

State of New Hampshire



PERSONNEL APPEALS BOARD
25 Capitol Street
Concord, New Hampshire 03301
Telephone (603) 271-3261

Appeal of Pamela Lindberg – Docket #2010-L-075
Personnel Appeals Board Decision on
Appellant’s Motion for Reconsideration and/or Rehearing
December 16, 2013

By letter dated November 26, 2013, SEA Grievance Representative Sean Bolton filed a Motion for Reconsideration and/or Rehearing of the Board’s October 29, 2013 decision denying the appeal of Pamela Lindberg. In accordance with Per-A 208.03 (f) of the Board’s rules, “A motion for rehearing in a case subject to appeal under RSA 541 shall be granted if it demonstrates that the board’s decision is unlawful or unreasonable.”

NH RSA 21-I: 58, I states that if the board finds that the action being appealed “was taken in violation of a statute or of rules adopted by the director,” the employee shall be reinstated. The Appellant has not argued that there has been any violation of a statute.

The Appellant, in her motion for reconsideration, asserts that the Board “misinterpreted the personnel rules” (Per 1101.02) by ruling that the Department of Health and Human Services acted appropriately by determining whether the Appellant had the necessary qualifications to displace an employee with less seniority rather than merely moving Appellant into another Program Specialist III position, regardless of the duties of that other position. Basically, the Appellant asserts that her seniority should have been the only factor to be considered.

The Appellant made this argument in great depth at the hearing and has presented nothing new in her motion for reconsideration. In addition, the Appellant has not fully recognized the Supreme Court’s explanation of the agency’s requirements in dealing with employees who have been laid off – “[the agency] **was required** to examine the other Program Specialist II positions and offer Morton one of those positions in lieu of layoff **if she is qualified** and more senior than its present holder.”

(Emphasis added.) Not only is an agency entitled to review the qualifications of a laid off employee for another position in the same classification, the agency is REQUIRED to do so.

The Appellant also argues that the Personnel Appeals Board did not properly apply its own rule, Per-A 207.12 (d). The Appellant argues that the Board should ignore the factual determinations made by the Department of Health and Human Services concerning the Appellant's qualifications and "must assess those qualifications for itself." The Appellant wants the Board to step into the shoes of the Department of Health and Human Services and substitute its judgment for that of the Department.

The Appellant is reading considerably more into Per-A 207.12(d) than is appropriate under NH RSA 21-I: 58. The Board, under this rule, must determine whether the Department's interpretation and application of Per 1102 was correct. The Board ruled that the Department had to determine the seniority of the Appellant in relation to other employees who were also in Program Specialist III positions AND then determine whether the Appellant's qualifications were such that she should be able to displace one of those other employees. The Board ruled that the Department of Health and Human Services properly interpreted and applied Per 1102.

The Appellant has made no argument that Per 1102 was invalid. Nor has the Appellant argued that the application of Per 1102 as made by the Department of Health and Human Services was unlawful. Rather, the Appellant argues that the Department's analysis of the Appellant's qualifications should be set aside and the Board should make its own analysis because the Appellant believes a different conclusion should have been reached. Per 1102 requires the Department of Health and Human Services to determine whether the Appellant was qualified to fulfill the duties of the other Program Specialist III positions. "Various positions within state agencies may have the same classifications and general qualifications, as well as the same basic duties, but the specific nature of those positions can require specialized knowledge or experience." Appeal of Vicky Morton. The Department's application of Per 1102 to make the determination of the Appellant's qualifications was both appropriate and lawful. The Board's ruling is in keeping with its statutory authority and is in accord with Per-A 207.12 (d); whether the Board might draw a different conclusion from the information reviewed by the Department is irrelevant.

The Appellant also argues that the Appellant was not properly recalled to her former position. This issue was presented at the hearing in substantial detail. The Appellant has not provided any

additional factual information nor has she presented anything to show that the Board's decision on this matter was unlawful or mistaken.

The Appellant argues that the hearing should have been a full-blown hearing with witnesses rather than a hearing on offers of proof. As the Appellant properly notes, the parties have the right to "an adjudicative proceeding" at which they have to right "to respond to and present evidence and argument on all issues involved." NH RSA 541: 31. Again, this issue was addressed at the hearing. After hearing from both parties, the Board determined that the appeal "arose from an application and interpretation of a rule or rules adopted by the Director of Personnel" and that if the Board concluded after the presentation of the offers of proof that witness testimony would be needed "to address a relevant matter involving the credibility of witnesses or to understand or fairly assess the arguments at issue" the Board would schedule a time for that testimony.

The record clearly shows that both parties had ample opportunity to present evidence, to challenge the evidence presented by the other party, and to make detailed and comprehensive arguments. The Appellant has provided no evidence that the parties were not provided an adjudicative hearing that complied with the requirements of NH RSA 541:31.

The other matters raised by the Appellant in her motion for reconsideration present no new factual matters or legal arguments.

Accordingly, the Appellant's Motion for Reconsideration is DENIED.

PERSONNEL APPEALS BOARD

By: Isl Patrick H. Wood

Patrick H. Wood, Chairman, NH Personnel Appeals Board

cc: Karen Hutchins, Director of Personnel

Sean Bolton, SEA Grievance Representative

Jennifer Jones, Attorney, NH Department of Health and Human Services

State of New Hampshire



PERSONNEL APPEALS BOARD
25 Capitol Street
Concord, New Hampshire 03301
Telephone (603) 271-3261

Appeal of Pamela Lindberg

Docket #2010-L-075

Department of Health and Human Services

October 29, 2013

The New Hampshire Personnel Appeals Board (Wood, Johnson and Casey) met in public session on Wednesday, October 16, 2013, under the authority of RSA 21-I:58 and Chapters Per-A 100-200 of the NH Code of Administrative Rules to hear the appeal of Pamela Lindberg, a former employee of the NH Department of Health and Human Services. Ms. Lindberg, who was represented at the hearing by SEA Grievance Representative Sean Bolton, was appealing her October 29, 2009, layoff from her position as a Program Specialist III. Attorney Jennifer Jones appeared on behalf of the Department of Health and Human Services. Neither party objected to the members of the Board convened to hear the appeal.

The record of the hearing in this matter consists of pleadings submitted by the parties including Appellant's November 10, 2009 notice of appeal¹, the Appellant's January 27, 2010 Evidentiary Submission in Response to the Board's Directive Issued on January 13, 2010, Appellant's January 10, 2013 Motion for Summary Disposition, State's January 17, 2013 Motion to Dismiss, Appellant's February 11, 2013 Motion for Summary Disposition, Appellant's April 3, 2013 Notice of Appearance, Board's May 6, 2013 Decision Denying Department's Motion to Dismiss, Board's June 24, 2013 Notice of Scheduling, Appellant's August 15, 2013 Motion to Compel and Reminder of Outstanding Motions for Summary Disposition, State's August 27, 2013 Limited Objection to Appellant's Motion for Discovery and Objection to Motion for Summary Disposition, and Appellant's August 28, 2013

¹ The State Employees Association included in its original appeal a copy of the October 22, 2009 Petition for Declaratory and Other Relief filed by the State Employees Association in Merrimack County Superior Court challenging the legislature's authority to suspend portions of the Rules of the Division of Personnel, including bumping provisions that would have allowed Ms. Lindberg and other laid-off employees with more than 10 years of service to displace less senior employees within their divisions. At a February 3, 2010 prehearing conference, the Appellant indicated that there was no rush in scheduling her hearing, as the SEA's Petition regarding layoff and bumping was pending in Superior Court. That Petition was later withdrawn.

Motion to Continue. The record also includes the digital audio recording of the hearing on the merits of the appeal, and documents admitted into evidence as follows:

SEA Exhibits

1. October 14, 2009 Layoff Letter
2. August 26, 2013 DHHS Email from Attorney Jennifer Jones to SEA Grievance Representative Sean Bolton
 - a. Email attachment labeled "Limited Objection to SEA Motion for Discovery and Objection to Motion for Summary Disposition"
 - b. Email attachment labeled Exhibits including
 - i) DHHS Exhibit A – Seniority List
 - ii) DHHS Exhibit B – Supplemental Job Description (SJD) for Program Specialist III position 11736 held by Ms. Lindberg at the time of her layoff
 - iii) DHHS Exhibit C – Supplemental Job Description (SJD) for Program Specialist III position 19837 held by Patrick McGowan at the time of Ms. Lindberg's layoff
 - iv) DHHS Exhibit D – Supplemental Job Description (SJD) for Program Specialist III position 43629 held by Kristin Booth at the time of Ms. Lindberg's layoff
 - v) DHHS Exhibit E – Supplemental Job Description (SJD) for Program Specialist III position 43628 held by Jessica Sugrue at the time of Ms. Lindberg's layoff
 - vi) Ms. Lindberg's employment application and résumé dated November 23, 1994
3. SJD for DOE position 13106, the position Ms. Lindberg was hired into from the RIF list
4. December 10, 2009 Reduction in Force hire letter from JoAn Buntun
5. February 11, 2010 Letter from Marilyn Doe to Pamela Lindberg
6. Certified Mail receipt for delivery of the February 11, 2010 letter from Marilyn Doe to Pamela Lindberg
7. October 22, 2009 Employment Application and Résumé for Division of Personnel for use in the RIF hiring process
8. General Class Specification for positions of Program Specialist III as provided on the Human Resources website

The Board also reviewed the Supreme Court's Decision in the Appeal of Vicky Morton (November 7, 2008), as that case presented similar issues involving seniority within a classification within a division, and an agency's authority to establish different minimum qualifications for individual positions within a general classification.

Review of pending motions:

Attorney Jones argued that instead of taking live witness testimony, the Board should hear the appeal on oral arguments and offers of proof, as the decision giving rise to the appeal did not involve a termination, demotion or suspension without pay as described in Per-A 207.02 (e) of the Board's rules. Attorney Jones argued that, in accordance with Per-A 207.02(d), appeals involving an

application of a rule or rules adopted by the Director of Personnel should be heard on oral argument and offers of proof.

Mr. Bolton objected, arguing that since the last prehearing conference, the Appellant had prepared her presentation expecting the opportunity to call witnesses. He argued that while the State failed to identify any witnesses or exhibits to be offered into evidence, the Appellant had provided a list of exhibits, and had given the State and the Board notice that Ms. Lindberg planned to testify on her own behalf, as well as offering the testimony of Diana Lacey, a former co-worker and current President of the SEA. Mr. Bolton argued that Per-A 207.02(e) permitted the Board to hear appeals on offers or proof only when “(1) The parties agree to do so and the board determines that the testimony of witnesses is not necessary to address a relevant matter involving the credibility of witnesses or to understand or fairly assess the arguments at issue; or (2) The case does not involve disputed issues of material fact.” He argued that there were disputed issues of material fact, and the Appellant did not agree to hearing the appeal on offers of proof.

Attorney Jones argued that the provisions of Per-A 207.02(e) to which Mr. Bolton referred applied only to appeals involving, “(1) termination, (2) demotion, (3) suspension without pay, or (4) any other proceeding in which the Board determines that testimony of a witness is necessary in order for the Board to resolve the case fairly,” not to those appeals involving the interpretation and application of a rule. Attorney Jones argued that the rules did not require the parties’ agreement in order for the Board to hear an appeal on offers of proof unless the Board determined that such testimony was necessary in order for the Board to resolve the case fairly.

After reviewing its rules and determining that the appeal arose from an application and interpretation of a rule or rules adopted by the Director of Personnel, the Board informed the parties that it would hear the appeal on oral argument and offers of proof. The Board advised the parties that it believed Mr. Bolton could present offers of proof that would cover any of the facts that would have been elicited through the testimony of Ms. Lindberg and Ms. Lacey. The Board also noted that, as set forth in Per-A 207.02(c), the Board would hear the testimony of witnesses if the Board concluded that such testimony was needed for the Board to address a relevant matter involving the credibility of witnesses or to understand or fairly assess the arguments at issue. For the record, the Board noted the Appellant’s objection.

The Board also heard argument by the parties on the Appellant’s outstanding Motions for Summary Disposition. In the first Motion, dated January 9, 2013, Nicholas McGinty, the Appellant’s

representative of record at the time, described the Appellant's status in relation to other Program Specialist III incumbents in her division at the time of layoff, and asserted that she should not have been laid off when there were less senior Program Specialists in the division who did not possess "unique credentials that are necessary for the agency to carry out a legislated mandate" as detailed in Per 1101.02(e) of the Rules. Mr. McGinty argued that the Appellant possessed the credentials, education and experience that she would have needed to certify for any of the three Program Specialist III positions held by less senior employees. Mr. McGinty described efforts that the Appellant had made to obtain information related to her layoff from the Department of Health and Human Services, and argued that, because the agency failed to provide the information requested, the Appellant was entitled to summary disposition in her favor, including an order of the Board reinstating her with full back wages and benefits. Mr. McGinty filed a similar request on February 11, 2013, arguing that because the agency failed to deny that it had not followed the layoff process, and because the agency failed to provide documentation that the Appellant would not certify for three less senior positions in her classification, the Appellant was entitled to summary disposition in her favor and reinstatement to her position of Program Specialist III with full back wages and benefits.

In her August 27, 2013 Limited Objection to Appellant's Motion for Discovery and Objection to Motion for Summary Disposition, and in oral argument before the Board, Attorney Jones asked the Board to find that both the Appellant's Motion for Summary Disposition and her request for reinstatement were moot. In support of that request, Attorney Jones argued that the Appellant already had received the information she had requested, and the Board had granted the Appellant's request to continue the hearing to a later date in order to allow the Appellant to review the information and develop a presentation of her appeal based on the information received. Attorney Jones also argued that in February 2010, the Appellant received and rejected an offer to be recalled to a position of Program Specialist III at DHHS, and asked that her name be removed from the recall list as she was happy in her new position. As such, Attorney Jones argued, the Appellant forfeited any right to reinstatement at the DHHS.

Mr. Bolton agreed that the Appellant had refused the opportunity to be recalled, but argued that she did so only because she did not understand her rights. Mr. Bolton argued that the Appellant had been placed through the RIF process in a Program Specialist III position at the Department of Education, and she did not understand that she still was entitled to be recalled to her own agency. Mr. Bolton argued that the Appellant did not remember telling Ms. Doe during their telephone conversation that she was happy in her new position at the Department of Education, although she

might have said that she was happy to have a job. Mr. Bolton also offered to prove through the Appellant's testimony that the Appellant was informed that she would lose her seniority and would begin a new probationary period if she returned to the Department of Health and Human Services. Mr. Bolton argued that the Appellant would testify that until the letter from Ms. Doe was provided in response to the Appellant's request for discovery, the Appellant had never seen the letter concerning the conversation with Ms. Doe. Mr. Bolton offered to prove through the Appellant's testimony that the Appellant's daughter was the one who actually signed for receipt of the letter from Ms. Doe, and that the Appellant was unaware of the contents.

Having heard the parties' oral arguments and having considered their offers of proof, the Board denied the Appellant's Motion(s) for Summary Disposition. The Board neither granted nor denied the State's request for the Board to consider the reinstatement request moot.

After carefully considering the documentary evidence and the parties' oral arguments and offers of proof, the Board made the following findings of fact and rulings of law:

Findings of Fact

1. In a letter dated October 15, 2009, signed by DHHS Commissioner Nicholas Toumpas, Pamela Lindberg was notified that because of insufficient funding resulting in a change in the organization, Ms. Lindberg was to be laid off from her position as a Program Specialist III, effective October 29, 2009. (SEA Exhibit 1)
2. The letter identified Ms. Lindberg as the least senior Program Specialist III in her division, although there were three other Program Specialist III employees in her division with less seniority. The letter also informed the Appellant that there were two possibilities for rehire including recall, as described by Per 1101.06 of the NH Code of Administrative Rules, and placement in a position in another state agency through the statewide recall process described by House Bill 2 (2009). The letter gave a detailed description of the recall process and reference to the appropriate Personnel Rule, and specific information concerning the statewide placement process authorized by HB-2 (2009) along with directions about how to obtain additional information regarding the placement process.
3. The Program Specialist III classification is a generic classification. Specific education and experience requirements for entry into that class may vary from position to position, although they must be consistent throughout the classification in terms of level of education and years of experience. The generic specification provides that, "Specific degree and experience

requirements must be tailored to meet documented recruitment needs of the agency or department. All specific minimum qualifications must be stated on the supplemental job description and approved by the Division of Personnel prior to posting at the agency level.” (SEA Exhibit 8)

4. In order to certify as meeting the minimum qualifications for the classification of Program Specialist III, the generic class specification requires an applicant to possess a “Bachelor’s degree from a recognized college or university with a major in a field relevant to the program area in which the position is assigned. Each additional year of approved formal education may be substituted for one year of required work experience.” The generic classification also requires an applicant to have, “Four years’ professional or paraprofessional experience in a field or occupation relevant to programs area in which position is assigned, with responsibility for program implementation, direct service delivery, planning or program evaluation. Each additional year of approved work experience may be substituted for one year of required formal education.” (SEA Exhibit 8)
5. The Appellant’s educational background includes an AA in Liberal Arts, a BA in Speech/Communications and M.Ed. in Curriculum and Instruction. At the time of her layoff, the Appellant described her 15 years of work experience at the DHHS as “Certified agencies professional [sic] and programs to assist in meeting the services needs of New Hampshire’s children and families, created certifications administrative rules and policies, acted as liaison between DCYF and the general public as well as perform certification duties defined by RSA 1 [photocopy unclear] RSA 170:G. 1994-1995 was responsible for Family Preservation and Support Grant plan, application and implementation.” The Appellant also listed experience as a Speech Communication Lecturer at the college level, a substitute teacher for grades K – 12, and as a member of the State Board of Education. (SEA Exhibits 2b-vi. and 7)
6. At the time of the Appellant’s layoff, position #19837, which was occupied by a less senior Program Specialist III, was responsible for overseeing and coordinating the Child Development Bureau’s financial and contractual objectives for children’s services, through development of Requests for Proposals and the construction of contracts for Governor & Executive Council (G&C) approval. To develop, review and evaluate and monitor fiscal issues related to on-going programs and to provide recommendations and consultations to the Financial and Child Development Bureau Administrators...” To certify for the position, an applicant would have to have possessed a Bachelor’s degree from a recognized college or university and “Four years’ professional or paraprofessional experience in business management including fiscal and contractual matters, with responsibility for program implementation, direct service delivery, planning or program evaluation.” (SEA Exhibit 2b iii.)

7. After reviewing the Appellant's 1994 application for employment, her résumé and her supplemental job description, the human resources office at the DHHS concluded that Ms. Lindberg lacked the business management experience described in the scope of work and minimum qualifications for position #19837.
8. At the time of the Appellant's layoff, position #43629, which was occupied by a less senior Program Specialist III, was responsible for performing "administrative and professional duties, including analyzing and implementing data and policies in order to plan, implement and evaluate statewide and regional childcare and early childhood professional training events." To certify for the position, an applicant would have to have possessed a "Bachelor's degree from a recognized college or university with a major in early childhood education, child development or other relevant field," as well as "Four years professional or paraprofessional experience in the field of early childhood education, or child development with responsibility for program implementation, direct service delivery, planning or program evaluation. (SEA Exhibit 2b iv.)
9. After reviewing the Appellant's 1994 application for employment, her résumé and her supplemental job description, the human resources office at the DHHS concluded that Ms. Lindberg lacked the requisite experience in early childhood education, or child development. The Appellant's AA, BA and M.Ed. were not in the field of early childhood education or child development, nor were her degrees in a related field to qualify her for assignment to position #43629.
10. At the time of the Appellant's layoff, position #43628, which was occupied by a less senior Program Specialist III, was responsible for "lead[ing] program improvement initiatives through monitoring, analyzing, interpreting data and policies, as well as providing consultation to Child Development Bureau program improvement contractors. Collaborate with state and federal agencies, as well as childcare resources and referral, and after school associations." To certify for the position, an applicant would have to have possessed a Bachelor's degree from a recognized college or university with a major in early childhood education, child development or other relevant field, and "Four years' professional or paraprofessional experience in the field of early childhood education, or child development..." (SEA Exhibit 2b v.)
11. After reviewing the Appellant's 1994 application for employment, her résumé and her supplemental job description, the human resources office at the DHHS concluded that Ms. Lindberg lacked the requisite experience in early childhood education, or child development." The Appellant's AA, BA and M.Ed. were not in the field of early childhood education or child development, nor were her degrees in a related field to qualify her for assignment to position #43629.

12. By letter dated December 10, 2009, JoAn Bunten of the NH Division of Personnel advised the Appellant that she had been placed in the vacant position of Program Specialist III at the Department of Education, effective December 10, 2009. (SEA Exhibit 4)
13. On or about February 10, 2010, in a telephone conversation with Marilyn Doe of the Department of Health and Human Services, the Appellant was offered the opportunity to be recalled to a position of Program Specialist III at the Department of Health and Human Services. The Appellant declined the offer to be recalled. The Appellant asserted that she did not recall having a discussion about removing her from the recall list and believed the call to her was a mistake, as no one explained the recall process to her. (SEA Exhibit 5 and Appellant's August 15, 2013 Motion to Compel and Reminder of Outstanding Motions for Summary Disposition)
14. Under the provisions of Per 1101.06(a) of the NH Code of Administrative Rules, an employee is eligible for recall to a vacancy in the same classification in the same agency from which the employee was laid off for a period of 3 years from the original layoff date. The Appellant's recall rights under Per 1101.06(a) expired on October 29, 2012. The Appellant had constructive notice of those rights in the letter issued to her on October 15, 2009, which also directed her to the appropriate Personnel Rule and resources available on the State's website.
15. On February 12, 2010, Ms. Lindberg's daughter Caroline Perrault signed a receipt for certified mail from the Department of Health and Human Services with Ms. Doe's letter dated February 10, 2010, describing Ms. Doe's recollection of her February 10, 2010 telephone conversation with the Appellant. (SEA Exhibit 6) Ms. Lindberg confirmed that the address on the letter was accurate, and that the individual who signed for receipt of that letter was at that address at the time. (Appellant's Offer of Proof)

Rulings of Law

- A. In light of the Court's earlier ruling in the Appeal of Vicky Morton, the Appellant did not prove by a preponderance of the evidence that the DHHS incorrectly interpreted or applied the provisions of Per 1101.02, that the rule was invalid, or that the appointing authority's or the personnel director's application of the rule was unlawful.
- B. The Department of Health and Human Services did produce sufficient evidence, as required by Per-A 207.01(b), to support its decision to layoff the Appellant, and to refuse to certify her as meeting the minimum qualifications for reassignment into one of the three positions held by Program Specialist III incumbents who were junior to her.

Position of the parties:

Mr. Bolton argued that the Department of Health and Human Services violated the Rules of the Division of Personnel when it laid the Appellant off from her position of Program Specialist III while there were three employees in the same classification in the same Division of the agency who had less seniority than the Appellant. Mr. Bolton argued that when a reduction in force is anticipated, the Personnel Rules require an agency to identify the class or classes of positions within a division that will be affected by the reduction in force, and then identify individuals for layoff solely on the basis of their seniority within that classification. Mr. Bolton argued that regardless of the differences in education or experience that might appear on individual employee supplemental job descriptions, seniority is the only determining factor any agency may apply to any employees within the classification who meet the basic requirements for education and experience to certify for that class. In this case, Mr. Bolton argued, the Appellant met the minimum qualifications for the classification of Program Specialist III, and although the agency alleged that the Appellant lacked experience performing some of the duties and responsibilities described in the individual supplemental job descriptions for the less-senior Program Specialist III incumbents who were not laid off, the agency improperly relied upon that assessment when it selected the Appellant for layoff and determined that she could not be reassigned into one of the three positions held by less senior employees.

Mr. Bolton argued that the Appellant had extensive experience assessing the needs of children and families, and certifying programs and providers to work with children and families. Mr. Bolton argued that the Appellant had managed grants and contracts, that she had written administrative rules, and that she developed and utilized standards by which she could certify programs and providers. Mr. Bolton argued that the Appellant was more than qualified to perform the work described in the supplemental job descriptions for the three less senior Program Specialist III positions.

Mr. Bolton argued that as long as the Appellant possessed the minimum qualifications contained in the general class specification for the position of Program Specialist III (SEA Exhibit 8), Per 1101.02 (e) required that the order of layoff must be determined solely on the basis of seniority, not on job function or work assignment. Mr. Bolton argued that after the agency eliminated a position of Program Specialist III and laid off the least senior employee in that classification, it was the agency's responsibility to determine how to allocate the work among the remaining Program Specialist III incumbents in order to carry out the various program responsibilities.

Attorney Jones argued that Per 1101.02(e) could not be read in a vacuum, but must be considered in the context of the rule as a whole, otherwise, it would lead to an illogical conclusion. Attorney Jones argued that it would make no sense to require an employee to meet the minimum qualifications and certify for a vacant position into which the employee would be reassigned or demoted, but not to require that same employee to certify for a position in his or her own general classification when it would result in displacing another employee who did meet the minimum qualifications.

Attorney Jones argued that Department was directed to reduce expenditures, with cost savings to be accomplished through reductions in personnel, including specific requirements for reductions in general fund spending. Attorney Jones argued that although there were three Program Specialists who were junior to the Appellant, their positions were federally funded, while the Appellant's position was funded through the general fund. Attorney Jones argued that the Department could still meet its operational requirements if a reduction in force resulted in elimination of the Appellant's position. Attorney Jones argued that the agency reviewed the Appellant's qualifications and work history, and determined that she would not meet the minimum qualifications for any of the three Program Specialist III positions that were junior to her. Attorney Jones argued that the agency also did not have vacant positions for which the Appellant qualified into which the Appellant could have been reassigned or demoted in lieu of layoff at the time of her layoff.

Attorney Jones argued that by looking at the supplemental job descriptions for the position held by the Appellant and those held by less senior Program Specialist III incumbents, it was clear that there were radically different qualification standards and differences in funding sources. Attorney Jones argued that the Appellant had not met her burden by simply alleging that her position was improperly identified for layoff, or by insisting that she could have performed the work outlined in the supplemental job descriptions for positions occupied by less senior Program Specialist III incumbents. Attorney Jones also argued that the Appellant had the burden of proof, and did not offer evidence to support her allegation that the agency failed to make a sufficient effort to place her in an alternate position instead of laying her off.

Attorney Jones argued that the Board needed to look at the supplemental job description for the position that Ms. Lindberg occupied prior to layoff, and those for employees with less seniority, to determine if the Appellant would certify as meeting the minimum qualifications. Attorney Jones also argued that the Board should look at the similarity between the Appellant's two applications for employment, including the one that was on file at the Department of Health and Human Services

when the Appellant was laid off, and the one subsequently used by the Division of Personnel to certify her as meeting the minimum qualifications for a Program Specialist III position at the Department of Education. Attorney Jones argued that the applications were substantially the same in that they listed the same education and work experience, and that neither would provide evidence of education and experience that would have certified the Appellant as meeting the minimum qualifications for any of the three less senior Program Specialist III positions.

Decision and order

The Appellant insists that the Board must rely on a literal reading of a portion of Per 1101.02, specifically paragraphs (a) through (e) and ignore the latter portions of the rule, Per 1101.02 (f) through (l), and find that the DHHS could not layoff the Appellant when there were less senior Program Specialist III incumbents in her same division of the agency, regardless of the approved minimum qualifications on supplemental job descriptions for those positions. The Board does not agree.

As the Court found in the Appeal of Vicky Morton:

"[O]nce [Morton's] position was abolished, [the agency] was required to examine the other Program Specialist II positions and offer Morton one of those positions in lieu of layoff if she is qualified and more senior than its present holder... At the time of her layoff, Morton's position no longer existed. Rather, she was an employee awaiting the NHCTCS decision who would be laid off as a result of the position's abolition. Restoring her to her previous position does not mean reinstatement as a program Coordinator. Rather, it requires a determination of the proper remedy from the moment of the abolition forward. This is what the PAB did. The PAB correctly ordered NHCTCS to evaluate the Program Specialist II position in Stratham [where the incumbent had less seniority than Morton] and determine whether Morton was qualified, and if so, to offer her that position."

The Department of Health and Human Services was required to reduce expenditures and to accomplish that reduction, in part, by cutting personnel. Ms. Lindberg's position was identified for elimination as a means of reducing general fund expenditures. Having eliminated the Appellant's position of Program Specialist III, it then was the agency's responsibility to determine which employee within that classification within the division would actually be laid off. The agency did so, and determined that, although the Appellant had more seniority than three other Program Specialist III incumbents, she did not meet the minimum qualifications to certify for any of those positions that were junior to her. Moreover, when a Program Specialist III position at DHHS for which Ms.

Lindberg would qualify became available, the Department promptly contacted Ms. Lindberg and offered her that position; Ms. Lindberg declined to take that position.

The Appellant argued that in terms of evaluating the Appellant's qualifications, the agency improperly applied different minimum qualifications to several positions classified as Program Specialist III in the Appellant's division of the agency. Again, the Board does not agree.

In its November 7, 2008, decision in the Appeal of Vicky Morton, the New Hampshire Supreme Court wrote:

We disagree with Morton that RSA 21-I:42, II, mandates that SJD minimum requirements be the exact same as those in the generic class specification... The statute's plain meaning suggests that not all positions within a class will have the exact same qualifications, but rather reasonably similar qualifications...

To hold that positions within a classification can require the minimum experience qualification to be tailored for the position is consistent with the statutory framework. To interpret the statute and rules otherwise would lead to an absurd result; we will not interpret a statute to lead to such a result. See Appeal of N.H. Troopers Assoc., 145 N.H. 288, 290 (2000) ("We interpret statutes to lead to a reasonable result.") Various positions within state agencies may have the same classifications and general qualifications, as well as the same basic duties, but the specific nature of those positions can require specialized knowledge or experience.

The education sector provides a good example of why this is necessary. If a college wishes to hire two new professors to teach mathematics and Russian literature, under Morton's reasoning, the college would not be able to create SJD qualifications for the positions requiring a degree and teaching experienced in each respective field."

In her February 11, 2013 Motion for Summary Disposition, the Appellant argued that when she was contacted by DHHS, she was unaware that she was on a DHHS recall list or that the position that was offered to her by DHHS was due to the recall process described in Per 1101.06. Ms. Lindberg also asserted that in a conversation with staff of the Division of Personnel, she was told that she must accept the position at the Department of Education if she wished to retain her seniority. The Appellant indicated that there was no further discussion of the recall process, so she was unaware of her rights.

The notice of layoff issued to Ms. Lindberg on October 15, 2009, clearly describes two different mechanisms for an individual to return to employment following layoff. The letter describes the recall process under Per 1101.06, including the length of time that recall is available, the role of seniority in recalling employees to positions within an agency, and the manner in which seniority and

unused leave are restored. The letter also describes an entirely separate process for re-employment through the statewide RIF list. The letter provides instructions for the employee to obtain additional information about that process, and directs the employee to the State's website for further information. There is nothing in the letter to suggest that placement through the statewide RIF list under HB-2 would invalidate an employee's entitlement to recall under the provisions of Per 1001.06. Although the Appellant states without contradiction that the Department of Education was uncertain whether or not they had right to refuse the placement, it would be unreasonable to hold the Department of Health and Human Services responsible for any of the Appellant's interactions with the Department of Education or with the Division of Personnel. If the Appellant had questions or concerns about her rights as a laid off employee of the Department of Health and Human Services, she had every opportunity to contact them for additional information or clarification.

For all the reasons set forth above, the Board voted unanimously to DENY the Appeal of Pamela Lindberg, and find that her October 29, 2009 layoff from employment as a Program Specialist III at the Department of Health and Human Services was lawful and reasonable, and effected in conformance with the Rules of the Division of Personnel.

THE NEW HAMPSHIRE PERSONNEL APPEALS BOARD

/s/ Patrick Wood

Patrick Wood, Chair

/s/ Robert Johnson

Robert Johnson, Commissioner

/s/ Joseph Casey

Joseph Casey, Commissioner

cc: Karen Hutchins, Director of Personnel
Attorney Jennifer Jones, Department of Health and Human Services
Grievance Representative Sean Bolton, State Employees Association