State of New Hampshire

PERSONNEL APPEALS BOARD
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APPEAL OF JEAN BERGMAN
Docket #93-C-5
Division of Public Health Services

June 1, 1994

The New Hampshire Personnel Appeals Board (Rule and Johnson) met Wednesday, October 13, 1993, to hear the classification appeal of Jean Bergman, an employee of the Division of Public Health Services, Department of Health and Human Services. Ms. Bergman was represented at the hearing by SEA Field Representative Margo Hurley. Virginia Lamberton appeared on behalf of the Division of Personnel.

The matter was originally scheduled for hearing on July 7, 1993. However, when the Director of Personnel attempted to submit materials for the Board's review, Ms. Hurley objected, arguing that the materials should have been submitted to the Board in accordance with Per-A 208.03 of the Rules of the Personnel Appeals Board which allows the Director 20 days from the date of the appellant's original submissions to file a response.

The Board agreed to accept the Director's submissions, and to allow the appellant ten days in which to file a further response, noting that such response was to be limited to any new issues which had been raised by those submittals, and that the response itself should not exceed 5 pages in length. On July 14, 1993, the appellant wrote to the Board, again objecting to the materials provided by the Director as late-filed, since they were not received by the State Employees' Association within 20 days of the appellant's original appeal submissions in 1992.

The Board had already ruled on Ms. Hurley's objection during the meeting of July 7, 1993, and had agreed to admit into the record those documents which the Director of Personnel had attempted to offer at the hearing. The Board allowed the appellant time to file a response to those documents before rescheduling Ms. Bergman's appeal for hearing. Ms. Hurley failed to offer any compelling reason why that ruling should be considered unreasonable or unlawful and the Board again over-ruled her continuing objection to the admission of those materials into the record of Ms. Bergman's appeal.

At the conclusion of the hearing, Director Lamberton submitted proposed findings of fact and rulings of law. While the Board is mindful of its obligations to respond to proposed findings of fact and rulings of law, and finds them helpful in focusing the Board's review on the material facts in dispute, detailed, compound findings which do not allow the Board to focus on the issues are not helpful in reaching a decision. Accordingly, the Board will make its own findings in this case. To the extent that the proposed findings are consistent with the Board's decision, they are granted. Otherwise, they are denied.

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On February 19,1992, the Department of Health and Human Services submitted to the Division of Personnel a request for review of the position of Legal Coordinator and Contracts Monitor, salary grade 22, assigned to the Division of Public Health Services. Assistant Commissioner Poirier's letter to the Personnel Director stated, in pertinent part:

> As we discussed, I would like you to carefully review this position to insure that adequate legal services for the Division of Public Health Services are met. Also attached is a portion of a March 3,1989 letter from the Division of Personnel to William T. Wallace, M.D., M.P.H., which indicates that at the time of the previous review, it was felt the position classification of Legal Coordinator II was appropriate. I am not sure that high of a level is appropriate for this position and incumbent. (See State's Exhibit #1)

A completed request for reclassification, including a position classification questionnaire completed by the incumbent, was submitted to the Division of Personnel on February 26, 1992. The position was reviewed by an Analyst from the Division of Personnel. Both Ms. Bergman and the Director of the Division of Public Health Services were interviewed as part of the review process.

On May 26, 1992, the Director of Personnel wrote to Assistant Commissioner Poirier, transmitting her decision to reclassify Ms. Bergman's position from Legal Coordinator and Contracts Monitor (salary grade 22) to Program Specialist III (salary grade 22). Ms. Bergman then requested reconsideration of the Director's decision, arguing that the position in effect had been reclassified in 1989 when, on May 18, 1989, the Director approved a supplemental job description for the position at the level of Legal Coordinator II.
The Division of Personnel responded by letter dated July 16, 1992. In her response, the Director stated the following:

> [T]he classification system proposed during the classification study was not implemented by the legislature, although the Personnel Rules now require that supplemental job descriptions be developed as part of the current system. The proposed classification system included a restructuring of salary grades and a significant reduction in the number of class titles. Therefore, what may have been proposed as a Legal Coordinator during the study would bear no relation to the Legal Coordinator titles which are part of the current personnel system.
>
> Because of this confusion between the proposed and current systems, I issued a Personnel Memorandum in august, 1990 describing the current personnel system. In that memo, I specifically stated that job descriptions must obtain an approval date AFTER May 1, 1990 in order to be used in conducting personnel actions and procedures. ... Based on the information contained in the Memorandum, your proposed system supplemental job description dated May, 1989 would not meet the standards necessary to obtain Division of Personnel approval under the current personnel system.

In her request for reconsideration, Ms. Bergman also argued that the Director improperly reviewed the appellant's file and considered the appellant's education and experience in classifying her position. She argued that the experience and education of an incumbent are immaterial to the appropriate classification of a position, and that reclassifying a position on the basis of the incumbent's education and experience was contrary to the intent of Per 303.06 (c) of the Rules of the Division of Personnel.

Ms. Bergman argued that the both the Program Specialist III specification and the specification for Legal Coordinator II required incumbents to "interpret law". She argued that the absence of a *juris doctorate* degree had not precluded her from performing her duties prior to the reclassification, and that since that requirement also appeared in the specification for Program Specialist III, that argument could not be used to deny her reclassification.

In response to that argument, the Director stated:

> "I have reviewed the Program Specialist III class specification and agree that the language requiring the interpretation of laws is not appropriate for this class title. Therefore, I have instructed the Classification Section of this Division to review all specifications in the Program specialist series, and to delete this terminology. Draft class specifications containing these revisions were developed and have been sent out to state agency personnel offices for review and comment.
>
> You are correct in stating that the Division of Personnel normally reclassifies positions based on the merits and characteristics of the position. In this instance, the position requirements are such that a law degree is necessary to perform the job responsibilities. In many instances, an incumbent would not be required to meet the new minimum qualifications when the position the employee occupies is reclassified. This would not be the case, however, when the minimum qualifications are required by law, a mandated under Per 303.06(c)..."

Finally, Ms. Bergman argued that the Legal Coordinator II position description was "...cut and had new language pasted over it to give the appearance that both the reviewer and supervisor approved on the dates which were originally signed for a Legal Coordinator II classification." She went on to say, "This cut and paste of what represents a binding agreement can only be a draft document meant for proper execution upon approval of those who are required to sign the document." (See Bergman letter dated June 10, 1992, SEA ATTACHMENT IV)

The Director's July 16, 1992 response was as follows:

> Lastly, although you refer to the supplemental job description as a 'binding agreement', the job description was not designed for that purpose. Rather, it is a tool to be used and developed by agency managers, in conjunction with employees, in order to assign and evaluate job accountabilities. Supervisors and employees are not required to 'approve' a job description, merely sign the document to acknowledge that a review has taken place. When a request for reclassification is submitted by a state agency or employee, the cla'ssification heading on the supplemental job description should be left blank, so that the appropriate classification can be assigned by the Division of Personnel. Since your job description was not submitted in the required format, it was necessary for this Division to update the information which had changed before granting final approval in accordance with Personnel Memorandum 91-33 and Per 301.03(f).

On those points, the Board agrees that the Division of Personnel is responsible for approving supplemental job descriptions, as well as the list of accountabilities and minimum qualifications contained therein. An employee's or an agency's disagreement with the Division of Personnel on the contents of a supplemental job description and ultimate position classification do not make those requirements any less valid or binding. When an employee or agency disagree with the allocation of a position in a classification, the employee and agency may appeal to the Board under the provisions of RSA 21-I:57. That is precisely what has

happened in this instance.

In order to more clearly understand the basis for Ms. Bergman's appeal, the Board reviewed the classification questionnaire completed and signed by the appellant's immediate supervisor, Susan Epstein (former Acting Director of the Division of Public Health), on August 1, 1991. In that classification questionnaire, Ms. Bergman's responsibilities for programs in the agency were described as follows:

> Supervise the legal and regulatory activities of the Division; supervise the construction of all division regulatory orders and decisions; supervise the content and appropriateness of all Division contracts; supervise the construction of all Division rule making responsibilities.

In describing the kind of problems the appellant is required to solve, the classification questionnaire states the following:

> Negotiates resolution of disagreements between program regulators and those being regulated; address daily concerns of the public relative to public health policies and rules.

These duties do not appear to be consistent with the current classification of Legal Coordinator II. However, they are consistent with other positions classified as Program Specialist III. The scope of work described for the Program Specialist III position located in the Legal Unit of the Office of Child Support (Personnel Exhibit #9) is as follows:

> Researches, analyses, evaluates, and interprets regulations and policies and procedures of the Office of Child Support Enforcement under the general direction of the Chief Staff Attorney. Supervises and manages the day-to-day functions of the clerical staff within the Office of Child Support -Legal Unit under the direction of the Chief Staff Attorney.

Similar to Ms. Bergman, this employee is responsible for performing a number .of position accountabilities, to include the following:

> Researches, analyzes and interprets various data related to the program, policies and operations to ensure effective implementation.
>
> Prepares and presents oral and written findings with recommendations to management staff in order to ensure effective agency operation.
>
> Coordinates and consults with other State program specialists, courts, attorneys, clients, defendants and federal representatives to ensure agency compliance and effective operation.

The written arguments submitted August 17, 1992, by SEA Field Representative Margo Hurley on Ms. Bergman's behave, generally were unpersuasive, and will not support allocation of the position to a higher salary grade than that assigned to Program Specialist III, salary grade 22.

Ms. Hurley argued that for the "Skill" factor, the appellant's position should be rated at the 5th level (95 points) for requiring skill in analyzing and interpreting data, policies and procedures. The Board agrees that this attribute is appropriate for the appellant's responsibilities.

For the "Knowledge" attribute, Ms. Hurley argued that the appellant's position should be rated at the 6th or highest degree requiring "expertise in a highly specialized, technical, or professional discipline to manage or create policy at a systemwide administrative level." While Ms. Bergman may participate in the mechanics of policy administration and training, there is nothing in the record to suggest that Ms. Bergman is responsible for policy creation or management at a systemwide administrative level.

Ms. Hurley argued that the "Impact" factor is improperly allocated at the fourth level, which requires "responsibility for achieving direct service objectives..." She argued that this factor should be increased to the fifth level. In support of that position, she stated, "Ms. Bergman plans long- and short-term agency goals necessitated by statutes, regulations and rule making. She reviews recommendations for procedural changes. She develops and revises program policies by writing and rewriting legislation and rules. She instructs administrators in policy and legislative intent and impact." Contrary to Ms. Hurley's assertion, writing and rewriting legislation and rules does not necessarily carry with it "responsibility for achieving major aspects of long-range agency objectives."

Ms. Hurley suggested that it would be "inappropriate to allocate [Ms. Bergman's] position at the first level [for working conditions], with no acknowledgement of the mental stress inherent in the position." Examples of the "stress" inherent in Ms. Bergman's position, Ms. Hurley pointed to daily contact with the public on the subject of the Division's policies and rules, working with the Attorney General's Office, participating in review of legislation, regulations and administrative orders of the agency, reviewing contracts for accuracy, and serving as a committee member on her Division's behalf. The Evaluation Manual defines working conditions as "the specific working environment and physical conditions to which an employee is exposed in performing required job duties and tasks. This factor measures the uncontrollable job elements which affect an employee's mental or physical capacity to complete job assignments in the normal course of work, including occupational hazards such as injury or disease." Apart from a reference to sometimes driving in bad weather, the appellant provided virtually no evidence to suggest that there was any risk to her Bergman's physical or mental health, and therefore offered absolutely no evidence which would warrant increasing the number of points allocated to this factor.

On the issue of "Physical Demands", the appellant argued that her work is "not exclusively sedentary". She said she must access equipment such as Xerox machines, word processors, printers, fax machines and calculators. She must bend and reach for books, and may, from time to time, move audio visual equipment. That explanation is not consistent with the requested second level for this factor which involves "light work, including continuous walking or operating simple equipment for extended periods of time as well as strenuous activities such as reaching or bending." The board does not believe that handling printed materials in the regular course of work such as that described by Ms. Bergman qualifies for assignment to the second level for this category.

Ms. Hurley has suggested that the appellant's position should be allocated at the sixth, or highest, level for the "Communication" factor. It is currently allocated at the fifth level. In support of her request, Ms. Hurley pointed out that Ms. Bergman serves on "State Task Forces" and testifies before legislative committees, as well as providing management training. The Board believes those duties are more than adequately allocated at the fifth level, which includes "making management level decisions to solve problems or to achieve work objectives as well as articulating and expressing those solutions and goals". While the Board remains unconvinced that Ms. Bergman is responsible for making management level decisions, her

formal, public presentations may warrant allocation at the fifth, rather than the fourth level.

For the factor of "Complexity", Ms. Hurley has suggested that the appellant's position be increased from the fourth to the fifth level. The fourth level requires "coordinating a combination of diverse job functions in order to integrate professional and technical agency goals...", while the fifth level entails "evaluating a combination of wide ranging job functions to determine work procedures, to solve problems, and to reach conclusions to applying analytical, technical or scientific thinking. This level also requires planning policies and long-term strategies, drawing conclusions based on available criteria, and evaluating the effectiveness of program objectives." The Board heard no evidence to suggest that Ms. Bergman either plans or evaluates Division of Public Health program objectives.

Ms. Hurley argued that Ms. Bergman's position is improperly allocated at the fourth level for "Independent Action" and should be increased to the fifth level. Again, Ms. Hurley referred to the appellant's responsibilities for problem solving "most of the time" in advising Division staff, reviewing contracts and participating in review of legislation. She equated these responsibilities to the level of independent judgment in planning and evaluating procedures and in supervising the development of standards." The fifth level addresses "planning and evaluating work procedures" as well as "supervising the development of professional, technical and managerial standards". The record will not support a finding that Ms. Bergman's duties rise to this level of independent action.

The Board noted with some interest that Ms. Hurley addressed eight of the nine evaluation factors, agreeing with the allocation of two, requesting allocation at a higher level for seven, and completely ignoring the ninth, "Supervision". The Board assumes she has either agreed with the allocation of this factor at the level assigned, or understands that the appellant may be allocated at a level higher than that which would normally be assigned to her position.

On the record, the Board voted to deny Ms. Bergman's appeal. The Board found that Ms. Bergman's 'responsibilities are accurately described by the class specification for Program Specialist III, and that the Director correctly allocated her position to that classification at a salary grade 22.

THE PERSONNEL APPEALS BOARD

Lisa A. Rule, Esq.

Robert J. Johnson, Commissioner

cc: Virginia A. Lamberton, Director of Personnel
Patrick Meehan, M.D., Director of Public Health
Margo Hurley, SEA Field Representative