

State of New Hampshire



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

Appeals of Francis Cronin

Docket #93-P-8, #94-P-4 and #90-O-5

Response to Appellant's Reconsideration Request

June 30, 1998

On October 10, 1994, the Board received the Appellant's Reconsideration Request for each of the above-docketed appeals.¹ A properly filed Motion for Rehearing must set forth fully every ground upon which it is alleged that the decision of the Board is either unlawful or unreasonable. With that standard in mind, the Board responds as follows:

#90-O-5 Division of Information Services (Non-Posting of Vacancies)

The appellant's second request for reconsideration is denied.

The Board originally denied Mr. Cronin's appeal as untimely. The Board also denied the appellant's request for reconsideration of that matter, continuing to find that the appeal was untimely.

In his second request for reconsideration, Mr. Hardiman maintained that, "delay in issuing a decision causes concern over a panel issuing a decision when that panel may not have heard the full case. We can only speculate that Mr. Cushman [who was no longer a member of the Board and did

¹ Mr. Cronin's appeal files had been treated as inactive, in spite of properly filed motions for reconsideration. The Board appreciates the State Employees' Association's diligence in ensuring that the files were reactivated for the Board's review and consideration.

not participate in discussion of the original request for reconsideration] may have been swayed by the arguments contained in the reconsideration request."

The underlying issue was, and remains, straightforward. Mr. Cronin argued that the agency failed to notify applicants that positions being posted were temporarily downgraded. He argued that if he had been aware of that fact at the time, he would have applied for selection, anticipating an increase in compensation when the position was returned to its original classification and salary grade. He argued that his appeal should be considered timely because he did not discover that the posted positions were temporarily downgraded until they were later "returned to grade" after his opportunity for filing a timely appeal had lapsed.

The Board fully understands the appellant's theory that the practice of posting downgraded positions without notifying applicants of the position's status allowed the agency to manipulate the system in order to dissuade the appellant from applying for promotion. However, there was no evidence that if Mr. Cronin had applied, and had been selected, for a temporarily downgraded position that the agency would have requested or received approval to return the position to a higher salary grade at any date in the future. If there is a prohibition against temporarily downgrading a position, or a requirement that agencies notify applicants that a position has been temporarily downgraded, the appellant failed to apprise the Board of those facts. There is no evidence that those who did apply for and receive appointments to temporarily downgraded positions were either aware of, or party to, any decision of the agency with respect to the position classifications. Apart from unsubstantiated allegations that the agency misused the merit system as a means of thwarting the appellant's career objectives, the appellant has offered neither evidence nor argument to support an allegation that the Board's decision was unlawful or unreasonable in light of the facts in evidence.

93-P-8 and 94-P-4 (Department of Health and Human Services)

The appellant argued that the job specification for Data Processing Project Manager "changed drastically in a seven month period." He asked why applicants were prohibited from substituting

experience for formal education when the Data Processing Project Manager position was posted in April, but permitted to substitute experience for education when a similar position was posted in November. He suggested that, "The only logical explanation is to fit the qualifications of a previously selected candidate.

That argument is contrary to the weight of the evidence. Ms. Platt made an uncontroverted offer of proof that changes to the Data Processing Project Manager specification were not requested by the Department of Health and Human Services, but initiated by the Division of Personnel in response to complaints received by the Division that the original qualifications could be deemed discriminatory. The Board recognized the fact that Mr. Cronin possessed the formal education required by the first specification, and that revisions to the specification broadened the field of candidates. However, that fact does not support the appellant's allegation that the specification was changed in order to accommodate a particular candidate's experience, or his insinuation that pre-selection had occurred.

The appellant argued that the Board's decision was inconsistent with the premise that State service should be made attractive as a career, since the agency failed to provide the appellant with job assignments that would provide the experience and training he needed to improve his chances of promotion. Again, that allegation is contrary to the weight of the evidence. As the Board's decision noted,

"The specification did not require Mr. Cronin or any other candidate to have attained all the necessary work experience through employment by the State. Since both specifications allowed the substitution of approved additional education for the required work experience, Mr. Cronin's management 'experience' could have been derived from additional training and education. The Board found that he bore some responsibility for attaining the level of knowledge, if not a degree of proficiency in those areas, if he wanted to be considered seriously for promotion."

The appellant argued that, The Rules of the Division of Personnel allow for a relatively new supervisor to hire his/her choice for the vacancy by placing emphasis on areas outside of the job

specification and posting." Again, that argument is contrary to the weight of the evidence. Ms. Platt made an uncontroverted offer of proof that both Data Processing Project Manager positions, salary grade 30, were, "highly visible, highly responsible management level positions with broad responsibility for management of programs and staff," The agency's decision to seek candidates with managerial, administrative and systems development experience is quite consistent with the positions as described. Mr. Cronin failed to persuade the Board that, "he understood the concept of system 'users,' that he was capable of developing policies and procedures, that he had a sufficient understanding of systems development and management, or that he possessed an understanding of personnel management and administration to supervise and direct a professional and technical staff," all of which are consistent with the described positions of Data Processing Project Manager, salary grade 30.

Finally, through use of a sports metaphor, the appellant argued that the appellant's burden was insurmountable, that the ground rules were constantly changing, and that the Board should simply ask the Director of Personnel to initiate rule-making to add promotion appeals to the list of invalid appeals. In the first instance, the Board does not believe that the appellant's burden is insurmountable. There is no question that the appellant's burden is substantial. Historically, agencies have enjoyed broad discretion in selecting for promotion those candidates they deem best qualified and best suited for the position. Similarly, agencies have long been permitted to deny selection to those employees who are deemed to lack the personal and professional qualifications for promotion. [See: Division of State Police v. Personnel Commission, 120 NH 72 (1985)] On the other hand, if the appellant had offered evidence to support a claim that the agency abused its discretion, his burden would have been met. However, the appellant failed to produce evidence supporting the grounds for his appeal. He did not produce evidence of superior qualifications for promotion or greater capacity for the vacancy. He failed to substantiate his claim of anti-union animus. He failed to persuade the Board that the agency sought or participated in revision of the job specification to accommodate another candidate. Finally, he failed to persuade the Board that his 20 years of service, his desire to advance his career, and his own belief that he could learn to perform the functions of the position should be weighed more heavily than the agency's assessment of his capacity and suitability for the vacancy.

The appellant failed so persuade the Board that its decision in these appeals was either unlawful or unreasonable in light of the facts in evidence. Accordingly, the Board voted unanimously to deny the Request for Reconsideration.

THE PERSONNEL APPEALS BOARD



Mark J. Bennett, Chairman



Robert J. Johnson, Commissioner



Lisa A. Rule, Commissioner

cc: Virginia A. Lamberton, Director of Personnel, 25 Capitol St., Concord, NH 03301
Thomas Hardiman, SEA Director of Operations, PO Box 3303, Concord, NH 03302-3303
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State of New Hampshire



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APPEAL(S) OF FRANCIS X. CRONIN
Docket #94-P-4 and #93-P-8
Department of Health and Human Services

September 21, 1994

The New Hampshire Personnel Appeals Board (Bennett, Johnson and Rule) met Wednesday, August 31, 1994, to hear the appeals of Francis Cronin, an employee of the Department of Health and Human Services. Mr. Cronin was represented at the hearing by Thomas F. Hardiman, SEA Director of Field Operations. Sandra Platt, Administrator, appeared on behalf of the Department of Health and Human Services. Mr. Cronin was appealing his non-selection to two separate postings for the position of Data Processing Project Manager, salary grade 30.

Before taking up the merits of Mr. Cronin's current non-selection appeals, the Board briefly reviewed Mr. Hardiman's request dated June 30, 1993, that the Board hold the instant appeals in abeyance until the Board could respond to the May 30, 1993 request for reconsideration of his appeal #90-O-5, arising from an allegation that the appellant's former employer, the Division of Information Services, had failed to properly post a similar promotional opening.

Ms. Platt objected to linking the current appeals (#93-P-8 and #94-P-4), with the former appeal (#90-O-5), noting that the instant appeals arise from Mr. Cronin's non-selection for posted vacancies in the Department of Health and Human Services, and were completely unrelated to his prior appeal arising out of a position posting in the now-abolished Division of Information Services. When the Chairman suggested that Docket #90-O-5 might be moot, Mr. Hardiman said that he intended to address the case only to illustrate how, historically, Mr. Cronin had been kept "down". The Board advised the parties that it would hear the instant appeals on their own merits, but would also review the pending reconsideration request.

The Board heard Mr. Cronin's appeals on offers of proof made by the representatives of the parties. At the request of the appellant with the concurrence of the State, the Board agreed to consolidate the appellant's two outstanding appeals. The record consists of the audio tape recording of the hearing and the documents exchanged by the parties and submitted to the Board prior to the hearing.

After considering the offers made by both parties, the Board found that the following facts were not in dispute:

1. Mr. Cronin is currently employed by the Department of Health and Human Services as a Management Information Systems Analyst/Programmer II.

2. Mr. Cronin applied for promotion to a vacant position of Data Processing Project Manager (position #12474) which was posted on April 27, 1993. That position required a Bachelor's degree from a recognized college or university with major study in business administration or computer science with special training in systems and procedures, systems planning, or EDP program courses. Each additional year of approved formal education could have been substituted for one year of the required work experience. The position also required eight years of experience in systems analysis or data processing with at least three years of supervisory experience in a large scale computer environment. Additional years of related work experience could not have been substituted for the formal education required by the class specification.
3. Mr. Cronin was certified as meeting the minimum entrance requirements for the position. Mr. Cronin was not selected for promotion, and was so notified by letter dated May 12, 1993, signed by Moe Fortier, Director of MIS in the Bureau of Management Systems/COAF, Department of Health and Human Services.
4. The May 12, 1993 notice of non-selection stated that his skills and experience were different from the particular requirements of the job. Additionally, the letter listed four personal and/or professional qualifications which the department had utilized in determining that Mr. Cronin was not the most qualified candidate for selection to the vacancy.
5. Mr. Cronin applied for promotion to a vacant position of Data Processing Project Manager (position #12463) which was posted on November 24, 1993. That position required a Bachelor's degree from a recognized college or university with major study in business administration, computer science, mathematics, physics, engineering or a related field, with special training in systems and procedures, systems planning, or EDP program courses. Each additional year of approved formal education could have been substituted for one year of the required work experience. The position also required eight years of experience in systems analysis or data processing with at least three years of supervisory experience in a large scale computer environment. Each additional year of approved work experience could have been substituted for a year of required formal education.
6. Mr. Cronin was certified as meeting the minimum entrance requirements for the position. Mr. Cronin was not selected for promotion, and was so notified by letter dated December 15, 1993, signed by Moe Fortier, Director of MIS in the Bureau of Management Systems/COAF, Department of Health and Human Services.
7. The December 15, 1993 notice of non-selection stated that the appellant's skills and experience were different from the particular requirements of the job. Additionally, the letter listed four personal and/or professional qualifications which the department had utilized in determining that Mr. Cronin was not the most qualified candidate for selection to the vacancy.

Through the documents filed with the Board, and the offers of proof made by his representative, Mr. Cronin asserted that in May, 1993, he was the only permanent, full-time

employee who applied for, and met the minimum qualifications for promotion to, Data Processing Project Manager. He argued that the agency was obliged, under the provisions of Per 603.02, to promote him instead of hiring from outside the department, since he was deemed "qualified" for promotion by the Division of Personnel. Mr. Cronin also asserted that when the second Data Processing Project Manager vacancy was posted, the minimum qualifications had been amended to allow experience to substitute for education, thereby allowing the selection of individuals who would not have been certified as meeting the minimum requirements of the position as it was posted in April, 1993.

Through the documents filed with the Board, and the offers of proof made by its representative, the Department of Health and Human Services asserted that the agency was under no obligation to promote Mr. Cronin solely because he met the minimum qualifications for consideration and was an internal applicant for promotion. Ms. Platt asserted that both positions for which Mr. Cronin had applied were highly visible, highly responsible management level positions with broad responsibility for management of programs and staff. She asserted that without a fully qualified, competent systems manager, both the NECSES and EMS systems would have to be "out-sourced", at a considerable cost to the State. Ms. Platt asserted that outsourcing would have resulted in a loss of control by the department and probably would have necessitated laying off other employees within the department to offset the costs.

Ms. Platt stated that at the time of posting, the NECSES system which handles child support payments statewide had a backlog of 15,000 manhours of customer requests. She stated that the EMS system, with a client base of 90,000, had a backlog of 32,000 manhours of customer requests. She said that during his interviews for both positions, Mr. Cronin failed to demonstrate that he understood the concept of system "users", that he was capable of developing policies and procedures, that he had a sufficient understanding of systems development and management, or that he possessed an understanding of personnel management and administration to supervise and direct a professional and technical staff.

Ms. Platt stated that the minimum requirements on the specification for Data Processing Project Manager were revised as a result of complaints received by the Division of Personnel, not because of a request by the Department of Health and Human Services. Ms. Platt stated that the Director of Personnel would testify that restricting the educational requirements to business administration or computer science could be considered a form of age discrimination. Many older workers completed their formal education before degrees were awarded in "computer science". She said that the Director would testify that she had revised the minimum qualifications to allow applicants possessing degrees in mathematics, physics, engineering or a related field, or extensive experience in systems and procedures, systems planning, or EDP program courses, to qualify for consideration as vacancies arose. She said that the timing of the change in qualifications was merely coincidental, and that with or without the change in qualifications, Mr. Cronin would not have been selected for promotion because he lacked personal and professional qualifications required for performance of the job.

Through offers of proof, the appellant attributed his lack of managerial experience to the agency's failure to give him the appropriate work assignments where he might have gained experience and skill in hiring and firing, managing a data processing project group, or developing processes, policies, procedures and standards. Mr. Cronin asserted that the

appointing authority could not now deny him promotion for lacking experience in work which the appointing authority failed to assign to him. He argued that if his experience as a Management Information Systems Analyst/Programmer was sufficient to certify him as meeting the minimum experience requirements of the position, it should have been sufficient to demonstrate his capacity for the promotion.

The specification did not require Mr. Cronin or any other candidate to have attained all the necessary work experience through employment by the State. Since both specifications allowed the substitution of approved additional education for required work experience, Mr. Cronin's management "experience" could have been derived from additional training and education. The Board found that he bore some responsibility for attaining a level of knowledge, if not a degree of proficiency in those areas, if he wanted to be considered seriously for promotion.

Per 603.02(a) states, "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." While full-time employees are the first group of employees who are entitled to consideration for such selection, there is no requirement that an agency select an employee solely on the basis of his/her attainment of the minimum education and experience to qualify for consideration. There is no requirement that an agency promote an individual who lacks the appropriate work experience simply because the applicant is an employee who meets the minimum requirements for consideration.

Per 602.02(c) states that employees may be denied selection if, in the opinion of the avvoiting authority, an applicant is considered to lack personal or professional qualifications for promotion. If an agency can demonstrate that the personal and professional qualifications cited as the basis for non-selection are bona fide requirements for the satisfactory performance of the job, and that there is a basis in fact upon which to form the opinion that the employee lacks those characteristics, an employee may be denied selection.

Mr. Cronin asserted that there had always been some level of animosity in his department because of his continuing role as an "employee advocate", and that his union activities were at the core of the decision not to select him for promotion. Again, the Board does not agree. The appellant failed to make any offers of proof or to supply any documentary evidence which would support such a conclusion.

On the record before it, the Board found that under the provisions of Per 602.02(c), the appointing authority did have articulable reasons sufficient to form the basis of its opinion that Mr. Cronin was not the most qualified candidate for promotion to Data Processing Project Manager. Accordingly, the Board voted unanimously to deny Mr. Cronin's appeal.

Mr. Cronin failed to demonstrate that the agency abused its discretion by placing emphasis on managerial, administrative and systems development experience when selecting a candidate for the position of Data Processing Project Manager. Mr. Cronin failed to demonstrate that the agency unreasonably denied him promotion because he lacked that experience, or that the only way he could have gained the necessary experience was through his employment with the State

of New Hampshire. Mr. Cronin failed to persuade the Board that the agency had any obligation to improve his opportunities for promotion by giving him work assignments at a level beyond those normally associated with his position of Management Information Systems Analyst/Programmer II, or that they were demonstrating any animus by not grooming him for promotion.

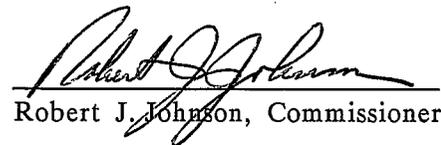
On the record before it, the Board found that Mr. Cronin met the minimum requirements for consideration of his application for promotion, but did not demonstrate a capacity for the vacancy or the personal and professional qualifications necessary for promotion to Data Processing Project Manager. Accordingly, the Board voted unanimously to deny his appeal.

Having voted to deny Mr. Cronin's appeal of non-selection for promotion to Data Processing Project Manager at the Department of Health and Human Services, the Board also reviewed its decision in his earlier appeal of an alleged improper posting through his former employer, the Division of Information Services. That appeal, which sought to have three positions in the Division of Information Services declared vacant to allow Mr. Cronin to apply for promotion to one of the proposed new vacancies, was dismissed by the Board as untimely. The Board continues to find that the appeal was untimely. Inasmuch as the Division of Information Services no longer exists, there is no remedy available and the appeal is moot. Accordingly, the Board also voted to deny the appellant's request for reconsideration of the Board's decision in Docket #90-O-5.

THE PERSONNEL APPEALS BOARD



Mark J. Bennett, Vice-Chairman



Robert J. Johnson, Commissioner



Lisa A. Rule, Commissioner

cc: Virginia A. Lamberton, Director of Personnel
Sandra Platt, Administrator, Health and Human Services
Stephen J. McCormack, SEA Field Representative

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APPEAL OF FRANCIS CRONIN

Division of Information Services

Docket #90-0-5

May 17, 1990

The New Hampshire Personnel Appeals Board (Bennett, Cushman and Johnson) met Wednesday, April 25, 1990, to consider the appeal of Francis Cronin as filed April 24, 1990, by SEA Field Representative Margo Hurley. Mr. Cronin, an employee of the Division of Information Services, Department of Administrative Services, cites as the basis for his appeal a violation of PART Per 302.02 of the Rules of the Division of Personnel.

Ms. Hurley asks, "...as a remedy that positions #10242, #10222 and #10256 be vacated by those holding them, that they be posted and posted according to their actual position so that Mr. Cronin may be given a fair and equitable opportunity to apply for promotion". According to Ms. Hurley, Mr. Cronin heard a rumor in late January, 1990, that "three employees in the division who were labor grade 27's in March 1989 were possibly now at labor grade 30. There had not been any postings for labor grade 30 positions. A call to the Department of Personnel confirmed the rumor and an appeal was filed with Director Morrison on February 1, 1990".

The remedy sought by Appellant would require the vacation of three separate positions, and presumably the discharge of the three incumbents of those positions, solely for the purpose of allowing Mr. Cronin to apply for such positions. Even if Mr. Cronin were successful in his attempts at promotion to one of those three positions, two would remain vacant, with all three incumbents discharged without cause. As such, the relief requested would not only be beyond the scope of Mr. Morrison's authority, but would appear to request that he effect the discharge, without cause, of three permanent employees.

Per 306.04 of the Rules of the Division of Personnel provides a vehicle whereby an employee may be granted the relief sought by his immediate supervisor, if the supervisor believes that such relief is justified. It is unreasonable to believe that Mr. Cronin's immediate supervisor would have had the authority in February 1, 1990, to order the vacation of three positions which had been filled for the previous nine months in order to provide the requested relief. Thus, it is reasonable to conclude that the only appeal process which could possibly have granted Appellant the requested relief would have been an appeal to the Personnel Appeals Board.

Based upon the foregoing, the Board ruled that Appellant erred by seeking relief through the grievance and appeal procedure outlined in the Rules of the Division of Personnel. His appeal, to be properly filed, must have been filed directly with the Personnel Appeals Board under the provisions of RSA 21-I:58, which provides in pertinent part:

"I. Any permanent employee who is affected by any application of the personnel rules, except for those rules enumerated in RSA 21-I:46, I and the application of rules in classification decisions appealable under RSA 21-I:57, may appeal to the personnel appeals board within 15 calendar days of the action giving rise to the appeal."

Appellant argues that, "In late January 1990, [he] heard a rumor that three employees in the division who were labor grade 27's in March 1989 were possibly now at labor grade 30. There had not been any postings for labor grade 30 positions. A call to the [Division] of Personnel confirmed the rumor ...and an appeal was filed with Director Morrison on February 1, 1990." The confirmation to which Appellant refers is a letter of January 23, 1990 from Personnel Assistant Leo Sorel, which was received by the State Employees' Association on January 25, 1990 (Appellant's Attachment #2). The Board has generally held that the date of the action, in this instance either the posting or the return to grade of the grade 30 positions, is the date from which the fifteen day filing period would begin. For the purpose of discussion in this instance, however, the Board will consider the January 23, 1990 letter (Attachment #2) as the date of the "action" from which this appeal arises.

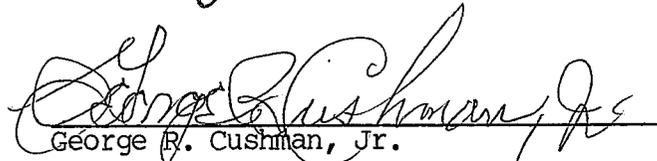
Pursuant to the provisions of RSA 21-I:58 I, a timely appeal must have been

APPEAL OF FRANCIS CRONIN
Docket #90-0-
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filed with the Board within fifteen calendar days of the date of the action giving rise to the appeal. Were such action to have occurred on January 23, 1990, a timely appeal must have been filed not later than Wednesday, February 7, 1990. Having failed to properly file notice of appeal with the Board by February 7, 1990, Mr. Cronin's appeal is dismissed as untimely.

THE PERSONNEL APPEALS BOARD


Mark J. Bennett, Acting Chairman


George E. Cushman, Jr.


Robert J. Johnson

cc: Margo Hurley, Field Representative
State Employees' Association

George C. Jones, Commissioner
Department of Administrative Services

Virginia A. Vogel, Director
Division of Personnel

David S. Peck, Assistant Attorney General
Civil Bureau