State of New Hampshire

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

Appeal of Liquor Enforcement Investigators and Sergeants

Docket #2009-C-002 and #2009-C-003 (Consolidated)

New Hampshire State Liquor Commission

March 30, 2011

The New Hampshire Personnel Appeals Board (Bonafide, Johnson and Casey) met in public session on Wednesday, January 19, 2011, under the authority of RSA 541-A:31, RSA 21-I:57 and Chapters Per-A 100-200 of the NH Code of Administrative Rules, to hear the reallocation appeals of NH State Liquor Commission employees classified as Liquor Investigator I, Liquor Investigator II and Liquor Enforcement Sergeant. Attorney Kevin Buck and Liquor Investigator Brandon Neudecker appeared on behalf of the Appellants. Assistant Attorney General Rosemary Wiant and Personnel Director Karen Hutchins appeared on behalf of the Division of Personnel. The record of the hearing in this matter consists of pleadings and exhibits submitted by the parties prior to the hearing, notices and orders issued by the Personnel Appeals Board, and the audio tape recording of the hearing on the merits of the appeal. The Board also reviewed public documents published on the State's website for various law enforcement positions including Conservation Officer, State Police Trooper and Forest Ranger.

Position of the parties:

The Appellants argued that as fully-qualified law enforcement personnel, they were entitled to parity with all other law enforcement personnel throughout the State classified system. The Appellants argued that while they remained responsible for regulatory functions, they had added responsibility for enforcing all State laws including criminal and motor vehicle law and regulations and those laws and regulations related to the sale of tobacco. They cited RSA 179:59, which states, "The commission shall appoint liquor investigators whose primary function shall be the proper prosecution of this title. The liquor investigators shall have all the powers of the sheriff in any county, with reference to enforcement of all laws either in cooperation with, or independently of, the officers of any county or town. The commission shall have the primary responsibility for the enforcement of all liquor and beverage laws upon premises where liquor and beverages are lawfully sold, stored, distributed, or manufactured. Any person violating the provisions of any law may be prosecuted by the

commission or any of its investigators as provided in this section, or by county or city attorneys, or by sheriffs and their deputies, or by police officials of towns."

Mr. Neudecker argued that the Liquor Commission had accepted and approved the changes that the Appellants had recommended for their supplemental job descriptions, including the addition of seven specific accountabilities that were identical to those found on the class specification for State Police Trooper. Mr. Neudecker argued that in reviewing their positions, the Division of Personnel failed to recognize that Liquor Enforcement personnel are subject to the same working conditions as State Police officers, arguing that a change in that one evaluation factor alone would immediately result in an increase in the labor grade assigned to their positions. Mr. Neudecker stated that the Investigators and the Enforcement Sergeants were not asking the Board to find that positions of Liquor Investigator have responsibilities identical to positions within the Division of State Police, but that they should be recognized and compensated for their role as full-time law enforcement personnel. Mr. Neudecker stated repeatedly that the Division of Personnel had substantially underrated positions in Liquor Enforcement by failing to recognize that not only were the incumbents subjected to physical demands and working conditions that could result in injury or partial disability, they, like other law enforcement personnel, risked death and total disability.

Assistant Attorney General Wiant argued that the Appellants had failed to establish that there had been any substantial change in the duties of a Liquor Investigator I, Liquor Investigator II or Liquor Enforcement Sergeant that would warrant their reallocation. Ms. Wiant pointed to the Personnel Director's letter dated December 19, 2008, in which the Director found that the primary responsibility of the Liquor Enforcement staff was to enforce RSA 179, Title XIII (State's Exhibit 1). She also asked the Board to note that in the Director's reconsideration decision dated March 6, 2009, the Director acknowledged that the Enforcement staff serve as back-up for other law enforcement personnel and reallocated their positions accordingly (State's Exhibit 2).

Having carefully considered the documentary evidence, argument and offers of proof by the parties at the hearing on the merits of the appeal, the Board made the following findings of fact and rulings of law:

1. On or about November 6, 2007, the Division of Personnel received a request to reallocate position titles within the Bureau of Liquor Enforcement as follows:
   Liquor Investigator I, from Labor Grade 17 to Labor Grade 21
   Liquor Investigator II, from Labor Grade 18 to Labor Grade 23
   Liquor Enforcement Sergeant, from Labor Grade 19 to Labor Grade 24
2. After comparing information provided in their position classification questionnaires to other law enforcement positions statewide, including positions in the Department of Safety, the Department of Fish and Game, and the Department of

Resources and Economic Development, Personnel Director Hutchins determined that there was insufficient evidence of material changes in the positions' duties and responsibilities to warrant a reallocation of those positions.

3. Between December 19, and December 31, 2009, the Director of Personnel received three separate requests for reconsideration of her decision denying the requests for reallocation of positions within Liquor Enforcement. On or about February 6, 2010, Director Hutchins met with Sara Willingham, Liquor Commissioner Mark Bodi, Bureau of Enforcement Chief Eddie Edwards, Deputy Chief Scott Dunn, Department of Safety Commissioner John Barthelmes and Assistant Safety Commissioner Earl Sweeney in order to discuss and better understand the scope of responsibility for Liquor Enforcement positions as compared to positions within the Department of Safety, Division of State Police. By letter dated March 6, 2009, the Director agreed to increase the labor grades assigned to Liquor Investigator I, Liquor Investigator II and Liquor Enforcement Sergeant by one labor grade each resulting in the reallocation of their positions as follows:

   Liquor Investigator I, from Labor Grade 17 to Labor Grade 18

   Liquor Investigator II, from Labor Grade 18 to Labor Grade 19

   Liquor Enforcement Sergeant, from Labor Grade 19 to Labor Grade 20

4. In her letter dated March 6, 2009, the Director of Personnel wrote, "As a result of my review, it continues to be clear to me that the primary responsibility of the Liquor Enforcement staff is the enforcement of RSA 179, Title XIII. However, I agree that Enforcement staff do serve as a backup role within the State as it relates to RSA 179:59, specifically the statute language that relates to the powers and duties of the investigator staff..."

5. Supplemental job descriptions proposed by the Appellants for positions of Liquor Investigator I included changes in five of the nine evaluation factors including Knowledge, Complexity, Independent Action, Working Conditions, and Physical Demands.

6. Liquor Investigator I positions are currently assigned at the same level as State Police Trooper I, Conservation Officer I and Forest Ranger I for the factors of Skill, Knowledge, Impact and Complexity. They are rated at the same level or higher than those same positions for the factors of Supervision and Communication. Although they are rated one level below State Troopers and Conservation Officers for the factors of Independent Action and Working Conditions, they have the same rating for those factors as Forest Rangers.

7. In their position classification questionnaire, Liquor Investigator I incumbents described some of their most unpleasant working conditions and physical demands as follows:

   - "Work days and nights, including weekends and holidays. Could be called to return to duty and work additional hours. Days off could be changed. Some assignments may require to sit or stand for long periods of time. During special details you may be exposed to foul weather conditions. Exposure to second hand smoke is possible during inspections of private social clubs (i.e. American Legion and VFW).
   - Pursue suspects who are eluding and may have to quickly enter or exit a patrol vehicles. [sic] Run and climb through a variety of terrain, including forests, beach, alleys, and buildings or structures.

8. Some of the working conditions and physical demands described in the Conservation Officer I class specification include, "Enforces laws, rules and regulations relating to the operation of snowmobiles as defined by statute and gives emergency medical treatment when necessary to injured people," and "Assists in Search and Rescue missions to include carrying out injured or deceased individuals, often from remote and/or mountainous locations." State Police Trooper I positions are responsible "Perform[ing] rescue functions at accidents, emergencies and disasters to include directing traffic, administering emergency medical aid, and evacuating people from dangerous situations." The classification of Forest Ranger I includes requirements for certification as a police officer as well as certification as a Forest Ranger qualified to fight forest fires by the New Hampshire Fire Standards and Training Commission. The Forest Ranger I classification has as a primary responsibility aiding or directing Forest Fire Wardens, Deputy Wardens, Special Deputy Wardens and municipal fire fighting personnel in woodland fire suppression and prevention.
9. Using the class specifications posted on the Division of Personnel website, and having reviewed of the various evaluation factors and evaluation levels described in the Division's Technical Assistance Manual, the Board considered the differences and similarities in positions classified as Liquor Investigator I, State Police Trooper I, Conservation Officer I and Forest Ranger I as depicted in the table below.

	Liquor Investigator I	State Police Trooper I	Conservation Officer I	Forest Ranger I
Skill	Level 4	Level 4	Level 4	Level 4
Knowledge	Level 3	Level 3	Level 3	Level 3
Impact	Level 3	Level 3	Level 3	Level 3
Supervision	Level 2	Level 1	Level 2	Level 2
Working Conditions	Level 5	Level 6	Level 6	Level 5
Physical Demands	Level 3	Level 4	Level 4	Level 4
Communication	Level 4	Level 4	Level 4	Level 3
Complexity	Level 3	Level 3	Level 3	Level 3
Independent Action	Level 2	Level 3	Level 3	Level 2
Total Points	315	325	330	285
Salary grade	18	19	18	16

10. Based on a comparison of the class specifications for State Police Trooper I, Conservation Officer I and Forest Ranger I with the Appellants' description of their duties and responsibilities, positions of Liquor Investigator I are appropriately placed in the evaluation matrix, including the rating for the factors of Knowledge, Complexity, Independent Action, Working Conditions, and Physical Demands.
11. Accountabilities listed on the classification questionnaires for Liquor Investigator I and Liquor Investigator II are almost identical, except that Liquor Investigator I incumbents described themselves under proposed Accountability 7 as "pursuing suspects who are eluding," while Liquor Investigator II incumbents focused on their need to "possess and maintain the necessary physical attributes in order to pass the maximum fitness requirements for certification as a police officer in New Hampshire. Must be able to speak clearly and without impediment in order to make clear and articulate radio transmissions. Must possess excellent communication skills with the public."

12. While there is very little to differentiate between classifications of Liquor Investigator I and Liquor Investigator II, the Liquor Investigator II classification is allocated one level higher than Liquor Investigator I for the factors of Supervision, Complexity, and Independent Action. They are appropriately allocated one level lower than positions of Conservation Officer II for the factors of Working Conditions and Physical Demands based upon a comparison of their duties and responsibilities.
13. The point matrix describing Liquor Enforcement Sergeants as compared to State Police Sergeants and Conservation Officer Sergeants is as follows. There is no classification for Forest Ranger Sergeant. Liquor Enforcement Sergeants have the same rating as Conservation Officer Sergeants for Knowledge, Impact, Supervision, and Independent Action. The Liquor Enforcement Sergeants did not describe duties or responsibilities that would justify increasing either Working Conditions or Physical Demands. Each of the classifications is assigned the same value for the Communications factor.

	Liquor Enforcement Sergeant	State Police Sergeant	Conservation Officer Sergeant
Skill	Level 4	Level 4	Level 3
Knowledge	Level 3	Level 4	Level 3
Impact	Level 3	Level 3	Level 3
Supervision	Level 3	Level 4	Level 3
Working Conditions	Level 5	Level 6	Level 6
Physical Demands	Level 3	Level 4	Level 4
Communication	Level 4	Level 4	Level 4
Complexity	Level 3	Level 4	Level 4
Independent Action	Level 3	Level 4	Level 3
Salary grade	20	24	21

14. The duties and responsibilities described in the position classification questionnaire and appeal documents did not provide a sufficient basis to determine that any of the evaluation factors had been undervalued or required reallocation, particularly when they are considered in comparison to the duties and responsibilities established for Sergeants in the State Police and Conservation Officer Series.
15. As with each of the other classifications under appeal in the Enforcement Bureau, the Liquor Enforcement Sergeant pointed to enactment of RSA 179:59 and increased law enforcement responsibility as the primary change supporting their request for reallocation of their positions from classification.
16. RSA 179:59, which the Appellants describe as the law expanding their authority beyond performing regulatory functions to include broad law enforcement activities, was enacted in 1990 and amended on June 23, 1995.
17. RSA 179:59 states, in part, "The liquor investigators shall have all the powers of the sheriff in any county, with reference to enforcement of all laws either in cooperation with, or independently of, the officers of any county or town." The law also defines the "primary function" of Liquor Investigators as "... the proper prosecution of this title...," and states, "...The commission shall have the primary responsibility for the enforcement of all liquor and beverage laws upon premises where liquor and beverages are lawfully sold, stored, distributed, or manufactured...."

18. In their written submissions and offer of proof, the Appellants' referred to increased law enforcement responsibility and authority, but did not offer evidence to demonstrate that there had been substantial or material changes in their responsibilities since their supplemental job descriptions were amended in 1998, that any incremental changes were sufficient to require a reallocation of any of the evaluation factors assigned to their position classifications beyond those approved by the Division of Personnel, or that there had been changes in the laws or regulations that would significantly alter the basic purpose or scope of their positions.
19. When asked in the position classification questionnaire to describe, "What precipitated the permanent change in the duties of this position to necessitate the review of this position?" the Appellants, including Liquor Investigators I, Liquor Investigators II and Liquor Investigator Sergeant responded, "The entire job of a [Liquor Investigator I, Liquor Investigator II, or Liquor Investigator Sergeant] since last reviewed in 1985 has evolved from a regulatory function to a full law enforcement function, with no real limitation on enforcement authority, while giving preference to Title XIII laws. These events frequently place Investigators in view of numerous others [sic] offenses elsewhere in the criminal code."
20. The Appellants' supplemental job descriptions show 1998 as the "Date of Last Amendment," roughly three years after the effective date of RSA 179:59, as amended, when the Appellants claim their duties and responsibilities evolved into a wider range of enforcement than regulatory functions.
21. RSA 21-I:57 Allocation Review

    The employee or the department head, or both, affected by the allocation of a position in a classification plan shall have an opportunity to request a review of that allocation in accordance with rules adopted by the director under RSA 541-A, provided such request is made within 15 days of the allocation. If a review is requested by an employee, the director shall contact the employee's department head to determine how the employee's responsibilities and duties relate to the responsibilities and duties of similar positions throughout the state. The employee or department head, or both, shall have the right to appeal the director's decision to the personnel appeals board in accordance with rules adopted by the board under RSA 541-A. If the board determines that an individual is not properly classified in accordance with the classification plan or the director's rules, it shall issue an order requiring the director to make a correction.
22. Per-A 102.15 of the Board's rules defines "reallocation" as "a determination by the director of personnel that because of a change in the duties and responsibilities of a class of positions, those positions should be assigned to a salary grade other than the one to which they were assigned previously."

Standard of Review

In accordance with the provisions of Per-A 207.12 (f) of the NH Code of Administrative Rules (Rules of the Personnel Appeals Board): "In appeals of a position reclassification or reallocation, the board shall determine if the appellant proves by a preponderance of the evidence that: (1) The duties of the position have changed sufficiently to warrant reclassification or

reallocation; or (2) The position was improperly allocated or classified in accordance with the director's rules or the classification plan."

Decision and Order

RSA 21-I:42, II, charges the Director of Personnel with, "Preparing, maintaining and periodically revising a position classification plan for all positions in the classified service, based upon similarity of duties performed and responsibilities assumed so that the same qualifications may reasonably be required for, and the same schedule of pay may be equitably applied to, all positions in the same classification..." Although the Liquor Commission itself apparently approved the requests for reallocation of positions in Liquor Enforcement, and approved the Appellants' proposed supplemental job descriptions, their support does not and can not replace a detailed analysis that compares the duties and responsibilities of those positions with similar positions throughout the classified service.

The Board found that the Director of Personnel and her staff conducted a thorough review of the classification and allocation of the positions under appeal. When the Appellants requested reconsideration of the Director's original decision, the Director sought additional information from the Chairman of the Liquor Commission and the Commissioner and Assistant Commissioner of Safety. The Director then decided to reallocate the positions by increasing the salary grade assigned to each job title by one salary grade.

Although neither party offered compelling evidence of substantial or material changes in the positions that would warrant the reallocations approved by the Director of Personnel, the Director of Personnel did reallocate Liquor Investigator I and II positions so that their salary grades were equal to those assigned to Conservation Officers I and II. The Director also agreed to upgrade the title of Liquor Enforcement Sergeant to salary grade 20, one grade below that assigned to Conservation Officer Sergeants.

In reviewing the evidence and argument offered by the parties, the Board gave careful consideration to Mr. Neudecker's argument that because the Appellants are fully-qualified law enforcement personnel, they are entitled to "parity" with other law enforcement personnel throughout system, even though their duties and responsibilities may differ from those of other law enforcement positions. The Board noted that in their original request for reallocation, the Appellants requested increases of four or five labor grades for each of the positions under appeal. Under the Appellants' plan, while Liquor Investigator Sergeants would be equivalent to State Police Sergeants, Investigators I and II would be allocated two salary grades higher than positions of Trooper I and II in the Division of State Police, and two to four grades higher than other law enforcement positions in the Conservation Officer and Forest Ranger job series.

The Board found that although Liquor Investigators and Liquor Investigator Sergeants have powers of arrest comparable to Troopers, Conservation Officers and Forest Rangers, there are a significant differences in their overall duties and responsibilities that clearly warrant the differences in the way the classification factors have been evaluated for those positions and points assigned for each job title.

The Board found that the Appellants did not prove by a preponderance of the evidence either that the duties of their positions had changed sufficiently to warrant reclassification or reallocation, or that their positions were improperly allocated or classified in accordance with the director's rules or the classification plan.

For all the reasons set forth above, the Board voted unanimously to DENY the reallocation appeals for positions of Liquor Investigator I, Liquor Investigator II and Liquor Enforcement Sergeant.

THE PERSONNEL APPEALS BOARD

Philip Bonafide, Acting Chair

Robert Johnson, Commissioner

Joseph Casey, Commissioner

cc: Karen Hutchins, Director of Personnel, 25 Capitol St., Concord, NH 03301
Rosemary Wiant, Assistant Attorney General, Dept. of Justice, 33 Capitol St., Concord, NH 03301
Attorney Kevin Buck, Nolan Perroni Harrington, LLP, 133 Merrimack St., Lowell, MA 01852
Brandon Neudecker, Liquor Investigator, Bureau of Enforcement (NHSLC), 10 Commercial St., Concord, NH 03301