

# State of New Hampshire

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## PERSONNEL APPEALS BOARD

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

APPEAL OF ALBERT HUTCHINS  
Docket #91-P-30  
Department of Corrections

February 13, 1992

The New Hampshire Personnel Appeals Board (Bennett, Johnson and Rule) met Monday, January 27, 1992, to hear the appeal of Albert Hutchins, an employee of the Department of Corrections. Mr. Hutchins, who was represented at the hearing by SEA Field Representative Stephen McCormack, was appealing his non-selection for promotion to the rank of Corporal. Warden Michael Cunningham appeared representing the Department of Corrections.

The parties stipulated that Mr. Hutchins would have been promoted were it not for his removal from the promotional "register" when the agency determined that his use of sick leave had been excessive.

Mr. Hutchins testified that when he applied for promotion to Corporal, he had been employed with the Department of Corrections for a year and a half. He testified that his performance evaluations had been good, none of his requests for sick leave had been denied, and the Department never required him to secure certification that his sick leave absences were legitimate.

Warden Cunningham argued that Per 302.03 allows an agency to deny promotion to ostensibly qualified candidates for promotion who lack certain "personal and professional qualifications". He testified that the appellant had used 125 hours of sick leave in a year's time, and that those absences were not a result of major injury or illness. He testified that ranking officers are expected to serve as role models for the officers they supervise, and that Officer Hutchins' use of sick leave did not provide the "model" the Department of Corrections expected. He argued that one of the qualifications for

promotion was that employees report to work on time, and that when an employee is out sick an inordinate number of times, that employee is not "reporting to duty" on time or as scheduled. He argued that such attendance indicated a lack of personal and professional qualifications for promotion.

The appellant argued that since the agency had never questioned Mr. Hutchins' use of sick leave, had never denied any of his requests for sick leave, and had never required him to provide certification of his sick leave absences, his use of sick leave could not be used against him in selecting candidates for promotion. In his May 2, 1991 notice of appeal, Mr. Hutchins argued that he had used sick leave for "...an ill child, oral surgery, death in the immediate family and other valid reasons in context with the current Collective Bargaining Agreement". He argued that the agency exceeded its authority in arbitrarily selecting a maximum number of hours of sick leave used to disqualify an otherwise qualified candidate for promotion.

Having considered the testimony and evidence received, the Board voted to deny Officer Hutchins' appeal for promotion to Corporal, but to order the Department of Corrections to return his name to the list of persons meeting the minimum qualifications for promotion. In so doing, the Board made the following rulings of law:

I. Department of Corrections Promotional Registers

Per 101.38 defines "Register" as "...a list of persons who are eligible for a specific classification." Further, Per 101.23 defines "Eligible candidate" as meaning "...any applicant who receives a passing earned rating." PART Per 302 of the Rules of the Division of Personnel describes the manner in which registers of eligible candidates are established and maintained by the Director of Personnel.

The promotional list used by the Department of Corrections is not a "register" within the meaning of the Rules. Authority for establishment and maintenance of a register of eligible candidates for a specific classification is vested solely in the Director of Personnel.

Appellant's Exhibit #3 was a memo dated March 20, 1991 to Viola Lunderville, Administrator of Security from Warden Michael Cunningham, on the subject of "Corporals Semi-Annual Promotion Register." The memo stated:

"The following officers have been selected for promotion to Corporal and will be promoted, as vacancies occur, in the order listed. This list expires September 20, 1991."

The appellant's name appeared fifth on the list as originally published. When Mr. Hutchins' name reached the top of the list, he was informed by the Department of Corrections that because his sick leave usage was excessive, and the extent of his use of leave had just been discovered, his name was being removed from the promotional roster and he would not be considered for promotion until the next "Corporal's Board".

The Board does not find this practice to be in compliance with the Rules of the Division of Personnel which require that all qualified candidates be afforded the opportunity to apply for promotions as vacancies occur and are filled.

By holding promotional boards at six month intervals and failing to post each and every position which is to be filled by promotion, the Department of Corrections has violated and continues to violate the Rules of the Division of Personnel. The Board finds the Department's current promotional policy as set forth in its Policy and Procedure Directive to be in clear violation of the Personnel Rules. Accordingly, the Board strongly recommends that the Director of Personnel refuse to approve or authorize the promotion of any Department of Corrections candidate unless the Department can demonstrate conclusively that it has posted such vacancy prior to selection, and that the promotion was available to all qualified candidates for promotion.

## II. Disqualification for "Excessive Use of Sick Leave"

The parties would be well-served by carefully reading Per 302.03(b) of the Rules of the Division of Personnel pertaining to promotion of "qualified" candidates for promotion.

(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.

Countless factors may be considered by an appointing authority in weighing an applicant's capacity for a vacancy. Attendance is one of them. Merely arguing that an individual's use of leave has not given rise to disciplinary action does not mean that his/her use of leave can not be considered as part of a promotional decision. Inasmuch as the Rules provide for transfer, demotion or discharge of employees who are of such physical condition as to make it impossible for them to do their work, the Board must find that use of sick leave is a matter suitable for consideration in selecting candidates for promotion.

III. Compliance with the Rules of the Division of Personnel in Selecting Candidates for Promotion.

The current Rules of the Division of Personnel are clear and unequivocal in addressing promotion. Vacancies shall be filled "whenever possible and reasonable" by the promotion of qualified permanent employees of the department or agency. If, at the time of selection, the agency has fifteen permanent employees who meet the minimum qualifications for promotion, each should be considered. The Rules neither suggest nor provide for the establishment of the sort of "blacklisting" which the Department appears to have used in this situation. Retaining a ranking of candidates for any period of time beyond that required to select a candidate for the vacancy in question, or informing an employee that he will not be considered for promotion for a pre-established period of time clearly violates the merit principles of employment in State service.

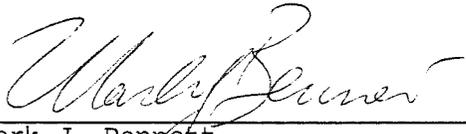
IV. Managerial Discretion in Selection for Promotion

The agency is responsible for selecting the most suitable candidate for promotion. The Board finds it altogether reasonable that an appointing authority should look at an employee's attendance and the likelihood that the employee will regularly report to duty in selecting a candidate for promotion. The Board does not, however, believe that an employee who meets "the minimum qualifications" and is therefore an "ostensibly qualified candidate" can be denied the opportunity to apply for promotion. By removing

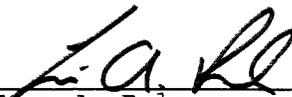
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Mr. Hutchins' name from the list of those eligible for promotion, or by informing Officer Hutchins or any other employee that they may not be considered for promotion constitutes a violation of the Rules.

THE PERSONNEL APPEALS BOARD

  
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Mark J. Bennett

  
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Robert J. Johnson

  
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Lisa A. Rule

cc: Virginia A. Vogel, Director of Personnel  
Warden Michael Cunningham, New Hampshire State Prison  
Viola Lunderville, Administrator of Security, New Hampshire State Prison  
Lisa A. Currier, Human Resource Coordinator, Department of Corrections  
Stephen J. McCormack, SEA Field Representative