

State of New Hampshire



PERSONNEL APPEALS BOARD

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

APPEAL OF LT. MARTIN HEON

November 29, 1988

At its meeting of November 22, 1988, the New Hampshire Personnel Appeals Board, Commissioners Cushman, Brickett and Platt sitting, considered the promotional appeal of Lt. Martin Heon, an employee of the Department of Safety.

On September 26, 1988, the Personnel Appeals Board had issued an order allowing the parties ten days to address the question of timely filing. The Division of State Police responded by memo dated September 30, 1988, and the appellant responded by memo dated October 3, 1988.

Based upon the record before it, the Board found that there were no material facts in dispute. Lt. Heon, by his own admission, was aware of his non-selection to the position of Captain by August 22, 1988. Pursuant to the Rules of the Division of Personnel, Lt. Heon's request for hearing should have been filed with the Promotional Appeal Tribunal within five (5) working days of his notification of non-selection. Lt. Heon's appeal to the Promotional Appeals Tribunal was not filed until August 31, 1988, seven days after the date Lt. Heon admitted to knowledge of his non-selection.

Per-A 206.02(a) states in part, "...filing shall not be timely unless the papers are received by the clerk within the time fixed by rule or law." The Board strictly construes its rules in order to insure uniform application to all affected parties. In this case, the Board did not find just cause to waive its rules and accept a late-filed appeal. The Board voted unanimously to exercise the provisions of Per-A 206.03(a) of the Rules of the Personnel Appeals Board, "Dismissal or refusal to hear an appeal."

Lt. Heon's appeal is, therefore, dismissed for failure to timely file.

FOR THE PERSONNEL APPEALS BOARD

A handwritten signature in cursive script that reads "Mary Ann Steele".

MARY ANN STEELE
Executive Secretary

cc: Lt. Martin Heon, Dept. of Safety
Division of State Police
Marjor Lynn Presby, Executive Officer
Division of State Police
Edwin J. Goodrich, Human Resource Coordinator

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APPEAL OF MARTIN HEON

Motion for Rehearing

DATED: November 15, 1989

The Personnel Appeals Board (McNicholas, Johnson and Bennett) met Wednesday, November 15, 1989, to consider the December 15, 1988 Motion for Rehearing filed by former State Police Lieutenant Martin Heon. In his motion, Appellant requested that the Board rescind its November 29, 1988 order of dismissal for failure to timely file, and grant him a hearing to appeal his denial of promotion to the rank of Captain.

On November 7, 1989, Mr. Heon wrote to the Board, forwarding an original and three copies of a request that the Board review his appeal and order, on its own motion, his promotion to the rank of captain. In the materials submitted, Appellant makes reference to two separate promotional issues. They will be dealt with separately below.

The first appeal involved Appellant's denial of promotion to the rank of Captain on August 19, 1988. The Board dismissed this appeal by order dated November 29, 1988, for failure to timely file. Appellant subsequently filed a timely motion for rehearing on December 15, 1988. No record of an answer to that motion appears in the Board's records.

The second appeal again involved Appellant's denial of promotion to the rank of Captain on January 25, 1989. That appeal was placed on the Board's docket of pending promotional appeals. Appellant requested, in part, that this matter be consolidated with his prior appeal of non-selection to the position of Captain. Inasmuch as the original appeal had been dismissed for failure to timely file, the two appeals could not be consolidated in the absence of a ruling on the Motion for Rehearing, which was under consideration at that time by the prior members of the Appeals Board. Consequently, Mr. Heon's second appeal for denial of promotion was held in abeyance pending a response on the December 15th Motion for Rehearing.

As was noted in his most recent correspondence with this Board, Mr. Heon retired from State service on May 15, 1989. No further action was anticipated or taken by this Board.

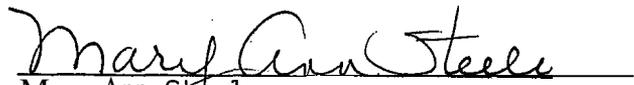
Upon review of the request submitted by Mr. Heon on November 7, 1989, the Board took the following action:

1. The Board has voted to grant Mr. Heon's Motion for Rehearing (December 15, 1988), of his initial denial of promotion to the rank of Captain. The Board voted unanimously to reverse the November 29, 1988 ruling, finding that Mr. Heon's efforts to timely file within the meaning of RSA 21-I:58 provided good and sufficient reason for the Board to waive the requirements of Per-A 209.02, and order a hearing on the merits of his appeal.
2. The Board voted unanimously to deny Mr. Heon's request that this matter and his subsequent appeal of denial of promotion be consolidated. If the Board were to accept Mr. Heon's allegations that the Department of Safety took punitive or retaliatory actions following the filing of his first appeal, then it would appear that consolidating the two matters would be more detrimental than beneficial to a hearing on the merits of the first denial of promotion.
3. The Board voted to dismiss Mr. Heon's request for hearing on the second denial of promotion to the rank of Captain. Under the provisions of RSA 21-I:58, Mr. Heon's eligibility for appeal was predicated upon his being a "...permanent employee who is affected by any application of the personnel rules..." When Mr. Heon retired from State service prior to a scheduling of a hearing on the merits, he ceased to be a permanent employee, rendering his second appeal moot.

The Board will hear Mr. Heon's appeal of non-selection to the position of Captain, Division of State Police (8/19/88) on Wednesday, December 6, 1989 at 9:00 a.m. in Room 401, State House Annex, Concord, New Hampshire. The Board has scheduled one hour for this hearing.

Any motions for special scheduling, continuance or postponement must be made in writing and be received by the Board within ten (10) calendar days of the date of this order.

FOR THE PERSONNEL APPEALS BOARD



Mary Ann Steele
Executive Secretary

cc: David S. Peck, Assistant Attorney General
Lynn Presby, Division of State Police
Richard M. Flynn, Commissioner, Department of Safety
Virginia A. Vogel, Director of Personnel
Judd Gregg, Governor of the State of New Hampshire
Martin Heon, (State Police - Retired)

State of New Hampshire

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PERSONNELAPPEALSBOARD
State House Annex
Concord, New Hampshire 03301
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88-9-105

APPEAL OF MARTIN HEON

Division of State Police

Response to State's Objections to Interrogatories and Exhibits
and
Appellant's Objection and Request for Hearing

November 13, 1990

The New Hampshire Personnel Appeals Board met Wednesday, November 7, 1990, to review the State's Motion to Object to specific interrogatories filed on behalf of Martin R. Heon by his attorneys, Nixon and Branch. The State's Objection, dated October 17, 1990, argues that appellant's interrogatories (#1, 4, 5, 6, 7, 9, 10, 12, 16, 17, 20, 26, 27, 28 and 40) or portions thereof are irrelevant and immaterial to Mr. Heon's promotional appeal. Attorney Nixon's response by letter dated November 2, 1990, states that his client objects to the State's Motion, and asks that the Board schedule a hearing on the issue of the State's objections to the interrogatories, as well as the matter of the State's objections to the admission of certain exhibits by the appellant.

Upon consideration of the rationale presented by the State in support of its objections, the Board rules as follows:

Objection #1 is overruled.

Objections 4, 5, 6, 7, 9, 10, 12, 16, 17, 26, 27, 28 and 40 (as amended) are sustained.

In so ruling, the Board notes that Interrogatories in question refer to the vacant position of Field Area Captain. In Mr. Heon's submissions in his original appeal of non-selection, he provided for the Board's consideration his response to the posting for the August, 1988 promotion to captain. That posting states, "In anticipation of future openings for the rank of Captain, qualified lieutenants are requested to notify the Director's office if wishing to be considered for either position listed below". (Emphasis added) Lt. Heon's name is written next to the listing for "Captain - Radio Communications". There is no indication that Lt. Heon wished to be considered for both vacancies, or that he intended to merely to indicate a "preference" for the position in Radio Communications. Further, in his August 26, 1988 memo to Col. Iverson, Lt. Heon stated, "I am respectfully requesting in writing the reason(s) I was not selected for the Captain's position I applied for." Again, Lt. Heon only referred to the "position" for which he had applied, not the "positions".

With regard to the State's objections to the exhibits which the appellant intends to offer into evidence, the Board will defer ruling on those objections until they are offered into evidence, at which time the State may challenge those exhibits individually. The Board will consider appellant's exhibits to be marked only for the purposes of identification.

The Board denies Appellant's request for a hearing on the issue of the interrogatories or the exhibits. The Board has extended to the Appellant far more opportunity for preparation of his case than is normally accorded to parties in administrative appeals. The Board, upon request of the appellant, has ordered several continuances in order to allow Appellant the opportunity to prepare his promotional appeal. Further, the Board has scheduled two separate evidentiary hearings at which Appellant has presented himself unprepared to go forward absent extensive pre-hearing discovery.

Upon receipt of the first hearing scheduled for December 6, 1989, Appellant filed a November 22, 1989 Motion to Continue, arguing that "As a result of [delays in disposition of his appeal] Appellant needs additional time to prepare a full and fair evidentiary presentation of [his] case. Moreover, Appellant requires additional time in which to pursue the 'informal exchange of information' permitted and[d] encouraged by Per-A 202.08." That motion was filed, and the continuance granted by the Board over the State's objection almost a full year prior to Appellant's November 2, 1990 request for a hearing on the issue of discovery and evidence.

A hearing on the merits of **Mr. Heon's** appeal of non-selection to the position of Captain - Radio Communications was scheduled before the Promotion Appeals Tribunal on March 20, 1990. Because of impending State employee lay-offs, the Board was forced to postpone the hearing. Current counsel for the appellant filed his appearance with the Board on March 20, 1990.

The parties were notified by order dated July 26, 1990 that a hearing on the merits was scheduled for August 15, 1990 before the Promotion Appeals Tribunal. The Division of State Police appeared, prepared to go forward with the hearing on the merits. The appellant argued that he had not had sufficient time to prepare his case, being under the impression that prior to a hearing on the merits, the Board would convene a pre-hearing conference, and that the appellant would be allowed to pursue his discovery requests prior to the Board hearing the merits of **Mr. Heon's** appeal.

During that meeting of the Promotion Appeals Tribunal on August 15, 1990, the Chairman directed the parties be prepared for a hearing on the merits before the full Board on September 19, 1990, and to exchange their lists of witnesses. The parties were further informed that absent extraordinary issues, the Board would entertain no further motions from either party to the appeal.

On August 31, 1990, Appellant submitted to the Board a Request for Special Scheduling, requesting that the Board schedule at least 8 hours for the hearing, indicating that he intended to call 2 to 13 witnesses, introduce 45 exhibits, and offer several letters of commendation for the Board's review. On that same date, Appellant submitted a further Motion for Discovery seeking authorization to depose Col. George Iverson (N.H. State Police, retired), Col Lynn M. Presby, Maj. Donald Anderson, and Maj. Richard Tuck. Appellant also sought permission to promulgate interrogatories upon Col. Presby, Maj. Anderson and Maj. Tuck.

The verbal orders of the Tribunal's August 15, 1990 meeting were reproduced in writing and sent to the parties by facsimile mailing on September 5, 1990. The Board reiterated that no further motions from either party would be considered except for extraordinary reasons.

On September 7, 1990, the Division of State Police responded to Appellant's Motion for Special Scheduling and Motion for Discovery, setting forth the grounds upon which it believed both of appellant's Motions should be denied.

By letter dated September 13, 1990, the Division of State Police forwarded to the Board a letter indicating it had complied with all of the appellant's original discovery requests dated September 13, 1988. Attached was a copy of

a letter dated September 13, 1990 to Attorney Nixon, forwarding an amended witness list and four additional exhibits which would be offered by the State Police during the direct presentation of its case on September 19, 1990.

On September 19, 1990, the date of the scheduled hearing, Appellant submitted to the Board his (1) Response to Answer to Motion for Discovery (2) Response to Answer to Request for Special Scheduling and (3) Second Request for Special Scheduling. Again, the appellant was unprepared to go forward, arguing that his appeal would be prejudiced if the Board denied his requests for additional prehearing discovery.

Throughout the two years in which **Mr. Heon** and/or his representatives have sought to have the Board vacate the Division of State Police decision denying **Mr. Heon** promotion to the position of Captain, Radio Communications, the appellant has provided no evidence to support his argument that the non-selection decision involves any "exceptional circumstances", or that presenting his appeal requires any extraordinary discovery.

Mr. Heon, the appellant, bears the burden of proof. The Rules of the Division of Personnel, Per 302.03, provide in pertinent part:

(a) A vacancy shall be filled whenever possible and reasonable by promotion of a qualified permanent employee from within the department or agency.

(b) Selection for such promotion shall be based upon capacity for the vacant position, ability as evidenced by past performance, and length of service with the department.

(1) It is the prerogative of the appointing authority to give such weight to an employee's job performance as he deems appropriate when considering the employee for appointment to a vacancy.

(2) If the appointing authority finds certain professional and personal qualifications lacking in even ostensibly qualified candidates for promotion, employees may be denied promotion.

(3) While probationary and part-time employees not having six months service within a one-year period can respond to a departmental posting, preference in selection must be given to permanent employees.

In order to sustain his burden, the appellant must initially demonstrate that the successful candidate for the position of Captain, Radio Communications:

(a) Was not a qualified permanent employee from within the department or agency; or

(b) Was selected for promotion without consideration for his capacity for the vacant position, ability as evidenced by past performance, and length of service with the department; or

(c) Was selected without appropriate consideration of his job performance when considering the employee for appointment to a vacancy; or

(d) Was selected despite a finding by the appointing authority that he lacked certain professional and personal qualifications promotion; or

(e) Was selected while employed on a probationary or part-time basis, having less than six months service within a year, receiving preference in selection over qualified, permanent employees.

Per-A 209.01 of the Rules of the Personnel Appeals Board states, "Except as specifically set forth in this Part, the general rules provided in this Chapter shall apply to promotional appeals". The general rules of the Board require that when an employee files an appeal, he must, "...state the action complained of, and [his appeal] shall contained a detailed description of why the appellant believes the action was inappropriate." [See Per-A 202.01 (b)]

Absent a clear explanation of why the appellant believes his non-selection to have been inappropriate, or to have been accomplished in violation of the Rules of the Division of Personnel, the Board will not consider any further requests or motions for special scheduling or pre-hearing discovery.

Both parties will be expected to present themselves before the Board for a hearing on the merits of **Mr. Heon's** appeal on Wednesday, February 13, 1990 at 9:00 a.m. in Room 401 of the State House Annex, Concord, New Hampshire.

THE PERSONNEL APPEALS BOARD


Patrick J. McNicholas, Chairman


Robert J. Johnson


Mark J. Bennett

cc: David Nixon, Esq., Nixon, Hall and Hess, Professional Association

Maj. Thomas Kennedy, Division of State Police

Virginia A. Vogel, Director of Personnel