

State of New Hampshire

WPPID742



PERSONNEL APPEALS BOARD

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

Response to Appellant's Request for Reconsideration APPEAL OF MARY VINCENT Docket #91-D-1

May 2, 1991

The New Hampshire Personnel Appeals Board (McNicholas, Johnson and Bennett) met Wednesday, April 3 1991, to consider the March 4, 1991 Reconsideration Request filed by SEA Field Representative Stephen J. McCormack on behalf of Mary Vincent. In consideration of the record before it, the Board voted unanimously to deny the request and, in so doing, voted to affirm its decision of February 14, 1991, upholding the withholding of Ms. Vincent's annual increment and her demotion from Administrative Secretary/Supervisor to Executive Secretary in the Department of Health and Human Services.

Attached to the appellant's Reconsideration Request were a number of documents including Ms. Vincent's February 26, 1991 rebuttal to her June 21, 1990 performance evaluation, a February 22, 1991 statement purportedly "clarifying" Ms. Vincent's testimony at her hearing before the Board, several internal agency memoranda, copies of selected meeting minutes, copies of class specifications and/or job descriptions, and a certificate for training completed by the appellant in Lotus 1-2-3. The appellant has failed, however, to demonstrate what good cause might be shown for inclusion of these materials in the record of her appeal 48 days after the date of the hearing, and 20 days after the decision of the Board. The appellant has offered no reason why these documents were not available at the hearing in January 1991, and why they were not exchanged with the appointing authority at least 72 hours prior to the hearing as required by the provisions of Per-A 202.08 of the Rules of the Personnel Appeals Board.

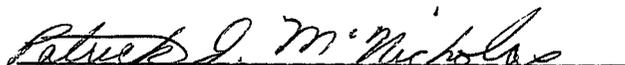
The appellant's request for reconsideration essentially appears to be a written summary of the appellant's original arguments, and raises no issues or arguments not already properly raised or answered by the Board's February 14, 1991 order. The appellant has failed to establish grounds to support an

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allegation that the Board's order was either unreasonable or unlawful. Accordingly, the Board voted unanimously to deny the appellant's request for reconsideration and to affirm its decision of February 14, 1991.

THE PERSONNEL APPEALS BOARD


Patrick J. McNicholas, Chairman


Robert J. Johnson


Mark J. Bennett

cc: Virginia A. Vogel, Director of Personnel
Dr. Doris Nuttleman, Director, N.H. Board of Nursing
Jan D. Beauchesne, Human Resource Coordinator, C.O.M.B./H.H.S.
Susan Epstein, Acting Director, Division of Public Health Services
Stephen J. McCormack, SEA Field Representative
Civil Bureau - Office of the Attorney General

State of New Hampshire

WPPID677



PERSONNEL APPEALS BOARD

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

APPEAL OF MARY VINCENT Division of Public Health Services Docket #91-D-1

February 14, 1991

The New Hampshire Personnel Appeals Board (McNicholas, Johnson and Bennett) met Wednesday, January 16, 1991, to hear the appeal of Mary Vincent regarding the second withholding of her annual increment and subsequent demotion from her position of Administrative Secretary Supervisor (salary grade 13) to Executive Secretary (salary grade 10). The appellant was represented at the hearing by Stephen J. McCormack, SEA Field Representative. Dr. Doris Nuttleman, Executive Director of the Board of Nursing represented the Board. Dr. Nuttleman and Ms. Vincent each presented sworn testimony.

By letter dated January 7, 1991, Susan Epstein, Acting Director of the Division of Public Health Services, requested a continuance of the scheduled hearing, arguing that the agency would require additional time to prepare its case in light of "personnel changes and reductions at the Board of Nursing, and the untimely resignation of the Director of Public Health Services". At its meeting of January 9, 1991, the Personnel Appeals Board (McNicholas, Johnson and Bennett) voted to deny the request and to order that the parties appear as scheduled for a hearing on the merits of Ms. Vincent's appeal.

At the outset of the hearing, Mr. McCormack moved for dismissal of the appeal, asking the Board to order the immediate reinstatement of Ms. Vincent to her former position of Administrative Secretary/Supervisor to the New Hampshire Board of Nursing. Mr. McCormack argued that the Board of Nursing had illegally withheld the appellant's second increment and had therefore illegally accomplished her demotion to the position of Executive Secretary. In support of his motion, he argued that the Board should refer to its own order in the matter of Elaine Fugere (PAB Order of May 22, 1989), in which the appellant claims that the Board had ruled that the appointing authority could only withhold one increment. He contended that the same principle should also apply in Ms. Vincent's appeal. The Board voted to take the motion under advisement, and instructed the parties to proceed with the hearing on the merits.

Dr. Nuttleman argued that after the first withholding of Ms. Vincent's annual increment, not only did the appellant's work fail to show any improvement, but

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her performance actually deteriorated. She submitted for the record draft copies of New Hampshire Board of Nursing minutes dated September 21, 1990, January 18, 1990, February 15, 1990 and May 17, 1990. She indicated that much of the difficulty with the minutes arose from Ms. Vincent's insistence upon providing a verbatim record of the discussions, rather than a clear record of the action taken at the meetings. She pointed out several factual errors in the minutes, and testified that she had attempted to make Ms. Vincent understand that she was responsible for reporting the substantive issues raised and the votes taken at those meetings, not an exact record of the discussion between the Board members. She stated that a tape recorder had been made available to Ms. Vincent for use in recording the Board of Nursing meetings, and that Dr. Nuttleman had offered to assist and retrain Ms. Vincent in preparing acceptable meeting minutes. Dr. Nuttleman testified that Ms. Vincent refused her help, insisting that she knew how to produce accurate meeting minutes, and that her minutes represented exactly what she had taken down in her stenographic notes. Ms. Vincent responded that her minutes "are verbatim minutes and as accurate as I possibly could give to you." She also stated that final edit was the responsibility of her superiors. Of the drafts she provided to her supervisors she stated, "from that the ladies gleaned whatever they wanted to make them into a viable instrument."

Dr. Nuttleman submitted a copy of the June, 1990 performance evaluation showing Ms. Vincent's performance as below expectations in the majority of categories. Dr. Nuttleman noted for the record that Ms. Vincent did not exercise her legal right to non-concur in writing with the evaluation, nor did she supply any information in the "Employee Comment" portion of the evaluation. **Mr. McCormack** responded that such comment or written non-concurrence was unnecessary because Ms. Vincent intended to pursue an appeal of whatever action resulted from the unsatisfactory performance appraisal. Further, he argued that an evaluation completed in June 1990, at approximately the same time as Ms. Vincent's hearing on the first withholding of her increment, could not possibly be an objective, unbiased assessment of her performance.

Dr. Nuttleman indicated that following the first withholding of Ms. Vincent's annual increment, the appellant had received a written warning for unsatisfactory work and absence without approved leave, which was reduced upon appeal within the Division of Public Health Services, to an oral warning. **Mr. McCormack** objected to the inclusion of this information in the record of Ms. Vincent's appeal. The Board, however, over-ruled his objection and admitted the relevant documents, noting that for the purposes of this hearing, the parties were in full agreement the appellant had received an oral, not a written warning, on April 11, 1990.

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Dr. Nuttleman testified that Ms. Vincent is an excellent typist, and said there was no question that in her current work assignment the appellant is performing quite well. Dr. Nuttleman argued that Ms. Vincent's success in her current assignment should serve as further proof that the decision to demote the appellant to Executive Secretary was both reasonable and proper.

Mr. McCormack argued that the Board of Nursing and the Division of Public Health Services were without the authority to withhold Ms. Vincent's increment for a second year, citing the Appeals Board's ruling in the matter of Elaine Fugere. Mr. McCormack contended that the Board of Nursing had illegally demoted the appellant, having first relied on the provisions of Per 304 of the Rules of the Division of Personnel as the authority to demote, and having also failed to satisfy the procedural requirements of Per 308 to accomplish the demotion. Mr. McCormack stated that in light of the Fugere decision, the Board of Nursing would have been required to issue multiple written warnings for unsatisfactory work, under the provisions of Per 308.04, prior to any decision to demote. He also argued that in any case, the Board of Nursing was prohibited from withholding the appellant's salary increment a second time.

Ms. Vincent testified that she believed her minutes of the Board of Nursing meetings to be accurate. Ms. Vincent was questioned concerning certain factual discrepancies, such as reporting in one paragraph that a vote was unanimous and then reporting the number of ayes and nays on the same question in the following paragraph. Ms. Vincent repeated that her notes were a verbatim record of the meeting, from which she would "try to pull out the most meaningful, descriptive part". She also stated that the Board members might take a quick vote on an issue, then go back and change the vote. She therefore stated that her minutes merely reflected the actual activity at those meetings.

Ms. Vincent admitted to frequent meetings, both with Mrs. Nay prior to her resignation as the Executive Director of the Board of Nursing, and with Dr. Nuttleman, the current Executive Director. The State described these as supervisory meetings where the appellant's job performance and corrective action were discussed. The appellant characterized her meetings with both Nuttleman and Nay as "intimidation". When questioned about the substance of her meetings with either Nuttleman or Nay, Ms. Vincent generally responded that she didn't remember the discussions which took place. With regard to the accuracy of her note-taking and her minutes, she repeated that she would take down everything word for word, produce the minutes in draft and "from that the ladies gleaned whatever they wanted to make them into a viable instrument." She argued that she understood the need to have the final draft of the minutes reflect those issues addressed at the Board meetings and the action taken, but felt she was required to make note of any and all remarks made. She added that Director Nay would frequently ask her during the week to report on the details of the discussions between the Board members, even if that discussion were unrelated to the actual minutes of the meeting.

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At the close of the hearing, Dr. Nuttleman submitted the State's Requests for Findings of Fact and Rulings of Law. *Mr. McCormack* objected to the Board's receiving those requests unless the appellant were allowed ten days in which to respond. The Board noted for the record that the State's proposed Requests for Findings and Rulings were merely pleadings and required neither response nor objection from the appellant. The Board further noted that the appellant had had the same opportunity to prepare and submit Requests for Findings and Rulings by the close of the hearing and therefore declined to allow the appellant ten additional days in which to prepare and submit similar pleadings.

In consideration of the testimony and evidence presented, the Board voted to deny the appellant's Motion to Dismiss. The Board found sufficient evidentiary support for the withholding of *Ms. Vincent's* annual increment and the subsequent decision to demote her in lieu of discharge. The Board voted unanimously to deny the appellant's oral Motion to Dismiss, finding that the Board of Nursing had not acted in violation of the Rules of the Division of Personnel. Having found that the appellant failed to meet her burden of proof, the Board voted unanimously to deny *Ms. Vincent's* appeal.

The Board ruled as follows on the Appointing Authority's Request for Findings of Fact:

1, 2, 3, 4, 5, 6, 7, 9, 10, and 11 are granted,
8 is granted to the extent that it is consistent with the decision above.

The Board ruled as follows on the Appointing Authority's Request for Rulings of Law:

1, 2, 3, 4, 5, 6, 7 are granted.

The appellant has compared the instant appeal to the matter of *Elaine Fugere*, arguing that the Board has already ruled on the issue of the second withholding of an annual increment. In the *Fugere* matter, the Board stated, "

"This placement of Per 304.04 (a) among rules dealing with compensation, with no specific cross-reference to the section in the disciplinary rules, suggests to the Board that Per 304.04 (a) does not provide a way to bypass the provisions of Part Per 308.

"Per 308.03 (3)(e) lists 'unsatisfactory work' as one of the 'other offenses', Other offenses are handled as provided in Per 308.03 (4) Under Per 308.03 (4)(3), an employee may be discharged (emphasis added) only after the third written warning for the same offense such as unsatisfactory work. If Per 304.04 (a) were intended to provide an alternative method of discharge for unsatisfactory work, the Board would have expected some reference to that fact in Per 308.03."

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In the instant appeal, the Board does not find that the Board of Nursing attempted to avoid the disciplinary rules while attempting to effect the appellant's discharge from employment. The record reflects that the appellant had already received a letter of warning for unsatisfactory work, which was upheld on appeal. That letter of warning preceded the decision to withhold appellant's first annual increment. Following the withholding of the increment, the employee was again warned, albeit verbally, concerning her performance and absenteeism without approved leave. The employee received a performance evaluation which, on the whole, shows her work to be unsatisfactory. That evaluation was followed by a decision to withhold her annual increment a second time for failure to meet the required work standard.

By contrast, in the Fugere matter there is no record of any discipline or counselling prior to the first notice of withholding of her increment, nor is there evidence of subsequent discipline or counselling between the first and second notice that the employee's increment would be withheld. All in all, without the benefit of any discipline and/or counselling, the agency attempted to discharge the employee merely by declining to award her a salary increase for two consecutive years.

The facts of this appeal are substantially different. The appellant received prior notice of unsatisfactory work in both the form of a written warning in May of 1989 and notice that her increment would be withheld in June 1989. The appellant was again disciplined in April 1990, and was constantly informed verbally by her supervisors that her work continued to be unsatisfactory. The fact that the appellant characterized her supervisory meetings as a form of "intimidation" does not necessarily repudiate the State's claim that the appellant was constantly on notice that the agency found her work to be unsatisfactory. The appellant's inability to recall what happened at those meetings, other than to say she found them to be a form of intimidation, lends credibility to the State's position that it apprised her of her work deficiencies, and she in turn refused to take corrective action. Finally, having received a generally unfavorable performance evaluation, the appellant failed to offer either comment or non-concurrence, as she was entitled to do.

The second significant difference between the instant appeal and the matter of Elaine Fugere is the fact that the appellant in this case was not dismissed, but rather was demoted in lieu of discharge. Although by virtue of demotion the appellant suffered a loss in pay, she suffered no break in service and she continued to accrue leave and receive the other benefits of full-time State service. Her demotion appears to have resulted in a job assignment at which she is successful and for which her efforts have been commended.

The agency might have made a credible case for discharge, inasmuch as there is evidence of continuing counselling and discipline for unsatisfactory work. Per 308.03 (3) e., Unsatisfactory work, may apply to either a single instance of an assignment which the employee fails to complete properly, or to an

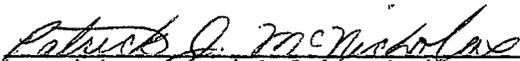
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on-going performance problem. The Board has always held that an employee must receive proper counselling and notice that performance is not meeting the required work standard prior to the withholding of an increment. On the other hand, the Board does not find that the Rules require the issuance of multiple written warnings prior to the withholding of an increment.

In its letter to the appellant, dated June 29, 1990, the Division of Public Health Services notified the appellant that "In accordance with PART Per 304.04(a) of the rules, the employee would be demoted in lieu of discharge. As such, the procedural restrictions of Per 308.02 (c) would apply: "Immediate demotion. Subsections (a) and (b) of Per 308.02 shall not apply in the case of an employee who is demoted in lieu of discharge..." As such, the demotion of Ms. Vincent, following written and oral warnings for unsatisfactory work, and the second withholding of her annual increment, is consistent with the applicable provisions of both Per 304.04 and Per 308.02 of the Rules of the Division of Personnel.

THE PERSONNEL APPEALS BOARD


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cc: Stephen J. McCormack, SEA Field Representative
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