

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

91-507 Appeal of Susan Searah

In Case No.

June 25, 1992

the court upon made the following order:

Case is remanded to the personnel appeals board for reconsideration in light of Appeal of Linda Tancrede, 135 N.H. (decided May 28, 1992).

Distribution:

NH Personnel Appeals Board
Michael C. Reynolds, Esquire
Attorney General's Office
Donna R. Craig, Supreme Court
File

JUN 29 8 18 AM '92
RECEIVED
DIV OF PERSONNEL
Howard J. Zibel

Clerk

The State of New Hampshire

supreme Court

No. 91-507

Appeal of Susan Searah

TO THE CLERK OF PERSONNEL APPEALS BOARD

I hereby certify that the Supreme Court has issued the following order(s) in the above-entitled action(s):

June 25, 1992 Case is remanded to the personnel appeals board for reconsideration in light of Appeal of Linda Tancrede, 135 N.H. ____ (decided May 28, 1992).

RECEIVED
DIV. OF PERSONNEL
Jul 20 1 03 PM '92

Attest: Howard J. Zibel
Howard J. Zibel, Clerk

July 17, 19 92

NOTICE: This opinion is subject to motions for rehearing under Rule 22 as well as formal revision before publication in the New Hampshire Reports. Readers are requested to notify the Clerk/Reporter, Supreme Court of New Hampshire, Supreme Court Building, Concord, New Hampshire 03301, of any errors in order that corrections may be made before the opinion goes to press.

THE SUPREME COURT OF NEW HAMPSHIRE

Personnel Appeals Board
No. 91-181

APPEAL OF LINDA TANCREDE & a.
(New Hampshire Personnel Appeals Board)

May 28, 1992

Michael C. Reynolds, of Concord, general counsel, State Employees' Association of New Hampshire, Inc., by brief and orally, for the appellants.

John P. Arnold, attorneygeneral (William C. McCallum, attorney, on the brief and orally), for the State.

BATCHELDER, J. The appellants, Linda Tancrede and others, are members of the clerical staff at the New Hampshire Department of Corrections. The director of personnel did not act upon the appellants' requests for job reclassifications after the legislature enacted a moratorium, which the appellants claim denied them their right to consideration of their requests. Because the appellants' questions are moot or not ripe for review, we dismiss the appeal.

On May 19, 1989, the appellants submitted a request for reclassification of their positions, pursuant to RSA 21-I:54, III, and the then applicable N.H. Admin. Rules, Per 303.04, which provide State employees a procedure for the reclassification of their positions. Effective June 5, 1989, however, Laws 1989, 408:105, I, took effect. This statute, enacted by the legislature in anticipation of a restructuring of the State employee classification system, provided that "the director of personnel shall not consider any requests for reclassification or reallocation until July 1, 1990." Laws 1989, 408:105, I. The legislature then enacted another moratorium making it expire on July 1, 1991, Laws 1990, 209:04.

The director of personnel took no action on the appellants' reclassification request prior to June 5, 1989, and on July 24, 1990, she informed the appellants that in light of the moratoria she

"will remain unable to review the classification" of the appellants' positions. The appellants appealed the decision to the personnel appeals board (PAB), which dismissed the appeal in February 1991. The PAB cited the moratorium then in effect until July 1, 1991, and quoted its earlier decision in another case, in which the PAB ordered the director of personnel "to consider the classification of the affected positions . . . as soon as she is lawfully and reasonably able" The appellants sought reconsideration of the PAB's dismissal on the grounds that Tancrede's case was distinguishable from the earlier case. The PAB disagreed and denied the motion for reconsideration, and this appeal followed.

The appellants ask this court to determine whether the PAB erred in ruling that the director of personnel, in the words of the appellants, "was permanently barred from considering the appellants' request for position reclassification." Contrary to the appellants' contention, the record reveals that neither the PAB nor the director of personnel ever considered themselves "permanently barred" from considering the request. Both the PAB and the director made it clear to the appellants that consideration was barred only as long as the moratoria were in effect.

The appellants argue that the PAB misconstrued or misapplied the moratoria statutes, and rely upon the New Hampshire Constitution, part I, article 23, which bars the application of retrospective laws. The appellants seek an "order that their classified reviews and upgrade requests go forward, retroactive to May 14, [sic] 1989; with appropriate retroactive pay and benefits."

We decline to address the appellants' request. First, the moratoria statutes have expired, and the PAB ordered the director of personnel "to consider the classification of the affected positions . . . as soon as she is lawfully and reasonably able" Because the only bar to review by the director that is alleged by the parties is the moratoria, their expiration renders the appellants' request to construe them moot. Absent any other bar, the appellants are now entitled to a review of their May 19, 1989 application. See Durell v. City of Dover, 130 N.H. 700, 546 A.2d 1072 (1988) (appeal dismissed for mootness where party entitled to records she sought). Second, the agency has not yet ruled on the appellants' request. Thus, we cannot tell whether the appellants will be granted any relief, nor whether the agency will act unlawfully. Therefore, the appellants' remaining claims are not ripe for review. See City of Portsmouth v. Association of Teachers, 134 N.H. , , 597 A.2d 1063, 1068 (1991). Accordingly, the appeal is dismissed.

Appeal dismissed.

All concurred.

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

HOWARD J. ZIBEL
CLERK OF COURT AND
REPORTER OF DECISIONS
CAROL A. BELMAIN
DEPUMCLERK
DAVID S. PECK
DEPUTY CLERK

RECEIVED
DIV. OF PERSONNEL

FRANK ROWE KENISON
MAY 20 10 23 AM '92
SUPREME COURT BUILDING
CONCORD, N.H. 03301
(603) 271-2646
TTY/TDD RELAY 225-4033

May 25, 1992

Michael C. Reynolds, Esquire
SEA of New Hampshire, Inc.
P.O. Box 1403
Concord, NH 03302-1403

William C. McCallum, Esquire
Attorney General's Office
State House Annex
Concord, NH 03301

Re. 91-181 Appeal of Linda Tancrede & a.

The court will release an opinion in the above case on Thursday, May 28, 1992. A copy will be mailed to you on that date. You may also pick up a copy at the clerk's office anytime after 8:30 a.m. on the release date,.

You may also call the clerk's office on the release date to find out the result. The office staff, however, has been instructed to give by telephone only the mandate of the court (i.e., affirmed, reversed, dismissed, etc.). The office staff will not be available to read the opinion to you on the telephone or to discuss the theories of the decision.

Very truly yours,


Howard J. Zibel

HJZ/drc

cc: Personnel Appeals Board

State of New Hampshire

WPPID829



PERSONNEL APPEALS BOARD

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

APPEAL OF SUSAN SEARAH Docket #92-0-3 New Hampshire Hospital Response to Appellant's Request for Reconsideration

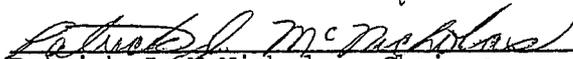
October 11, 1991

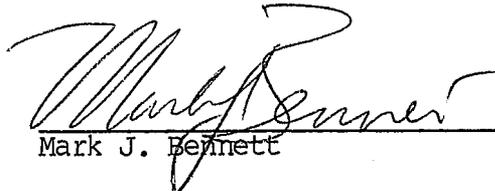
The New Hampshire Personnel Appeals Board (McNicholas, Bennett and Johnson) met Wednesday, October 9, 1991, to review the appellant's Motion for Reconsideration of the Board's September 26, 1991 decision dismissing the above captioned appeal.

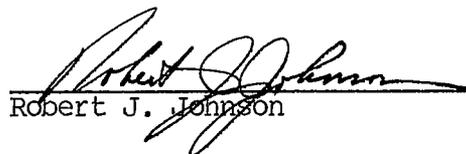
Having reviewed the appellant's arguments in support of her request for reconsideration in conjunction with the Board's September 26, 1991 order in this matter, the Board found that no arguments were presented which were not already raised or considered by the Board in reaching its original decision to dismiss the appeal.

Accordingly, the Board voted unanimously to affirm its order of September 26, 1991, and to deny Ms. Searah's Request for Reconsideration.

THE PERSONNEL APPEALS BOARD


Patrick J. McNicholas, Chairman


Mark J. Bennett


Robert J. Johnson

cc: Virginia A. Vogel, Director of Personnel
Jean Chellis, SEA Field Representative
Sharon A. Sanborn, Director of Human Resources, New Hampshire Hospital

State of New Hampshire

WPPID812



PERSONNEL APPEALS BOARD

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

APPEAL OF SUSAN J. SEARAH New Hampshire Hospital

Docket H92-0-3

September 26, 1991

The New Hampshire Personnel Appeals Board (McNicholas, Bennett and Johnson) met Wednesday, September 11, 1991, to consider the appeal of Susan J. Searah, an employee of New Hampshire Hospital. In that appeal, filed on her behalf by Jean Chellis, SEA Field Representative, the appellant alleged that the Director of Personnel erred in refusing to complete a position review submitted on March 2, 1989. In her original appeal, the appellant requested that the Board delay any action on the instant appeal until the New Hampshire Supreme Court decided two similar cases, specifically the Appeal of Richard Lalumiere (Supreme Court Case No. 91-355) and the Appeal of Linda Tancrede et al. (Supreme Court Case No. 91-181).

By letter dated September 6, 1991, the State Employees' Association asked that the appellant be allowed to amend her appeal, arguing that the Fiscal Committee had approved a staffing plan affecting the subject position in October 1988, prior to the reclassification moratorium. The appellant also argued that the instant appeal must be considered in light of evidence that the Division of Personnel had completed a position review on another position at New Hampshire Hospital after June 5, 1989, the effective date of the legislatively enacted moratorium on position reviews. The appellant therefore asked the Board to conclude that her appeal was not sufficiently similar to the appeals of Lalumiere and Tancrede to warrant delaying a decision in the matter, requesting a full hearing before the Board as quickly as scheduling would allow.

The Board has repeatedly issued orders regarding positions affected by the moratorium on position reclassifications instituted by the Legislature between June 5, 1989 and July 1, 1991. While each of the appeals presented for review by the Board offers a slightly different set of facts and circumstances, the Board intends to rely upon its order in the matter of Bailey, Burton and Eaton (PA6 decision, February 14, 1991) in deciding such matters.

APPEAL OF SUSAN J. SEARAH
Docket #92-0-3

New Hampshire Hospital

page 2

Pertinent portions of the Board's February 14, 1991 Order in Bailey, Burton and Eaton are as follows:

"We do not, nor do we need to, more fully consider issues of retroactivity, or timing in connection with pending appeals, or our jurisdiction pursuant to RSA 21-I, the rules of the Department of Personnel and those of the Board, except as follows:

"...It appears, without deciding, that a reclassification or reallocation decision is not final or binding until all appeal options are exhausted, and that the retroactivity of any such decision may also apparently be limited by legislative intent...

"Accordingly, it is reasonable to conclude that the legislature's intent has changed since 1989; i.e., that a transition in the types of classification appeals, and how they would be handled, was contemplated initially in order to implement the so-called "new system." However, this appears to have given way in light of recent (probably particularly fiscal) developments to a view that no reclassification, reallocation or reevaluation appeals (without deciding what each of the foregoing indeed is), should be available, be heard by us, or considered by the Director of Personnel until at least July 1, 1991."

In support of her request for a hearing, the appellant offered evidence of a position reclassification which was completed after the effective date of Chapter 408:105 I, Laws of 1989. She argued that this evidence not only proves the dissimilarity between the instant appeal and the appeals of Lalumiere and Tancrede, but that it supports her contention that the review initiated in March, 1989, should have been completed.

Were the Board to find that the reallocation of Ms. Farmer's position was accomplished in accordance with the prevailing statutes, that evidence might be relevant to the instant appeal. Since no appeal involving that reallocation was timely filed, and the Board has no record in such matter to which it might refer, the Board may not now rely on its outcome in deciding the instant appeal.

As the State Employees' Association is aware through testimony offered in other appeals involving implementation of the Laws of 1989, Chapter 480; Section 105, II, the full extent of the prohibition on classification reviews

APPEAL OF SUSAN J. SEARAH

Docket #92-0-3

New Hampshire Hospital

page 3

was unclear at the outset. In oral argument before the Board in the appeals of Bailey, Burton and Eaton, the Director testified that she believed classification reviews which had been initiated prior to June 5, 1989, could be completed, but that no new requests received on or after June 5, 1989, were to be considered. In subsequent correspondence with the Attorney General in the fall of 1989, and receipt of a formal opinion on the issue, the Director was instructed not to complete any review for which a final decision had not been issued before June 5, 1989. The Director was acting in compliance with the Attorney General's interpretation of Laws of 1989, Chapter 408; Section 105, II, by refusing to complete the review of Ms. Searah's position.

The appellant argued that the equities of her appeal require a hearing. The Board does not agree. As the state argued in its response to the Board's May 17, 1990 Order in the appeal of Bailey:

"The PAB may disagree with the legislature's judgment in imposing this moratorium. But [it] is not the function of this Board to judge the wisdom of this statute. See Logan v. Logan, 120 NH 839, 843 (1980). 'However foolish and arbitrary' section 105, I may be thought to be, 'relief from its inappropriateness, incongruity and obduracy must be sought through further legislative action.' Trustees of Phillips Exeter Academy v. Exeter, 92 NH. 473, 478 (1943). Neither the executive nor the judicial branches have the power to alter the consequences of what the legislature has plainly provided. See Appeal of Cremin, 131 NH 480, 485 (1989).

"[T]he question before us is not what the legislature ought to have done when it enacted this statute but what it did, as expressed in the words of the statute itself. Nor is it for this court to add terms to the statute that the legislature did not see fit to include. It is not our function to speculate upon any supposed intention not appropriately expressed in the act itself. Relief 'from its inappropriateness' must be sought through further legislative action.

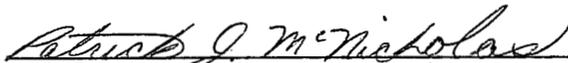
"Ahern v. Laconia Country Club, Inc. 118 NH. 623, 625 (1978) (citations omitted). Because section 105, ■ plainly prohibits consideration by the director of the reclassification requests here at issue, the appeals must be denied."

APPEAL OF SUSAN J. SEARAH
Docket #92-0-3
New Hampshire Hospital

page 4

In light of the foregoing, and having determined that there were no material facts in dispute, the Board voted to dismiss the appeal. In so doing, the Board found that the Director of Personnel's decision refusing to complete the position review initiated in March, 1989, is in compliance with the statutory prohibition on position reviews and reclassifications.

THE PERSONNEL APPEALS BOARD


Patrick J. McNicholas, Chairman


Mark J. Bennett


Robert J. Johnson

cc: Virginia A. Vogel, Director of Personnel
Jean Chellis, SEA Field Representative
Sharon A. Sanborn, Director of Human Resources, New Hampshire Hospital