

# State of New Hampshire



**PERSONNEL APPEALS BOARD**  
State House Annex  
Concord, New Hampshire 03301  
Telephone (603) 271-3261

## Appeal of Edwin Hanson

Department of Corrections

Docket No. **91-P-36**

May 21, 1992

Edwin Hanson is an employee of the New Hampshire Department of Corrections. He serves as a correctional sergeant on the second shift at the New Hampshire State Prison. He has been a sergeant since **1984**. Sergeant Hanson appeals his non-selection for promotion to the rank of Lieutenant. He is represented in this appeal by State Employees Association Field Representative Stephen J. **McCormack**. The Department is represented by Viola Lunderville, its Administrator of Security. A hearing was held before the Board (Commissioners Bennett, Johnson and Rule) on February 10, **1992**. For the reasons **that** follow the Board upholds the decision of the Department of Corrections, thereby **denying** Sgt. **Hanson's** appeal.

In the context of this appeal there is no contention that Sgt. Hanson is anything but a conscientious and satisfactory employee of the Department of Corrections. Rather, the appellant contends generally that his non-selection for promotion is based upon his level of physical fitness, and the vagaries of the application of the Department of Corrections' rather byzantine policy and

procedure on Personnel Selection, Promotion and Retention, admitted herein as Exhibit 7.

Hanson, testifying on his own behalf, tells us that in his 15 or so years of service with the Department, he has served as a correctional sergeant since November of 1984. He has worked all phases of minimum security operations, in maximum security operations for 7 to 7 1/2 years, and in the medium custody units, at least on overtime. Hanson refers to a speed letter from Prison Warden Cunningham (Exhibit 1) in discussing the reasons for his non-selection to the **Lieutenant's** position he sought. Cunningham suggests that he get on the SERT Team (Special Emergency Response Team) and seek assignment to the medium custody unit (MCN) as a security sergeant, as well as improving property control skills, hygiene, etc.

Hanson says that there are other employees at his level of fitness at the prison. He says that not everyone is on the SERT team, and that he has worked on the MCN and functioned as a Lieutenant serving as Acting Shift Commander when his Captain and Lieutenant were absent. He says he has received nothing but compliments in the performance of his duties, but that he was below the "cut-off" for promotion under the **Department's** system when the opportunity arose. Mr. Hanson appealed because he feels he was unjustly placed (by the Warden, and below the cut-off) on the list. He feels he can do the job, and can, and wants to, contribute to the **prison's** administration.

Sergeant **McGill**, who was selected for promotion to the rank of Lieutenant, has not worked in as many operations areas of the prison as Mr. Hanson, nor had as long a length of service as he, according to Hanson, and this contributes to **Hanson's** concerns. Hanson says that there have been no significant changes in the prison in the past 3 to 4 years, but Sergeants have not acted as shift commanders during that period. Hanson has been a yard sergeant during the past 5 to 5 1/2 years. He says he has never been spoken to about his appearance nor had difficulty adapting to new operational requirements. Although he applied to be on the SERT team, he was not accepted because he did not complete the running test therefore in the time allotted. When he was not selected for promotion he met with Ms. Lunderville to ascertain the reasons. He then appealed to Warden Cunningham and this Board.

Ms. Lunderville, who is responsible for the uniformed officers, tells us in her testimony that she had wanted Mr. Hanson to work on the MCN again because she felt that there had been significant changes in the unit since he last had worked thereon. When Hanson was promoted to Sergeant, cross-training and **cross-**working of the type now practiced was not in place. Each housing unit is a mini-prison now, and no one with a rank lower than Lieutenant may be in charge of the prison on a temporary basis, although that may have occurred in the more distant past. One of the Sergeants promoted, Mr. Dragon, has barely three years of experience, but has unit experience, including "shock

**incarceration**" experience. His promotions have come quickly. He has a military background.

The problem of promotion is, of course, to fairly select the best qualified candidate for the promotional position in accordance with the Rules of the Division of Personnel and other applicable law. The Department contends that it does this pursuant to the above-referenced policy (Exhibit 7). The appellant disagrees, asserts that the policy is, in part, the problem, and that extraneous factors such as his alleged fitness level and his past duty assignments were the basis for his non-selection, although these are contended not to be appropriate qualifications for the position, and he contends himself to be otherwise well qualified, sufficiently senior, and suitable for promotion.

The appellant's representative makes much of our Promotion Appeals Tribunal's decision in the Appeal of Michael Beadle, No. 91-P-11 (04/03/91), which it contends stands for the proposition that the **Department's** policy (Exhibit 7) fails to comport with, or is unlawful under, the Rules of the Division of Personnel. The upshot of the argument is that, once placed upon the promotional list, the appellant must be promoted. We regret the extent to which this oversimplifies the **appellant's** (and his representative's) position; however, to the extent that this reflects that position it is erroneous. In Beadle, we simply require that the **Department's** policy, which we neither approve of nor endorse, be read in consonance with the Rules of the Division of Personnel to permit all qualified applicants to apply for vacant

positions when such positions are to be filled by other than demotion or lateral transfer.

The Board (and the Tribunal) have issued a certain amount of dicta regarding the Department's policy (i.e., Appeal of Hutchins), but has ruled very little about it. Basically, that policy provides for a method of selection of candidates for promotion which is based upon testing, oral boards, ranking, evaluation in light of various factors (which do not appear to be totally objective), and re-ranking by the Warden, in order to produce a list of persons eligible to be promoted. Thus, it appears that the re-ranked list results in persons certified as minimally qualified for the position under Division of Personnel Rules, but who are not considered to be the better candidates therefore by the Warden, being on the promotion list, but below the cut-off, due to the number of promotions to actually be made.

What this does, in effect, is to cloak in objectivity that which is subjective, but which is nonetheless permissible, lawful and consistent with the Rules of the Division of Personnel as a general matter. See, Appeals of Pierre Planchet. It is possible that a candidate for promotion lacks personal qualities making the appointing authority reluctant to appoint the person to a certain position, such as attitude, ability to work with others, irrelevancy of recent experience, etc. So long as the appointing authority chooses the best qualified candidate for the job and violates no law (eg., the prohibition on discrimination on the basis of sex, age, race or religion), we will give the appointing

authority broad discretion to choose the "best qualified candidate." The Department's policy is not at odds with this, it merely obscures the principles. That is, it appears that the reasons for non selection are lost in the method of selection. A candidate is not always clearly told that she or he has personal traits or recent experience unsuitable for the position. He or she is instead told that they are number six on a list where only five are promoted.

The Board does not favor or support this approach. However, in the instant case, the appellant has failed to persuade us that the Department's decision is unreasonable or unlawful. In any event, the appellant was not the candidate just below the ultimate cut-off, but in the second position below. One more vacancy would not have made him a Lieutenant.

The promotional policy thus dealt with, the Department appears, on all of the evidence, to have articulable and lawful reasons for not promoting the appellant. The appellant has failed to meet his burden. The decision of the Department must be sustained.

Appeal denied.

The Personnel Appeals Board

  
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Mark J. Bennett, Acting Chairman

  
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Robert J. Johnson, Commissioner

  
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Lisa A. Rule, Commissioner

Copies: Virginia A. Vogel  
Director of Personnel

Lisa A. Currier  
Human Resources Administrator  
Department of corrections

Viola Lunderville  
Administrator of Security  
New Hampshire State Prison

Stephen J. McCormack  
SEA Field Representative