

State of New Hampshire

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

RESPONSE TO REQUEST FOR RECONSIDERATION AND REHEARING

Appeal of David Kinsman

Division of Mental Health

dated: March 15, 1990

The Personnel Appeals Board (Bennett, Johnson and Rule) met Wednesday, February 14, 1990, to consider Appellant's Request for Reconsideration and Rehearing, and the State's Objection to same, of the Tribunal's January 3, 1990 decision in the promotion appeal of David Kinsman.

In his January 22, 1990 request for reconsideration and rehearing on Appellant's behalf, SEA Field Representative Stephen McCormack alleges:

- A. that the decision not to promote David R. Kinsman is discriminatory;
- B. that the Division of Mental Health is a recipient of Federal Financial Assistance, and as such is required to comply with all the provisions of Section 504 of the Rehabilitation Act of 1973; and
- C. that the Personnel Rules of the State of New Hampshire, PART Per 102.01(f) prohibit discrimination against any person, and that the Division of Mental Health has discriminated against David R. Kinsman.

By letter dated February 1, 1990, John Wallace, Director of Client and Legal Services for the Division of Mental Health, filed the Division's Objection. He argued that the appellant has merely restated his original arguments made in the initial hearing, and has failed to provide any grounds for claiming unlawfulness or unreasonableness of the Tribunal's decision.

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Per-A 209.05 (c) of the Rules of the Personnel Appeals Board provides that the Board "may review the evidence submitted at the hearing before the Tribunal or may order a rehearing of the matter before the full Board." The Board, at its meeting of February 14, 1989, considered the Motion for Rehearing and the Objection, reviewed the evidence submitted at the promotion appeal hearing, and voted to affirm the Tribunal's order in this matter.

In his request for reconsideration and rehearing, Appellant points to Subpart B, Section 504 of the Rehabilitation Act of 1973, subsections 84.11 and 84.12, specifically, as grounds for his allegation of discrimination against Mr. Kinsman. Appellant argues that "[t]here are four employees within the Division of Mental Health that perform similar duties. These duties and responsibilities could have been distributed to allow for his promotion. There are a percentage of homes that require inspection and these are handicap accessible."

This issue was both recognized and addressed in the Tribunal's decision issued January 3, 1990, and Appellant has provided no new evidence, nor an offer of additional evidence which could not have been provided at the hearing on April 12, 1989, to support his argument. The Tribunal found "that there is no reasonable accommodation that could be effected that would permit appellant to reasonably perform the position for which he applied, and that the appellant, accordingly, does not meet all bona fide occupational qualifications pertinent to the position in question" (emphasis added).

The Tribunal ruled that "'job rearrangement' would [not] produce a job the appellant could perform on a full time basis, or that that would constitute a 'reasonable accommodation' for his handicap..." The Tribunal found "no violations of the Rehabilitation Act of 1973, or other pertinent law, to the extent we need consider these in evaluating the promotional appeal before us. We find that the appellant has failed to meet his burden in connection with this appeal."

Appellant argued that "There are a percentage of homes that require inspection and these are handicap accessible". While those homes may be accessible to

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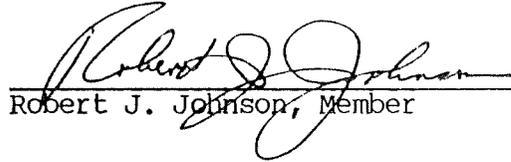
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the clients served who are handicapped, no evidence was submitted to support a conclusion that these sites are also "accessible" for the purpose of inspection.

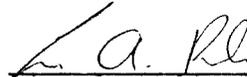
THE PERSONNEL APPEALS BOARD



Mark J. Bennett, Esq., Acting Chairman



Robert J. Johnson, Member



Lisa A. Rule, Alternate

cc: Stephen J. McCormack, SEA Field Representative
Jan D. Beauchesne, Commissioner's Office of Management and Budget
John Wallace, Esq., Division of Mental Health
Virginia A. Vogel, Director of Personnel
David S. Peck, Assistant Attorney General, Civil Bureau