

State of New Hampshire



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

Appeal of Barbara Reed - Docket #2012-D-008

Department of Health and Human Services

NH Personnel Appeals Board Decision on Appellant's Motion for Reconsideration and Hearing

October 24, 2012

On July 11, 2012, the New Hampshire Personnel Appeals Board issued its decision dismissing the Appeal of Barbara Reed, a former employee of the Department of Health and Human Services. On July 30, 2012, the Board received Attorney John Vanacore's Motion for Reconsideration and Hearing filed on Ms. Reed's behalf. Ms. Reed was appealing a letter of warning issued to her on April 12, 2011, prior to her retirement, while she was working as a permanent employee.

In accordance with Per-A 208.03 (c), and (f) of the NH Code of Administrative Rules (Rules of the Personnel Appeals Board), "(c) Such motion for rehearing shall set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable," and "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."

The underlying facts and chronology of events in this case are not in dispute:

1. Ms. Reed received a written warning on April 12, 2011.
2. On April 27, 2011, Ms. Reed's representative filed a request for informal settlement of that warning, asking that it be removed from her file.
3. On May 11, 2011, Ms. Reed's supervisor issued a decision upholding the warning.
4. On May 24, 2011, Ms. Reed's representative filed a further request for informal settlement of the warning.
5. Ms. Reed retired from State service on June 1, 2011.
6. On September 1, 2011, the Board received Ms. Reed's appeal of the April 12, 2011, written warning which stated, in part:
,"...[T]he State of NH has declined to respond to the 5/24/2011 Step II appeal, it is believed because Ms. Reed was forced into retirement on 6/1/2011 following the State's failure to provide

adequate accommodations for her disabling conditions under the ADA.¹ Ms. Reed presently has an ADA action against DHHS filed with the Human Rights Commission, in which she claims the State's [sic] failed to accommodate her and further that they retaliated against her by, inter alia, enacting the disciplinary action which she is herein appealing. This appeal is not moot, because the letter of warning would remain in her file regardless of its merits and would then have potential ramifications for any future employment prospects."

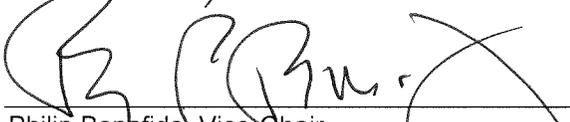
The Board found that retired State employees are not "permanent employees" as described by the NH Supreme Court in its decision in the Appeal of Carol Higgins-Brodersen and William McCann (1990) 133 N.H. 576, 578, nor are retirees' concerns about "potential ramifications for any future employment prospects" equivalent to what the Court described as personnel decisions subject to appeal "...involving the application of a personnel rule which affects [employees] while they hold their permanent status."

Having carefully review the Appellant's Motion for Reconsideration and Hearing in conjunction with original notice of appeal filed with the Board on September 1, 2011, the State's June 20, 2012, Motion to Dismiss, the Appellant's July 2, 2012, Objection to Motion to Dismiss, and the Board's July 11, 2012, decision dismissing the appeal, the Board found that the Appellant failed to demonstrate that the Board's decision was unlawful or unreasonable. As a result, the Board voted unanimously to AFFIRM its decision dismissing the appeal, and to DENY the Appellant's Motion for Reconsideration and Hearing.

THE NEW HAMPSHIRE PERSONNEL APPEALS BOARD



Patrick Wood, Chair



Philip Bonafide, Vice-Chair



Robert Johnson, Commissioner

cc: Karen Hutchins, Director of Personnel, 25 Capitol St., Concord, NH 03301
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Attorney Jennifer Jones, Department of Health and Human Services, 129 Pleasant St., Concord, NH
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¹ If there was a written decision issued by the agency regarding a State II appeal, none was provided as part of the appeal.

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Department of Health and Human Services

NH Personnel Appeals Board Decision on Department of Health and Human Services' Motion to Dismiss, and

Appellant's Objection to Motion to Dismiss

July 11, 2012

On June 22, 2012, the New Hampshire Personnel Appeals Board received the Department of Health and Human Services' Motion to Dismiss the above-titled appeal of a written warning issued to the Appellant on April 12, 2011. In that Motion, Attorney Jennifer Jones argued that the Appellant, Barbara Reed had retired from her position as a permanent DHHS employee on or about June 1, 2011 [sic] and therefore was no longer eligible to appeal to the Board under the provisions of RSA 21-1:58.

In the State's Motion to Dismiss, Attorney Jones argued that NH RSA 21-1:58 provides a right of appeal to, "Any permanent employee who is affected by any application of the personnel rules..." When Ms. Reed retired from State service, effective June 1, 2011, she ceased to be a "permanent employee" and therefore could no longer be "affected by any application of the personnel rules."

The NH Supreme Court addressed the definition of "employees" in its decision in the Appeal of Carol Higgins-Brodersen and William McCann (1990) 133 N.H. 576, 578. In that decision the Court wrote:

"In reviewing RSA 21-1:58, it is clear to us that the legislature intended to confer upon State employees a specific right of appeal to the Board based upon permanent status. Permanent employees have completed a working-test period and have been recommended for permanent appointment by the proper appointing authority The term 'permanent' reflects a degree of mutual commitment between employer and employee and an expectation that their relationship will be long-term. It is quite reasonable for the legislature to accord employees holding permanent status greater opportunity to challenge personnel decisions affecting them. It is also reasonable to conclude that the legislature did not intend RSA 21-1:58 to confer upon such employees a right to challenge all personnel decisions, but only ones involving the application of a personnel rule which affects them while they hold their permanent status."

The Appellant's Objection to the State's Motion to Dismiss was received by the Board on July 6, 2012. In that objection, Attorney Vanacore argued that the Court's decision in Higgins-Brodersen was inapplicable in this case, as Ms. Reed was a permanent employee affected by an application of the personnel rules when the warning was issued. Attorney Vanacore further argued that the inclusion of a written warning in Ms. Reed's personnel file could be detrimental to her future employment opportunities. He also argued that, "Ms. Reed's resignation can hardly be considered voluntary." He asserted that the Appellant had been "harassed and retaliated against" as a result of her pursuit of her claim under the Americans with Disabilities Act. He argued that the Appellant had been put on notice of the agency's intent to terminate her employment for non-disciplinary reasons and that avoiding the "stigma of being discharged" was one of the reasons behind her decision to retire. He also argued that the agency's failure to "adequately accommodate Ms. Reed's disability caused her significant financial loss" and that, "Retirement had become a financial necessity because of the actions of the DHHS."

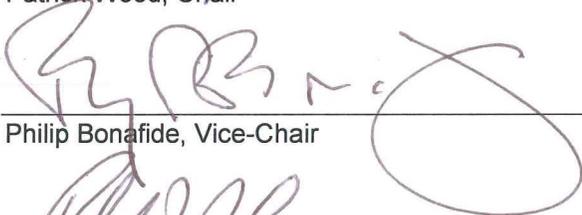
Although the Appellant now argues in her Objection to the State's Motion to Dismiss that her "resignation was tendered under duress and constitutes a constructive discharge from employment, the issue of her separation from service was not timely filed with this Board. As a result, allegations that the Appellant now raises of constructive discharge are matters outside the Board's jurisdiction.

Having carefully reviewed the original notice of appeal, the State's Motion to Dismiss, and the Appellant's Objection to Motion to Dismiss, and in consideration of the fact that Ms. Reed retired from State service effective June 1, 2011, the Board voted unanimously to DISMISS the appeal.

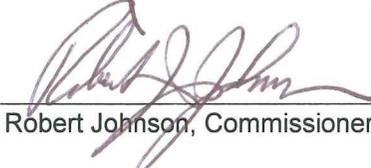
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