

# State of New Hampshire



## PERSONNEL APPEALS BOARD

State House Annex  
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### Appeal of Edward P. Burke

Docket No. 89-C-1

Edward P. Burke is employed as the Planning Director of the New Hampshire Developmental Disabilities Council (Salary Grade 30). He appeals the decision of the Director of Personnel, Virginia A. Vogel, of December 20, 1988, denying his request for reclassification and upgrading of his position to that of Executive Director of the Council, which he proposes to be at Salary Grade 34. The Division of Personnel approved the title change, but determined that the appropriate salary grade remained Grade 30.

A hearing in this matter, lasting **approximately** 45 minutes, was held on November 29, 1989. The Board consisted of Commissioners Bennett (Acting Chair) and Cushman. Appellant Burke appeared pro se. Director Vogel represented the Division and herself.

An audiotape recording of the hearing was made, and that, together with all papers, exhibits and pleadings received by the Board constitute the record in this case. The Division has filed Requests for Findings of Fact and Rulings of Law, which we deal with below.

The Division has also filed a Motion to Dismiss dated April 11, 1989. The basis for this motion is that Per-A **206.02(c)** requires that copies of papers filed with the Board are to be served upon the party respondent. The Division contends that it was never timely served in that Mr. Burke served a Notice of Appeal on December 30, 1988, on Mary Pillsbury Brown, the Chairman of the Council, and filed it with the Board, but did not serve it upon the Division. The Division says Burke never provided it with the supporting documentation he filed either.

At hearing the Board received argument on the motion. It appears that Burke's appeal was received by the Board on January 4, 1989, and that the Board's Executive Secretary executed a receipt therefor. It is conceivable under our rules that **Burke's** appeal is untimely, and it appears to the Board that service upon the Division was not effected in accordance with Per-A **206.02(c)**. While the Board could certainly dispose of this appeal on these grounds, the Board determined, in the interests of fairness, to take the motion under advisement and receive evidence on the merits of the appeal. Having done so, we deny the motion, as we decide the appeal on other grounds.

However, we note that our rules are intended to provide guidance for parties appearing before the Board and we will generally interpret them strictly. Parties who do not adhere to the rules strictly accept the risk of possible summary disposition of the case at hand in accordance with those same rules. Note **Per-**

A 202.04. By way of comment, it is not apparent to us that Mr. Burke had any special excusable mistake, misfortune or accident giving rise to his failure to comply with the referenced rule, and it is clear to us that his taking pains to obtain a receipt for his ultimate filing of his appeal is irrelevant to the issues raised by this particular motion. We note further that communication with the Board does not constitute communication with the Division, a separate legal entity, and vice versa. The manner in which timeliness is computed is set forth in our rules.

We turn now to some of the evidence and findings in the case, and decide it based upon all of the record:

Appellant Burke filed a large packet of materials explaining and intended to support his appeal. This is dated December 30, 1988, and addressed to the former Chair, Loretta Platt. We appreciate Mr. **Burke's** efforts in compiling these materials, and we reviewed them in our deliberations. Accordingly, we do not recount those materials in detail as they are contained within the record.

In those materials, the appellant sets forth five arguments which he contends warrant a modification or reversal of Director **Vogel's** determination. These are alleged procedural irregularities in the position review process, subjectivity in the review process, that the information apparently received by the Director does not support her decision, that the position has changed substantially (in part due to changed federal law and its requirements), and that

the positions to which Mr. **Burke's** was compared (such as Deputy Directors in the Department of Health and Human Services) do not represent appropriate, reliable comparatives, and that "...**(i)n** short, it has been our case all along that the position is a unique one requiring a higher classification."

The appellant contends that the evidence compels an upward adjustment to the "educational," "skill" and "experience" requirements (evaluation factors) for the position, thereby requiring reallocation to Grade 34. (Details below). (See, Division of Personnel, Evaluation Manual). (The balance of the packet contains documentary exhibits contended to support **appellant's** arguments).

The position in question was reviewed previously in 1985, and then upgraded to its present Labor Grade 30. The changes requested are:

|                    |   |
|--------------------|---|
| <u>Education</u>   | 7th degree - 100 points to<br>8th degree - 115 points<br>( <b>see</b> , Position Classification<br>Questionnaire) |
| <u>Experience</u>  | 8th degree - 100 points to<br>9th degree - 125 points<br>( <b>see</b> , Position Classification<br>Questionnaire) |
| <u>Supervision</u> | 5th degree - 60 points to<br>6th degree - 80 points<br>(contends to supervise technical<br>consultants)           |

Physical Effort      2nd degree - 10 points to  
                                 3rd degree - 20 points  
                                 (assists persons in wheelchairs, uses  
                                 audio visual equipment, etc.)

(The **appellant's** addition appears to be off by five points, but his contention is that a revised point total is 750 points overall, which he says equate to a Labor Grade 34). Ms. **Vogel's** determination letter of December 20, 1988, is also included. Therein, at pages four and five, she comments on the **Division's** rationale for not accepting the referenced evaluation factor point reallocations.

At the hearing, testimony was received from the appellant, Council Chairman Brown, Mr. Harold Acres, the Council Vice Chair, and Director Vogel.

Mr. Burke stressed the trans-departmental character of his agency and the great need for negotiation and advocacy skills pertinent to his position, as well as the independence required of the Council in order to perform the functions contemplated by federal law. (he cites, inter alia, 42 USC § 6024).

Chairman Brown indicated that she had long been seeking the upgrading of this position. The desired upgrading has suffered by the comparison of Burke's position to the Deputy Directors of the Department of Health and Human Services. Mr. Acres, a seven year veteran on the Council, concurred in Mr. **Brown's** comments. The position is an unusual one in his view, warranting the upgrade. (But see, Per-A 201.02(c), note (c)(5), "economic factors" not

grounds for reclassification, touched upon by both Chairman Brown and Mr. Acres).

Director Vogel testified about the history of the position and the prior upgrade in **1986**. She advised that it is possible to augment salaries for recruiting purposes, but that that was not done in this case, and she notes that there are other positions in state service which report to appointed boards (**i.e.**, Human Rights Commission, Chief Administrator is Labor Grade 27; Pharmacy Board, a Labor Grade 28).

Director Vogel went on to compare the position in question to the allegedly comparable positions, particularly as to the evaluation factors in issue. She notes that the job specification for the position requires a **Master's** Degree, not that degree plus 30 additional credit hours, as the appellant urges are actually needed. She testified that this would be inconsistent with the class of "**comparable**" positions generally, and believes it to be inappropriate and likely to make recruiting even more difficult. She advances the same position respecting the required amount of experience (per job description). She points out that the position in question reviews many programs, but has no "implementation" responsibility, or supervision over many employees in multiple programs warranting a change in the supervision attribute to the sixth degree (**80** points). This would be inconsistent with the application of the evaluation parameters to other positions and in other cases, in her view.

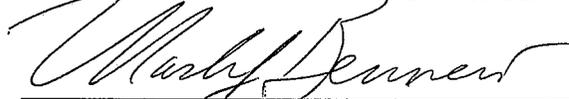
Similarly, the classification standard regarding physical effort requires "continuous lifting," and it is Ms. Vogel's view that an increase in the points attributable to that **parameter** would also be unreconcilable to the classification/evaluation system as used and defined based upon the physical activities which appear to actually be required in Mr. Burke's position. Ms. Vogel concludes that the position in question is an Administrator III position in type (Labor Grade 30) (i.e. Administrator, Bureau of Plant and Property; Chief Psychologist; Chief of Data Processing; Assistant Manager of Safety; etc.).

Upon consideration of the foregoing, the Board rules that the appellant has failed to meet his burden to show that the Director's decision was unlawful or unreasonable. We find that decision to be supported by the evidence for the foregoing reasons. Accordingly, the instant appeal must be denied.

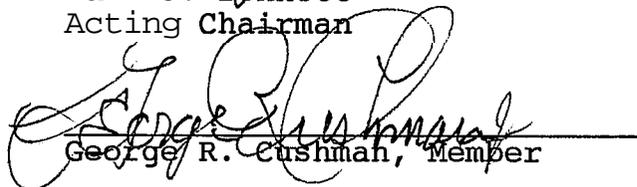
The Division's Requests for Findings of Fact and Rulings of Law are each granted to the extent not inconsistent with the foregoing.

13 August 1990

THE PERSONNEL APPEALS BOARD



Mark J. Bennett  
Acting Chairman



George R. Cushman, Member

Edward P. Burke, Executive Director

cc: Harold Acres, Chairman  
M. Mary Mongan, Commissioner  
Health and Human Services  
Virginia A. Vogel, Director, Personnel