State of New Hampshire

PERSONNEL APPEALS BOARD
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APPEAL OF STEPHEN R. FOSTER

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Docket # 2003-P-004

February 10, 2004

The New Hampshire Personnel Appeals Board (Wood, Johnson, and Urban) met on Wednesday, October 1, 2003, under the authority of RSA 21-I:58, I, to hear the appeal of Stephen R. Foster, an employee of the Department of Health and Human Services. Mr. Foster, who was represented at the hearing by Mr. Paul Stokes, SEA President, was appealing the Department's decision not to select him for promotion to the position of Administrator II, Position 14795, at the Bureau of Radiological Health. Attorney John Martin and Ms. Karen Hutchins, 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 and Mr. Foster. The record of the hearing in this matter consists of the pleadings submitted by the parties prior to the hearing, the audio tape recording of the hearing on the merits of the appeal, the arguments presented by the parties at the hearing, the notices and orders issued by the Board, and the documents admitted into evidence as follows:

Agency's Exhibits:

1. Performance Summary of Stephen R. Foster for the period of February 4, 2001 to February 7, 2002 dated April 15, 2002.

Appellant's Exhibits:

1. Letter dated February 3, 2003 with attached tabulated set of documents consisting of tabs 0, 1, 2, 3, 4, 5, and documents made a part of each tab, as summarized or explained in the letter of February 3, 2003.

2. Letter of appellant dated September 19, 2003, with copies of ten matters identified in that letter. Note: We have not set forth in detail in this opinion each of those

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attachments and reference may be made to the official record for these documents. The attachments accompanying these cover letters of February 3, 2003 and September 19, 2003 are extensive and contain substantial information from Appellant concerning questions he has raised about the application, interview, and decision-making process, as well as detailed explanations as to his understanding of his qualifications and experience.

Mr. Martin began his presentation by explaining that Ms. Veronica Malmberg, an Administrator IV, was the appointing authority authorized to establish the application and interviewing process for the position of Administrator II in the Bureau of Radiological Health. He explained that Mr. Foster is currently employed within the Bureau as a Health Physicist I. Ms. Malmberg oversees the laboratory.

Mr. Martin explained that there were two internal applicants for this position, one of whom was Mr. Foster. Although not required to do so, Ms. Malmberg established a panel, consisting of Ms. Malmberg, Ms. Mary Holiday, and two members from the State Advisory Committee, to conduct oral interviews with both applicants. After the oral interview process and review of the applications, the appointing authority determined that the two internal applicants did not have the technical and management skills required for the position. At that point the position was opened for external applications and there were forty-one applications, nine of whom were qualified. Seven were not selected and two were offered the position over salary demands. The position was not filled and is currently subject to a hiring freeze. This hiring freeze applies to all generally funded positions, even those that are partially funded.

The oral interview process consisted of a series of questions and an interview that lasted between one and a half and two hours with Mr. Foster. In response to a specific question raised by Mr. Foster to Ms. Malmberg prior to the hearing, she advised him that one of the questions would be a general question as to why he should be selected for this position. At the time of the interview, Mr. Foster had been with the Department for about two years. However, he had never been in a supervisory position. The position of Administrator II requires the delegation of duties and hiring and significant supervisory and management skills.

Mr. Martin stated that there are a number of jobs that Mr. Foster had held in the private sector before becoming a state employee. Requests were made of him for permission to speak with prior employers or supervisors concerning his supervisory abilities, but those requests were denied. His explanation for denying that request was that he could not take the risk that some comment might ruin his career. According to Mr. Martin, the appointing authority had no information concerning Mr. Foster's supervisory skills. His response to the request to contact prior employers also raised the specter of damaging information that might be presented. It was acknowledged that the applicant has the right to refuse to allow contact, but refusal would obviously limit the interview capabilities and the scope of information available to the appointing authority.

Questions were also raised concerning Mr. Foster's interpersonal relations. It was expressed that at times he was argumentative with past supervisors. He also did not want to discuss his educational experience other than what was in the personnel file and the application. Also in the interview, Mr. Foster appeared to present negative comments about current supervisors; his negativity was not well received by the review board.

In addition, Mr. Foster's presentation appeared somewhat arrogant as if he knew the answers and the right way to do all of the various matters, but did not recognize that other people had a similar or even greater knowledge. Concern was raised after the interview about his collaborative skills.

Since the position requires significant public outreach, the review board and the appointing authority concluded there was a significant question as to whether Mr. Foster had the requisite skills for that aspect of the position.

In addition, the answers provided by Mr. Foster were one-dimensional and related almost exclusively to emergency response matters. Some of the technical questions were improperly answered, such as a type of meter needed for a certain test. There was also question about his knowledge of the rules and regulations.

Next, Mr. Martin discussed the performance evaluation for Mr. Foster that was submitted into evidence. Generally, the performance evaluation was good, with some "constructive criticisms" in the evaluations. According to Mr. Martin, these were areas of room for improvement. The performance evaluation contained fourteen pages of response by Mr. Foster with numerous attachments to his response. This 'indicated to the appointing authority that Mr. Foster had difficulty accepting constructive criticism.

Mr. Martin then reviewed some of the items in the performance evaluation, and in particular, the concern about Mr. Foster's writing being verbose'and technical. The comment was that he be more concise. Mr. Martin noted that the written response to the evaluation contained thirty-five pages, which seemed to be a fitting example of the concern raised in the evaluation.

With regard to the specific issues raised by Mr. Foster in the letter of February 5, 2003, the first item was the content of the non-selection letter not being sufficient in detail. It was explained that there were additional discussions with Mr. Foster about the reasons for non-selection and there were meetings held with him subsequent to the interview and an offer to have a second interview conducted. This offer was rejected by Mr. Foster.

The second matter raised in the February 5, 2003 letter concerned the actual identity of the appointing authority. It was clear from the information presented to Mr. Foster that Ms. Malmberg was the authority, and Mr. Foster was advised of that prior to the interview. It

was also noted that the Commissioner at the time must approve funding of all positions having a grade of 26 or over, which did not include this position.

The third item raised in the February 5, 2003 letter concerned the proposal by Director Dunn to offer an opportunity for Mr. Foster to present his case before a totally revised interview panel. Although receiving an initially positive response from Mr. Foster's representative, Mr. Foster rejected the offer of a second interview alleging that it would violate the rights of the other applicant.

The fourth item raised by Mr. Foster in the February 5, 2003 letter dealt with the specifics of Per 602.02(a) in which he has read the words "whenever possible" in the language of the rule as requiring appointment of current state employees. Mr. Martin pointed out that there is no such requirement in the rule.

The fifth item raised in the letter of February 5, 2003 referred to a change in the supplemental job description after the non-selection. Mr. Martin indicated that this was not in fact the case and that the supplemental job description reviewed by Mr. Foster in which he believed there was a change was indeed for a totally different position.

In summary, Mr. Martin argued that the requested relief from Mr. Foster was not appropriate and that the non-selection should be upheld. He also emphasized the fact that the Agency did not believe there was an environment of retaliation in the Bureau due to this appeal.

Mr. Stokes reviewed the four points in the appeal set forth in the February 5, 2003 letter. In particular, the first point argued the non-selection letter was not sufficient with respect to the content requirements for a reason for the non-selection. Mr. Stokes referred to the appeal of Cheryl Corson decided by the Personnel Appeals Board on March 23, 2000, Docket #00-P-5, in which the Board said that the reasons in the non-selection letter should be "sufficiently specific that the Appellant may understand why the selected candidate's knowledge or experience more closely matches the skill level required for the position." The letter of non-selection to Mr. Foster in this case states simply that Mr. Foster had not been selected "due to your limited experience in operational health physics." This letter dated July 18, 2002 is found in Tab 3, Exhibit E of Mr. Foster's exhibits of February 2, 2003. This, according to Mr. Stokes, is insufficient notice to Mr. Foster of the reasons for his non-selection.

The second question raised in Mr. Foster's appeal related to the identity of the actual appointing authority. While Ms. Malmberg, before the oral interviews, clearly indicated that she was the appointing authority in an e-mail dated June 19, 2002 to Mr. Foster, according to Mr. Stokes, this identification was confusing in light of an earlier e-mail from Ms. Malmberg to Mr. Foster dated June 3, 2002 in which Ms. Malmberg stated that Director Dunn "will be weighing in on the final choice." She also indicated that since it was a management position, the Commissioner would also have to approve the appointment. This information appeared to Mr. Foster and to Mr. Stokes to be confusing and somewhat

shifting of responsibility for making the decision. They argued that such was not permitted under the administrative rules, and therefore the process was sufficiently flawed so that it should be overturned.

They next argued that the proposed informal dispute resolution made by Director Dunn during step 2 of the informal appeal process was merely an attempt to appease Mr. Foster. The offer to have new oral interviews for the applicants appeared to Mr. Stokes and Mr. Foster as further indication of major flaws in the system. Mr. Foster believed that a letter of Ms. Dunn dated October 11, 2002, found in Tab 2, second document, of Mr. Foster's exhibits of February 3, 2003, was unfair to him and to the other applicant in that it seemed to be singling him out for some special treatment. My. Stokes indicated that Mr. Foster did not want to have the position "handed to him" but rather wanted to earn it.

The fourth point in the letter of appeal stressed the concept that the appointing authority by non-selecting the two in-house applicants and then going to the outside to attempt to find someone to fill the position, violated the provisions of PER 602.02(a) that require the Agency "whenever possible" to fill a vacancy from within the Agency. Mr. Stokes argued that if the appointing authority had given proper reasons for Mr. Foster's non-selection, then their fourth point of appeal would not be an issue. However, Mr. Foster does not believe there is other evidence to support the non-selection, and therefore the refusal to appoint Mr. Foster is a violation of the obligation of the Personnel rules to hire from within. They also questioned the concept of the "structured interview" and referred to e-mail from Ms. Hutchins, the Human Resources Administrator for the Department of Health and Human Services, to the effect that the "structured interview" process was not a requirement for this level of administration hiring. The fact that oral interviews were conducted implies that this was a structured interview, according to Mr. Stokes, and the process that was followed of not keeping the record of the oral interview and the notes taken by the interviewers violated the obligations surrounding the structured interview process. Not keeping the documentation and scoring sheets, he argued, is a further basis to overturn this decision and to begin the application process again or to allow Mr. Foster to serve as the Administrator II under the circumstances.

The fifth point in their appeal regards alleged changes in the position requirements after the close of the internal posting period. In support of this position, they referred to an e-mail notice that was posted by Mr. Wayne F. Johnston on July 19, 2002, the day after the non-selection letter. That e-mail, the eleventh page under Tab 2 of Mr. Foster's Exhibits of February 3, 2003, refers to the position of the Radiological Health Bureau Chief Administrator II and suggests that people interested in applying can send a cover letter and resume to Ms. Malmberg. Mr. Stokes argued that this was an unfair changing of the terms of the position to the detriment of Mr. Foster. Although they were advised that this was not an official posting, the Appellant argued that it was still putting Mr. Foster and the other applicant from the Agency at an unfair advantage as compared to applicants from outside the Agency.

After Mr. Stokes had made his presentation concerning his points of appeal, he asked the Board if Mr. Foster could make some statements, and the Board agreed. Mr. Foster continued the presentation and referred to the issue concerning his references from prior employers. He said that only one person had been contacted of the references he had provided to the appointing authority and this was a previous supervisor from New York. Others were apparently not contacted, so he questioned the position of the State with regard to obtaining his references. Particularly he referred to a July 12, 2002 e-mail to Mr. Foster from one of the references provided by Mr. Foster. This e-mail message is attached to the September 19, 2003 letter from Mr. Foster as Exhibit 1. According to Mr. Foster, this was the only person that he knew had been contacted and that his prior supervisor from New York had not been contacted.

He also referred to his writing ability, and said that, in his opinion, he was a fairly well-skilled writer. He did admit that he was not prone to poetic prose, but nevertheless felt he was an above-average writer. With regard to his comments on the performance evaluation, he knew he had a right to rebut some of the inferences and felt it was appropriate and necessary for him to do so. He also admitted that he had no supervisory experience with the State, but wanted to gain that experience. He further stated that in his eight years at FEMA, he alleged he did have supervisory experience. He also said he was the supervisor of five people at the nuclear power plant in Illinois which was identified in his application. Finally, he argued that the letter from Director Dunn as part of the Step 2 was merely an attempt to appease him, and was in his opinion, a further violation of the rules. He felt the rules concerning structured interviews had been ignoi-ed "willy-nilly" and that as a union steward, it was his job to try to preserve the rules for everyone. He felt that the letter of Ms. Dunn proposing to have a new interview would have been, in effect, a disenfranchisement of the other applicant.
In response to the presentation from Mr. Stokes and Mr. Foster, Mr. Martin again emphasized the reasons for non-selection that he had spelled out previously. Mr. Martin pointed out that on pages 3 and 4 of Mr. Foster's application for this position of Administrator II, he specifically noted that he did not permit the contacting of Mr. Foster's prior employers at the Federal Emergency Management Agency or the Illinois Power Company. Mr. Martin also noted that the names of references provided eventually by Mr. Foster did not appear to be his immediate supervisors.

With regard to the "posting" on July 19 by Mr. Johnston, Mr. Martin explained that this was not an official posting, but merely an informational posting. The official posting for the position did not change, and anyone contacting Ms. Malmberg would have been given the complete information necessary, and that information would have been the same information provided to Mr. Foster and the other in-house applicant.

With regard to the e-mail from Ms. Malmberg to Mr. Foster dated June 3, 2002 in which she referred to Director Dunn and the Commissioner as being involved in management position appointments, Mr. Martin pointed out that Mr. Foster's request for the information did not specify for which position he was asking her to identify the appointing authority. Mr. Martin

explained that the appointment of a person to the position of Administrator II did not have to be done by the Director or the Commissioner and indeed, Ms. Malmberg was the appointing authority.

Mr. Foster, in closing, argued that the rules have the effect of law and that the Board should review all of this information in light of the preponderance of the evidence and the standards of review in our rules.

After listening to the offers of proof and reviewing the exhibits presented, the Board makes the following findings of fact.

1. The Office of Community & Public Health/Bureau of Radiological Health posted the position of Administrator II, #14795, as open with a recruitment beginning May 14, 2002, with the end date for applications being 'May 20, 2002.

2. In accordance with the Personnel Rules, this posting was initially open only to then-current state employees.

3. Two state employees applied for the position, one of whom was the appellant, Stephen R. Foster.

4. Veronica Malmberg, Administrator IV, was the appointing authority for this position.

5. In order to assist her in interviewing candidates for the position, Ms. Malmberg established an oral interview board consisting of herself and three other persons, two of whom served on the State Radiation Advisory Committee, and at least one of those individuals was not a state employee.

6. Mr. Foster's application for employment listed his prior work for the Federal Emergency Management Agency and the Illinois Power Company, but specifically refused to allow contact with those companies for reference information.

7. The oral interviews were held on June 26, 2002.

8. Subsequent to the oral interviews, Mr. Foster provided names of individuals as references, and at least one of those individuals was contacted on or about July 12, 2002.

9. Mr. Foster had no supervisory experience in the field of administration of radiological health.

10. The comments provided by Mr. Foster dated April 25, 3002 in response to his performance evaluation clearly indicate that Mr. Foster considered himself to be a

"relatively new trainee" at the position of Health Physicist I and that he had a great deal yet to learn about that position.

11. The reasons for the non-selection of Mr. Foster to the position of Administrator II were identified as his "limited experience in operational health physics."

12. Mr. Foster's educational record was not the reason 'for his non-selection.

13. The proposal by Director Dunn to provide Mr. Foster with a second interview for the Administrator II position as set forth in her letter to Mr. Foster dated October 11, 2002, clearly indicates that other candidates would be interviewed "using the same process, tools and procedures as you will experience should you choose to proceed," and did not offer to provide a second interview only to Mr. Foster.

14. The appointing authority determined that the two state employees that applied for the position did not qualify for the position of Administrator II.

15. The e-mail posting on July 19, 2002 was not an official posting of the position for the Bureau Chief, Administrator II.

16. Mr. Foster met the minimum educational requirements for the position of Administrator II.

Decision and Order

The Board recognizes management's broad discretion in determining which employees are best suited for promotion. The Board will generally not substitute its judgment for that of the appointing authority in assessing candidates' qualifications for specific vacancies. 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. As Per 602.02(d) provides, "candidates may be denied selection if, in the opinion of the appointing authority, they are deemed to lack personal or professional qualifications for promotion."

In this appeal, the appointing authority clearly explained to Mr. Foster that he was not selected for the position of Administrator II because the appointing authority did not believe he possessed enough experience in the operational health physics area. This explanation is supported by Mr. Foster's own comments attached to his performance evaluation and his statements at the hearing that he lacked supervisory experience in this area and was still learning the position of Health Physicist I.

Finally, Mr. Foster submitted requests for findings of fact and rulings of law. The Board reviewed the requests and makes the following rulings concerning the appellant's requests.

> The Board DENIES appellant's request for findings of fact and refers to the facts set forth above.
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> The Board also DENIES appellant's request for rulings of law.

Accordingly, the appeal of Mr. Foster is DENIED.

THE PERSONNEL APPEALS BOARD

/s/ _____
Patrick H. Wood, Chair

/s/ _____
Robert J. Johnson

/s/ _____
Anthony Urban

cc: Joseph P. D'Alessandro, Director of Personnel
Attorney John Martin, DHHS
Karen Hutchins, Human Resources Administrator, DHHS
Stephen Foster, DHHS
Paul Stokes, SEA President