's decision on pending motions, objections and supplemental correspondence in the Appeal of Daniel Ryan. I apologize that the decision does not have the Board members' actual signatures. Unfortunately, in preparing to duplicate and distribute the document, the page bearing the original signatures was ruined.

State of New Hampshire



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

Appeal of Daniel Ryan

Docket #2009-D-004

Department of Resources and Economic Development

Personnel Appeals Board Decision on Pending Motions, Objections and Supplemental Correspondence

October 29, 2009

On May 21, 2009, the NH Personnel Appeals Board issued its decision on the State's Motion to Dismiss and the Appellant's Objection thereto, finding that as a full-time employee, Mr. Ryan would have standing to appeal his suspension without pay, even if he had not attained "permanent status" as defined by RSA 98-A:3.¹

1. On June 19, 2009, Senior Assistant Attorney General Anthony Blenkinsop filed with the Board the Department of Resources and Economic Development's Motion to Reconsider. Mr. Blenkinsop argued that the PAB and the New Hampshire Supreme Court have both held that an application of the rules adopted by the Director of Personnel is expressly limited to full-time employees within the State system, and that Mr. Ryan was not a full-time employee. Attached to the Motion was the Affidavit of Sandra Adams, Human Resources Administrator for the Department of Resources and Economic Development, attesting to Mr. Ryan's status as a temporary part-time employee.
2. On June 26, 2009, Attorney Brian T. Stern filed on the appellant's behalf an Assented-to Request for Additional Time to File Response to the Department of Resources and Economic Development's Motion to Reconsider. Mr. Stern's Objection was received by the Board on July 7, 2009. In it, Mr. Stern argued that while a party may be entitled to file a Motion for Rehearing, under the Board's rules, there is no authority for a Motion to

¹ 98-A:3 Position Made Permanent. – Any person appointed under a temporary appointment or any person appointed under a seasonal appointment who works the equivalent of 6 months or more, not necessarily consecutively, in any 12-month period shall be deemed to be respectively a permanent temporary employee or a permanent seasonal employee and entitled to all the rights and benefits of a permanent employee in the classified service of the state.

Reconsider. He also argued that while the State relied on "coding status" of the appellant, and upon its statistical analysis of the hours that the appellant worked in 2008, full-time status is not determined by the State's position coding, but by the way the employee is actually treated, including the terms under which the employee is hired and how the employee performs. He argued that the appellant was hired to work 8 hours per day 5 days per week, noting that his hours "may be reduced beyond the expected schedule of 40 hours based on issues of medical leave and rain dates, and where there is reduced staffing according to expected reduced beach activity." He argued that Mr. Ryan is a long-term employee with fourteen consecutive years, working on average 40 hours per week, each and every year. Attorney Stern attached copies of reports titled, "DRED Bi-Weekly Time Report Temporary and Part Time Employees" showing Mr. Ryan's hours worked during the 2008 season.

3. On July 9, 2009, Senior Assistant Attorney General Anthony Blenkinsop filed the Department of Resources and Economic Development's Response to Appellant's Objection to Motion to Reconsider. In that Response, Mr. Blenkinsop argued that the department clearly moved in a timely manner pursuant to Per-A 208.03 to have the Board reconsider its decision, and whether the motion was captioned as a request for rehearing or reconsideration, the relief requested by DRED was explicitly contemplated and permitted under the language of the applicable rule and statute. He argued that the appellant's "coding status" was relevant to the appellant's access to the appeals process, and that his status as a temporary part-time employee was detailed in Ms. Adams' affidavit attached to the State's original Motion to Reconsider. Mr. Blenkinsop argued that documents attached to the appellant's objection clearly substantiated DRED's assertion that the appellant was not a full-time employee. As such, he argued, the Board should reconsider its May 21, 2009 decision and dismiss the underlying appeal for lack of standing and jurisdiction.
4. On August 27, 2009, Attorney Stern forwarded to the Board copies of payroll records from 1997 forward, arguing that "in any given summer there are reasons for variability in the scheduled, but that the appellant consistently worked 37.5 to 40 hours per week. Attorney Stern also wrote, "The end of 2005 and all of 2006 were the period in which there was a problem resulting in the underlying litigation which was resolved favorably to Mr. Ryan with a Settlement Agreement. The case before the Board now involves the Claimant's alleged violation of that Settlement Agreement and ongoing retaliation by the State."
5. On August 31, 2009, Senior Assistant Attorney General Blenkinsop filed a response to the allegations contained in Attorney Stern's August 27th letter to the Board. In his response, Senior Assistant Attorney General Blenkinsop wrote that, "Mr. Ryan, like other lifeguards, is let go at the end of each season and must be hired

again at the beginning of a new season in order to be a State employee," and that the only relevant dates were his date of hire in May 2008, and his date of separation in September 2008. Mr. Blenkinsop argued that the appellant does not remain an employee during the months that he is not employed as a lifeguard, and that he has not been a full-time employee of the State of New Hampshire in 2008, 2009, or at any other time. He further argued that under the relevant enabling statutes, the Personnel Appeals Board does not have jurisdiction to consider an alleged violation of the terms of a settlement agreement reached in a contested New Hampshire Superior Court case, or claims of retaliation stemming from such an agreement.

6. On September 4, 2009, Attorney Stern filed a response to the State's August 31, 2009, letter, saying that prior periods of employment were relevant, as the State gives raises to lifeguards every 2,080 hours worked, and that the Hampton Beach Park Manager uses seniority "as a measure to determine a variety of workplace duties/ranks and privileges."
7. On September 21, 2009, Attorney Stern filed a further response, enclosing a copy of the parties' Settlement Agreement, asking the Board to note specifically in paragraph 2 of the document that "references Dan Ryan's reinstatement at the wage and seniority that he would have earned had he not had a break in employment."
8. On September 25, 2009, Senior Assistant Attorney General Blenkinsopp submitted a further response, reiterating that Mr. Ryan had never worked the requisite number of hours in a given period of employment to be considered a full-time employee. He argued that the basis for the instant appeal is "a suspension without pay due to Mr. Ryan's inappropriate behavior in July 2008." He argued that "Mr. Ryan's continued attempt to re-litigate a 2005 Superior Court case, or the agreement resulting from that case, before this Board is simply inappropriate."

Jurisdiction:

In accordance with RSA 21-I:46, I:

"The personnel appeals board shall hear and decide appeals as provided by RSA 21-I:57 and 21-I:58 and appeals of decisions arising out of application of the rules adopted by the director of personnel..."

The 2005 settlement agreement between Mr. Ryan and the Department of Resources and Economic Development is not an action related to the appellant's position classification nor is it an action involving an application of rules

adopted by the Director of Personnel. As such, any alleged violation of that agreement is a matter outside the Board's subject matter jurisdiction.

The question of Mr. Ryan's standing can only be resolved by determining whether or not the appellant's work schedule would qualify him as a full-time employee, and if so, whether or not he had attained "permanent" status as described by RSA 98-A:3 as either a permanent temporary or permanent seasonal employee.

In accordance with RSA 98-1, Terms Defined:

The following terms shall be construed as follows:

I. "Temporary appointment" shall mean an appointment made to fill a temporary position on a full-time basis for the period of appointment.

II. "Seasonal appointment" shall mean an appointment made to fill a seasonal position on a full-time basis for the period of appointment. A seasonal appointment is one which may reasonably be anticipated as likely to recur each year for a varying number of months.

III. "The equivalent of 6 months or more" shall mean the equivalent of 130 or more regularly scheduled work days, not necessarily consecutive, provided that whenever an employee of the racing commission or greyhound racing commission is employed on any day on a per diem basis he shall be deemed to have worked one day.

IV. "Full-time basis" shall refer to employment calling for not less than 37-1/2 hours work in a normal calendar week or calling for not less than 40 hours work in a normal calendar week with respect to positions for which 40 hours are customarily required.

V. "Part-time basis" shall refer to employment calling for less than 37-1/2 hours work in a normal calendar week or calling for less than 40 hours work in a normal calendar week with respect to positions for which 40 hours are customarily required.

RSA 98-A:3 describes when a position is made "permanent." It states, "Any person appointed under a temporary appointment or any person appointed under a seasonal appointment who works the equivalent of 6 months or more, not necessarily consecutively, in any 12-month period shall be deemed to be respectively a permanent temporary employee or a permanent seasonal employee and entitled to all the rights and benefits of a permanent employee in the classified service of the state."

According to Mr. Stern, "the appellant was hired to work 8 hours per day 5 days per week" although his schedule "may be reduced beyond the expected schedule of 40 hours based on issues of medical leave and rain dates, and where there is reduced staffing according to expected reduced beach activity."

Payroll records provided by the appellant indicate that Mr. Ryan never worked more than 16 weeks in any calendar year, nor is there a single season listed in which the appellant worked a full-time schedule throughout the length of the season. Mr. Ryan worked:

1. Full-time (37.5 hours per week) in 10 weeks of the 11 week season in 1997
2. Full-time (37.5 hours per week) in 6 weeks of the 12 week season in 1999
3. Full-time (40 hours per week) in 9 of the 15 week season in 2004
4. Full-time (40 hours per week) in 8 of the 12 week season in 2005, including 2 weeks in which he worked more than 40 hours and earned overtime compensation
5. Full-time (40 hours per week) in 11 weeks of the 16 week season in 2007, including 4 weeks in which he worked more than 40 hours and earned overtime compensation
6. Full-time (40 hours per week) in 2 weeks of the 16 week season in 2008
7. Full-time (40 hours per week) in 1 of the 6 weeks listed for the 2009 season

Per 1201.01 of the Personnel Rules defines the "basic workweek" as follows:

- (a) The basic workweek for every full-time clerical, supervisory and professional employee in the state classified service, with due allowance for authorized holidays and leaves of absence with pay, shall be 37 1/2 hours per week.
- (b) The basic workweek for every full-time trade, custodial, or other employee in a similar category in the state classified service, with due allowance for authorized holidays and leaves of absence with pay, shall be either 40 hours per week or 37 1/2 hours per week, depending on work schedules determined by the appointing authority, as approved by the director.
- (c) Work hours beyond the basic workweek or work period shall be authorized, in advance, by the appointing authority.
- (d) An appointing authority may reduce or eliminate overtime hours.

The Rules make no provision for reducing the number of hours in a basic workweek for "rain dates or reduced staffing."

Based on the information provided by the appellant,, the Board found that Mr. Ryan was neither a full-time temporary nor a full-time seasonal employee, and at no time did he attain "permanent" status by working the equivalent of 6 months in any 12 month period. The Board found that Mr. Ryan was a temporary part-time employee who was not subject to the disciplinary provisions of the Personnel Rules, or the right to appeal under the provisions of RSA 21-1:58. For those reasons, the Board voted to GRANT the State's Motion to Dismiss based on the appellant's lack of standing and subject matter jurisdiction.

THE PERSONNEL APPEALS BOARD

/s/

Patrick Wood, Chair

/s/

Philip Bonafide, Vice-Chair

/s/

Robert Johnson, Commissioner

/s/

Joseph Casey, Commissioner

cc: Karen Hutchins, Director of Personnel, 25 Capitol St., Concord, NH 03301
Anthony Blenkinsop, Sr. Assistant Attorney General, Dept. of Justice, 33 Capitol St., Concord, NH 03301
Sandra Adams, HR Administrator, Dept, of Resources and Economic Development, 72 Pembroke Rd.,
Concord, NH 03301
Attorney Brian Stern, 88 Locust St., Dover, NH 03820

State of New Hampshire



PERSONNEL APPEALS BOARD

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

Appeal of Daniel Ryan

Docket #2009-D-004

Department of Resources and Economic Development

Personnel Appeals Board Response to State's Motion to Dismiss and Appellant's Objection Thereto

May 21, 2009

On July 28, 2008, the NH Personnel Appeals Board received Daniel Ryan's notice of appeal requesting a hearing to appeal his suspension without pay for a period of ten working days, effective July 20, 2008. The parties appeared for a mandatory prehearing conference on September 17, 2008. Senior Assistant Attorney General Anthony Blenkinsop appeared on behalf of the Department of Resources and Economic Development. Attorney Brian Stern appeared on behalf of the appellant.

At the prehearing conference, the parties indicated that they anticipated calling a total of eight or nine witnesses at any hearing on the merits of the appeal. Although the parties agreed that they would be able to stipulate to some of the facts, Attorney Stern advised the Board that he intended to depose two of the State's witnesses and asked that any hearing on the merits of the appeal be scheduled accordingly. The Board, with the parties' agreement, scheduled a second prehearing conference for 9:00 a.m. on October 29, 2008. By letter dated September 23, 2008, Attorney Stern informed the Board that those depositions would not be necessary, and the parties were prepared to have the matter scheduled for a hearing on the merits of the appeal, and asked the Board to schedule the matter for hearing on December 17, 2008. By letter dated December 5, 2008, the State filed an Assented-to Motion to Continue the hearing until January 28, 2009. The Board granted that Motion rescheduled the hearing as requested.

On January 13, 2009, the State filed a Motion to Stay, asking the Board to stay any proceedings in the appeal pending a decision on the State's Motion to Dismiss, which was filed concurrently. In that Motion, the State argued that RSA 21-1:58 permits appeals by "permanent" employees, and that throughout his employment with the Department, the appellant had never worked full-time the equivalent 6 months in any twelve-month period to qualify as a "permanent" employee as defined by RSA Chapter 98-A:3. The State

argued that in order to have standing to appeal under the provisions of RSA 21-I:58, the appellant first must have attained permanent status. In the Motion to Stay, the State also indicated that the NH Supreme Court was scheduled to hear oral argument in another case involving the Board's jurisdiction, and that a decision in that appeal could provide some guidance in deciding the State's Motion to Dismiss.

On January 22, 2009, the Board received the Appellant's Objection to both Motions. With respect to the State's Motion to Dismiss, Attorney Stern argued that the State had always treated Mr. Ryan as a permanent employee, and had never raised any issue with respect to the appellant's standing to appeal his suspension without pay until the date that the Motion to Dismiss was filed. The appellant argued that as a full-time employee suspended under the provisions of Chapter Per-A 1000 of the Rules of the Division of Personnel, the appellant was entitled to a hearing.

In an email message to the parties dated January 26, 2009, the Board advised the parties that it had decided to treat the State's Motion to Stay as a Motion to Continue, and that the Motion had been granted. The Board further advised the parties that the Motion to Dismiss would be taken under advisement.

By letter dated January 27, 2009, Attorney Stern submitted a letter for the Board's review along with a copy of a July 18, 2008 email message to Mr. Ryan from Sandra Adams of the Department of Resources and Economic Development in which Ms. Adams stated:

"In terms of appeal rights, the rules say that they apply to full-time employees. Although you are neither a regular full-time employee nor a true seasonal employee, you are employed full-time on a temporary basis. Therefore, if you take exception to the disciplinary suspension, you would be required to follow the appeal process that is in place – appeal to the personnel Appeals Board within 15 calendar days (from July 17) pursuant to RSA 21-I:58 or resolved through the procedures for settlement of disputes pursuant to Admin Rules of the Division of Personnel PART Per 205."

While RSA 21-I:58 clearly refers to appeals by permanent employees, an analysis of the appellant's standing to appeal his suspension without pay is far more complicated when reviewed in light of apparently conflicting statutes, administrative rules and collective bargaining provisions. RSA 98-A:3, for instance, provides that, "Any person appointed under a temporary appointment or any person appointed under a seasonal appointment who works the equivalent of 6 months or more, not necessarily consecutively, in any 12-month period shall be deemed to be respectively a permanent temporary employee or a permanent seasonal employee and entitled to all the rights and benefits of a permanent employee in the classified

service of the state." Those rights and benefits extend well beyond access to the appeals process under RSA 21-I:58 and can include retroactive accumulation of annual and sick leave as specified in RSA 98-A:4 and seniority credit as described in RSA 98-A:5. At the same time, RSA 98-A:6-c states, "Full-time seasonal employees shall be considered permanent employees only for the purposes of the death benefit under RSA 21-I:29," while RSA 21-I:55 provides that temporary employees of the Department of Transportation must occupy their positions continuously and carry out their duties for a period of 2 years before attaining permanent status. Within the context of the Personnel Rules, a person appointed to a full-time position may not be considered "permanent" until he or she has completed 12 months of work "in a position," while Article XVI, Section 16.8 of the Collective Bargaining Agreement between the State of NH and the State Employees Association states, "Notwithstanding any rule to the contrary, an agency appointing authority may request approval from the Division of Personnel for permanent status for any probationary employee prior to the end of that employee's probationary period but not sooner than six months following that employee's date of hire. This provision shall not apply to employees in positions for which a year-long training or evaluation period is required."

In its decision dated April 17, 2009 in Case No. 2008-0367 and 2008-0368, Petition of Darlene Frappiea; Petition of Pamela Blake, the Court affirmed the Personnel Appeals Board's decision that it lacked subject matter jurisdiction to hear appeals by part-time employees when such claims were not clearly the result of an application of rules adopted by the Director of Personnel as they applied to part-time employees. ("...Blake argues that the PAB has jurisdiction to hear her claim because she alleged that her termination violated New Hampshire Administrative Rules, Per 1002.03 and 1002.08, which govern employment discipline. We disagree. Application of these rules is expressly limited to full-time employees within the state system. See N.H. Admin. Rules, Per 1002.01.") Unlike Ms. Blake, the appellant claims standing as a full-time employee. Although the appellant reportedly never worked a sufficient number of days in any 12-month period to qualify as a "permanent" employee as defined by RSA 98-A:3, there is no dispute that the appellant worked as a full-time employee. There also is no dispute that the appellant's notice of suspension cites alleged violations of Per 1002.06 of the Rules as the basis for the discipline imposed, and his right of appeal under the general provisions of RSA 21-I:46 would then be predicated upon his status as a full-time employee appealing an application of rules adopted by the Director of Personnel,

Per 1002.01 states: "The following disciplinary measures shall exist for full-time employees within the state system:

- (a) Dismissal during initial probationary period;
- (b) Written warning;

- (c) Withholding salary increment;
- (d) Disciplinary suspension without pay;
- (e) Demotion; and
- (9 Dismissal,"

Per 1002:06 (e) requires an appointing authority who imposes a disciplinary suspension without pay, such as that imposed upon the appellant in July 2008, to provide written notice to both the employee and the Director of Personnel, "...that the suspension may either be: a. Appealed to the board within 15 calendar days from the date of notice pursuant to RSA 21-1: 58; orb. Resolved through the procedures for settlement of disputes pursuant to Part Per 205."

While RSA 21-1:58, I, refers specifically to appeals by "permanent" employees, RSA 21-1:46 draws no such distinction based upon permanent status. Given all the conflicting provisions regarding attainment of permanent status, the Board believes the that RSA 21-1:46 provides a more reasonable basis upon which to assess the appellant's rights to appeal a decision arising out of an application of rules adopted by the Director of Personnel as they apply to full-time personnel. As such, while the appellant may not have standing to appeal under the provisions of RSA 21-1:58, the Board believes that the appellant has standing to appeal his suspension without pay under the broader language of RSA 21-1:46. While he may have no right to the specific reinstatement rights prescribed in RSA 21-1:58 for permanent employees , the Board believes it has jurisdiction to hear and decide his appeal.

FOR THE PERSONNEL APPEALS BOARD



Patrick Wood, Chair

cc: Karen Hutchins, Director of Personnel, 25 Capitol St., Concord, NH 03301
Anthony Blenkinsop, Sr. Assistant Attorney General, Dept. of Justice, 33 Capitol St., Concord NH
03301
Sandra Adams, HR Administrator, Dept, of Resources and Economic Development, 72 Pembroke
Rd., Concord, NH 03302-1856
Attorney Brian Stern, 88 Locust St., Dover, NH 03820