

State of New Hampshire



PERSONNEL APPEALS BOARD

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APPEAL OF CHERYL CORSON *DEPARTMENT OF HEALTH AND HUMAN SERVICES*

Docket #00-P-5

March 23, 2000

The New Hampshire Personnel Appeals Board (Rule, Johnson and Barry) met on Wednesday, February 16, 2000, under the authority of RSA 21-I:58, I, to hear the appeal of Cheryl Corson, an employee of the Department of Health and Human Services. Ms. Corson, who was represented at the hearing by SEA Field Representative Linda Chadbourne, was appealing the Department's decision not to select her for promotion from Administrative Secretary (s.g. 13) to Administrative Assistant I (s.g. 15). Sandra Platt, Human Resources Administrator for the Department of Health and Human Services, appeared on behalf of the agency.

Without objection by either party, the appeal was heard on oral argument and offers of proof by the representatives of the parties. 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:

Appellant's Exhibits:

- A. Job Posting for Administrative Assistant I, Position #14969
- B. Cheryl Corson's Application for Position #14969
- C. Performance Evaluations of Cheryl Corson

D. E-mail correspondence between Penney Keyser and Cheryl Corson

State's Exhibits:

1. Personnel Action Form showing the date position #14969 became vacant, the date the appointing authority requested that the position be posted, and the immediate supervisor as of the date the position became vacant
2. Copy of an e-mail regarding a request from the Bureau of Human Resources related to the need for an updated supplemental job description
3. May 23, 1999 request from Penny Keyser to Sandra Adains requesting assistance in hiring Elizabeth Healy as a temp fill-in dated
4. May 27, 1999 e-mail message from Susan Warren to Sabin Guertin regarding the need for a supplemental job description for position #14969
5. Correspondence dated May 25, June 1, and June 2, 1999 about hiring Elizabeth Healy as a temp fill-in for position #14969
6. August 16, 1999 notation of change in reporting relationship for position #14969,
7. Request to transfer position #14969 as approved by the Director of the Division of Personnel on August 24, 1999
8. Re-posting of position #14969 with a recruitment period of August 30, 1999 -- September 3, 1999
9. Cheryl Corson's August 27, 1999 application for position #14969
10. Preliminary list of all applicants for position #14969 sent to John Wallace on September 16, 1999 at 3:19 p.m.
11. Cheryl Corson's request for annual leave for the period of September 16 -- October 8, 1999
12. Two Division of Personnel lists of qualified applicants for position #14969 with test scores, received by Human Resources on September 13 and September 21, 1999
13. Compiled list of certified, qualified internal applicants for position #14969 sent to John Wallace on September 21, 1999
14. October 1, 1999 notice of non-selection addressed to Cheryl Corson

15. October 20, 1999 letter to Jolui Avlas
16. November 22, 1999 letter to John Avlas
17. November 30, 1999 letter to Linda Chadbourne

Ms. Platt described the position for which Ms. Corson had applied as the Administrative Assistant I assigned to the Office of Program Support. The supplemental job description for that position (SEA Exhibit A) indicates that the Administrative Assistant "Supervises the administrative and office management functions as assistant to the Associate Commissioner with secretarial and PC support provided to other staff in the Office of the Commissioner, DHHS." Ms. Platt said that there was some urgency to filling the position, as the department reasonably believed that the Governor was about to impose a hiring freeze in order to address possible budget shortfalls. She argued that the agency had moved as expeditiously as possible to post the position, accept applications, certify the applicants and arrange for tests and interviews, and that Ms. Corson was unavailable for an interview or to release her personnel file for review by the appointing authority. Ms. Platt argued that employees seeking promotion must take some responsibility for being available when the agency conducts testing and interviews.

Ms. Platt argued that Per 602.02 of the Rules of the Division of Personnel establishes the criteria for selection to fill a vacancy and the order in which candidates must be considered. She argued that Per 602.02 (a) provides for selection based on an employee's possession of the knowledge, skills, abilities and personal characteristics listed on the class specification for the vacant position. Ms. Platt argued that although Ms. Corson possessed the technical skills required for the position, the selected candidate possessed the best combination of skills and abilities, including the "ability to establish and maintain harmonious working relationships with administrative officials, other employees and the general public," as set forth in the recommended work traits for the position.

Ms. Platt argued that although Ms. Corson was not available to be interviewed or to release her personnel file for review by the appointing authority, the agency did have sufficient information

about her to give proper consideration to her application for promotion. Ms. Platt said that Mr. Wallace, the appointing authority, had consulted both Ms. Platt and Penny Keyser, the support staff supervisor, about Ms. Corson's work performance. She argued that Mr. Wallace also had an opportunity to review Ms. Corson's application and examination scores, and had first-hand knowledge of Ms. Corson's work performance, having observed her interactions with employees and members of the public when she occasionally "filled-in" for support staff in the Commissioner's Office.

Ms. Platt argued that oftentimes, selecting a candidate for promotion involves making a choice between "good, better and best" rather than refusing to promote a candidate who lacks qualifications. She argued that while Ms. Corson was a good candidate, the selected applicant was a better fit for the job, possessing the best combination of knowledge, skills, abilities and recommended work traits for the position. Ms. Platt argued that the agency's October 1, 1999 notice of Ms. Corson's notice of non-selection therefore complied with the provisions of Per 602.02 (e) in that it notified her of her non-selection and it "state[d] the reasons why the employee was not selected," specifically that "another candidate whose knowledge and experience matches the skill level required for this position [had] been selected."

Ms. Chadbourne argued that the Rules of the Division of Personnel give broad discretion to appointing authorities in determining which employees are best suited for selection to a vacancy. However, she argued, the Rules and the merit system are rendered meaningless if an agency can refuse to promote a long-term, qualified employee on the premise that the employee was away on vacation and therefore unavailable when the appointing authority chose to complete promotional interviews. Ms. Chadbourne argued that the Department's October 1, 1999 notice of non-selection also failed to advise Ms. Corson of the specific reasons for her non-selection, thereby violating Per 602 of the Rules of the Division of Personnel.

Ms. Chadbourne argued that the Department of Health and Human Services was aware of Ms. Corson's vacation plans when her application for promotion was received. She argued that if the

Department truly believed that the threat of a hiring freeze was imminent, arrangements could have been made to interview Ms. Corson prior to her leave. She also argued that despite the agency's claim that it had attempted to reach Ms. Corson at home, neither the appellant nor her children ever received such a message.

Ms. Chadbourne asked the Board to order the Department to vacate and re-post the position in question, to order the agency to award the next Administrative Assistant I vacancy to the appellant or to order the agency to reclassify the position currently occupied by the appellant to Administrative Assistant I, salary grade 15.

The following material facts are not in dispute:

1. On May 23, 1999, Penny Keyser, who supervises clerical staff in the Department of Health and Human Services' state office, wrote to Human Resources Administrator Sandra Adams requesting approval to hire Elizabeth Healy on a temporary basis in any one of several positions, including position #14969, the Administrative Assistant I assigned to Licensing and Regulation, Office of Program Support.
2. On June 2, 1999, Ms. Adams advised Ms. Keyser that Elizabeth Healy could be appointed temporarily to fill position #14969 as an Executive Secretary, salary grade 10.
3. While Ms. Healy occupied the position, the supplemental job description was revised by the Department of Health and Human Services to reflect its expected reassignment from Licensing and Regulation to the Associate Commissioner's Office.
4. On August 16, 1999, Ms. Keyser was advised of the revisions to the job description for position #14969, and the position's reassignment.
5. On August 18, 1999, Ms. Corson sent e-mail to Penny Keyser, Supervisor, outlining her plans to take a vacation from September 20 to October 8, 1999. Ms. Keyser acknowledged the message and responded by e-mail to Ms. Corson that same afternoon.
6. On August 27, 1999, the Department of Health and Human Services posted in-house recruiting notices for position #14969, Administrative Assistant I, salary grade 15 assigned to

the Office of Program Support/Administration. The notice indicated that applications would be accepted between the dates of August 30 and September 3, 1999.

7. Ms. Corson submitted an application dated August 27, 1999 as an in-house candidate for the position. Her application was certified by the Department on September 9, 1999 as meeting the minimum qualifications, and her application (State's Exhibit 9) shows a score of 93.4% on the combination written and typing test.
8. Ms. Corson submitted an annual leave slip dated September 15, 1999 for the period of September 16 through October 8, 1999. Her supervisor approved and signed the request, dating the leave slip September 15, 1999.
9. On September 16, 1999, the first day of Ms. Corson's leave, Susan Warren sent e-mail to Associate Commissioner John Wallace and Supervisor Penny Keyser, listing the names and examination scores of the internal applicants who met the minimum qualifications for selection to the Administrative Assistant I vacancy.
10. Ms. Corson's score on the written examination and typing test was the highest among the 11 scores listed.
11. Jean Barnes, an employee in the Office of Program Support, was assigned to contact candidates to arrange for interviews. She reported that when she tried to reach Ms. Corson at her office, her voice mail message said she was away on vacation. Ms. Barnes reported that she left recorded messages for Ms. Corson at home and at work about the interview schedule.
12. Ms. Corson asserted that she received no such messages.
13. Interview teams conducted interviews between September 27 and September 29, 1999 and forwarded their recommendations to Mr. Wallace.
14. Mr. Wallace, who was aware that Ms. Corson was not scheduled to return to work until October 11th, asked Ms. Platt if he would have to delay his selection decision until Ms. Corson returned.
15. Ms. Platt advised him that because he was familiar with Ms. Corson's application and had first-hand knowledge of work performance, and because it was important to fill the position quickly, he could fill the position without waiting to interview Ms. Corson.

16. On October 1, 1999, the Department offered the position to Denise Sherburne, with a job "start date" of October 5, 1999.
17. The Department sent a letter to Ms. Corson dated October 1, 1999 advising her that, "...due to the immediate business needs of the work unit, the duration of your absence and for the obvious reason we were unable to contact you, it was impossible to delay filling the position until you returned." After thanking Ms. Corson for her interest in the position, Ms. Keyser wrote, "However, the interview process has been concluded and another candidate whose knowledge and experience matches the skill level required for this position has been selected."
18. Ms. Chadbourne timely filed a request for informal settlement on Ms. Corson's behalf, asking the Department either to vacate and re-post the position, to give Ms. Corson serious consideration for the next available open Administrative Assistant position, or to upgrade Ms. Corson's current position from Administrative Secretary to Administrative Assistant I, labor grade 15.

Decision and Order

The Board recognizes management's broad discretion in determining which employees are best suited for promotion, and the Board generally will not substitute its judgment for that of the appointing authority in assessing candidates' qualifications for specific vacancies. The Board also recognizes that exigent circumstances arise that may create situations in which management must move expeditiously to fill vacancies. However, the Board also understands the rights afforded by the Rules of the Division of Personnel to employees to be considered for vacancies for which they have applied, to compete fairly for selection to those vacancies, and to be apprised of the reasons for non-selection when their applications are rejected. In this case, the evidence simply does not support the Department's assertion that circumstances existed that created particular urgency in filling this position that required the Department to make a final decision before Ms. Corson returned from leave.

According to State's Exhibit 1, a request was submitted to the Bureau of Human Resources on May 19, 1999 to fill the position of Administrative Assistant I (position #14969) when it became vacant on June 11, 1999. Before active recruitment occurred, however, Penny Keyser wrote to Sandra Adams, informing her that she would like to hire "A Rare Find" named Elizabeth Healy who had worked for Ms. ICeyser the previous year. Ms. ICeyser suggested that Ms. Healy might certify as a "temp" in one of several positions including Clerk IV (position #17411), Administrative Assistant (positions #12486 or 14969) or Secretaiy II (no position number listed). Correspondence between Ms. Keyser and Ms. Adams over the following several days was not focused on filling the Administrative Assistant vacancy, but on hiring and compensating Ms. Healy.

The first evidence of renewed interest in filling the AA I position is e-mail correspondence dated August 16, 1999 from Diane Young to Susan Warren and Penny Keyser concerning the revised supplemental job description for position #14969 and reassignment of the position to Associate Coinmissioner Wallace's staff. On August 17, 1999, Ms. Platt wrote to Personnel Director Virginia Lamberton requesting permission to transfer the vacant Administrative Assistant I position to the Associate Commissioner's Office, and to release the position for recruitment (State's Exhibit 7). That request was approved on August 24, 1999. None of the correspondence offered as State's Exhibits 1 - 13 suggests a sense of urgency. The "immediate business needs of the work unit" were never mentioned until October 1, 1999 when Ms. ICeyser informed the appellant of her non-selection.

Clearly an agency is under no obligation to keep a position vacant for the applicants' convenience. However, the evidence reflects that the agency knew in May, 1999 that the position would be vacant in June, 1999 and chose to delay its recruitment to fill the position until late August, 1999, apparently so that it could accommodate hiring a student who had worked for Ms. Keyser previously. The alleged urgency in filling the position provides a weak rationale for failing to interview a long-term, qualified in-house candidate.

The State's second reason for non-selection, that it chose "...another candidate whose knowledge and experience matches the skill level required for this position," is more persuasive, particularly when that reason is accompanied by Ms. Platt's explanation that agencies often must choose between candidates who are "good, better and best." However, the Board found that even under those circumstances, Per 602.02 (e) suggests that applicants should receive a more substantial explanation for non-selection that would enable them to improve their promotional prospects in the future. If, for instance, the agency believed that the selected candidate demonstrated a greater capacity for establishing and maintaining harmonious working relations, it should have said so.

While the agency obeyed the "letter of the law," it ignored the more subtle responsibility to extend certain courtesies to its permanent, full-time employees. Therefore, Ms. Corson's appeal is **GRANTED IN PART.**

In selecting an appropriate remedy, the Board weighed each of the appellant's proposals for relief. RSA 21-I:58 authorizes the Board to "...reinstate an employee or otherwise change or modify any order of the appointing authority, or make such other order as it may deem just." The Board found that ordering Ms. Corson's promotion into the next available Administrative Assistant vacancy would not constitute "reinstatement," nor would it be just. It would pre-empt the agency's right to select the candidate it considers best suited to that vacancy and deprive other qualified candidates of the opportunity to compete for such a vacancy when it occurs.

RSA 21-I:57 authorizes the Board to hear appeals arising out of classification decisions of the Director of Personnel. The Board has no information about the duties and responsibilities of the position that Ms. Corson currently occupies. Further, the Board has neither a request for reclassification nor a decision by the Director of Personnel for which a remedy might be appropriate under the provisions of RSA 21-I:57. Ordering the State to reclassify Ms. Corson's position would exceed the Board's statutory authority under either RSA 21-I:57 or RSA 21-I:58.

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