

State of New Hampshire



PERSONNEL APPEALS BOARD

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APPEAL OF FINN POSNER DOCKET #92 -C-9 DEPARTMENT OF TRANSPORTATION

June 11, 1993

The New Hampshire Personnel Appeals Board (Bennett, Johnson and Rule) met Wednesday, March 17, 1993, to hear the classification appeal of Finn Posner, an employee of the Department of Transportation. Mr. Posner appeared *pro se*. The Division of Personnel was represented by its director, Virginia A. Lamberton.

In his opening statement, Mr. Posner argued that the Rules of the Division of Personnel, adopted pursuant to RSA 541-A, had expired, and that the validity of the Director's rules remained in question when the decision on his classification was made. Mr. Posner also argued that no one at the Department of Transportation was aware that as a result of the downgrading of his position, he would be deemed ineligible for additional salary increments in his former salary grade.

Ms. Lamberton questioned the basis of Mr. Posner's appeal, noting that there appeared to be no dispute about the appropriate classification but rather which rules should be applied to the downgrading of his position from Civil Engineer V, salary grade 29, to Civil Engineer IV, salary grade 26. Ms. Lamberton testified that if the former Rules of the Division of Personnel had expired, as Mr. Posner alleged, then he would lose the protection of his salary at the level of grade 29 and should be reduced within two years of the reclassification to salary grade 26. If the former rules were to apply, Mr. Posner would be allowed to continue receiving a salary equivalent to salary grade 29, although he would not be entitled to annual increments within that salary grade in excess of the maximum step of salary grade 26. For the record, Ms. Lamberton noted that an annual increment in grade 29 had been processed by the Department of Transportation in spite of the prohibition against such an increase in the Code of Administrative rules.

Mr. Posner summarized his appeal in his letter to the Board dated March 12, 1992, as follows:

1. At no time until he received the January 21, 1992 letter from the Department of Transportation, Bureau of Human Resources, was he informed he would be ineligible for additional salary increments.

2. At no time until he received the aforementioned letter was anyone in the department advised he would be ineligible for annual salary increments due to the reorganization of the bureau and the downgrading of his position from salary grade 29 to salary grade 26.

3. The Rules of the Division of Personnel which would have prohibited his earning additional annual salary increments in salary grade 29 had expired at the time the decision to downgrade his position had been made.

Mr. Posner characterized the appeal as a "breach of contract" issue. He questioned where the line of authority between the Department of Transportation and the Division of Personnel could be drawn. He argued that the Department of Transportation had hired him, making an offer of employment which included a starting salary at grade 29, and an assurance he would receive annual salary increments until he reached the maximum of that grade provided that he performed satisfactorily in the position to which appointed. He testified that he was advised the downgrading of his position would not result in a loss of pay.

Ms. Lamberton argued it was difficult to accept that the Department of Transportation was unaware of the prohibition against awarding additional salary increments to an employee in a downgraded position if the award of an increment resulted in a salary which exceeded the maximum step of the new grade. In support of that argument, she pointed to the fact that Richard Williams, the Human Resources Coordinator for the Department of Transportation, had previously been employed by the Division of Personnel and as an employee of the division was responsible for advising agencies on the application of the Personnel Rules. Ms. Lamberton also asked the Board to consider the consequences of finding that the current rather than the former personnel rules should be applied in this instance. Under the current rules, she argued, the incumbent would not be held harmless at the former salary, but instead would receive a salary consistent with the downgraded position after a period of two years. Ms. Lamberton also questioned why the appellant had not applied for other Civil Engineer V vacancies which had been posted since he had received notice of the Division's decision to downgrade his position.

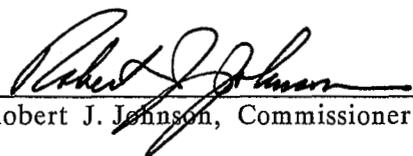
After reviewing the documents filed by both parties to this appeal, and considering the testimony offered during the hearing, the Board found that the Division of Personnel properly applied the former Rules of the Division of Personnel [Per 304.01(g) effective 4/15/83] in grandfathering the appellant's salary at the rate he was receiving prior to the downgrading. The Board also found that the Division correctly applied the former Rules of the Division of Personnel in determining that the appellant was ineligible for additional annual salary increments within the range of salary grade 29 if such increment award would increase his salary above the maximum step of salary grade 26. However, if the appellant's salary at the time his position was downgraded exceeded the maximum step of salary grade 26, the Board found the appellant was entitled to continue receiving that salary until such time as he vacated the position.

Having so found, the Board voted unanimously to deny Mr. Posner's appeal.

THE PERSONNEL APPEALS BOARD



Mark J. Bennett, Acting Chairman



Robert J. Johnson, Commissioner



Lisa A. Rule, Commissioner

cc: Virginia A. Lamberton, Director of Personnel
Charles O'Leary, Commissioner of Transportation
Richard Williams, Human Resources Coordinator, DOT
Finn Posner, Civil Engineer, Bureau of Railroads and Public Transfer