State of New Hampshire

WPPID741

PERSONNEL APPEALS BOARD
State House Annex
Concord, New Hampshire 03301
Telephone (603) **271-3261**

Response to Appellant's Request for Reconsideration
Of the Board's Order
Dated February 14, 1991

IN RE: Appeal of Thomas Robinson
Docket #90-O-2

May 2, 1991

The New Hampshire Personnel Appeals Board (McNicholas, Johnson and Bennett) met Wednesday, April 3, 1991, to consider the Request for Reconsideration filed by SEA Field Representative Margo Hurley in the above-captioned matter. In support of that Request, Ms. Hurley argued that Mr. Robinson had not requested reclassification of his position, believing that the position was permanently classified as "Assistant Superintendent of Grounds", salary grade 15. She further argued that inasmuch as there is one other permanently classified "Assistant Superintendent of Grounds" at Laconia Developmental Services, that position should have been reallocated when the similarly titled position at New Hampshire Hospital was reallocated from salary grade 15 to salary grade 16. She also contended that there was no evidence offered regarding the request to reclassify the position at New Hampshire Hospital to "Supervisor". Finally, Ms. Hurley argued that equity, rather than timeliness, must be considered in reaching a decision on Mr. Robinson's appeal for placement at salary grade 16.

In consideration of the record before it, the Board found that no issues were raised in the Request for Reconsideration which were not properly raised and addressed in the Board's order of February 14, 1991. The Board had already addressed the appeal on its merits to see if "for good cause shown" the Board should waive the timely filing issue. As the Board stated in its order of February 14, 1991:

> "If the Board were to consider the January 16, 1990 letter to Albert Nolin as a 'decision' from which an appeal might arise, an appeal must have been filed with the Board not later than January 31, 1991. The Board did not receive notice of appeal until March 6, 1990. As such, the appeal as filed would have to be deemed untimely.
>
> "If the Board were to consider the Director's February 15, 1990 letter to Ms. Hurley as a 'decision' from which an appeal might arise, the Board finds such appeal to be untimely. ...Even if it were a decision, a timely appeal of same would need to have been filed with the Board within fifteen calendar days, or not later than Friday, March 2, 1990."

The appellant offered no argument not already properly raised and addressed to persuade the Board that "for good cause shown", the Board should waive the timely filing requirement and reconsider Mr. Robinson's appeal on the merits. Accordingly, the Board voted unanimously to affirm its decision of February 14, 1991, dismissing Mr. Robinson's appeal as untimely.

THE PERSONNEL APPEALS BOARD

Patrick J. McNicholas, Chairman

Robert J. Johnson

Mark J. Bennett

cc: Virginia A. Vogel, Director of Personnel
Albert J. Nolin, Director, Division of Plant and Property Management
Margo Hurley, SEA Field Representative
Civil Bureau - Office of the Attorney General

State of New Hampshire

WPPID678

PERSONNEL APPEALS BOARD
State House Annex
Concord, New Hampshire 03301
Telephone (603) 271-3261

Appeal of Thomas Robinson
Docket #90-O-2

February 14, 1991

The New Hampshire Personnel Appeals Board (McNicholas, Johnson and Bennett) met Wednesday, January 16, 1991, to hear the appeal of Thomas Robinson, an employee of the Division of Plant and Property Management, Department of Administrative Services. Mr. Robinson was represented at the hearing by SEA Field Representatives Hurley and McCormack. Virginia A. Vogel, Director of the Division of Personnel, represented that Division.

In its order of April 23, 1990, the Board had dismissed Mr. Robinson's appeal as untimely. The appellant subsequently filed a Motion for Reconsideration which the Board granted in part, under the provisions of Per-A 204.06 (d) of the Rules of the Personnel Appeals Board. In that order, however, the Board voted to limit the testimony and oral argument to the single issue of timeliness. The Board further ordered the parties to be prepared to go forward with a hearing on the merits following argument on the issue of timeliness, but noted for the record that the Board's decision to schedule a hearing in this matter should not be construed as a decision to grant any of the arguments set forth in Appellant's Motion for Reconsideration.

Director Vogel made her strenuous objection to the Board's entertaining Mr. Robinson's appeal, noting the grounds set forth in her March 14, 1990 Motion to Dismiss. Additionally, she asked the Board to consider the following, and to refer to documentation of same in previous correspondence between the parties and the Board:

1. Although the appellant is currently compensated at Salary Grade 15, that allocation was a result of a temporary upgrade. His permanent position classification is Grounds Foreman, salary grade 9.

2. The temporary allocation of Mr. Robinson's position at salary grade 15 was approved on the basis of a request from Mr. Gibney, the former Director of the Division of Plant and Property Management, and was predicated upon representations he made to the Director of Personnel that legislation was pending which, when enacted, would transfer all buildings and grounds maintenance positions to the control of the Department of Administrative Services. Such legislation was not enacted.

3. The temporarily upgraded position now occupied by Mu. Robinson was to have been returned to its original classification and salary grade when the former incumbent of that position resigned. The return to title and grade was never accomplished and the Division of Plant and Property Management advertised the position without any notation that its permanent classification was Grounds Foreman, Salary Grade 9.

4. Neither Mr. Robinson nor the prior incumbent in his position ever completed a Position Classification Questionnaire.

5. Because Mr. Robinson's position is permanently classified as Ground Foreman, salary grade 9, the review and reclassification of other positions in State Service entitled "Assistant Superintendent of Grounds" would not have triggered an automatic review of Mr. Robinson's position.

6. Because the New Hampshire Hospital request for review of Mr. Stillman's position (Assistant Superintendent of Grounds) was a request for reclassification to the title "Supervisor", such review would not necessarily have triggered a review of all positions in the class "Assistant Superintendent of Grounds". If review of Mr. Stillman's position established it to be properly classified but improperly evaluated at salary grade 15, incumbents in positions permanently assigned to that class would have been requested to complete Position Classification Questionnaires.

7. Legislation enacted to be effective June 5, 1989, prohibited the review or reclassification of any positions, Because a review of Mr. Stillman's position had occurred prior to the ban on reclassifications, his position upgrading was completed and the salary grade increased from salary grade 15 to salary grade 16. Since no classification questionnaire was submitted by the Division of Plant and Property Management to reclassify Mr. Robinson's position of Grounds Foreman (temporarily upgraded to Superintendent of Grounds) no review, reclassification or reallocation occurred.

With regard to the issue of a "decision" from which an appeal might arise, the Director objected to either her letter of January 16, 1990 to Albert Nolin or her letter of February 15, 1990 to Ms. Hurley being construed as decisions. Her letter of January 16th to Albert Nolin stated,

> "I have reviewed your request to discuss the possible reallocation of Tom Robinson's position, which is currently classified as a Grounds Foreman and temporarily allocated to the level of Assistant Superintendent of Grounds, labor grade 15. As you are probably aware, HB764-FN was signed into law on June 5, 1989, specifically prohibiting the Division of Personnel from reclassifying or reallocating positions until July 1, 1990. For this reason, I cannot accept any new requests to evaluate classified positions. Further, because a Position Classification Questionnaire for position #10124 was not submitted prior to this date, I do not have the job documentation required to determine if Mr. Robinson's present job duties are at the same level of responsibility as the other two positions you mentioned in your January 4 memo."

On January 31, 1990, SEA Field Representative Margo Hurley wrote to the Director, notifying her of intent to

> "...appeal your decision relative to the labor grade associated with [Mr. Robinson's] allocation to Assistant Superintendent of Grounds. He is a labor grade 15 while the two other Assistant Superintendents of Grounds are labor grade 15."

On February 15, 1990, the Director answered Ms. Hurley's letter expressing her irritation that "the letter [she had] written to Mr. Nolin for the purpose of sharing information is being construed as a decision and therefore appealable. ... Please refer back to my letter which addresses the requirements for reclassification or reallocation. A salary grade change is a consequence of a position review. No review has occurred, no review can occur and therefore there is no appeal to something that never occurred."

The appellant then filed an appeal with the Board, through his representative the State Employee's Association, by letter dated March 5, 1990.

The appellant asked during his hearing that if the Board were to consider the matter untimely, that it grant a waiver of the timely filing requirement "for good cause" to allow the appeal to be considered on its merits. Ms. Hurley failed to explain what "good cause" might be shown for failure to timely file. The Board is naturally reluctant to waive the requirements for timely filing in the absence of clear and compelling evidence that circumstances beyond the appellant's control prohibited him from perfecting his appeal as provided by law.

Before ruling on the issue of timeliness, or whether the Board "for good cause shown" should waive the timely filing issue, the Board must determine whether or not a decision was rendered from which an appeal might arise. If the Board were to find that a decision had been rendered, it must then determine the date of such decision.

Both parties refer to correspondence between the Director of Personnel and the Director of the Division of Plant and Property Management. Neither party has provided a copy of the correspondence from Director Nolin, and the Board must therefore look to the response from the Director of Personnel dated January 16, 1990. In that response to Mr. Nolin's inquiry, the Director explained that in the absence of a completed request for reclassification, no position review could occur. Further, the Director noted that with passage and enactment of HB764, the Director was prohibited from accepting new requests for reclassification or reallocation.

Clearly, the correspondence relates to the issue of the appropriate classification and allocation of a position. In the case of Mr. Robinson, the record reflects that Mr. Robinson occupies a position permanently assigned to the classification "Grounds Foreman" and that such position has been temporarily upgraded to Superintendent of Grounds. That temporary upgrading was accomplished without an actual position review, and without completion by the incumbent of a Position Classification Questionnaire. On January 16, 1990, the Director of Personnel informed the Director of the Division of Plant and Property Management that no request for reclassification had been filed prior to June 5, 1989, and that the provisions of HB764, effective June 5,

1989, prohibited her from considering any new requests for reclassification. The only decision which could even be implied from that correspondence would be a refusal to accept a completed request for reclassification prior to July 1, 1990.

RSA 21-I:54 (eff. 3/27/86) provides that "The director shall dispose of requests for reclassification or reallocation from departments or employees within 45 days of receipt of a completed request for reclassification or reallocation.. ." Both parties agree that neither Mr. Robinson, nor the former incumbent, nor the Division of Plant and Property Management submitted a completed request for reclassification or reallocation prior to June 5, 1989. Both parties agree that neither Mr. Robinson nor the Division of Plant and Property Management submitted a position review request and completed Position Classification Questionnaire subsequent to June 5, 1989.

Even if the Board were to construe the January 16, 1990 letter from Director Vogel to Director Nolin as a "decision", which it does not, a timely appeal must have been filed with the Board within fifteen calendar days, or not later than January 31, 1990. Instead, Ms. Hurley filed her complaint with the Director of Personnel.

RSA 21-I:58,I provides:

> "Any permanent employee who is affected by any application of the personnel rules, except for those rules enumerated in RSA 21-I:46, I and the application of rules in classification decisions appealable under RSA 21-I:57, may appeal to the personnel appeals board <u>within 15 calendar days of the action giving rise to the appeal</u>." (Emphasis added)

If the Board were to consider the January 16, 1990 letter to Albert Nolin as a "decision" from which an appeal might arise, an appeal must have been filed with the Board not later than January 31, 1990. The Board did not receive notice of appeal until March 6, 1990. As such, the appeal as filed would have to be deemed untimely.

If the Board were to consider the Director's February 15, 1990 letter to Ms. Hurley as a "decision" from which an appeal might arise, the Board finds such appeal to also be untimely. Ms. Hurley alleges that notice of the action giving rise to Mr. Robinson's appeal was the February 15, 1990 letter to her from the Director of Personnel. First, the Board does not consider that letter to be a "decision" within the meaning of RSA 21-I. Even if it were a decision, a timely appeal of same would need to have been filed with the Board within fifteen calendar days, or not later than Friday, March 2, 1990. The letter of appeal from Ms. Hurley to the Board was not even prepared until March 5, 1990, eighteen calendar days after the date of the Director's letter, and was not received by the Board until March 6, 1990, nineteen (19) calendar days after the date of the Director's letter.

The Board voted unanimously to dismiss Mr. Robinson's appeal. In so doing, it found no evidence of a decision affecting the classification or allocation of his position, only correspondence between two Division Directors and an employee representative for the purpose of requesting and transmitting information relative to the classification process. The Board does not find such correspondence to constitute a decision from which an appeal might arise. Had an actual decision been rendered, the subsequent appeal filed on Mr. Robinson's behalf would not have been timely.

Based upon the information presented, the Board finds that Mr. Robinson's position is permanently allocated as Grounds Foreman, salary grade 9. Absent a request for reclassification of that position, or permanent inclusion of that position in the class "Assistant Superintendent of Grounds" prior to June 5, 1989, the Board finds that the Director of Personnel acted both legally and reasonably in refusing to reallocate that position to salary grade 16.

Mr. Robinson's position shall remain classified as Grounds Foreman until such time that the Division of Personnel can legally accept and review completed requests for reclassification. Should such review result in reclassification and/or reallocation of Mr. Robinson's position, any resulting personnel action shall be accomplished in accordance with the statutory provisions in place at the time of the review. Mr. Robinson shall be held harmless in his present position, and shall continue to be compensated at his current rate of pay. Should Mr. Robinson vacate the position, however, it shall be returned to its permanent title and grade allocation for the purposes of recruitment and selection, unless and until a proper position reclassification review can be completed.

THE PERSONNEL APPEALS BOARD

Patrick J. McNicholas, Chairman

Robert J. Johnson

Mark J. Bennett

cc: Margo Hurley, SEA Field Representative
Virginia A. Vogel, Director of Personnel
Albert J. Nolin, Director, Division of Plant and Property Management
Civil Bureau, Office of the Attorney General

State of New Hampshire

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APPEAL OF THOMAS ROBINSON
Department of Administrative Services
Docket #90-O-2

April 23, 1990

The New Hampshire Personnel Appeals Board (McNicholas, Johnson and Rule) met Wednesday, April 18, 1990, to review the appeal of Thomas Robinson. Appellant, through his SEA Field Representative Margo Hurley, requested a hearing before the Board by letter dated March 5, 1990. In that request, Appellant states that he has been compensated as an Assistant Superintendent of Grounds, salary grade 15, since September 25, 1987, while another employee with the same position title is being compensated at salary grade 16.

On March 14, 1990, Personnel Director Virginia Vogel filed a Motion to Dismiss, arguing that the appeal was not timely filed, and that an appeal of the allocation decision filed pursuant to RSA 21-I:57 must have been made not later than October 10, 1987. She further argues that Mr. Robinson's appeal could not legally be filed under the provisions of RSA 21-I:58, and that the instant appeal, if it could legally be filed under RSA 21-I:58, still would not have been timely.

By letter dated March 26, 1990, Ms. Hurley responded to the Motion to Dismiss, requesting that the Board waive the timely filing issue, arguing that it was "in the best interests of the state to correct an inadequacy" and that timeliness should not be a factor "because the situation occurs every time Mr. Robinson receives a paycheck". Ms. Hurley later asks that the Board consider "...the continuous nature of the problem and that it could be appealed every payday".

The Board voted to grant the Director's Motion to Dismiss for failure to timely file, as will be discussed below.

The claim for timeliness, based upon the bi-weekly issuance of Appellant's paycheck, was previously addressed in the Board's decision of September 25, 1989, in the Appeal of Wendell Stephenson (Docket #89-O-12). In that decision the Board specifically found that:

> "Appellant's representative has raised this issue in prior appeals and the Board again finds that it is an argument without merit. The plain language of the statute provides that an appeal must be taken 'within fifteen calendar days of the action giving rise to the appeal'".

The State Employees' Association then brought this issue before the New Hampshire Supreme Court in the appeal of Wendell Stephenson (NHSC #89-147), asking the Court specifically to find that denial of pay to which the employee believed himself to be entitled would "...create an ongoing right under the statute so that his appeal to the Board should be considered timely". (Appeal by Petition, page 2) By order dated February 9, 1990, the Court declined the appeal. Again, in the instant appeal, the Board finds Appellant's argument for timeliness based upon the "continuous" nature of the complaint to be an argument without merit.

Appellant also claims to have timely filed, believing that the Board's past practice has been to accept appeals on the first working day following the fifteenth day should that deadline fall during a week-end. While Appellant is technically correct in interpreting that practice, he errs in believing that the fifteen day calculation begins with the date of receipt rather than the date of the action from which an appeal arises. In this instance, Appellant argues that the appeal is taken from Personnel Director Vogel's February 15, 1990 letter Ms. Hurley. Fifteen days from the date of the Director's letter is Friday, March 2, 1990, not Saturday, March 3, 1990. Therefore, were the Board to believe February 15, 1990 to be the date of the action giving rise to the appeal, Ms. Hurley's letter to the Board on March 5, 1990, was not timely filed.

Finally, it is the Board's finding that the only opportunity Mr. Robinson had to challenge his position allocation, in the absence of a completed request for reclassification, would have been within fifteen days of his original allocation, or not later than October 10, 1987. Even if the Board were to construe Director Vogel's letter of January 16, 1990 to Albert Nolin as a "decision", which it does not, an appeal arising from same must have been filed with the Board within fifteen calendar days of that action, or not later than Wednesday, January 31, 1990.

THE PERSONNEL APPEALS BOARD

Patrick J. McNicholas, Chairman

Robert J. Johnson

Lisa A. Rule

cc: Margo Hurley, SEA Field Representative
Virginia A. Vogel, Director of Personnel
Albert J. Nolin, Director, Division of Plant and Property
David S. Peck, Assistant Attorney General