

State of New Hampshire



PERSONNEL APPEALS BOARD
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THE STATE OF NEW HAMPSHIRE

DEPARTMENT OF PERSONNEL

PERSONNEL APPEALS BOARD

(PROMOTIONAL APPEALS TRIBUNAL)

Appeal of Barry A. White, Sr.

89-P-7

Opinion and Order of the Tribunal

I. Procedural Backaround and Appearances

Mr. Barry A. White, Sr., timely appealed, on April 18, 1989, his non-selection to the position of Drawbridge Operator in the Bureau of Bridge Maintenance, Department of Transportation. He is and was, at all pertinent times, employed as a Gateman in the Bureau.

Mr. White contends, in his letter of appeal, that it was both "...possible and reasonable..." to promote him. The Board assigned a case number to this proceeding and processed it in the usual manner in accordance with our rules. In his letter of appeal, Mr. White requested to be apprised of the reasons for his

non-selection by the agency. This was done by letter dated April 27, 1989, to the Board accompanied by a contemporaneous letter to Mr. White from Mr. Richard Giles, Sr. Construction Superintendent, who was also a member of the Interview Committee which evaluated applicants for the job in question.

Thereafter, the appeal was scheduled for hearing on July 26, 1989, continued, and heard finally on October 11, 1989. The Board finds no notices respecting the October hearing in its files; however, all concerned appeared and no objection was raised, and we deem the issue to be either moot or waived.

On July 17, 1989, Mr. Kenneth Olson requested that Mr. White should "...elaborate upon the basis for his appeal,..." upon receipt of which reasons for his non-selection, which was provided about April 27, 1989, the Department of Transportation would be prepared to proceed with its case. Mr. Olson provided the appellant's representative and the Board with a list of questions asked the applicants at the time of oral interview. On July 20, 1989, the appellant's representative, Jean Chellis, Field Representative of the State Employee's Association, provided Mr. Olson, Mr. White and the Board with the information Mr. Olson requested. No objection was raised thereto by Mr. Olson or Ms. Chellis at the hearing and the hearing thus proceeded with all preliminary matters resolved or waived.

Mr. Olson represented the New Hampshire Department of Transportation at the hearing. Ms. Chellis represented the appellant.

II. The Record, the Hearing and Factual Findings of the Tribunal

The record in this appeal is comprised of the transcript of the hearing on October 10, 1989, all submittals to the New Hampshire Division of Personnel contained in Case File No. 89-P-7 and Exhibits A-F admitted without objection at the hearing, these being: A - job description of Drawbridge Operator, B - job description of **Gateman**, C - so called "seniority list," D - Giles' letter of April 27, 1989, E - Olson's letter of April 27, 1989, describing the selection and interview process, and F - the interview questions.

The following was adduced from testimony taken under oath at the hearing:

Mr. White testified on his own behalf and indicated that he has been employed by the Department of Transportation for 11 years at the Memorial Bridge in Portsmouth. He is a **Gateman** and has a G.E.D. He has always received good performance evaluations. He has worked as an operator (presumably, duties similar to those of the position for which he was not selected) during his tenure (see Exhibit A).

Mr. White testified that he was transferred from Division 6 to 26, the effect of which was to take six hours of regular overtime away from him and his co-workers, as 12-hour shifts were

then the norm, and different hours were worked. Mr. White contends that Mr. Giles disallowed a pay differential on account of this change. Mr. White claims that he and another employee went to the State Employee's Association about this and that the State Employee's Association resolved it for them.

Mr. White says he was on the bridge one day and that Mr. Giles told him he shouldn't have gone to the Union, that he'd get even, and that that is why he was not selected for promotion.

Mr. Kenneth Olson, Administrator of the Bureau of Bridge Maintenance, New Hampshire Department of Transportation, cross examined Mr. White.

The Department of Transportation called Mr. Giles as its witness, which was objected to by the State Employee's Association on grounds of inadequate notice. This objection was overruled by the Tribunal due to actual notice, in that appellant had Mr. Giles listed as a witness on its Witness List, and that it may do substantial justice and assist the Tribunal if he in fact testified.

Mr. Giles testified that there were three qualified persons on the Interview Panel, all with 25 to 35 years of bridge operations experience. The panel interviewed several candidates and the selection was unanimous (of a Mr. Moulton).

On cross examination by Ms. Chellis, Mr. Giles testified that there were a few (i.e. three) interviews conducted by the panel and that a unanimous decision to choose Mr. Moulton was

achieved through a rating system wherein each interviewer could rate each response to each question. It was a point system with a percentage feature, but Mr. Giles does not have the ratings. He feels there was a wide point spread. The panel had the applicants' applications present at the time of the interviews.

All of the applicants were "certified" but he **doesn't** know personally whether they were certified by the Division of Personnel. Giles said he didn't threaten Mr. White, as aforesaid, that he has known him for 11 years, that he is a good worker most of the time, but for a few problems in the past, which have been corrected. Mr. Giles states that he likes Mr. White. He says he didn't make the promotional selection, Mr. Olson did, and that his letter (Exhibit D) contains his views, but also those of the panel's, as he relates them.

Mr. Olson testified at this point. The Board takes this practice to be irregular and would not ordinarily permit it as Mr. Olson was presenting the case. However, the Tribunal was of the view that his testimony could be of assistance in reaching a decision and that its potential value outweighed any procedural anomalies in this administrative proceeding.

Mr. Olson says the position (Drawbridge Operation), was advertised and posted on March 5, 1989, closing on March 31, 1989. There were eight applicants, three were certified by the Department of Transportation. The Interview Panel were well qualified individuals, conducting the interviews on April 12,

1989. Mr. Olson authorized his Administrative Assistant to write the selection letters upon receipt of the panel's recommendation. (In the Tribunal's view, he basically, but conditionally, delegated this authority to his Administrative Assistant.)

Mr. Olson feels he followed all of the pertinent procedures. There was a second Drawbridge Operator position available at this time. Mr. White was not selected for that position either. The reasons for the decision in Mr. Giles' letter, Mr. Olson believes, were prepared after the second interview was conducted.

III. Discussion and Legal Arguments

The appellant argues that he should have been the candidate chosen for promotion, as it was both possible and reasonable to promote him. He further contends that, dealing with the exhibits - Exhibit A shows the minimum qualifications for the position, that he allegedly met. Exhibit B shows the nature of his prior experience. Exhibit C shows proof that he has 11 years of experience (see also Exhibit D1, and that the selected candidate was not qualified in accordance with the job specifications. Exhibit E describes a flawed selection process and Exhibit F sets forth the interview questions.

The appellant further contends that the Interview Panel failed to properly apply Per 302.03(b) (selection to be based upon capacity to perform in the position, as evidenced by past performance, and length of service).

The appellant also contends that the Interview Panel violated, Per 102.01(f) of the Rules by "discriminating" against him for non-merit factors.

(Appellant, a black person, neither alleges nor argues that he was the subject of racial discrimination, nor does he so much as raise the point in connection with the appeal. Accordingly, we deem that issue to be waived and take his argument under 102.01(f) to raise the contention of anti-union animus in the context of this case. We find that position to be, under the referenced section of the Rules, of little merit. However, we do not discount either the racial considerations or the anti-union considerations in the relief that we ultimately order below, nor in our deliberations.)

The appellee contends to the contrary and says that Exhibit C is unreliable as it includes a listing of part-time employees, or excludes whether any candidate had vast prior creditable experience with another employer, which is not reflected in the raw statistics (this last point is inferred by the Tribunal).

The Tribunal is, basically, taken aback by this appeal. The Department of Transportation has not complied fully with our rules (i.e. respecting notice to adversaries of witnesses), and has presented only poorly, and without addressing key issues in any meaningful way, its position on the matter. While the appellant has the burden of persuasion, his case is sufficient to leave us wondering what the relevant facts actually are, and

what, consistent with our responsibilities, we should do about them.

We admonish State agencies who have business before this Tribunal to attend to our rules, and to follow them carefully. This means, to give the required notices to adversaries, and to prepare and present journeyman-like cases. The assistance of agency Human Resource Coordinators and the Attorney General are surely available, if needed, and they should be used when needed; as here.

J We have endeavored beyond ordinarily reasonable limits, to ascertain and evaluate the Department of Transportation's position in this case. We encourage the Department of Transportation to consider its position when it must come before a quasi-judicial administrative agency or Tribunal, and it is ill-prepared.

IV. ORDER

On all of the evidence the Tribunal Orders the following:

A. The promotional decision of the Department of Transportation to promote Mr. Moulton over Mr. White is vacated.

However, such vacation shall be effective only after compliance with the following provisions of this Order, through Paragraph D, in the event that a different candidate is selected.

B. The original listing and applications of the eight candidates for the position of Drawbridge Operator (first vacant position) are committed to the Director of Personnel for review

and certification of those candidates who are in fact qualified perforce of the duly adopted job specifications for the said position to be considered for said position.

C. The then qualified applicants are to be interviewed by a panel to be appointed by the Department of Transportation using new questions. The identity of the panel members may be the same or different than the previous panel. The questions shall be reviewed by an independent observer appointed by the Director of Personnel, in advance. The independent observer, who need have no knowledge of bridge operations, shall also be present at the candidate interviews, but shall have no vote on the Interview Panel. The observer shall be provided with: the questions, the applicants' applications, the scores attributed to the answers by the Interview Panel, and such other information as the observer shall reasonably request. The observer shall make a report of and respecting the, re-selection process to the Director of Personnel.

D. The re-selection process, as aforesaid, shall result in a candidate for appointment to the instant position, unless the Director, the appellant, or the Department of Transportation shall re-appeal thereafter to the Appeals Tribunal, in which instance, the promotion shall be stayed, pending the appeal.

The members of the Tribunal shall be the same members as heard this appeal, if requested by either party, otherwise the Tribunal shall be chosen in the usual manner.

17 October 1989.

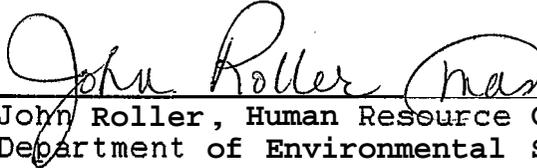
By the Promotional Appeals Tribunal



Mark J. Bennett, Chairman



Joan Day, Human Resource Coordinator
Department of Employment Security



John Roller, Human Resource Coordinator
Department of Environmental Services

Date of Issue: January 8, 1989

cc: Raymond J. Lemieux, Human Resource Coordinator
Department of Transportation

Kenneth R. Olson, Administrator
Bureau of Bridge Maintenance, D.O.T.

Jean Chellis, SEA Field Representative

Virginia A. Vogel, Director of Personnel

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