

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

In Case No. 95-452, Appeal of Lorraine Alley & a., the court upon November 16, 1995, made the following order:

Appeal from administrative agency is declined. See Rule 10(1).

Distribution:

Michael C. Reynolds, Esquire
Marti Moore, Esquire
NH Personnel Appeals Board 91-D-4
Theresa H. Hayes, Supreme Court
File

Howard J. Zibel,
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State of New Hampshire



PERSONNEL APPEALS BOARD

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Concord, New Hampshire 03301
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APPEAL OF LORRAINE ALLEY, ET AL DOCKET #91-D-4

Response to Appellant's Motion for Reconsideration and Rehearing

June 7, 1995

By letter dated May 10, 1995, received by the Board on May 12, 1995, Thomas Hardiman, SEA Director of Field Operations, requested reconsideration of the Board's April 26, 1995 decision in the above-captioned appeal. Mr. Hardiman also requested a rehearing, arguing that "the appellants were never offered a complete copy of all positions in State service that have become vacant and available since the appealed action... Absent the cited documents, [it] is impossible for the cited appellants to have been offered all the rights and benefits to which they were entitled." Specifically, Mr. Hardiman argued that the appellants were entitled to certain benefits conferred by RSA Chapter 261:1, Laws of 1990, and later "...reflected in Chapter Laws of 1993, Chapter 358:6." (See Request for Reconsideration, page 1) After considering the Request in light of the Board's decision in this matter, and after reviewing the record of the original appeal, the Board voted to deny the Request for Reconsideration and Rehearing.

The Board found, and continues to find, that the State properly implemented the Court's decision that the appellants should have been subject to the lay-off rules rather than the demotion rules. The Board found, and continues to find, that under rules adopted by the Director of Personnel, the appellants have been extended all the rights and benefits to which they would have been entitled if they had been laid off on September 21, 1990.

In his original appeal to the Board (October 3, 1990), outlining the benefits to which he believed the appellants were entitled, Mr. Hardiman stated:

"In each case, the affected employee could have exercised bumping, in accordance with the Personnel Rules, PART Per 308.05, and the end result would have been that the affected party would have been in a higher paid position than that to which he/she was demoted." (Emphasis added)

"All of the cited appellants could have bumped, in accordance with the rules, into positions with a higher labor grade."

Two of the five original appellants demonstrated that there were other positions within the department for which they would have qualified, and into which they could have bumped if they not been demoted in lieu of lay-off. They were given an opportunity to transfer into those positions and receive retroactive compensation for the difference between their actual earnings and what they would have earned if they had bumped into those positions. The remaining three appellants were unable to demonstrate that they could have qualified to bump into any positions other than those to which they were demoted if they had been laid-off. Accordingly, the Board found that the State had properly implemented the Court's order, and had afforded the appellants all the rights and benefits to which they would have been entitled if, on

September 21, 1990, they had been subject to the lay-off rules rather than the rules for demotion in lieu of lay-off.

The appellants' current claim, conveyed in their Request for Reconsideration and Rehearing, is that they were also entitled to additional benefits under the provisions of Chapter 261, Laws of 1990, and any subsequent legislative enactment. The Board found this claim to be beyond the Board's subject matter jurisdiction. Time and again, the Board has found that its jurisdiction is limited to appeals arising out of the application of rules adopted by the Director of Personnel, a finding which has been affirmed by the Court. See Appeal of Carol Higgins-Brodersen and William McCann, 133 N.H. 576 (1990) and Appeal of Paul Ingersoll, ___ N.H. ___ (1994).

The Board voted to deny the instant Request for Reconsideration and Rehearing, affirming its April 26, 1995 decision that the State properly implemented the Court's decision.

THE PERSONNEL APPEALS BOARD



Mark J. Bennett, Acting Chairman



Robert J. Johnson, Commissioner

cc: Virginia A. Lamberton, Director of Personnel
Patrick J. Duffy, Commissioner, Department of Administrative Services
Marti Moore, Assistant Attorney General, Civil Bureau
Thomas F. Hardiman, SEA Director of Field Operations
Stephen J. McCormack, SEA Field Representative

State of New Hampshire



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Appeal of Lorraine Alley, et al Docket #91-D-4 Division of Information Services

(Appeal of Lorraine Alley, 173 N.H. ____)

April 26, 1995

The New Hampshire Personnel Appeals Board (Bennett and Johnson) met Wednesday, December 7, 1994, to hear the above captioned appeal, which was remanded by the New Hampshire Supreme Court on April 7, 1993. Marti Moore, Assistant Attorney General, appeared on behalf of the State. Thomas Hardiman, SEA Director of Field Operations, and SEA Field Representative Stephen McCormack appeared on behalf of the appellants.

The Supreme Court's Order reversing and remanding the Appeals Board's decision in this matter stated, in part:

"We believe that the department relied on the wrong section of the personnel rules in dealing with the lack' of funding, and that the layoff rule should have been applied to protect the rights of these veteran employees. ..."

"... The layoff rule is the only one that reflects lack of funding as a basis for its application. Consequently, the department should have relied upon the layoff rule to resolve the funding problem, rather than upon an overly expansive reading of the demotion rule."

On May 11, 1993, Assistant Attorney General Susan Geiger wrote to Thomas Hardiman, SEA Director of Field Operations, confirming their verbal agreement to attempt to resolve the matter without further appeal to the Board. The appellants, through their representative the SEA, would provide a written settlement proposal for the five affected employees. The appellants' original proposal, contained Mr. Hardiman's May 20, 1993 letter to Assistant Attorney General Geiger (SEA Exhibit #6) is as follows:

- "1. All of the adversely affected parties (appellants) be returned to the salary grades they held at the time of the adverse action. The date of the action, demotion in lieu of layoff, occurred on September 21, 1990.
2. All of the affected parties be grandfathered into their former salary grades from September 21, 1990 to current date, and remain at said salary grades until they either retire, change positions or leave State service.
3. All of the affected parties be paid all applicable pay, benefits and any other entitlements they may have due retroactive to September 21, 1990.
4. All parties be given the option to remain in their current positions or

Appeal of Alley, et al
Docket #91-D-4

- return to their former positions but regardless of said selection they all remain at the salary grades they held prior to said adverse action.
5. No retaliatory action be taken against any of these employees because of this decision."

Ms. Geiger responded by letter dated June 24, 1993 (SEA Exhibit #7), stating, in part:

"The Alley decision expressly acknowledges that these employees could have been properly laid off and therefore would have been subject to the personnel rules concerning bumping. Accordingly, when analyzing each employee's claim for relief, we must proceed from the premise that they would have been laid off on September 21, 1990. In so doing, it is clear that returning them to their pre-demotion salaries is inappropriate."

Ms. Geiger's letter then detailed what relief would have been available to the five appellants if, instead of being demoted, they had been laid off on September 21, 1990. The proposed agreement would have affected only Gary Wilcox, who would have met the minimum qualifications for a labor grade 18 position which was three salary grades higher than the position into which he had been demoted. Therefore, the State proposed placing Mr. Wilcox into a vacant labor grade 18 position, compensating him retroactively for the difference between the labor grade 15 position into which he was demoted and the labor grade 18 position for which he would have qualified. Ms. Geiger's letter indicated that the other affected employees would not have qualified for available position classifications other than those to which they had been demoted.

Mr. Hardiman responded by letter dated June 30, 1993 (SEA Exhibit #8), suggesting that the review of the remaining four appellants' qualifications may have been "less than satisfactory" and needed additional study. He also suggested that the parties should sit down with the other employees and the record of the hearing to reach an acceptable resolution. In follow-up letters dated August 17, 1993 and August 26, 1993 (SEA Exhibits #9 and #10), Mr. Hardiman asked if he and SEA Field Representative McCormack might meet with the Director of Personnel, the affected employees and Ms. Geiger to review the appellants' qualifications and discuss job descriptions for any of the positions for which they might have qualified statewide.

The record reflects that a meeting was held between Personnel Director Lamberton, SEA Field Representative Stephen McCormack, Ms. Tonkin and Mr. Barlow of the Department of Administrative Services, and each of the individual employees to review their certification for positions which were, or which would have been, available to them for bumping purposes on September 21, 1990. Following that meeting, the Director issued a December 2, 1993, decision, which ultimately resulted in settlement agreements between the State and two of the appellants, Gary Wilcox and Patricia Taylor, whereby they were placed in positions classifications into which they could have bumped at the time of their demotions. They were also awarded retroactive compensation based upon the difference between the salary grade of the positions for which they would have qualified on September 21, 1990, and the positions into which they were demoted.

After reviewing their qualifications with the Director of Personnel, the remaining three appellants, Ms. Bradshaw (formerly Ms. Alley), Mr. Power and Ms. Brown pursued a further appeal to the Board. By letter dated December 14, 1993, SEA Director of Field Operations Thomas Hardiman requested a hearing before the Board so that the remaining three appellants

could "...address their concerns to the Personnel Appeals Board." He stated, in part:

"The appellants feel that the action taken in September 1990 was that of a layoff and should not have been arbitrarily treated as a demotion. Because of this we are requesting that all rights and benefits be extended to the appellants as if a layoff occurred in September, 1990."

In his March 3, 1994 letter to the Board, Mr. Hardiman laid out another proposed remedy in which the three remaining appellants would be "made whole" retroactive to the date that they were demoted in lieu of lay-off. He argued that the proper remedy should be as follows:

1. Restore the three appellants to their former labor grade, immediately and retroactively.
2. They must be treated as if they had not been laid off and not demoted.
3. It is our understanding that the N.H. Supreme Court has invalidated the demotions. Therefore, since the demotion is not valid and nothing else has occurred, the appellants should be placed back to the same step and labor grade that they were in prior to the forced demotion.
4. Even if the State claims that the positions were abolished, we feel that the employer is obligated under the Collective Bargaining Agreement, the Rules of the Division of Personnel and the personnel statutes, to pay the employees exactly what they would have been paying that employee until some valid action took place, and the employee was provided with proper written notice as to the action and employee status.
5. The employer has no right to reduce an employee's pay based upon a presumption as to where the employee would bump if he/she received proper notice.
6. The State must provide us with complete documentation as to all positions that have become available since the demotion. This listing should not only be for the department but also, for all state service.
7. If the employees chose to be laid off then each of them would have had the right, under state law, to be considered and recalled to any state position that was vacant, if they qualified for the position.
8. The State cannot say what the employees would have done if the State had acted properly."

At the hearing, the appellants failed to offer evidence that they would have qualified to bump into position classifications other than those to which they were demoted if they had been laid-off on September 21, 1990. The appellants failed to offer evidence that there were other positions in State service for which they would have qualified for "recall" on the basis of their education, experience and seniority, if they had been laid-off and separated from service on September 21, 1990. The appellants also failed to demonstrate that they had been denied any of the information requested in their August 26, 1993 letter to Ms. Geiger which might have resulted in their identifying other positions for which they might have qualified.

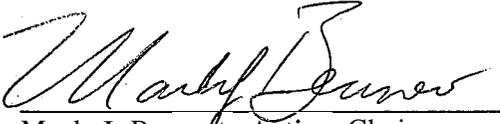
The Court's order clearly establishes that the State had a right to lay-off the appellants as a result of insufficient funding. In his letter to the Board dated December 14, 1993, Mr. Hardiman requested that "...all rights and benefits be extended to the appellants as if a layoff occurred in September, 1990." Upon review of the record in this matter, and in consideration of the oral argument offered by the representatives of the parties at the hearing on December

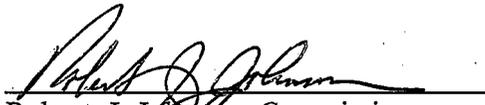
7, 1994, the Board found that the appellants have been extended all the rights and benefits to which they would have been entitled if they had been laid off on September 21, 1990.

Each of the appellants was given an opportunity to complete a revised application for employment for review with the Director of Personnel, SEA Field Representative McCormack, and managerial representatives of the Department of Administrative Services, to determine those positions for which they would have qualified if they had been laid off on September 21, 1990. The two appellants who would have qualified to bump into positions at a salary grade higher than that to which they were demoted were offered an opportunity to move into those positions and be compensated, retroactively, for the difference between the amount which they would have earned and the amount which they did earn as a result of the demotions. The remaining three appellants did not qualify for available positions at salary grades other than those to which they were demoted, nor did they demonstrate that there were positions into which they should have been "recalled" if they had been separated from service.

The Board found that the State properly implemented the Court's order. Accordingly, the Board voted to deny this appeal.

THE PERSONNEL APPEALS BOARD


Mark J. Bennett, Acting Chairman


Robert J. Johnson, Commissioner

cc: Virginia A. Lamberton, Director of Personnel
Patrick J. Duffy, Commissioner, Department of Administrative Services
Marti Moore, Assistant Attorney General, Civil Bureau
Thomas F. Hardiman, SEA Director of Field Operations
Stephen J. McCormack, SEA Field Representative

NOTICE: This opinion is subject to motions for rehearing under Rule 22 as well as formal revision before publication in the New Hampshire Reports. Readers are requested to notify the Clerk/Reporter, Supreme Court of New Hampshire, Supreme Court Building, Concord, New Hampshire 03301, of any errors in order that corrections may be made before the opinion goes to press.

THE SUPREME COURT OF NEW HAMPSHIRE

Personnel Appeals Board
No. 91-484

APPEAL OF LORRAINE ALLEY & a.
(New Hampshire Personnel Appeals Board)

April 7, 1993

Michael C. Reynolds, general counsel, State Employees' Association of New Hampshire, Inc., of Concord, by brief and orally, for the petitioners.

John P. Arnold, attorney general (Susan S. Geiger, assistant attorney general, on the brief and orally), for the State.

BATCHELDER, J. Pursuant to the appeal provisions of RSA 21-I:58, II, the petitioners, Lorraine Alley, Doris Brown, Nicholas Power, Gary Wilcox, and Patricia Taylor, seek our review of a decision of the New Hampshire Personnel Appeals Board (the board), that the department of administrative services (the department) properly demoted the petitioners in lieu of layoff. They argue that the board erred in finding that the "or for other good cause" language of the personnel rule covering demotion, New Hampshire Administrative Rules, Per 308.02 (1983) (current version at Per 1001.07 (1992)), permits demotion of employees because of insufficient funding of a department budget as distinguished from matters of discipline or job performance. Because we determine that the board improperly interpreted the personnel rules, we reverse and remand.

The facts briefly stated follow. Because of operating budget deficits in August 1990, former Governor Judd Gregg mandated that the department reduce its personnel budget by nine percent. The entire executive branch was similarly burdened. On September 21, 1990, the department responded to the mandate in part by demoting the petitioners, sending them letters containing the following notice:

A review of the personnel rules shows that the authors contemplated separate and distinct management solutions to two common problems of the workplace: i.e., the need for discipline and the lack of adequate funding. The demotion rule has as its primary purpose a management response to "inefficient performance of [an employee's] duties" when such a response is indicated "in lieu of layoff or discharge." N.H. Admin. Rules, Per 308.02 (1983). The layoff rule, however, addresses different management concerns; namely, "abolition of a position, because of change in organization, lack of work, insufficient funds, or like reasons." N.H. Admin. Rules, Per 308.05 (1983) (emphasis added). We believe that the department relied on the wrong section of the personnel rules in dealing with the lack of funding, and that the layoff rule should have been applied to protect the rights of these veteran employees.

The concerns of the department on September 21, 1990, were not those of management dealing with employees performing their tasks inefficiently or in contravention of established rules of the workplace requiring discipline short of layoff. Rather, the department was simply concerned about insufficient funds. The layoff rule is the only one that reflects lack of funding as a basis for its application. Consequently, the department should have relied upon the layoff rule to resolve the funding problem, rather than upon an overly expansive reading of the demotion rule.

Reversed and remanded.

All concurred.

State of New Hampshire



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Response to Appellant's Request for Reconsideration and Rehearing
APPEALS OF ALLEY, BROWN, POWER, WILCOX AND TAYLOR
Docket #91-D-4

September 26, 1991

The New Hampshire Personnel Appeals Board (Bennett, Johnson and Rule) met Wednesday, August 14, 1991, to review the August 2, 1991 Request for Reconsideration filed by SEA Director of Field Operations Thomas Hardiman on behalf of the above-named employees of the Division of Information Services relative to the Board's July 17, 1991 decision denying their appeal of demotion in lieu of lay-off.

Upon consideration of the appellants' request in conjunction with the Board's order of July 17, 1991, the findings of fact and rulings of law, and the documentary evidence contained in the record of the instant appeal, the Board voted unanimously to affirm its earlier order. The Board continues to find that its decision in this matter was both lawful and reasonable. Accordingly, the appellants' request for reconsideration and rehearing is denied.

THE PERSONNEL APPEALS BOARD



Mark J. Bennett



Robert J. Johnson



Lisa A. Rule

cc: Virginia A. Vogel, Director of Personnel
James Morrison, Director, Division of Information Services
Thomas F. Hardiman, SEA Director of Field Operations

State of New Hampshire

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APPEALS OF ALLEY, BROWN, POWER, WILCOX AND TAYLOR Division of Information Services Docket #91-D-4

July 17, 1991

The New Hampshire Personnel Appeals Board (Bennett, Johnson and Rule) met Wednesday, May 22, 1991, to hear the above-captioned appeal by employees of the Division of Information Services, Department of Administrative Services, who were demoted in lieu of layoff. The appellants were represented at the hearing by SEA Director of Operations Thomas F. Hardiman, and SEA Field Representative Stephen J. McCormack. Director James Morrison appeared on behalf of the Division of Information Services.

The appellants argued that the Division of Information Services misused the Rules of the Division of Personnel by employing Per 308.02 instead of Per 308.05, and demoting in lieu of layoff, effectively denying them the opportunity to "bump" into positions for which they qualified within the Department of Administrative Services. The appellants also argued that the rule governing demotion in lieu of layoff falls within the disciplinary provisions of the rules, and that agencies may only demote for disciplinary reasons.

Mr. Morrison testified that when his agency was directed to make substantial reductions in the personnel budget for his agency, the agency did lay off certain employees and allow them to bump. In an effort to further reduce personnel expenditures without further lay-offs, the agency then identified a tier of positions for elimination, laying off those who did not have five or more years of service, and demoting the remainder to positions for which they qualified. He testified that he had met with business administration staff of the Department of Administrative Services and with the Director of Personnel to determine the positions for which the affected employees would qualify before demoting those employees. He argued that demotion in lieu of layoff was utilized to preserve the agency's ability to function and provide services to other agencies. He noted that prior to the reductions, the Division of Administrative Services had 107 filled positions. After the budget reductions, there were only 76 filled positions.

The appellants noted in their original written arguments dated October 3, 1990, "Demotion, pursuant to PART Per 308.02, is 'in lieu of layoff or discharge, for inefficient performance of his (her) duties or for other good cause.' Stating to the named appellants that they are being demoted, in accordance with PART Per 308.02 of the Personnel Rules, but 'that this demotion is not a negative reflection or discredit to your performance' is incongruous with the cited rule..."

The rule which provides for demotion under a variety of circumstances is found in PART Per 308 SEPARATION AND DEMOTION. The plain language of the rule provides for demotion in lieu of layoff or discharge, for inefficient performance of an employee's duties "or for other good cause". The Board considers the budget reductions, in conjunction with the requirement that the agency continue to provide basic services to client agencies without interruption, to constitute "other good cause" within the meaning of this Rule. Further, by definition, demotion is not necessarily disciplinary in nature, and the Board does not, therefore, find the appointing authority's assurances to the affected employees to be inconsistent with the intent of the rule. "Per 103.13 'Demotion' means a transfer of an employee from a position in one class to a position in another class having a lower salary grade."

Per 308.05, which the appellants allege to have been the rule which the appointing authority should have utilized, describes the order of layoff as follows:

"Except for very infrequent instances of outstanding ability, seniority will govern the order of layoff for employees having 5 or more years of state service. Employees having less than 5 years of service shall be laid off generally on the basis of ability." [Per 308.05 (b)(1)]

"When seniority is the basis for layoff, demotion (bumping) to a lower class in the same department will be authorized only if the employee to be displaced has less seniority and the person exercising this privilege is qualified." [Per 308.05 (b)(1)]

The appellants argued that if they had been laid off pursuant to Per 308.05, and had been allowed to exercise bumping privileges, they each could have bumped into a higher paying position than that to which demoted. The evidence which the appellants submitted in support of that allegation, however, was insufficient to support such a finding. Although the appellants submitted a "Seniority Date Listing For Bumping Purposes", and an employee list for the Department of Administrative Services, the Board is unable to determine on the basis of those exhibits which positions the appellants would have selected, and whether or not they would have been deemed qualified for those positions.

The instant appeal challenges the legal authority of an agency to demote in

lieu of layoff, not the propriety of the level to which the various appellants were demoted. Per 308.02 provides the authority for an agency to demote employees in lieu of layoff or discharge, for inefficient performance of his duties or for other good cause. Monetary constraints, specifically the mandated reduction in personnel expenditures, constitutes "other good cause" as provided in Per 308.02.

The rules governing demotion make no provision for bumping. Only upon notice of lay off, or separation from service, do the rules provide for bumping. Therefore, the Division of Information Services did not violate the Rules of the Division of Personnel in denying the appellants an opportunity to bump into other positions for which qualified following notice of demotion. The employees were not laid off, and therefore the rules governing lay-off and bumping did not apply. Further, the appellants did not provide evidence to support a finding that had they been laid off, that they could have bumped into positions at higher salary grades than those to which demoted, or that their demotions violated Per 308.04.

The appellants received written notice, consistent with the provisions of Per 308.02 (b), fourteen days prior to the effective date of demotion which stated the reasons for the demotion.

The Board ruled as follows on the State's requests for findings of fact and rulings of law:

Requests for Findings of Fact:

- 1 - 4 are granted.
- 5 is granted in part. It was Mr. Morrison's determination that the division could no longer financially support the positions identified, but the Board does not find so expressly.
- 6 is neither granted nor denied.
- 7 is granted in part. Some letters were issued. Five appear in the record.
- 8 is neither granted nor denied.

Requests for Rulings of Law:

- 1 - 2 are granted.
- 3 is granted in part. That portion beginning with the word "pursuant" may be debated.
- 4 - 5 are too broad, and therefore are neither granted nor denied.
- 6 - 7 are granted in part, provided that the actions are subject also to the Rules of the Division of Personnel.
- 8 is granted.
- 9 is not relevant to the instant appeal and is neither granted nor denied.
- 10 is neither granted nor denied. Director Morrison was not so limited in the specific facts of this case.

Per 308.04 (c) provides that, "Nothing in this section shall be interpreted as preventing the [appeals board] from upholding the recommendation of the appointing authority since the burden of proof is upon the appellant." The appellants failed to persuade the Board that the appointing authority violated the Rules of the Division of Personnel by demoting them in lieu of layoff. The appellants also failed to persuade the Board that demotion in lieu of lay-off is reserved for disciplinary matters, or reductions affecting only those employees with less than five years of continuous full-time service. Accordingly, the Board voted unanimously to deny their appeal.

THE PERSONNEL APPEALS BOARD



Mark J. Bennett



Robert J. Johnson



Lisa A. Rife

cc: James Morrison, Director, Division of Information Services
Virginia A. Vogel, Director of Personnel
Thomas F. Hardiman, Director of Operations, State Employees' Association
Civil Bureau - Office of the Attorney General