

# State of New Hampshire



## PERSONNEL APPEALS BOARD

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### *Appeal of Daniel Torres*

*Docket #00-P-3*

*Department of Corrections*

*January 18, 2000*

The New Hampshire Personnel Appeals Board (Wood, Rule and Johnson) met on Wednesday, January 5, 2000, under the authority of RSA 21-I:58, to hear the appeal of Daniel Torres, an employee of the New Hampshire Department of Corrections. Lieutenant Torres, who was represented at the hearing by SEA Field Representative Stephen J. McCormack, was appealing the Department's May 10, 1999 decision not to select him for promotion to Corrections Captain. Staff Counsel John Vinson appeared for the Department of Corrections.

Without objection by either party, the appeal was heard on offers of proof by the representatives of the parties. The record of the hearing in this matter consists of the pleadings submitted by the parties, notices and orders issued by the Board, the audio tape recording of the hearing on the merits of the appeal, and documents admitted into evidence as follows:

#### Appellant's Exhibits

1. November 3, 1999 letter from Thomas F. Manning to Stephen J. McCormack, Re: Appeal of Daniel Torres
2. October 26, 1999 letter of appeal to Thomas F. Manning from Stephen J. McCormack, Re: Appeal of Daniel Torres
3. October 18, 1999 letter from Edda Cantor to Stephen J. McCormack, Re: Appeal of Daniel Torres

4. September 23, 1999 appeal letter to Henry Risley, Coinmissioner of Corrections from Stephen J. McCormack, Re: Daniel Torres, Non-Selection for Promotion
5. September 14, 1999 letter to Stephen J. McCormack from Warden Cunningham, Re: Daniel Torres, Non-Selection for Promotion
6. June 23, 1999 letter from Stephen J. McCormack to Michael Cunningham
7. May 17, 1999 letter form Stephen J. McCormack to Michael Cunningham, Re: Daniel Torres, Non-Selection for Promotion
8. May 10, 1999 Memorandum from Michael J. Cunningham, Warden, to Lt. Daniel Torres, Re: Captain Selection
9. Annual Performance Evaluation for Lt. Daniel Torres, Due 11/1/98, issued March 9, 1999
10. Comparison of experience between Lt. Daniel Torres and Lt. Beltrami
11. NH Department of Corrections Policy and Procedure Directive 2.1

State's Exhibits

- A. Pages 9-11 of the Personnel Appeals Board's decision in the Appeals of Robert Thyng, Docket #00-P-1 and #00-P-2
- B. May 10, 1999 memorandum from Warden Michael Cunningham to Lt. Torres Re: Captain Selection
- C. September 14, 1999 letter from Warden Michael Cunningham to SEA Field Representative Stephen McCormack Re: Dan Torres
- D. October 18, 1999 letter from Assistant Commissioner Edda Cantor to SEA Field Representative Stephen McCormack
- E. May 12, 1999 memorandum from Lisa Currier to Warden Michael Cunningham, Re: Temporary Promotion
- F. \*See Below
- G. Performance Evaluation signed by Lt. Torres on 319199
- H. Performance Evaluation signed by Lt. Torres on 9130197
- I. Performance Evaluation signed by Lt. Torres on 10121/96
- J. Performance Evaluation noting "Lt. Torres refused to sign 11121195"
- K. January 9, 1995 letter from Commissioner Paul Brodeur to Lt. Daniel Torres

\*The appellant objected to admission of State's Exhibit F, a Performance Evaluation that Lt. Torres received on November 4, 1999. In support of his objection, Mr. McCormack argued that the evaluation had not been completed by the appellant's supervisor, or considered by the Department during its selection process and therefore was irrelevant. Mr. Vinson argued that the evaluation reflected favorably on the appellant's work performance and covered work performed by the appellant prior to the selection process. He said that the evaluation had been offered by the Department solely for the purpose of presenting a complete picture of the appellant's work performance.

The Board agreed that the evaluation was not germane to the selection process itself since the document was completed after the selection decision itself. However, the Board decided that the evaluation might have bearing on the appropriate remedy if the Board were to find in the appellant's favor. Therefore, without objection by either party, the Board admitted the exhibit into the record for that limited purpose.

Mr. McCormack also objected to State's Exhibit K, arguing that it made reference to a letter of warning that had been removed from the appellant's personnel file in settlement of an appeal. Whereas the letter was part of the appellant's agency personnel record, the Board determined that it was admissible. However, the Board advised the parties that it would give the letter the weight it deserves.

#### Position of the Parties

Mr. McCormack argued that the appellant was the most qualified candidate for promotion to Captain and should have been selected for the vacancy for the following reasons:

1. He had been a Corrections Lieutenant for over seven years, whereas the selected candidate had served as a Lieutenant for only one year.

2. The appellant had performed all the duties and responsibilities of the position of Corrections Captain, having served in that capacity during a temporary promotion to Captain.

3. The reasons given for non-selection were contrary to written documentation regarding the appellant's performance over the past year.

Mr. McCormack argued that the appellant had performed the duties of a Captain on all three shifts for varying lengths of time from 1991 to the present, that he had served as the acting Captain for the last several months prior to his notice of non-selection for the permanent promotion, and that he had been cited for "a job well done" in that capacity. Mr. McCormack argued that Per 602.02 (a) of the Rules of the Division of Personnel provides for selection of a candidate based upon the employee's, "(1) Possession of the knowledge, skills, abilities and personal characteristics listed on the class specification for the vacant position; and (2) Capacity for the vacant position as evidenced by documented past performance appraisals." Mr. McCormack argued that the appellant had demonstrated his possession of the requisite knowledge, skills and abilities, and that his performance as acting Captain proved both his capacity and suitability for the vacancy.

Mr. McCormack argued that although an agency is entitled to some discretion in determining which candidate is best qualified for promotion, the Department's own Policy and Procedure Directive 2.1 provides in most cases for promotion of the candidate with the highest over-all score during the selection process. He offered evidence that Lt. Torres received a score of 76.33, whereas the selected candidate had a score of 76.29, and he argued that although the scores were close, they were not "virtually the same" as suggested by the appointing authority.

Mr. McCormack argued that the criteria for selection to a vacancy outlined by Per 602.02 are meaningless if agencies are allowed in all cases to claim discretion and management prerogative in deciding which employees to select for promotion. He argued that the agency failed to offer any evidence that Lt. Torres lacked the personal or professional qualifications for promotion, or that he lacked the knowledge, skills or abilities to perform the duties of a Captain. Therefore, he argued, Lt. Torres was entitled to the promotion as the candidate with the highest over-all rating under the Department's Policy and Procedure Directive 2.1.

Mr. Vinson agreed that the appellant met the qualifications for selection to the position of Captain and was, in fact, well qualified. However, he argued, under the provisions of Per 602.02(c) of the Rules of the Division of Personnel, management retains the discretion to determine which candidate is best qualified for promotion to a particular position.

Mr. Vinson argued that the appointing authority is in a unique position to understand the nature of the position being filled, to observe the candidates in the performance of their duties, to assess the candidates' suitability for the vacant position, and to determine which candidate was best qualified for promotion. Therefore, he asserted, it would be improper for the Board to substitute its judgment for that of the appointing authority. He argued that unless the appellant had evidence that the selected candidate did not meet the qualifications for promotion, or that the State acted arbitrarily, capriciously, unlawfully, in bad faith, or with some discriminatory motive in selecting another candidate for promotion, the State should prevail in the appeal as a matter of law.

Mr. McCormack argued that if management is allowed in all cases to defend its decision on the basis of managerial discretion, the Rules are meaningless. He asked the Board to find that the appellant's experience, performance and length of service had earned him the promotion to Corrections Captain.

Mr. Vinson argued that the language of the Rules imposes upon management an obligation to select the person best qualified for a vacancy, and to make that decision based on management's "opinion" about the candidates' capacity for the vacancy. Mr. Vinson asked the Board to find that if the evidence demonstrated that any appointing authority acting reasonably could have made the same decision, the decision should stand.

The following facts are not in dispute:

1. By letter dated May 10, 1999, Warden Michael Cunningham advised the appellant that he had not been selected for promotion to the position of Corrections Captain. The Warden's

letter indicated that he believed Lt. Steve Beltrami was the best qualified candidate for the position, "...both in terms of his experience throughout his career as a DOC employee and on his commitment to uphold and foster [the] Department's values."

2. In that letter, Warden Cunningham also informed the appellant that after observing the appellant's performance as the Acting Shift Commander during the previous month, Mr. Gerry, Administrator of Security, believed that the appellant, "...had room to grow, particularly as it pertains to administration and keeping the schedules working properly."
3. By letter dated May 17, 1999, SEA Field Representative Stephen McCormack appealed the decision not to select Lt. Torres for promotion, arguing that the appellant possessed, "...all of the requisite knowledge, skills, abilities, and personal characteristics to be a Corrections Captain." He argued that Lt. Torres had worked as the acting Captain, "...without any adverse actions against him, and in his last evaluation he was recognized for his actions as the acting Captain."
4. By letter dated June 23, 1999, Mr. McCormack confirmed an agreement between the appellant and the Department of Corrections to extend the timeframes for appeal, and to meet some time after July 19, 1999 to discuss the appeal.
5. Warden Cunningham responded to Lt. Torres' appeal by letter dated September 14, 1999. In that letter he indicated that Lt. Torres' and Lt. Beltrami's scores in the selection process were "virtually the same." Lt. Torres scored 76.33 with an oral board score of 20.29, while Lt. Beltrami scored 76.29 with an oral board score of 22.80.
6. By way of further explanation for the selection decision, Warden Cunningham also wrote that, "...both Dick Gerry and I believed [Lt. Beltrami] would bring the required leadership to the 1<sup>st</sup> platoon while at the same time have the administrative abilities to do the paperwork and scheduling tasks that this job entails."
7. Mr. McCormack submitted a letter of appeal dated September 23, 1999 to Corrections Commissioner Risley, reiterating his original arguments and arguing that Lt. Torres had received a higher over-all score than had Lt. Beltrami in the selection process and that he should have been selected for promotion.
8. Assistant Commissioner Edda Cantor responded to the appeal by letter dated October 18, 1999. In that letter, Ms. Cantor cited Departmental PPD 2.1, IV, and the Rules of the

Division of Personnel that provide for selection of "...the most qualified candidate, in the opinion of the appointing authority." She also wrote that Warden Cunningham, in his May 10 letter, "pointed to an area of potential growth for Lt. Torres, which he acknowledged at our meeting."

9. Ms. Cantor upheld the Warden's decision, concurring that Captain Beltrami had the leadership and administrative abilities that the position required.
10. By letter dated October 16, 1999, Mr. McCormack appealed Ms. Cantor's decision to Thomas Manning, Director of Personnel.
11. Director Manning replied by letter dated November 3, 1999, affirming the agency's action.
12. Mr. McCormack appealed that decision to the Board by letter dated November 10, 1999.
13. The Department of Corrections' Performance Summary ranks employee performance as follows: Below Average, 20 - 49; Average, 50 - 69; Above Average, 70 - 89; Exceptional, 90 - 100. Lt. Torres' Performance evaluation dated 3/8/99 has a score of 74, rating his performance as slightly above average.

### Rulings of Law

- A. "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: (1) Possession of the knowledge, skills, abilities and personal characteristics listed on the class specification for the vacant position; and (2) Capacity for the vacant position as evidenced by documented past performance appraisals." [Per 602.02 (a)]
- B. "The most qualified candidate for the position, in the opinion of the appointing authority, shall be selected from designated groups of employees considered in the following order: (1) Full-time employees; (2) Former full-time agency employees who have been laid off within the past 3 years; (3) Probationary employees; and (4) Part-time employees." [Per 602.02 (c)]
- C. "Candidates may be denied selection if, in the opinion of the appointing authority, they are deemed to lack personal or professional qualifications for promotion." [Per 602.02 (d)]

- D. "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 reason(s) why the employee was not selected." [Per 602.02 (e)]
- E. "Applications from fully qualified applicants will then be evaluated and a point score assigned to each applicant..." [Department of Corrections PPD 2.1, IV, 3. c.]
- F. "The hiring authority has the final say as to who is selected." [Department of Corrections PPD 2.1, IV, 3. g.]
- G. "Selection will generally be made, if all things are equal, in the numerical order as they appear on the final score sheet." [Department of Corrections PPD 2.1, IV, 3. g.(3)]

### Decision and Order

Having considered the evidence, oral argument and offers of proof, the Board voted unanimously to DENY Lt. Torres' appeal, upholding the Department's decision not to select him for promotion to the position of Corrections Captain.

The Rules of the Division of Personnel establish the criteria that an appointing authority must apply in assessing a candidate's qualifications for selection to a vacancy. However, once that assessment is made, those same rules impose upon appointing authorities the obligation to select "the most qualified candidate for the position," and to exercise a certain degree of discretion in making that determination.

While there was an undisputed difference of .04 points between Lt. Torres' and Lt. Beltrami's scores in the selection process, the scores alone are insufficient to differentiate between the candidates' qualifications. Mr. Gerry and Warden Cunningham believed that the appellant had "room to grow" in the administrative and scheduling functions associated with the Captain's position. Their assessment of the two candidates was supported by the Assistant Commissioner.

The Rules do provide 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." The Department of Corrections freely admitted that Lt. Torres was not denied promotion because he lacked personal or professional qualifications for the position, but because Lt. Beltrami was better prepared and better suited for the position, and therefore more qualified.

On all the evidence, argument and offers of proof, the Board found that the Department of Corrections acted within its authority as defined by the Rules of the Division of Personnel in denying Lt. Torres selection for promotion to the position of Captain. Furthermore, the Board found that the Department of Corrections adhered to its own rules in effecting the decision to select another candidate for promotion to Captain.

THE PERSONNEL APPEALS BOARD

  
Patrick H. Wood, Chairman

  
Lisa A. Rule, Commissioner

  
Robert J. Johnson, Commissioner

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