

State of New Hampshire

WPPID1031



PERSONNEL APPEALS BOARD

State House Annex
Concord, New Hampshire 03301
Telephone (603) 271-3261

APPEAL OF PAUL CLEMENT Youth Development Center Docket #92-P-10

December 29, 1992

The New Hampshire Personnel Appeals Board (McNicholas, Johnson and Bennett) met Wednesday, December 16, 1992, to consider the December 3, 1992 Motion for Rehearing filed by Thomas Hardiman, SEA Director of Field Operations, on behalf of Paul Clement. The appellant argued that the Board erred in denying Mr. Clement's appeal, particularly in that the Board considered testimony and evidence related to the appellant's job performance (i.e., performance evaluation and letter of warning). The Board disagrees. Per 302.03 (b)(1) of the [former] Rules of the Division of Personnel provides that, "It is the prerogative of the appointing authority to give such weight to an employees' job performance as he deems appropriate when considering the employee for appointment to a vacancy." Therefore, performance evaluations, attendance records and prior disciplinary actions involving the appellant must be considered relevant to the proceedings.

The appellant also complained that it was "...strange that the Board [could] grant all the findings requests and deny all the solutions." Again, the Board does not agree. The Board made its own findings of fact in addition to those proposed by the appellant, including the fact that there was no set of circumstances in which the appellant would have been considered the first, second or third choice to fill the vacancy. The Board also found the appellant lacked essential training for the position, and had been warned concerning his attendance, both through his performance evaluation and a letter of warning for absenteeism. The appellant argued none of these factors should have been considered in deciding this case. The Board disagrees.

For all practical purposes, the State Employees' Association has asked the Board to rule that an agency may not select a probationary employee to fill a vacancy if any of the other candidates for that vacancy are permanent full-time employees who meet the minimum qualifications for the job. The Personnel Appeals Board, its predecessor the Personnel Commission, and the New Hampshire Supreme Court have all upheld an agency's right to refuse to promote even ostensibly qualified permanent employees who lack the personal and professional qualifications for promotion.

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In consideration of the record in this matter, the Board found that the appellant lacked the personal and professional qualifications for promotion at that time. The agency offered credible testimony and evidence supporting its contention that it was not reasonable to promote Mr. Clement. The appellant failed to persuade the Board his non-selection for promotion was effected in violation of the Rules of the Division of Personnel.

Therefore, the Board voted unanimously to deny the instant Motion and to affirm its decision of November 19, 1992, denying Mr. Clement's appeal.

THE PERSONNEL APPEALS BOARD


Patrick J. McNicholas, Chairman


Mark J. Bennett


Robert J. Johnson

cc: Virginia A. Vogel, Director of Personnel
Thomas F. Hardiman, SEA Director of Field Operations
Ronald G. Adam, Superintendent, Youth Development Center

State of New Hampshire

WPPID1004



PERSONNEL APPEALS BOARD

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APPEAL OF PAUL CLEMENT Youth Development Center Docket #92-P-10

November 19, 1992

The New Hampshire Personnel Appeals Board (McNicholas, Johnson and Bennett) met Wednesday, October 7, 1992, to hear the appeal of Paul Clement, an employee of the Youth Development Center. Mr. Clement had applied for promotion to the position of Youth Counselor II (East Cottage) in response to a job posting dated September 24, 1991, was denied promotion, and appealed to the Personnel Appeals Board on November 1, 1991.

Mr. Clement, a Youth Counselor I, was represented at the hearing by Thomas F. Hardiman, SEA Director of Field Operations. The Youth Development Center was represented by Superintendent Ronald Adams. Also appearing on behalf of the Youth Development Center were Robert Boisvert, Supervisor II (Chief of Operations) and James Peace, House Director - East Cottage. The record in this matter consists of the audio tape recording of the hearing, an eleven page packet of exhibits admitted by the State without objection from the appellant, and the appellants requests for findings of fact and rulings of law.

Mr. Boisvert testified his duties as YDC Chief of Operations includes reviewing employee attendance records. He testified whenever an employee fails to report to work as scheduled, the agency must call in another employee, usually on premium pay, to cover the absent employee's staff position. He said the appellant had used a substantial amount of sick leave between August, 1990 and July, 1991, ultimately resulting in the Superintendent issuing the appellant a letter of warning for absenteeism.

Mr. Clement was one of seven candidates for the position, and was interviewed by a selection panel consisting of the East Cottage Treatment Coordinator, House Director and Assistant House Director, and a Youth Counselor II from another work unit. In reviewing the applications, the panel considered each applicant's education, experience and presentation during the interview itself.

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Mr. Peace, House Director at East Cottage for the previous seven years, testified that the panel was also looking for a dependable, reliable candidate whose training was up-to-date. He testified the appellant was unable to articulate suitable answers to situational questions, that some of his answers were incorrect, and too often he responded that he would ask a supervisor whenever he was unclear on any procedure.

Mr. Peace testified he believed the appellant was under-trained and when the appellant was advised of same, he responded he was unaware of his responsibility to seek out training opportunities because no one had told him about it. He said the appellant's prior performance evaluation indicated the appellant had poor work habits which needed improvement. Mr. Peace testified the appellant placed sixth of the seven candidates over-all.

Mr. Clement testified he had been employed at the Youth Development Center for three and a half years as a Youth Counselor. He testified he was unaware scheduling and attending training sessions was up to the employee, not the supervisor. On his April 20, 1991 Performance Evaluation, the appellant commented:

"I am always ready for training. None of these courses [which were listed in an attachment to the review] has never been offered to me, since I have been employed here. It will be 2 years May 30, 1991. It seems to me, that there should be better communication between the training office, and supervisors on down to get this accomplished."

Mr. Clement testified he had started taking courses to improve his level of training, including completion of a Defensive Driving course in February, 1992, and First Aid in April, 1992. He said he also completed the course in Aggression Management in August, 1992, but had failed the written examination, which he intended to take again within several weeks of the date of the hearing.

Mr. Hardiman argued at least four of the top five candidates for promotion were probationary employees who could not have been promoted if the agency had given the permanent, full-time employees applying for promotion "preference" as required by the Rules of the Division of Personnel in effect at the time the promotional decision was made. He suggested the appellant had made substantial efforts to improve his performance, had complied with the corrective action required of him in the letter of warning he received on July 30, 1991, and had enrolled in several courses to improve his skills. He also argued the Board should consider the risk Mr. Clement was willing to take by applying for promotion, since he would serve a new probationary period and could be demoted or discharged prior to completion of that probation if he failed to perform the work satisfactorily.

Superintendent Adams argued the agency was under no obligation to promote a permanent employee rather than a probationary employee if the agency did not find it possible or reasonable to do so. He said he had carefully scrutinized the selection recommendations, including the employment status of each of the candidates before deciding to promote Mr. O'Sullivan, and remained of the opinion the process had been fair and had resulted in selection of the best candidate. He indicated Mr. Clement's rating compared to the remaining six candidates, his failure to have seriously undertaken any training prior to the promotional decision, and his attendance record combined to make him a poor candidate for promotion. Therefore, he argued it was possible to promote Mr. Clement, but it was not reasonable.

Particularly in light of the appellant's claim to have been denied "preference" in selection as a permanent full-time employee, the Board reviewed the total score received by each candidate from each of the four interviewers. The Board found Mr. O'Sullivan, the selected candidate, was rated first by three of the interviewers and second by the fourth interviewer. On the other hand, Mr. Clement was rated last by two interviewers and tied for last place by the third interviewer. Mr. Clement's best rating came from the fourth interviewer who rated the appellant tied for third/fourth place with Ms. Conlon. The Board could find no set of circumstances under which the appellant would have been selected for promotion even if the first three or four choices had been eliminated.

The Board found the witnesses to have been fair, with no indication of any malice toward the appellant. The Board found the appellant had not completed essential training, had a poor performance evaluation and had received a warning for absenteeism less than three months prior to the promotional posting. Accordingly, the Board voted unanimously to deny Mr. Clement's appeal. The Board responded as follows to the appellant's requests for findings of fact and rulings of law:

Findings of Fact:

1 - 4, and 6 are granted
5 is granted in part, as the appellant has only cited a portion of the rule in question.

Rulings of Laws:

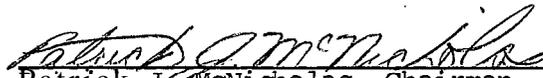
1 - 4 are denied.

The Board would like to express its appreciation to both parties in this matter for their efficient presentation of the facts. Both parties were clear

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and concise, wasting no time presenting both the factual and legal issues which the Board needed to consider.

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