

State of New Hampshire



PERSONNEL APPEALS BOARD

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Concord, New Hampshire 03301
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APPEAL OF THOMAS NORTON

Department of Safety - Division of Fire Safety Services

Docket #96-P-1

February 12, 1997

The New Hampshire Personnel Appeals Board (Bennett, Johnson and Rule) met on Wednesday, May 8, 1996, under the authority of RSA 21-I:58, to hear the appeal of Thomas Norton, an employee of the Department of Safety, concerning his non-selection for promotion to the position of Deputy State Fire Marshal. Mr. Norton was represented at the hearing by SEA Field Representative Stephen J. McCormack. Clarence Bourassa, Esq., appeared on behalf of the Division of Fire Safety Services. The appeal was heard on offers of proof, over the appellant's objection. The record in this matter consists of the audio tape recording of the hearing, documents and pleadings submitted by the parties prior to the hearing, and documentary evidence entered into the record as follows:

- Appellant's #1 January 10, 1996 notice of appeal
- Appellant's #2 January 3, 1996 interdepartmental communication announcing promotion of William Degnan to Deputy State Fire Marshal
- Appellant's #3 January 18, 1996 interdepartmental communication from Donald Bliss to Thomas Norton
- Appellant's #4 December 13, 1995 letter from Gary D. Johnson to Thomas M. Norton
- Appellant's #5 Thomas Norton application for promotion to Deputy State Fire Marshal
- Appellant's #6 Annual Performance Summary - Thomas M. Norton, January 6, 1995
- Appellant's #7 Annual Performance Summary - Thomas M. Norton, November 1993
- Appellant's #8 Letters from the personnel file of Thomas M. Norton
- Appellant's #9 Letter from Peter Hoe Burling in support of the Norton appeal
- Appellant's #10 Personnel Appeals Board decision in Appeal of William Chandler (Docket #92-P-8)
- Appellant's #11 Personnel Appeals Board decision on State's Motion for Rehearing in Appeal of William Chandler (Docket #92-P-8)
- State's #1 Job Posting - Deputy Fire Marshal

- State's #2 November 21, 1995 Written Examination Scores - Deputy Fire Marshal examination
- State's #3 October 23, 1995 memorandum from Donald Bliss to Joseph Canoles, Director of Fire Standards and Training re: Deputy Fire Marshal Oral Board
- State's #4 October 21, 1995, notice of Promotional Examination to Investigators Degnan, Farley and Norton
- State's #5 November 14, 1995 notice to candidates of Oral Review Board scheduling
- State's #6 December 20, 1995 memorandum from Donald Bliss to Commissioner Richard Flynn recommending promotion of William Degnan
- State's #7 January 2, 1996, memo from Donald Bliss to Claude Ouellette directing promotion of William Degnan
- State's #8 January 18, 1996, memorandum from Donald Bliss to Thomas M. Norton notifying him of non-selection for promotion
- State's #9 January 3, 1996 memorandum from Donald Bliss to all FMO Personnel announcing promotion of William Degnan

Mr. McCormack argued that when the Department of Safety posted a notice recruiting in-house candidates for the position of Deputy Fire Marshal, Donald Bliss, State Fire Marshall, entered into an oral contract with all of the applicants, informing them that the candidate who performed best through the selection process would be the selected candidate. Mr. McCormack argued that in order to fairly decide the appeal, the Board needed to test Mr. Bliss' credibility, and that in order to do so, the appellant needed the opportunity to present witnesses and cross-examine Mr. Bliss. He therefore reiterated his objection to proceeding with a hearing on offers of proof. Mr. Bennett advised the parties that if after hearing the parties' offers of proof the Board believed it had insufficient information upon which to decide the appeal, it would call witnesses. Otherwise, the hearing would proceed on offers of proof.

On the merits of the appeal, Mr. McCormack again argued that the selection process utilized by the State in this instance violated the terms of an oral contract which into which Mr. Bliss had entered with all the applicants. He offered to prove through the testimony of Mr. Norton that in discussing the selection process, Donald Bliss had assured the candidates that there would be no "politics" and that the best qualified candidate would be promoted based on the results of the interviews.

Mr. McCormack pointed to the number of letters which had been received supporting Mr. Norton's candidacy for the vacant Deputy Fire Marshal position, as well as the letter from Peter Hoe Burling

explaining his understanding of the promotional process. He argued that the Department of Safety chose the selection process, and while it was clear they were unhappy when that process yielded a result other than that which they had anticipated, they should be required to honor their commitment to that process.

Mr. McCormack argued that the selection process violated the Rules of the Division of Personnel because the Department of Safety failed to provide notice of non-selection to Mr. Norton prior to its announcement that William Degnan had been selected for promotion. He also argued that the reasons which the Department gave to Mr. Norton for failing to select him were contrived, and that any concerns raised about his suitability for the position were not reflected in his performance evaluations. He asked the Board to order the Department of Safety to remove the selected candidate from the position of Deputy Fire Marshal and promote Mr. Norton in his place.

Mr. Bourassa argued that Per 602.02(b) of the Rules of the Division of Personnel provides that in filling a vacancy, the selected candidate is to be that person deemed most qualified "in the opinion of the appointing authority." He argued that determining qualification for a position such as Deputy Fire Marshal requires more than passing a written examination or an oral board, and must take into consideration factors such as leadership, management skills, human relations, and public presence. He argued that these characteristics can not be measured by a test of technical skills. He argued that in making a recommendation for selection to fill the Deputy Fire Marshal position, the person best qualified to measure those skills in each of the applicants was the Fire Marshall, who had worked with the applicants for more than three years. He argued that after reviewing the examination scores and assessing the applicants' performance, the Fire Marshall made a recommendation to the Commissioner, who then reached his own decision about which candidate was best-qualified. Mr. Bourassa argued that even if Mr. Bliss had made an oral commitment to promote solely on the basis of test scores, doing so would have been tantamount to abdicating his responsibility as a manager.

Mr. Bourassa argued that there was no question Mr. Norton was qualified to do his job as a Fire Investigator. However, he argued that an employee's performance or proficiency as an Investigator does not necessarily prove that the employee is suitable for promotion to Deputy Fire Marshal.

Finally, Mr. Bourassa argued that all the applicants had received verbal notice of the selection decision before an announcement was made within the Department. He argued that the Rules make no requirement to provide written notice of non-selection to unsuccessful candidates before announcing the name of the selected applicant. He argued that even if the Board were to find that the Department had an obligation to provide such notice, requiring the Department to remove the successful candidate and promote Mr. Norton would not be an appropriate remedy for the error.

In consideration of the evidence, arguments and offers of proof, the Board made the following findings of fact and rulings of law:

FINDINGS OF FACT

1. In October, 1995, the Department of Safety began an internal recruitment process to fill the vacant position of Deputy Fire Marshal in the Division of Fire Safety.
2. Three Fire Investigators, including the appellant, applied for promotion.
3. Each of the candidates worked under the supervision of the Fire Marshal for three years prior to the promotional posting, and the Fire Marshal was familiar with their performance in that capacity.
4. The three candidates completed a written examination, oral board, written presentation and oral presentation as part of the selection process. The candidates' combined scores ranged from 80.1% to 86.6%. Mr. Norton received the highest combined score.
5. After reviewing the scores, Fire Marshal Donald Bliss made a recommendation to promote Fire Investigator William Degnan, who received the second highest overall score in the examination for promotion.
6. Mr. Norton received verbal notice of his non-selection. In that notice, he was informed that Mr. Bliss did not consider the appellant's promotion to be in the agency's best interest.
7. After departmental notice was made that William Degnan had been selected for promotion, Mr. Norton was informed in writing that in the Fire Marshal's opinion, Mr. Norton lacked the interpersonal and leadership skills which the Deputy Fire Marshal position required.

RULINGS OF LAW

- A. Per 602.02 (b) of the Rules of the Division of Personnel provides that, "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: Possession of the knowledge, skills, abilities and personal characteristics listed on the class specification for the vacant position; and Capacity for the vacant position as evidenced by documented past performance appraisals."
- B. Per 602.02 (b) of the Rules of the Division of Personnel provides that, "The most qualified candidate for the position, in the opinion of the appointing authority, shall be selected from designated groups of employees..."
- C. Per 602.02(c) of the Rules of the Division of Personnel provides that, "Candidates may be denied selection if, in the opinion of the appointing authority, they are deemed to lack personal or professional qualifications for promotion."
- D. Per 603.02 (d) of the Rules of the Division of Personnel provides, "If an employee is not selected after applying for a posted position, the appointing authority shall notify the employee in writing and shall state the reasons why the employee was not selected."

DECISION AND ORDER

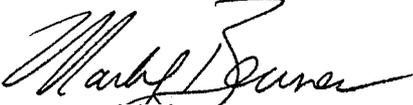
After considering the evidence, oral argument and offers of proof, the Board voted unanimously to deny Mr. Norton's appeal. The appellant argued that his appeal turns on the existence and enforceability of an alleged "oral contract" between Donald Bliss and the candidates to promote the candidate who achieved the highest "score" in the examination and interview process. The Board does not agree. It is clear from the evidence that Commissioner Flynn retained the final authority to select or reject any of the candidates for promotion, regardless of any representation Donald Bliss may or may not have made to the candidates.

The appellant also argued that the Department of Safety violated the notice provisions of Per 602.02 by failing to provide him with timely, written notice of non-selection. He suggested that the

appropriate sanction for such violation would be to order removal of the successful candidate from the Deputy Fire Marshal position, and promotion of Mr. Norton in his place. Again, the Board does not agree. While one might infer that written notice to unsuccessful candidates should follow the selection process immediately, the Rules make no such requirement. Even if there were such a requirement, the Board does not believe that removing a successful candidate from a promotional position and ordering the promotion of a less qualified candidate would be an equitable remedy for a procedural violation on the part of the appointing authority.

Per 602.02 (c) of the Rules provides that an employee may be denied selection if he or she is deemed to lack personal or professional qualifications for promotion. In some instances, that may mean simply that the employee does not possess or did not demonstrate as high a degree of qualification as the one individual who is selected to fill the vacancy.

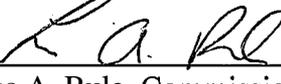
THE PERSONNEL APPEALS BOARD



Mark J. Bennett, Acting Chairman



Robert J. Johnson, Commissioner



Lisa A. Rule, Commissioner

cc: Virginia A. Lambertson, Director of Personnel
Stephen J. McCormack, SEA Field Representative
Clarence E. Bourassa, Esq., Safety Litigation Office