

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

1988 TERM

JUNE SESSION

No. 87-399

Appeal of Arthur Burbank

MOTION FOR RECONSIDERATION

By order dated May 23, 1988, this Court issued a declination of acceptance of this case pursuant to Rule 10(1). The Appellant, by and through his attorney, hereby moves that the Court reconsider said declination on the following grounds:

1. The most important document in this case is the letter from Judy S. Bastian dated January 12, 1987, notifying the Appellant's supervisor that retroactive pay for an upgrading of the appellant's position would only go back to November, 1985 rather than October, 1984. Appendix at 22.

2. The Personnel Appeals Board called that letter "a January 12, 1987 decision" without *any* evidence that the document actually was created on January 12, 1987; or whether it might have been created on the same day the Appellant actually received it (January 20, 1987) and backdated.

3. The State, on an appeal, also refers to "the Director's decision of January 12, 1987" (State's Response to Order to Show Cause, at 2), etc; and states that "there can be no doubt that the 15-day appeal period expired on January 27th"; without any evidence in the record to support the assumption that Ms. Bastian's letter dated January 12, 1987 was actually created on that day.

4. In any event, RSA 21-I:58 provides that:

Any permanent employee who is dismissed, demoted or suspended, or otherwise affected by any action ... may appeal the decision to the personnel appeals board within 15 calendar days after such dismissal, demotion, or suspension.

The "dismissed, demoted, or suspended" language was carried over from the predecessor section to RSA 21-I:58, RSA 98:15. The language "or otherwise affected by any action" was added to 98:15 to become part of 21-I:58. It would be hard to imagine a dismissal, demotion or suspension taking effect and thus the appeal period beginning to run, until the employee received actual notice of the action against him. Reason would suggest then, that the legislature would also have intended that the appeal period for an employee "otherwise affected", (i.e., denied equal pay for equal work by denial of retroactive pay), should also begin to run when the employee actually receives notice of the action against him. The appellant's 15-day appeal period would therefore not have

begun to run until January 20, 1987, clearly making his appeal to the Board timely.

The appeal language of the statute and the appeal language of the rules of the Board quoted by the State (Response at 3) are not so similar as to be identical in meaning, at least as the State would have the rules interpreted. To the extent that PER-A 202.01(a) conflicts with the statute and would allow the appeal period to begin running, not from actual notice to the employee, but from a date that an unknown individual places on a piece of paper, that rule should be declared invalid.

WHEREFORE, the Appellant prays that this Honorable Court:

A. Declare that the appellant's original appeal to the Personnel Appeals Board was timely filed based upon the January 20, 1987 receipt of the adverse decision; and order the case remanded to the Board for a full and fair hearing on the merits;

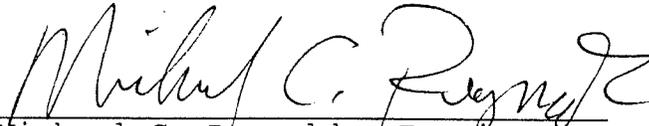
B. In the alternative, if the Court does not find that actual notice is required to start the appeal period, remand this case to the Board for a determination as to: a) when the January 12, 1987 letter was actually created; and b) whether, in any event, the facts of this case would make it equitable for the Board to waive strict compliance with the 15-day appeal period.

Respectfully submitted,

Arthur Burbank

By his attorney,

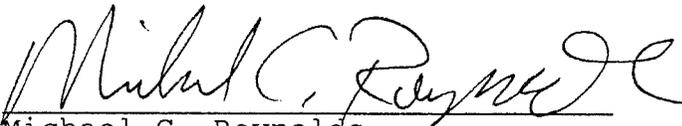
6/1/88
Date


Michael C. Reynolds, Esquire
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CERTIFICATION

I hereby certify that a copy of the foregoing motion and notice of its filing have been mailed first class postage prepaid this date to Assistant Attorney General David S. Peck, and to Mary Ann Steele, Executive Secretary, New Hampshire Personnel Appeals Board.

6/1/88
Date


Michael C. Reynolds

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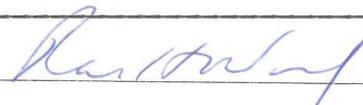
TO THE CLERK OF PERSONNEL APPEALS BOARD

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

May 23, 1988 Appeal from administrative agency is declined. See Rule 10(1). Thayer, J., did not participate.

June 29, 1988 Plaintiff's motion for reconsideration is denied. Thayer, J., did not participate.

Attest:



Ralph H. Wood,

Clerk

July 13, 1988