State of New Hampshire

PERSONNELAPPEALSBOARD
25 Capitol Street
Concord, New Hampshire 03301
Telephone **(603) 271-3261**

APPEAL OF DANIEL ST. HILAIRE

DOCKET #98-C-4

Response to Appellant's Request for Hearing/Motion for Rehearing

May 4,1999

On Marc11 26, 1999, the Board received Mr. St. Hilaire's request for an evidentiary heasing on the matter of his eligibility for compensation at salary grade 30 retsoactive to the date of his membership in the New Hampshire Bar Association.

In general, a request for reconsideration must either allege that the Board has made an error of law or must present additional facts that were not available for the Board's review when the appeal was decided. In order to request a rehearing, the party dissatisfied with the Board's order must set forth every ground upon which it is alleged that the Board's decision is unlawful or unreasonable. The Board may grant a rehearing if, in its opinion, good reason for such rehearing is stated in the motion.

Having reviewed the Motion in conjunction with its decision in this matter, the Board finds no good reason therein to reconsider its decision or to grant the appellant's request for an evidentiary hearing. The Board continues to find that there are no material facts in dispute that would necessitate the scheduling of an evidentiary hearing. The facts as set forth in the Board's February 24, 1999, decision are well-supported by the evidence, restate the material facts as presented by the appellant in his June 23, 1998, appeal, and summarize the documents offered for consideration by the Board. The appellant has failed to persuade the Board that its February 24, 1999, decision is unreasonable or unlawful.

1. *The appellant argued that the Director's arguments in support of her motion to dismiss the appeal were without merit.*

As the February 24, 1998, decision reflects, the Board weighed both the Director's arguments supporting her motion to dismiss the appeal for lack of timely filing, and the appellant's representation of events. The Board did not dismiss the appeal, but reviewed the case on it merits. The Board does not believe good reason exists to rehear an appeal based on the appellant's disagreement with arguments supporting a Motion to Dismiss when that Motion has already been denied.

2. *The appellant argued that the Board violated his due process rights by failing to respond to a request for a hearing in a timely manner, failing to notify the petitioner that a hearing or review was scheduled, and conducting a hearing on the merits without the petitioner present to present evidence. He further argued that he had suffered financial hardships, as he had been "told by state officials that the pay increase would take effect in November of 1997," had to wait seven months for a response from the Director, and another eight months for his appeal to be reviewed.*

The Board prioritizes its cases,, including this appeal, by category. It then schedules appeals within their category in the order in which they are received. There are no scheduling deadlines imposed by rule or law, and appeals are scheduled as expeditiously as possible. Per-A 202.09 requires the Board to give parties fourteen days notice if a hearing is to be scheduled on a pending appeal. In this instance, the Board determined on the pleadings that there were no material facts in dispute, and the Board disposed of the matter without evidentiary hearing in accordance with Per-A 202.04 (a)(1).

The appellant's personal financial circumstances, albeit regrettable, have no bearing on the facts of the case, or upon the lawfulness or reasonableness of the Board's decision denying his appeal.

3. *The appellant argued that each point the Board addressed was in dispute with the position of the Director, and that the Board therefore erred in finding that there were no material facts in dispute.*

Any facts in dispute relate solely to the timeliness of the appeal and are not material to the decision from which the appeal arises, specifically whether or not the appellant meets the minimum qualifications appearing on the class specification for an increase from salary grade 27 to salary grade 30.

4. *The appellant argued that the director's decision is arbitrary and capricious. He argued that Marta Modigliani, a former examiner with the department, was upgraded once the employee had passed the bar examination.*

Absent evidence that such an upgrading occurred, that the named employee did not have five years of experience as an attorney at the time the position was upgraded, and that the upgrading occurred after November 9, 1995, the appellant's argument is without merit.

5. *The appellant argued that the decision of the Board and Director is unlawful and unreasonable, noting that, "...bar membership is not necessary to practice law in an administrative setting."*

As the Board found in its February 24, 1999, decision, "The word attorney appears only in the minimum qualifications at the salary grade 30 level. By comparison, the lower levels of Hearings Examiner require either experience as a law clerk, or post graduate experience in the practice of law." Mr. St. Hilaire's work as a Hearings Examiner, salary grade 27, qualifies as "post graduate experience in the practice of law" but not experience as an attorney.

Clearly the appellant disagrees with the outcome of his appeal. However, restating the arguments already raised in the pleadings and fully considered by the Board in reaching its decision does not provide good reason for a rehearing.

Accordingly, the appellant's request for rehearing is DENIED.

THE PERSONNEL APPEALS BOARD

Mark J. Bennett, Chairman

Patrick H. Wood, Commissioner

James J. Barry, Commissioner

cc: Virginia A. Lamberton, Director of Personnel, 25 Capitol St., Concord, NH 03301

Daniel St. Hilaire, Dept. of Safety, Bureau of Hearings, 10 Hazen Dr., Concord, NH 03305

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APPEAL OF DANIEL ST. HILAIRE

DOCKET #98-C-4

DEPARTMENT OF SAFETY

February 24, 1999

On June 23, 1998, the Board received the above-titled appeal filed pursuant to Per-A 201.01 [Jurisdiction] and Per-A 208 [Classification and Evaluation Appeals] of the Rules of the Personnel Appeals Board. On September 23, 1998, the Board received Personnel Director Lamberton's September 22, 1998, letter asking the Board to dismiss the appeal as untimely.

Having reviewed the pleadings received to date, the Board found that aside from the issue of timeliness, the parties' disagreement is limited to the correct interpretation of the current statement of minimum qualifications for the position of Hearings Examiner, salary grade 30. Otheiwise, none of the material facts are in dispute. Therefore, in accordance with Per-A 202.04 (a)(1), the Board voted to decide the appeal without all evidentiary hearing.

The underlying facts are as follows:

1. Mr. St. Hilaire was hired as a Hearings Examiner for the Department of Safety, Bureau of I-Iearings, on December 28, 1992.
2. At the time of hire, Mr. St. I-Iilaire possessed a law degree from the Boston University School of Law. I-Iowever, he had not been admitted to the New Hampshire Bar Association and he had no experience as an attorney.
3. Because Mr. St. Hilaire did not possess the minimum qualifications for certification at the salary grade 30 level, the position was downgraded to salary grade 27 until such time that he met the minimum qualifications to certify at the higher level.

4. Effective November 9, 1995, the class specification for Hearings Examiner was revised, increasing the experience requirement for certification at the salary gsade 30 level.
5. The revised specification for Hearings Examiner, effective November 9, 1995, lists the following minimum qualifications for certification at the salary grade 30 level: J.D. from a recognized school of law; five years' experience as an attorney, two years of which must have been as an attorney involved with administrative law or concerned with regulatory authorities; and membership in the New Hampshire Bar Association.
6. On November 4, 1997, the Department of Safety submitted to the Division of Personnel a Personnel Action Form to promote Mr. St. Hilaire from salary grade 27 to salary gsade 30. The form indicated that Mr. St. Hilaire had been sworn in as a member of the New Hampshire Bar Association on November 3, 1997.
7. The Division of Personnel did not approve the promotion.
8. By letter dated November 14, 1997, addressed to Safety Commissioner Richard M. Flynn, Personnel Director Lamberton wrote that she had recently received a note from the Commissioner requesting reconsideration of her refusal to increase Mr. St. Hilaire's level of compensation. In her letter, Ms. Lamberton explained her rationale for denying the agency's request. She described the differences between qualifications for Hearings Examiner positions in the Department of Safety and the qualifications for Hearings Officer and Attorney positions in other State agencies. She also explained how the minimum qualifications for those positions relate to the classification/compensation plan..
9. Approximately three months later, on February 27, 1998, Mr. St. Hilaire wrote to the Director requesting that his position be "readjusted to a labor grade 30."
10. Mr. St. Hilaire quoted Black's Law Dictionary, defining attorney as "an agent or one who is authorized to act in the place or stead of another." He argued that even before his admission to the New Hampshire Bar in November, 1997, in his capacity as a Hearings Examiner he was acting as the legal agent for the Commissioner of Safety and Director of the Division of Motor Vehicles. Therefore, he argued, his experience as a I-Iearings Examiner must be considered experience as an attorney.
11. Having received no response to his February 27, 1998, letter, Mr. St. Hilaire wrote to the Director again on May 29, 1998, requesting information on the status of request.
12. The Director responded by letter dated June 8, 1998.

In his June 23, 1998, appeal to this Board, Mr. St. Hilaire wrote:

> "On November 3, 1997, this employee became a member of the NH Bar and completed paperwork for the upgrade [from salary grade 27 to salary grade 30] since the requirements of 5 years experience and membership in the Bar were fulfilled. This employee did not receive the expected pay increase and inquired in writing to the Division of Personnel on February 27, 1998."

There is no evidence of a request from Mr. St. Hilaire to the Director of Personnel for adjustment of his salary grade in November, 1997. Instead, the evidence reflects that a request was made by the Department of Safety through its submission of a Personnel Action Form dated November 4, 1997. The Director did not approve the request. Her written explanation of that decision was provided in a letter to Commissioner Flynn dated November 14, 1997. In order to have been timely, an appeal of the Director's refusal to adjust the appellant's compensation must have been received by the Board on or before November 29, 1997. Mr. St. Hilaire's letter to the Director dated February 27, 1998, is not a timely appeal of that decision.

However, upon review of the pleadings, the Board found that Mr. St. Hilaire's letter of February 27, 1998, is best described as a new request for adjustment of the appellant's compensation fi-om salary grade 27 to salary grade 30. Whereas the Director's response to that request was dated June 8, 1998, the Board found Mr. Hilaire's June 23, 1998, appeal to be timely.

Again, the material facts are not in dispute. In order to receive compensation as a Hearings Examiner, salary grade 30, an appointee must: 1) possess a J.D. from a recognized school of law, 2) have five years' experience as an attorney, with at least two years as an attorney involved with administrative law or concerned with regulatory authorities, and 3) be a member of the New Hampshire Bar Association. Mr. St. Hilaire earned his JD from the Boston University School of Law in 1992. Mr. St. Hilaire was employed by the Department of Safety in a downgraded Hearings Examiner position in December, 1992. He passed the N. H. Bar Examination and was admitted to the New Hampshire Bar on November 3, 1997.

In his February 27, 1998, letter to Director Lamberton, the appellant wrote:

> "Black's Law Dictionary defines attorney as an agent or one who is authorized to act in the place or stead of another. By virtue of my position as a Hearings Examiner, the New Hampshire statutes authorize I-Iearings Examiners to act as agents in the place or stead of the Commissioner and/or the Director of Motor Vehicles. By law, therefore, a Hearings Examiner is the legal agentlattomey for the Commissioner or Director. I have therefore been the legal agent/attorney for the Commissioner and Director, authorized by them through my employ to act in their place or stead. I have therefore represented the Commissioner and Director in this capacity for over five years."

In addition to the definition provided by the appellant, the Board found that "Black's Law Dictionary, Sixth Edition, also states, "In its most common usage, however, unless a contrary meaning is clearly intended this term [attorney] means 'attorney at law,' 'lawyer' or 'counselor at law.'" In order to determine whether the word "attorney" was intended to mean something other than "attorney at law," "lawyer," or "counselor at law," the Board compared the language in the qualifications section of the specification for the various levels of Hearings Examiner. The Board found significant differences:

> "Hearings Examiner, salary grade 25: JD from a recognized law school; six *months* of experience as a law *clerk*, preferably involved with administrative law."
> "Hearings Examiner, salary grade 27: JD from a recognized law school; *three years of post-graduate* experience in the practice *of law*, preferably involved with administsative law/and or regulatory authorities."
> "Hearings Examiner, salary grade 30: JD from a recognized law school; *five years' experience* as an attorney, two years of which must have been as an attorney involved with administrative law or concerned with regulatory authorities. Must be a member of the New Hampshire Bar Association."

The word attorney appears only in the minimum qualifications at the salary grade 30 level. By comparison, the lower levels of Hearings Examiner require either experience as a law clerk, or post-

graduate experience in the practice of law. In this context, the Board found that the word "attorney" was, and is, intended to mean "attorney at law," "lawyer," or "counselor at law," not simply one who acts, "...as an agent or one who is authorized to act in the place or stead of another."

For the reasons set forth above, the Board found that when Mr. St. I-Iilaire requested an adjustment of his compensation on February 27, 1998, he did not meet the minimum qualifications for certification as a I-Iearings Examiner at the salary grade 30 level. Therefore, the Board voted unanimously to DENY his appeal.

THE PERSONNEL APPEALS BOARD

Mark J. Bennett, Chairman

Patrick H. Wood, Commissioner

James J. Barry, Commissioner

cc: Virginia A. Lamberton, Director of Personnel, 25 Capitol St., Concord, NH 03301

Daniel St. I-Iilaire, Department of Safety, Bureau of Hearings, 10 Hazen Dr., Concord, NI-I 03305

Richard M. Flynn, Commissioner of Safety, 10 Hazen Dr., Concord, NI-I 03305