

State of New Hampshire



PERSONNEL APPEALS BOARD

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

APPEAL OF PAUL CALS DOCKET #93 -D-18

June 28, 1994

On March 9, 1994, the Personnel Appeals Board met to hear the appeal of Paul Cals, an employee of the Department of Employment Security, relative to his November 5, 1992 letter of warning. Prior to hearing the matter on the merits of Mr. Cals' appeal, the parties reached a settlement agreement. The Board determined that if either party breached the agreement the agreement, the other party could bring the matter forward for review and hearing by the Board within 60 days of the date of hearing, or not later than June 9, 1994. Inasmuch as neither party has requested that the matter be brought forward, the file has been closed.

A handwritten signature in cursive script that reads "Mary Ann Steele".

Mary Ann Steele, Executive Secretary
Personnel Appeals Board

cc: Virginia A. Lamberton, Director of Personnel
Thomas F. Hardiman, Director of Field Operations, State Employees' Association
Joan N. Day, Human Resources Administrator, Employment Security

State of New Hampshire



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APPEAL OF PAUL CALS **Docket #93 -O-4**

August 17, 1993

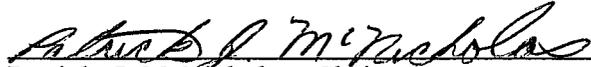
The New Hampshire Personnel Appeals Board is in receipt of Ms. Hurley's July 12, 1993 request for reconsideration of the Board's June 23, 1993 decision dismissing Mr. Cals appeal of a performance evaluation received by him after he had received a letter of warning. The Board dismissed the matter, citing RSA 21-I:46, which precludes the Board from hearing appeals involving performance evaluations, except that "...an employee who is disciplined or has other adverse action taken against him as a result of an evaluation may appeal that action." Ms. Hurley then defined the "adverse action" as follows:

"Mr. Cals has been 'disciplined' or has had other adverse action taken against him as a result of an evaluation. The Appointing Authority will use the allegations in the new retaliatory evaluation to deny Mr. Cals' appeal of the letter of warning dated November 5, 1992...."

The alleged adverse action cited by Ms. Hurley is described by her as something she expects to occur, not something which has occurred. The possibility that the evaluation will result in discipline or other adverse action does not qualify as an action subject to appeal under the provisions of RSA 21-I:46 or 58. The letter of warning to which Ms. Hurley refers has already been appealed to this Board (Docket #93-D-18). If the evaluation is a factor in that appeal, Ms. Hurley will have an opportunity to address that issue when the letter of warning appeal is heard.

Inasmuch as the appellant has failed to offer any compelling reason why the Board's June 23, 1993 decision should be considered unreasonable or unlawful, the Motion for Reconsideration is hereby denied.

THE PERSONNEL APPEALS BOARD



Patrick J. McNicholas, Chairman



Mark J. Bennett, Commissioner



Lisa A. Rule, Commissioner

cc: Virginia A. Lamberton, Director of Personnel
Margo Hurley, SEA Field Representative
Charles H. Bradley, III, Esq., Department of Employment Security
Joan Day, Human Resources Administrator, Department of Employment Security

State of New Hampshire

WPPID1069



PERSONNEL APPEALS BOARD

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APPEAL OF PAUL CALS Department of Employment Security Docket #93-0-4

June 23, 1993

The New Hampshire Personnel Appeals Board (McNicholas, Bennett and Rule) met Wednesday, April 28, 1993, to consider the above captioned appeal of Paul Cals, an employee of the Department of Employment Security. In the notice of appeal and request for hearing dated April 6, 1993, SEA Field Representative Margo Hurley argued on the appellant's behalf that he had received an excellent annual performance evaluation on September 24, 1992, and that the Department of Employment Security had misapplied the personnel rules by conducting a "special" performance evaluation dated November 25, 1992, covering the same period as the annual review, which directly contradicted the contents of the annual review. Ms Hurley also argued that the "special" evaluation given to Mr Cals on November 25, 1992, was performed solely as a justification for a letter of warning which Mr Cals received on November 5, 1992, which alleged he had had the smell of alcohol on his breath at work.

On April 15, 1993, the Department of Employment Security, through its attorney Charles H. Bradley, III, filed a Motion to Dismiss Mr Cals' appeal. Mr Bradley argued that the Board lacked statutory or regulatory subject matter jurisdiction to hear the issue of Paul Cals' performance evaluation. Mr Bradley cited Per 202.04(e) of the Rules of the Division of Personnel which specifically excludes the content of performance evaluations from those matters subject to informal settlement or appeal. Mr Bradley also argued that if the Department of Employment Security should attempt to introduce the November 25, 1992 performance evaluation as evidence in the hearing of Mr Cals' November 5, 1992 letter of warning appeal, the appellant would be entitled to object to its use as evidence, or, if admissible, to cross-examine the evaluator and argue the merits of the evaluation as evidence.

In her response to the State's Motion to Dismiss, Ms Hurley argued that although the appellant objected to the contents of the evaluation, his appeal arose from the manner in which the evaluation was performed. She alleged that the agency violated the rules by performing a "special evaluation" and that the Director violated her own rules by refusing to meet with the employee to attempt to resolve the resulting dispute.

RSA 21-I:46 ■ (a) provides the following, in pertinent part:

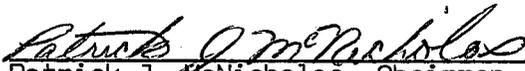
"The personnel appeals board shall hear and decide appeals as provided by RSA 21-I:57 and 21-I:58 and appeals of decisions arising out of the application of the rules adopted by the director of personnel except those related to:

"(a) Performance evaluations of classified employees; provided, however, that an employee who is disciplined or has other adverse action taken against him as a result of an evaluation may appeal that action."

The statute does not differentiate between the content of an evaluation and the manner in which an evaluation is performed; it specifically excludes appeals arising out of the application of rules adopted by the Director of Personnel when those rules relate to performance evaluations. The evaluation in question was performed after the issuance of the letter of warning and therefore could not be considered "adverse action taken ... as a result of an evaluation" as set forth in RSA 21-I:46 ■ -

In consideration of the foregoing, the Board voted unanimously to dismiss Mr. Cals' appeal (Docket #93-0-4). Should the appellant be disciplined or have other adverse action taken against him as a result of the special evaluation, he may appeal that action.

THE PERSONNEL APPEALS BOARD


Patrick J. McNicholas, Chairman


Mark J. Bennett, Commissioner

Lisa A. Rule, Commissioner

cc: Virginia A. Lamberton, Director of Personnel
Margo Hurley, SEA Field Representative
Charles H. Bradley, III, Counsel, Dept. of Employment Security