

# State of New Hampshire



## PERSONNEL APPEALS BOARD

25 Capitol Street  
Concord, New Hampshire 03301  
Telephone (603) 271-3261

### APPEAL OF STEVEN MACKINNON

Department of Transportation

#### Decision on Appellant's Motion for Rehearing

Docket #93-P-2

March 21, 1996

On July 14, 1995, the New Hampshire Personnel Appeals Board received the Appellant's Motion for Rehearing of the Board's May 25, 1995, decision in which it found that Mr. MacKinnon's appeal was not timely filed.

Attached to Attorney Allmendinger's July 14, 1995, Motion for Rehearing was an affidavit signed by Mary MacKinnon attesting to her recollection of delivering her husband's appeal to the Division of Personnel at approximately 12:30 p.m., six days prior to the date on which it was marked as received. The Board continues to consider the date and time stamp to represent more reliable evidence than the appellant's wife's recollection, nearly three years later, of the date on which she says she delivered the appeal. The Board continues to find that the appeal was not timely filed. However, given the substantial delay in deciding the instant Motion, the Board reviewed its records to determine the likelihood of Mr. MacKinnon prevailing in his appeal on the merits. The Board reviewed its entire case file including the following:

1. Statement of Interview Board Chairman Duane Potter, dated October 7, 1994, concerning the ranking of applicants for Highway Maintainer III-B
2. Interview Board letter dated June 16, 1992
3. Letters of non-selection to John Sadowski, James C. Jennison, Sr., Wayne R. Russell and Steven D. MacKinnon
4. June 16, 1992 letter of selection to Michael Reifke
5. August 17, 1992 letter from Assistant District Engineer Hiram Morrill to Steven MacKinnon

The Board also reviewed Attorney Allmendinger's October 20, 1994, request that the Board require the Department to submit copies of each of the candidates' applications for the Board's review prior to the Board issuing a final decision.

Per 602.02 of the Rules of the Division of Personnel which was in effect at the time of Mr. MacKinnon's non-selection stated:

"Filling Vacancies Within an Agency. Whenever possible, selection by the appointing authority to fill a vacancy shall be made from within an agency and shall be based upon the employee's:

(a) Possession of the knowledge, skills, abilities and personal characteristics listed on the class specification for the vacant position; and

(b) Capacity for the vacant position as evidenced by documented past performance appraisals."

A review of the applications would not describe the candidates' performance, nor the degree to which they demonstrated the knowledge, skills and abilities listed on the Highway Maintainer III-B position posting:

Ability to operate heavy equipment in difficult work demanding skill in operation. Working knowledge of uses and limitations of heavy duty equipment. Knowledge of diesel powered equipment and skill in their repair. Mechanical aptitude. Ability to follow written and verbal instructions with the ability to compute arithmetic computations. Ability to supervise. Thorough knowledge of rules and regulations for heavy equipment operation. Good physical condition and sufficient strength to do heavy lifting. Willingness to be on 24-hour call and to work under extreme weather conditions. Ability to establish and maintain harmonious working relationships with fellow employees.

Although reviewing the applications would disclose whether or not a candidate was certified as meeting the minimum requirements for education and experience, Mr. MacKinnon never alleged that the successful candidate failed to meet the minimum qualifications for selection. Reviewing the applications would not address the candidates' relative "capacity for the vacant position as evidenced by documented past performance appraisals" as required by Per 602.02 (b). Also, while a review of the applications would disclose the candidates' order of seniority among the candidates, seniority alone does not dictate the order of selection, and the record reflects that Mr. MacKinnon and the successful candidate had worked roughly the same amount of time for the department.

Selection for promotion was not based solely on the weight of the information contained in the applications. Apart from the appellant's assertion that he was "more qualified" than the successful candidate, Mr. MacKinnon's allegations were limited to his claim that the successful candidate enjoyed an unfair advantage over the other candidates because he was a personal friend of one Interview Panel member, and because he had taken a Grader Operator course of which the other candidates were unaware. Those are also allegations which can not be resolved by reviewing the candidates' applications. Accordingly, that request is denied.

On the evidence and argument offered by the parties, the Board found the following:

1. The successful candidate was one of the five applicants who met the minimum qualifications for possible promotion to Highway Maintainer III-B.

2. While Highway Maintainers III-B customarily have experience in a position of Highway Maintainer II prior to promotion, there is no such requirement in the specification or job posting for Highway Maintainer III-B.
3. Mr. MacKinnon and the successful applicant had worked roughly the same amount of time for the Department of Transportation when they applied for the vacant Highway Maintainer III-B position.
4. The three-member Interview Panel, consisting of the Maintenance Superintendent, Patrol Foreman and Construction Foreman, unanimously recommended the promotion of Michael Reifke to the vacant position of Highway Maintainer III-B.
5. The successful candidate was a personal friend of Mark Drew, Patrol Foreman and Interview Panel member. Although Mr. Drew asked to be excused from serving on the interview panel for that reason, his District Engineer required him to participate in the interviews because he would be directly supervising the selected applicant.
6. The successful candidate independently learned of a training course for Grader Operators through one of the publications received at his patrol shed. He completed the Grader Operator certification prior to his selection for promotion.
7. The Interview Panel believed that the successful candidate had demonstrated personal initiative by taking and completing the Grader Operator course.

Although Mr. MacKinnon alleged that the successful candidate had an unfair advantage because he had completed a Grader Operator certification, there was no evidence that anyone involved in the selection process made Mr. Reifke aware of the course in an attempt to give him an advantage over the other candidates, or that anyone attempted to withhold information about the course from the other candidates to put them at a disadvantage. There also was no evidence of bias on Mr. Drew's part in the selection decision. Mr. Drew served on the Interview Panel because he was required to do so, not because he chose to. The recommendation of the panel was unanimous, and the appellant failed to offer evidence or argument to persuade the Board that Mr. Drew's friendship with the selected candidate influenced the remaining two interviewers on the panel.

Agencies enjoy broad discretion in selecting candidates for promotion, and Mr. MacKinnon failed to persuade the Board that the Department of Transportation abused that discretion by denying him promotion to the position of Highway Maintainer III-B. Mr. MacKinnon failed to persuade the Board that he possessed knowledge, skills, abilities and personal characteristics superior to those of the successful candidate. He also failed to offer documentation of past performance appraisals which would demonstrate a superior capacity for the vacant position listed.

In an appeal of non-selection for promotion, the appellant has the burden of

proving that he or she is the best qualified candidate for promotion. Had Mr. MacKinnon's appeal been timely, the preponderance of the evidence reflects that the Department of Transportation acted within its discretion when it denied Mr. MacKinnon promotion to position #3B20365.

Accordingly, the Board voted unanimously to deny the Appellant's Motion for Rehearing.

THE PERSONNEL APPEALS BOARD

  
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Patrick J. McNicholas, Chairman

  
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Mark J. Bennett, Commissioner

  
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Lisa A. Rule, Commissioner

cc: Virginia A. Lamberton, Director of Personnel  
Michael J. Walls, Sr. Assistant Attorney General, Transportation Bureau  
James F. Allmendinger, Esq., 103 N. State St., Concord, NH 03301

# State of New Hampshire



## PERSONNEL APPEALS BOARD

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### APPEAL OF STEVEN MACKINNON

#### Department of Transportation

Docket #93 -P-2

May 25, '1995

On August 10, 1994, the Personnel Appeals Board (McNicholas, Bennett and Rule) met to hear the appeal of Steven MacKinnon relative to his non-selection for promotion to the position of Highway Maintainer III-B. After hearing offers of proof and statements by both parties, the Board issued an order dated September 21, 1994, directing the Department of Transportation to provide additional evidence, including the point scores and rankings of the three candidates interviewed for the position, if those scores were still available. In the event those scores were not available, the Department was to provide that information to the best of the interviewers' recollection. The Board also indicated that the scores and rankings would not be provided to the appellant, but would be reviewed in camera by the Board. The Board also requested copies of the August 17, 1992 letter from the Assistant District Engineer informing Mr. MacKinnon that his appeal was untimely.

Mr. MacKinnon insisted that his appeal had been timely filed. Although the Board's file indicated that the appeal was not received until August 8, 1992, the Board undertook a search of its files to determine whether an earlier copy might have been received and misfiled. The Board discovered that an original copy of the appeal had been received on July 8, 1992 at 1:39 p.m. The notice did not indicate that a copy of the notice had been forwarded to the Department of Transportation as required by Per-A 206.02 (c) of the Rules of the Personnel Appeals Board.

In order to be timely, an appeal must be received by the Board within the time fixed by rule or law. [See Per-A 206.02 (a)] RSA 21-I:58 provides that appeals must be received by the Board within fifteen calendar days of the date of the action giving rise to the appeal. In this case, Mr. MacKinnon's notice of non-selection was dated June 18, 1992. Therefore, in order to be timely, Mr. MacKinnon's appeal must have been received by the Board within fifteen calendar days, or not later than July 3, 1992. However, as July 3, 1992 was the Friday preceding a holiday, and State offices were closed that day, the Board would have considered the appeal timely filed if it had been received at any time on or before 4:30 p.m., Monday, July 6, 1992.

Inasmuch as Mr. MacKinnon's notice of appeal was not received until July 8, 1992, the Board must dismiss the appeal as untimely.

THE PERSONNEL APPEALS BOARD

  
Patrick J. McNicholas, Chairman

  
Mark J. Bennett, Commissioner

  
Lisa A. Rule, Commissioner

cc: Virginia A. Lamberton, Director of Personnel  
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# State of New Hampshire



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**APPEAL OF STEVEN D. MACKINNON**  
**Department of Transportation**  
**Docket #93 - P - 2**

September 21, 1994

The New Hampshire Personnel Appeals Board (McNicholas, Bennett and Rule) met Wednesday, August 10, 1994, to hear the appeal of Steven D. MacKinnon, an employee of the Department of Transportation, concerning his non-selection for promotion to the position of Grader Operator (Highway Maintainer III-B), DOT District 5. Mr. MacKinnon appeared pro se. The Department of Transportation was represented by Assistant Attorney General Michael J. Walls.

At the outset of the hearing, the Department of Transportation asked the Board to dismiss the appeal, stating that it was not timely filed. In support of that Motion, the Department stated that the candidates had been notified by letter dated June 19, 1992, of the selection decision. Mr. MacKinnon then met with Duane Potter, Maintenance Supervisor, on June 24, 1992, to discuss why the appellant had not been selected for promotion. Mr. MacKinnon's appeal was dated July 2, 1992, but was not received by the Board within 15 calendar days of the date of the action giving rise to the appeal, and therefore could not be considered timely. On that basis, the Department asked that the appeal be dismissed. Mr. MacKinnon said that his appeal must have been lost in the mail because he remembered sending it to the Board within the fifteen days of his non-selection for promotion.

The Board took the Motion to Dismiss under advisement and allowed the parties to present their evidence. The matter was heard on offers of proof by the parties.

Mr. MacKinnon alleged that the successful candidate, Mike Rifekey, is a personal friend of Tom Drew, one of the three interview panel members who made the recommendations for promotion to Highway Maintainer III-B (Grader Operator). He said that Mr. Drew was aware of the potential conflict and asked to be excused from serving on the interview panel, but that the District Engineer had insisted that he participate in the interviews. Mr. MacKinnon further alleged that the selected candidate had been given an unfair advantage in the selection process because he had been allowed to take a Grader Operator course which he had found listed in a newsletter at the patrol shed. Mr. MacKinnon said that he had not seen the course offering listed, and did not believe that anyone on the interview panel had brought it to the attention of the successful candidate. However, he believed that taking the course had given the

**Steven D. MacKinnon**  
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successful candidate an unfair advantage over other employees applying for promotion.

Mr. MacKinnon said he was more qualified than the individual selected for promotion, and had more seniority. He stated that Mike Rifecky, who was promoted, had never worked as a Maintainer II, which normally would be expected of a candidate before he could be promoted to Highway Maintainer III-B.

On behalf of the State, Mr. Walls stated that the position of Highway Maintainer III-B was posted on May 25, 1992. A selection panel consisting of Duane Potter, Maintenance Superintendent, Thomas Drew, Patrol Foreman, and Richard Drown, Construction Foreman, had interviewed the candidates who certified for the position. They made a written recommendation to Howard Smith, Highway District Engineer, on June 16, 1992, ranking the top three candidates from first to third in the following order: Michael R. Reifke, Steven D. MacKinnon, Mark Lee.

Mr. Walls admitted that Mr. Drew is a friend of one of the applicants and was sensitive to the possible appearance of partiality if his friend were to be selected for promotion. He asked to be excused from the selection panel. However, the District Engineer insisted that he serve on the interview team because he would be the selected candidate's immediate supervisor. He stated that Mr. Drew would testify that there was no bias in the selection process. Each of the five applicants was asked a series of nine questions. The candidates were all ranked on the basis of their answers. Mr. MacKinnon finished second out of the top three candidates.

Mr. Walls stated that the information on the Grader Operator course which the successful candidate completed had been available to all of the candidates. He said that notice of the course scheduling appeared in the November 1990 issue of Road Business, a magazine which is readily available in the patrol headquarters. He said that Mr. Rifecky had taken the initiative to take the course, which is not offered through the Department of Transportation. He said the interview panel would testify that taking the course was never a requirement of the job, but that it showed initiative on the part of the candidate recommended for promotion. Mr. Walls stated that the selection panel was comprised of three Department of Transportation Supervisors, and that contrary to Mr. MacKinnon's assessment of his own candidacy, the panel did not consider him to be the most qualified candidate for promotion. Mr. Walls said that seniority had been considered in the final selection decision. Mr. MacKinnon and Mr. Rifecky both have approximately the same number of years of service with the Department, although Mr. Rifecky did have a break in service during his employment with the Department.

Mr. Walls asked again that the Board dismiss Mr. MacKinnon's appeal as untimely. In the alternative, he asked the Board to deny Mr. MacKinnon's appeal and affirm the Department of Transportation's decision to deny Mr. MacKinnon promotion to the position of Highway Maintainer III-B.

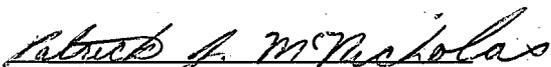
After considering the record in this matter, the Board determined that further evidence should be considered in rendering its decision. Therefore, upon its own motion and in accordance with Per-A 203.09 of the Rules of the Personnel Appeals Board, the Board directs the parties to provide the following evidence:

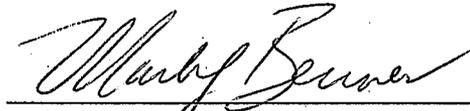
**Steven D. MacKinnon**  
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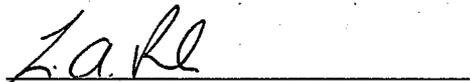
The Department of Transportation shall provide the point scores and rankings as determined individually by each of the three interviewers on the selection panel. If those scores are not still available, the interviewers shall provide the information to the best of their recollection. These scores and rankings will not be provided to the appellant, but will be reviewed in camera by the Board. The Department of Transportation shall also provide copies of the notices of non-selection mailed to the candidates, as well as a copy of the August 17, 1992 letter from the Assistant District Engineer to Mr. MacKinnon advising him that his appeal was untimely.

The evidence requested shall be provided to the Board within twenty days of the date of this order.

THE PERSONNEL APPEALS BOARD

  
Patrick J. McNicholas, Chairman

  
Mark J. Bennett, Commissioner

  
Lisa A. Rule, Commissioner

cc: Virginia A. Lamberton, Director of Personnel  
Steven D. MacKinnon, Appellant  
Michael Walls, Assistant Attorney General, Transportation Bureau  
Charles O'Leary, Commissioner of Transportation