

State of New Hampshire



PERSONNEL APPEALS BOARD

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Concord, New Hampshire 03301
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APPEAL OF RORY BOHANAN *DEPARTMENT OF CORRECTIONS*

Docket #00-P-9

November 15,2000

The New Hampshire Personnel Appeals Board (Wood, Rule and Barry) met on Wednesday, September 6,2000, under the authority of RSA 21-I:58, to hear the appeal of Rory Bohanan, a former employee of the Department of Corrections who was appealing his non-selection for promotion to the position of Investigator. Attorney Michael Sheehan appeared for the appellant. Attorney John Vinson appeared on behalf of the Department of Corrections.

The record of the hearing in this matter consists of pleadings submitted by the parties prior to the hearing, the audio tape recording of the hearing on the merits of the appeal, notices and orders issued by the Board, and documents admitted into evidence as follows:

State's Exhibits

1. February 4,2000 memo of non-selection
2. Ranking for November 15, 1999 Investigator Board
3. Ranking for June 3, 1999 Investigator Board
4. Memo from Mr Bohanan dated July 7,1999
5. Appeal filed by Mr. McConnack dated July 21, 1999
6. August 10, 1999 memo from Mr. McConnack
7. Appeal filed by Ms. Chadbourne dated November 3, 1999
8. Memo from Mr. Wefers dated November 9, 1999
9. Letter to Mr. McCann from Ms. Cantor dated May 22,2000
10. Affidavit of Mr. Wefers dated August 31,2000

11. Part Per 602 - Rules of the Division of Personnel
12. Department of Corrections PPD 2.1 IV A(3)g (page 9)
13. 1998 Performance Evaluation
14. 1999 Performance Evaluation
15. Letter of Resignation from Mr. Bohanan dated May 19,2000

Attorney Sheehan offered no documents into evidence, and offered no objection to admission of the State's exhibits. However, he asked the Board to note the appellant's objection to the accuracy of Mr. Wefers' affidavit (State's 10).

Attorney Sheehan argued that the case turned on a single issue, whether or not gender was a factor in the selection process. Attorney Sheehan made an offer of proof that Mr. Bohanan, Mr. Miller, and at least one other witness heard Mr. Wefers say that he was holding the position for a woman. Attorney Sheehan argued that by making gender a factor in the selection decision, the Department of Corrections discriminated against Mr. Bohanan, violating his rights under State and federal law. He argued that the Board should schedule a further hearing to take the testimony of Mr. Bohanan and Mr. Miller, allowing them the opportunity to provide evidence that Mr. Wefers did, in fact, indicate that he intended to select a female for the Investigator position. Attorney Sheehan stated that because Mr. Bohanan had resigned from his employment with the Department of Corrections at the end of May, 2000, the appellant was not actually asking the Board to order his promotion, but to award him lost wages from the date of his first application for promotion to the effective date of his resignation.

Attorney Vinson argued that the appellant would not be entitled to an award of back-pay even if the appellant could demonstrate that gender was a factor in the selection process. He argued that the appellant's allegations were equivalent to a Title VII claim of mixed motives, where there is one legal and one illegal reason for an employment decision. He argued that in a Title VII mixed motive claim, the extent of the relief to which the appellant would be entitled would be

declaratory relief and all injunction to prevent the employer from using an impermissible basis for selection in the future.¹

Attorney Vinson argued that the Rules of the Division of Personnel specifically provide for the appointing authority to exercise discretion in determining which candidates are best qualified and best suited for promotion. He argued that although Mr. Wefers had indicated that he would like to have men and women working in the Internal Affairs Bureau, his recommendations were not based on gender, and he would not have recommended an unqualified woman or any unqualified candidate for promotion.

Attorney Vinson made an offer of proof that promotions were offered to two male candidates and one female candidate as a result of the first recruitment. The female candidate declined promotion, leaving one of the three positions vacant. No candidate was offered promotion as a result of a subsequent outside recruitment. Ultimately, following another in-house posting, all of the positions were filled by appointment of male candidates.

The following facts are not in dispute:

1. Mr. Bohanan applied for, and was twice denied selection to, a position of Investigator assigned to the Department of Corrections Bureau of Internal Affairs.
2. In the first selection process in June 1999, the candidates for Investigator were scored and ranked by the Promotion Board as follows:

David O'Brien, 81.74

John Miller, 77.07

Angela Greenwood, 71.89

James Wilson, 69.49

¹ The parties referred to the Supreme Court's opinion in Price Waterhouse v. Hopkins, 490 u.s. 228 (1989). In that decision, the Court held, in pertinent part, "that when a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiffs gender into account..."

Rory Bohanan, 66.64

Clayton LeGault, 65.82

Darren Basoukas, 63.66

Raymond Young, 62.91

David Hart, 55.33

Deborah St. Laurent, 53.33

3. Offers of promotion were made to Mr. O'Brien, Ms. Greenwood and Mr. Wilson, who were ranked first, third and fourth respectively.
4. Mr. O'Brien and Mr. Wilson accepted the promotions. Ms. Greenwood declined the offer.
5. The Department notified the remaining seven candidates that they had not been selected, but that their applications were still under consideration.
6. The Department sought applications from candidates outside of the department but did not hire anyone as a result of that recruitment.
7. In November, 1999, the Department of Corrections again requested applications for selection to the position of Investigator.
8. The promotion board scored and ranked the candidates as follows:
 - Charles Hillsgrove, 75.24
 - Brien Blackden, 70.99
 - Paul Cascio, 76.83
 - Arthur Locke, 65.20
 - Scott Dodge, 63.49
 - Darren Basoukas, 63.07
 - Rory Bohanan, 61.65
 - Vicki Keith, 60.74
9. An offer of promotion was made to Brian Blackden, who ranked second.
10. Mr. Blackden accepted the position.
11. In the interim, Mr. Wilson was promoted to another position, creating an additional vacancy in the Internal Affairs Bureau.
12. The Department offered that vacant position to Clayton LeGault, who accepted the promotion.

13. Mr. Wefers made it widely known that he was interested in having both male and female Investigators working in the unit, believing that the Department "...would be at an equal disadvantage if [they] had all men [than they] would be at if [they] had all women" (see Affidavit of Mark L. Wefers, State's 10).
14. All of the candidates in each selection process were considered to meet the minimum qualifications for promotion and there was no "bright line" separating qualified from unqualified.
15. Mr. Wefers' recommendations were not made in the order of the promotional board's ranking of the candidates, nor was he bound to make his recommendations on that basis.
16. Mr. Bohanan's 1998 and 1999 performance evaluations (State's Exhibits 13 and 14) rate his performance at 70 and 74 points respectively, with 70 - 89 points being the range for "above average performance."
17. In a letter to SEA Field Representative McCann dated May 22, 2000, Assistant Commissioner Edda Cantor wrote that Mr. Bohanan was not as "competitive" because of his "documented history of excessive unscheduled absences." Ms. Cantor also suggested that Mr. Bohanan could become more competitive by enrolling in some college level writing and communication courses.

Having carefully considered the evidence and argument, the Board also made rulings of law as follows:

- A. "Whenever possible, selection by the appointing authority to fill a vacancy shall be made from within an agency and shall be based upon the employee's: (1) Possession of the knowledge, skills, abilities and personal characteristics listed on the class specification for the vacant position; and (2) Capacity for the vacant position as evidenced by documented past performance appraisals" [Per 602.02 (a)].
- B. "The most qualified candidate for the position, in the opinion of the appointing authority, shall be selected..." [Per 602.02 (c)].
- C. "Candidates may be denied selection if, in the opinion of the appointing authority, they are deemed to lack personal or professional qualifications for promotion" [Per 602.02 (d)].

- D. " 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 application of the rules adopted by the director of personnel ..." [RSA 21-I:46, I].
- E. "...If the personnel appeals board finds that the action complained of was taken by the appointing authority for any reason related to politics, religion, age, sex, race, color, ethnic background, marital status, or disabling condition, or on account of the person's sexual orientation, or was taken in violation of a statute or of rules adopted by the director, the employee shall be reinstated to the employee's former position or a position of like seniority, status, and pay. The employee shall be reinstated without loss of pay, provided that the sum shall be equal to the salary loss suffered during the period of denied compensation less any amount of compensation earned or benefits received from any other source during the period..." [RSA 21-I:58, I].

Decision on Appellant's Request for Further Hearing

After considering the evidence and arguments offered by the parties, the Board found that it did not need to hear testimony from Mr. Bohanan, Mr. Miller, Mr. Wefers, or any other witness in order to fairly decide this appeal. Assuming to be true all of the appellant's allegations that the Department of Corrections used gender as a factor in the selection process, the question before the Board would remain what remedy, if any, might be available to the appellant.

Jurisdiction

Title VII claims of discrimination are beyond the Board's subject matter jurisdiction. The Board's jurisdiction to hear and decide appeals by classified employees is proscribed by the provisions of RSA 21-I:46, 52, 57 and 58. In this case, the appellant has asserted a violation of statutes and rules prohibiting discrimination on the basis of gender, the remedy for which is described by RSA 21-I:58, I, that provides, in pertinent part:

"...If the personnel appeals board finds that the action complained of was taken by the appointing authority for any reason related to politics, religion, age, sex, race, color, ethnic background, marital status, or disabling condition, or on account of the person's sexual orientation, or was taken in violation of a statute or of rules adopted by the director, the employee shall be reinstated to the employee's former position or a position of like seniority, status, and pay. The employee shall be reinstated without loss of pay, provided that the sum shall be equal to the salary loss suffered during the period of denied compensation less any amount of compensation earned, or benefits received from any other source during the period..." [RSA 21-I:58, I].

Decision and Order

The Rules of the Division of Personnel provide broad discretion to appointing authorities in determining which of the candidates are best qualified for promotion to a particular vacancy. Under ordinary circumstances, in order to prevail in a promotional appeal and make a persuasive argument for an award of back-pay, an appellant would need to demonstrate by a preponderance of the evidence that he or she was the best qualified candidate and that the appointing authority abused its discretion by selecting a candidate who was neither qualified nor suitable for selection to the vacancy.

In this case, the appellant did not assert that candidates selected for promotion were unqualified, or that he was the best qualified candidate. The evidence reflects that the candidates were all considered to be "qualified." The evidence further reflects that promotional recommendations were not based upon the candidates' relative rankings by the promotional boards. Accordingly, the evidence does not support a finding that the appellant would have been promoted but for an impermissible reliance upon gender as a factor in the selection process.

In light of the evidence, if the Board were to find that the Department of Corrections factored gender into its selection process, or that it held one or more of the positions for selection of a female candidate, the only relief that the Board could order would be that provided by RSA 21-

I:58, I, or reinstatement to a position of like seniority, status and pay. The appellant made no argument that he was the best qualified candidate. Reinstatement to the employee's former position or a position of like seniority, status, and pay would simply result in the appellant being returned to his status as a candidate for promotion to the position of Investigator. The appointing authority would retain its discretion to select the candidate who, in the opinion of the appointing authority, is most qualified. The Department of Corrections found Mr. Bohanan to lack certain personal and professional qualifications for promotion and that Mr. Bohanan needed to improve his performance and skills to be more competitive. The Board is not persuaded that a new selection process would yield a different result.

Therefore, on all the evidence and arguments, the Board voted unanimously to DENY Mr. Bohanan's appeal.

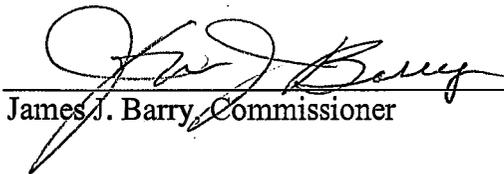
THE PERSONNEL APPEALS BOARD



Patrick H. Wood, Chairman



Lisa A. Rule, Commissioner



James J. Barry, Commissioner

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