State of New Hampshire

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PERSONNELAPPEALSBOARD
State House Annex
Concord, New Hampshire 03301
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RESPONSE TO REQUEST FOR RECONSIDERATION
Appeals of Dumont and Veloski
Counter Clerks - Department of Safety

August 13, 1990

On June 5, 1990, SEA Education and Training Director Dennis Martino sent to the Board a request for reconsideration of its May 17, 1990 decision in the retroactive pay appeals of Mary Kay Dumont and Kathy Veloski, employees of the Department of Safety. The Board had denied the appellants an award of retroactive compensation, finding that their requests for reclassification had not been received in the Division of Personnel until September 23, 1988, and they were not therefore part of the reclassification request for Counter-Clerk positions in other bureaus in the Department.

Appellants argue, in part, that they are entitled to retroactive compensation as a result of the review and reclassification of Counter Clerk positions in two other bureaus in their department, reiterating that the Department of Safety intended to ask that their positions be reclassified, but failed to include their position numbers or position classification questionnaires in the original review request. They conclude that delayed transmittal of their questionnaires was an administrative error for which they should not be penalized, and which the Board now has the discretion to correct.

In their motion, Appellants contend that a distinct difference exists between their situation and that presented in the Appeal of Roanne Harlow, et al (N.H. Supreme Court Case #89-150). In that matter, Appellants believed they were entitled to retroactive compensation when identical positions in the same division of the same department were upgraded. The Board denied their request for retroactive compensation, finding that there was no statutory authority for such compensation in the absence of a completed request for reclassification being received by the Division of Personnel. That decision was summarily affirmed by the New Hampshire Supreme Court on July 24, 1989, in accordance with Rule 25(1)(c), which provides that the case included the decision of the administrative agency, presented no substantial question of law, and that the Court did not find the decision to be unjust or unreasonable.

Ms. Dumont and Ms. Veloski argue that, "...a distinct difference exists between a group trying for retroactive pay on the coattails of others such as Roanne Harlow, et al, and that of employees whose request was bungled by admission of the department involved. In the first case, we believe employees

clearly were saying 'me too', whereas in the second case a mistake by their department caused their request to not be forwarded with the others holding the same title."

The Board notes, for the record, that according to the documents submitted by Mr. Martino on behalf of the appellants, Ms. Dumont did not occupy either of the positions in question at the time that position classification questionnaires were submitted to Mr. Goodrich at the Department of Safety. The Board also notes that both the appellants and the agency agree that the Department of Safety inadvertently delayed forwarding the subject classification questionnaires to the Division of Personnel for consideration. The Board believes that representation to be correct, finding that an administrative error in the business office of the Department of Safety caused the delayed delivery of the questionnaires to the Director of Personnel.

The Board believes a distinction might exist between the inadvertent failure of an agency to forward classification questionnaires to the Director of Personnel in a timely fashion, and the willful refusal to forward a classification questionnaire for consideration by the Director of Personnel. The Board does not offer an opinion, however, concerning the effect that such a distinction might have upon the acceptance or declination of any similar appeals of retroactive compensation.

As the Board noted in its earlier decision on this matter, the Department of Safety requested the reclassification of several Counter Clerk positions. In making such request, the Department forwarded classification questionnaires to the Director of Personnel for consideration. Several questionnaires were not received by the Director of Personnel until September 23, 1988. When a decision was made to reclassify these positions, the provisions of RSA 21-I:54 were applied in determining whether the incumbents were entitled to any retroactive compensation.

Upon learning that September 23, 1988 was to be used as the effective date of the reclassification, the Department appealed to the Director of Personnel. The Director declined to award retroactive payment, both on initial request, and upon request for reconsideration. An appeal was then taken to the Personnel Appeals Board, in which Appellants allege that they should be entitled to retroactive compensation, and the effective date of their reclassifications should have been consistent with other Counter Clerk positions in other bureaus of the Department of Safety. Appellants argue that they should not be penalized because of an administrative error in their department which delayed the processing of classification questionnaires for their positions.

While the Board is sympathetic to Appellants' arguments, the statutory provisions which authorize retroactive compensation are, nonetheless, unequivocal. '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...' (See RSA 21-I:54,III). The Rules of the Division of Personnel provide a remedy for the intentional or unintentional failure of an agency to provide notice to the Director of Personnel of changes in position content where a job reclassification might be appropriate.

"Appointing authorities shall give written notice within 60 days to the director of material changes in the duties and responsibilities of the positions occupied by their employees. If an appointing authority fails to so notify the director, the employee may file a written request with the director that his position be studied." [SEE Per 303.04(a), Rules of the Division of Personnel]

Based upon the foregoing, the Board voted to affirm its decision of May 17, 1990, in which it dismissed the appeals of Dumont and Veloski.

While the Board remains of the opinion that the appellants are not entitled to retroactive compensation based upon the date of receipt by the Director of the completed classification questionnaires, the Board also believes that simple instructions to both agencies and employees concerning the reclassification process would be beneficial to any employee or agency filing such a request for review by the Director of Personnel,

The statutes define the only authority for the award of retroactive compensation as the result of position reclassifications. The Code of Administrative Rules provides a vehicle whereby employees may submit reclassification requests directly to the Division of Personnel should their agencies fail to provide timely notice of changes in job content to the Division of Personnel. The Division of Personnel could provide information concerning the applicable statutory provisions and administrative rules by either amending page (1) of the N.H. DIVISION OF PERSONNEL POSITION CLASSIFICATION QUESTIONNAIRE (Revised 6/6/86), or by adding a cover sheet advising the reader how materials are received for review, and how an effective date of change is established.

THE PERSONNEL APPEALS BOARD

Patrick J. McNicholas, Chairman

Robert J. Johnson

Mark J. Bennett

cc: Dennis T. Martino, Education and Training Officer
State Employees' Association of N.H., Inc.
Edwin J. Goodrich, Human Resource Coordinator
N.H. Department of Safety
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Civil Bureau - Office of the Attorney General

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APPEAL OF MARY KAY DUMONT and KATHY VELOSKI
Department of Safety

May 17, 1990

By letter dated December 23, 1988, former SEA Field Representative Ann Spear filed with the Board a letter of appeal on behalf of the above-named employees of the New Hampshire Department of Safety. In that letter, Ms. Spear stated that the decision from which the appeal was taken was the December 8, 1988 decision on a request for reconsideration which had been denied by the Director of Personnel. Ms. Spear stated,

> "...we are also in the process of appealing the denial in accordance with Per 306.09 of the Rules of the Division of Personnel, and we have completed Steps I through III. However, in the event that the Personnel Appeals Board considers that this type of case be brought directly before them, we are also filing this appeal to you within the fifteen (15) calendar day time frame."

Although Ms. Spear made reference to the appeal concerning denial of retroactive compensation, and to an allegation that the appellants "...held positions and performed functions equal to other Counter Clerks within the Division who were also reclassified from I to II and did receive retroactive pay", no further information was ever provided for the Board's consideration.

On April 4, 1990, following a telephone conversation with the Board's administrative staff, SEA Education and Training Director Dennis Martino forwarded to the Board's attention additional information in the instant appeal. In that letter, Mr. Martino contended that the Department of Safety submitted a request for review of a number of positions, accidentally omitting four position review requests from the original packet. He argued that because of the late submission, those positions, when upgraded, were not awarded retroactive compensation.

Attached to Mr. Martino's April 4th letter were copies of correspondence including:

> April 3, 1987 to Edwin J. Goodrich, Safety Administrative and Personnel Officer for the Department of Safety from the Division of Personnel re: Positions Reviews - Counter Clerks

An excerpt from page 2 of a letter dated June 9, 1987 to Edwin J. Goodrich from Personnel Director Vogel concerning a reconsideration decision in the matter of Counter Clerks I in the Road Toll Bureau

September 23, 1988 memo from Edwin J. Goodrich to Virginia Vogel forwarding Classification Questionnaires from Kathy Veloski and Karla Gove, incumbents in two of the four Clerk I positions for which reclassification was requested

October 26, 1988 letter from Virginia Vogel to Robert K. Turner, Director of Motor Vehicles re: Position Review - Counter Clerks I

December 8, 1988 letter from Personnel Director Vogel to Motor Vehicle Director Turner re: Effective Date of Change - Counter Clerk II

November 22, 1988 letter from Robert K. Turner to Virginia Vogel requesting retroactive pay for Title Counter Clerks

November 16, 1988 memo from Dennis J. Smith, Supervisor, Bureau of Title and Anti-Theft to Robert K. Turner concerning the upgrading of Counter Clerks Veloski, Dumont, Gove and Paveglio

Mr. Martino's April 4, 1990 letter to the Board requests an order for payment to Ms Dumont and Ms Veloski, or a hearing to address the issue of payment to the affected employees.

Upon review of the information submitted, it would appear that Ms Dumont and Ms Veloski held positions titled Counter Clerk I, salary grade 6, in the Bureau of Title and Anti-Theft. While so employed, reclassification of certain Counter Clerks I occurred in another bureau of the Department of Safety, resulting in a change of their titles from Counter Clerk I, salary grade 6 to Counter Clerk II, salary grade 8. Subsequent to the first reclassifications, position classification questionnaires for the above named appellants were received and reviewed by the Division of Personnel, and the positions they held were also reclassified to Counter Clerk II.

Appellants argue that their work was equivalent to that performed by similarly titled employees in Road Toll, Financial Responsibility and Driver Licensing Bureaus. They further argue that they had submitted classification questionnaires to their personnel office at the same time as employees in bureaus other than Title and Anti-Theft, but were accidentally omitted from the list of positions for which review had been requested by their department. They therefore argue that their salary grades should have been increased effective February 26, 1988, rather than at the beginning of the pay period following Ms Vogel's October 26, 1988 letter to Robert Turner approving the reclassification of their positions.

Upon review of the correspondence submitted in the instant appeal, there appear to be no material facts in dispute. Regardless of when Appellants completed Position Classification Questionnaires and submitted same to their agency personnel office, those questionnaires were not received by the Division of Personnel until September 23, 1988.

The only outstanding issue is the Director's decision, in light of the admitted mishandling of Appellants questionnaires by the Department of Safety itself, in which she denied Appellants additional compensation retroactive to the effective date of reclassification for similarly titled positions in that department. The Director's decision is outlined in her letter of December 8, 1988, to Robert K. Turner, and January 3, 1989 letter to Charles Sova:

> "As you will recall, on July 17, 1987, I did write to you in regard to your second request for reconsideration on my decision not to upgrade the Counter Clerk I's within the Bureau of Title and Anti-Theft to Counter Clerk II's. In this same communication I indicated that you had exhausted your administrative remedies, however, I did agree that I would waive the one year waiting period before another review was accepted by my Division. Apparently, you did decide to take me up on my offer to you and new Questionnaires were forwarded to my Division on September 23, 1988. Apparently, long before that date, the position incumbents had inquired of Mr. Smith on numerous occasions concerning the status of the review request. Mr. Smith in turn discussed the situation with your Human Resources Coordinator and Mr. Smith had been led to believe that my Division had all the material but had not yet acted upon it. As you now know, this was not the situation at all and it was not until you hand carried the Position Classification Questionnaires to my Division that the forty-five day time frame began. Although I can and do sympathize with the employees within your Division of Motor Vehicle in regard to the failure within the Department of Safety to get the Questionnaires to my Division... I do not believe that I have the authority to negate the state law nor am I persuaded to even consider such an action when the breakdown in communications occurred within your own Department of Safety...". (See letter of Virginia Vogel to Robert K. Turner, December 8, 1988)

Upon further review of the correspondence forwarded to the Board by Appellants, it would appear that Charles Sova then wrote to SEA Field Representative Ann Spear on December 21, 1988, regarding Appellants, On December 23, 1988, Field Representative Spear filed the initial appeal with the Board. On January 3, 1989, Director Vogel then wrote to Charles Sova, outlining her rationale for denying the requested retroactive compensation.

> "When the legislature enacted Chapter 12, Laws of 1986, it specifically limited award of retroactive compensation to instances when the Division

of Personnel failed to respond to a completed request for reclassification within 45 days of receipt of same. ... The statute [RSA 21-I:54 III] provides no authority to either the Director of Personnel or the appointing authority to waive the formula for establishment of appropriate effective dates for reallocation to compensate for 'mishandling' of reclassification requests at the agency level."

(See letter of Virginia Vogel to Charles Sova, January 3, 1989)

The Board concurs with the Division of Personnel's decision in denying Appellant's request for additional compensation retroactive to February, 1988. Absent a completed request for reclassification, there is no statutory authority for the award of retroactive compensation in excess of that allowed under the provisions of RSA 21-I:54,III.

A similar issue was raised in the Appeal of Harlow, Barker, Hansen and Wheeler, Occupational Therapists from Laconia Developmental Services who appealed from a decision denying them retroactive pay based upon the effective date of upgrading for similarly titled positions in another agency of the Department of Health and Human Services. Appellants argued that "...if those employees at one State institution holding a particular job title were made whole from being improperly compensated for their duties... then those employees holding the same job title and performing the same duties at another State institution should be made equally whole".

The Board denied their appeal and subsequent request for reconsideration, finding that Appellants were "not part of the reclassification request filed by [the agency]; there was no material submitted to the Director of Personnel by the appointing authority or the [appellants] to document that the work performed by [the appellants] had materially changed, and therefore there was no justification to reclassify or upgrade those positions [retroactive to the date of reclassification for similarly titled positions in another part of the agency]." See Appeal of Occupational Therapists, Motion for Reconsideration, Personnel Appeals Board decision March 15, 1989.

Appellants subsequently took their appeal to the New Hampshire Supreme Court (N.H. Supreme Court Case #89-150, Appeal of Roanne Harlow & a.). In their Appeal by Petition filed with the Court Appellants argued that:

> "...the Board ruled that RSA 21-I:54,III, ... necessarily barred the appellants' request for retroactive pay. In so ruling, the Board ignored Ms Spear's prior admonition that occupational therapists at Laconia Developmental Services and New Hampshire Hospital are in the same department (and the same division), and that RSA 21-I:54,III refers to requests 'from departments or employees'." [Appeal by petition, pgs. 6-7, Appeal of Roanne Harlow et al (New Hampshire Personnel Appeals Board)]

Appellants asked that the Court rule on the question of:

> "Whether the Board erred as a matter of law or clearly acted unjustly and unreasonably in denying the appellants retroactive pay after an upgrade, when such retroactive pay was awarded to other employees in the same classification? RSA 21-I:42,II; Petition of State Employees' Association and Robinson, 129 NH 554 (1987)."

On July 24, 1989, the Court summarily affirmed the Board's decision in accordance with Rule 25(1)(c), that the case included the decision of the administrative agency, that no substantial question of law was presented, and that the Court did not find the decision of the Board to be unjust or unreasonable. The Court therefor affirmed the the Board's decision that in the absence of a completed request for reclassification, the appellants were not entitled to retroactive pay.

Based upon the foregoing, having found substantially the same facts represented in the instant appeal as that presented to the Supreme Court in the matter of Roanne Harlow & a., the Board voted to deny Appellants' request for order of payment, and further declined to schedule a hearing on the matter.

THE PERSONNEL APPEALS BOARD

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cc: Dennis T. Martino, Education & Training Director
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