

State of New Hampshire

WPPID956



PERSONNEL APPEALS BOARD

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

APPEAL OF BARRY WHITE

Docket #91-P-20

State's Motion for Reconsideration and Appellant's Response

June 11, 1992

On May 5, 1992, Senior Assistant Attorney General Michael Walls filed a Motion for Reconsideration of the Board's February 27, 1992 order in the matter of Barry White, Sr., an employee of the Department of Transportation who had been denied promotion to the position of Drawbridge Operator. Having considered the evidence, the Board had concluded the successful candidate may not have met the minimum qualifications for the position when he was selected.

Accordingly, the Board directed the appellant to secure a copy of his General Education Diploma and to present a copy of the document to the Department of Transportation within 60 days of the date of the Board's order. He was then to be promoted to the position of Drawbridge Operator, provided however that Mr. Moulton would also be afforded 60 days in which to submit records of prior military service to the Division of Personnel. If the Division of Personnel were to find that Mr. Moulton did meet the minimum qualifications for promotion to the position of Drawbridge Operator at the time of the original posting, the Board's order would be stayed until the Board could review all the certification documents for both White and Moulton.

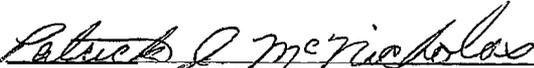
In its Motion of May 5, 1992, the Department of Transportation argued the certification provided by Mr. White to the Department of Transportation showed he had taken four of the five required tests for his GED. in April of 1992, and that the certification did not provide clear and convincing evidence that he had obtained his GED. at the time the original selection decision was made. The Department also argued Mr. Moulton was found by the Division of Personnel to have met the minimum qualifications for promotion at the time of the original posting, and therefore should not be required to vacate the position.

The State Employee's Association objected to the Motion, arguing that Mr. White had testified under oath he was unable to locate a copy of his GED., that he had taken the tests 20 years earlier in the State of California and could not remember the name of the testing center where the examinations had been taken. Therefore, the appellant argued he took the GED. test in April of 1992 and submitted the results to DOT on April 15, 1992. The State Employees' Association also argued Mr. Moulton should not be deemed certified because the Drawbridge Operator specification requires "two years' experience

as a Gateman", with no statement of equivalency provided. They also argued that the 14 weeks Mr. Moulton attended machinist school should not be considered "experience" for the purposes of certification.

The basis for Mr. White's appeal of his original denial of promotion was that he was the most qualified candidate for promotion at the time of the original posting. In consideration of the parties' arguments, Personnel Director Vogel's report on certification of Mr. Moulton dated April 30, 1992, and the Board's record in this matter, the Board voted to grant the State's Motion for Reconsideration. The Board found that Mr. White did not meet the minimum qualifications for the position of Drawbridge Operator at the time of his original application because he failed to produce evidence that he possessed a GED. at the time of said application. The Board further voted to modify its decision of February 27, 1992, confirming the Department of Transportation's selection of Mr. Moulton for the position of Drawbridge Operator and denying the appeal of Barry White.

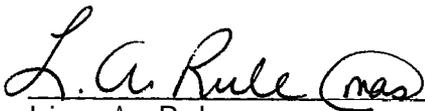
THE PERSONNEL APPEALS BOARD



Patrick J. McNicholas, Chairman



Mark J. Bennett



Lisa A. Rule

cc: Virginia A. Vogel, Director of Personnel
Michael Walls, Senior Assistant Attorney General, Transportation Bureau
John Scott, Human Resources Administrator, Dept. of Transportation
Jean Chellis, SEA Field Representative

stat, of New Hampshire

WPPID887



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

APPEAL OF BARRY WHITE
Docket #91-P-20
Department of Transportation

February 27, 1992

The Personnel Appeals Board (McNicholas, Bennett and Rule) met Monday, January 20, 1992, to hear the appeal of Barry White, an employee of the Department of Transportation. Mr. White was represented at the hearing by SEA Field Representative Jean Chellis. Assistant Attorney General Michael Walls appeared on behalf of the Department of Transportation.

In April, 1989, Mr. White appealed denial of promotion to the position of Drawbridge Operator for the Memorial Bridge. A hearing on the merits of Mr. White's appeal was held in October, 1989, and a decision issued by the Promotion Appeals Tribunal in January, 1990. The Board's Order in the matter was as follows:

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.

Ms. Chellis argued on Mr. White's behalf that the appellant had been prejudiced by delay in the re-selection process, which was not completed until January, 1991. Ms. Chellis argued that because of the delay the current incumbent, Mr. Moulton, was not only able to obtain the additional experience necessary to qualify for the position, but was able to better answer questions during the structured oral interview because of his first-hand knowledge of the position duties and responsibilities.

Mr. White, testifying on his own behalf, argued that at the time the original selection decision was made, the successful candidate did not possess the two years' experience as a Gateman which the job specification requires as a minimum qualification for promotion. He testified that prior to the original selection decision in 1989, Richard Giles had promised to "get even" with him for having filed a grievance with the union. Giles was part of the Interview Panel for promotional candidates for the position of Drawbridge Operator. Mr. White also argued that selection should have been based upon a written examination rather than a structured oral interview, as some candidates do not present themselves well in an interview setting.

Edward Welch, Jr., Assistant Administrator for the Bureau of Bridge Maintenance, testified that in compliance with the Tribunal's January 8, [1990] Order, the Department of Transportation had submitted applications to the Division of Personnel for certification, had worked with the Division of Personnel to develop questions for the structured oral interview, and had interviewed the two eligible candidates with an independent observer from the Division of Personnel present. He testified that interviews for the re-selection process had been scheduled November 27, 1990, but were cancelled because Mr. Moulton was not aware he would have to interview for his own job. Interviews were rescheduled for January 17, 1991.

Mr. Welch testified that the structured oral interviews had been designed to test the candidates' knowledge of drawbridge operations. Mr. White scored 700 points on the examination and Mr. Moulton scored 940 points. Mr. Welch testified that selection for promotion was based solely on the candidates' knowledge of the job. He said he had not heard Mr. Giles discuss "getting even" with the appellant, and did not believe that animosity played any role in the selection process.

Dennis McCabe, Supervisor of Examinations for the Division of Personnel, testified that he had assisted the Department of Transportation in developing the questions and evaluation materials for the Drawbridge Operator structured oral interview. He testified that the interview was technically based, and the questions designed to elicit information from the candidates on job knowledge, skills and abilities for successful performance if selected. He testified that Mr. Moulton's answers were more comprehensive than Mr. White's. He said that although he was not a voting member of the selection panel, he would have recommended Moulton's appointment rather than White's. He said that Moulton's answers ranged from "moderate" to "optimal", while White's answers reflected "minimal" job knowledge.

Virginia Vogel, Director of Personnel, testified that she had reviewed and certified the applications as required by the Tribunal Order, and that only two of the original eight candidates could be certified as meeting the minimum qualifications for promotion. Mr. White had been unable to produce a copy of his G.E.D. which should have been required to certify him as meeting the minimum qualifications, but Ms. Vogel had decided to take him at his word that he had completed a G.E.D. program. When questioned concerning Mr. Moulton's qualifications for promotion in April 1989, Ms. Vogel testified that his military experience may have been taken into consideration in conjunction with his part-time experience as a Gateman in certifying him for possible promotion. Ms. Vogel also expressed her belief that Mr. Moulton's qualifications for promotion had never actually been questioned.

Ms. Vogel also testified that neither the Division of Personnel nor the Bureau of Bridge Maintenance had delayed complying with the Tribunal's January 1990 Order. She explained that one of the former Personnel Officers in D.O.T. had simply not comprehended the Order and therefore had not taken timely steps to comply.

Per 302.03 (a) of the Rules of the Division of Personnel provides as follows:

"A vacancy shall be filled whenever possible and reasonable by promotion of a qualified permanent employee from within the department or agency."

In order to properly address the merits of Mr. White's appeal, the Board must consider the qualifications of the other applicant(s) for promotion. In spite

of the Director's position that Mr. Moulton's original certification is not at issue, the Board finds that question to have been preserved for consideration as part of the instant appeal.¹

According to Mr. Moulton's March 20, 1989 application for promotion to Drawbridge Operator, received in the Human Resources Office of the Department of Transportation on March 23, 1989, he worked 300 hours part-time as a Gateman and 237 hours part-time as a Drawbridge Operator prior to August 14, 1988. Subsequently, he was employed by D.O.T. full-time as a Gateman, with 318 hours serving as Drawbridge Operator.

Assuming that the position is a 40 hour per week position, Mr. Moulton had the equivalent of 13.425 weeks, or 3.1 months of creditable experience before converting to full-time employment. By adding his 3.1 months of part-time equivalency to the 8.25 months of full-time service, Mr. Moulton's experience as Gateman/Operator is less than one full year as Gateman. Therefore, absent compelling evidence that his prior military service included bridge operations as described by the position specification, Mr. Moulton did not meet the minimum qualifications for promotion at the time the position was posted in March, 1989.

The appellant, through his representative, expressed his reluctance to have the incumbent vacate the Drawbridge Operator position, and therefore requested as a remedy that the Board order the Department to promote Mr. White to Drawbridge Operator when the next vacancy in that classification occurs.

While the Board shares the appellant's reluctance to order that Mr. Moulton be removed from his position, the remedy suggested by the appellant does not present a viable alternative for several reasons. First, the Board has no way of knowing when another Drawbridge Operator position might become available. The Board has no way of predicting what the minimum qualifications might be for such position if posted. For instance, with increased regulation of the waterways, some sort of certification or licensure requirements might be imposed. Without possessing that license or certificate, the appellant would not qualify for promotion at the time of posting. Second, pursuant to Per 302.03 (b), "Selection for such promotion shall be based upon capacity for the vacant position, ability as evidenced by past performance, and length of service with the department." The Board has no way of predicting what Mr. White's performance may be during the period between its decision and the next posted vacancy for Drawbridge Operator.

¹ Exhibit C shows proof that [the appellant] has 11 years of experience (see also Exhibit D), and that the selected candidate was not qualified in accordance with the job specifications. (Opinion and Order of the Tribunal, Appeal of Barry A. White, Sr., January 8, [1990], p. 6

Simply ordering Mr. White promoted retroactive to the date of Mr. Moulton's original selection for the position of Drawbridge Operator presents problems as well. Although the Director of Personnel was willing to assume that Mr. White possessed the G.E.D. required for promotion, no such documentation was offered. Absent clear and convincing evidence that the appellant qualified for promotion at the time the original selection decision was made, the Board is equally reluctant to simply order Mr. White promoted to Drawbridge Operator.

Accordingly, the Board orders the following:

Mr. White is directed to secure a copy of his General Education Diploma, and shall present a copy of that document to the Department of Transportation within 60 days of the date of this order. Upon presentation of same, he shall be promoted to Drawbridge Operator, effective as of the date Joseph Moulton was originally promoted. Mr. Moulton shall be returned to the position of Gateman as of that date. If Mr. White is unable to produce certification that he successfully completed an approved G.E.D. program within the prescribed 60 days, the Department of Transportation shall vacate the Drawbridge Operator position and post the position for promotion, available to all qualified candidates certified by the Division of Personnel, which may include White and Moulton.

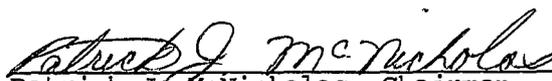
In fairness to Mr. Moulton, he is also afforded the ~~same~~ 60 day period afforded to Mr. White in which to submit records of his prior military service to the Division of Personnel. If the Division of Personnel concludes that these records show Moulton to have been minimally qualified and certifiable for the position of Drawbridge Operator as of March 23, 1989 (the date of his application), then the Director of Personnel shall so report to the Board, said report to include an analysis of the experience by which Moulton was found to be qualified. The Board may then consider modifications to this Order on its own motion or that of any party in the interests of fairness. A copy of this Order is to be given in hand to Joseph Moulton and Barry White. In the event Mr. Moulton submits records of his military service as aforesaid, any changes in occupancy of the Drawbridge Operator and Gateman positions referred herein shall be stayed until the review by the Board of the report thereon from the Director of Personnel as described above.

In the event that the Department must re-post the position, the Department shall submit all applications and supporting documents to the Division of Personnel for certification of the applicants. Following certification, the Department of Transportation shall establish a structured oral interview with the assistance of the Division of Personnel, and shall request the presence of

APPEAL OF BARRY WHITE
Docket #91-P-20
page 6

an independent observer who shall immediately report his/her findings to Director of Personnel and to the Board. No candidate shall be formally selected until approved by the Board.

THE PERSONNEL APPEALS BOARD


Patrick J. McNicholas, Chairman


Mark J. Bennett


Lisa A. Rule

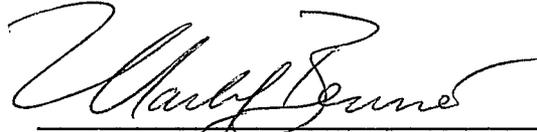
cc: Virginia A. Vogel, Director of Personnel
Michael J. Walls, Assistant Attorney General, Transportation Bureau
Jean Chellis, SEA Field Representative
Richard D. Williams, Human Resource Coordinator, Dept. of Transportation

APPEAL OF BARRY WHITE
Docket #91-P-20
page 6

an independent observer who shall immediately report his/her findings to Director of Personnel and to the Board. No candidate shall be formally selected until approved by the Board.

THE PERSONNEL APPEALS BOARD

Patrick J. McNicholas, Chairman



Mark J. Bennett

Lisa A. Rule

cc: Virginia A. Vogel, Director of Personnel
Michael J. Walls, Assistant Attorney General, Transportation Bureau
Jean Chellis, SEA Field Representative
Richard D. Williams, Human Resource Coordinator, Dept. of Transportation

