

under RSA 21-I:46, I (2000). Therefore, we must determine whether the petitioners raise claims in their pleadings before the PAB that are grounded upon alleged violations or misapplications of the personnel rules. See Appeal of Higgins-Brodersen, 133 N.H. 576, 581 (1990)(holding that the PAB lacked jurisdiction under RSA 21-I:46 to hear appeals grounded upon alleged statutory violation). Because the legislature has not provided for a statutory right to appeal PAB decisions to this court under the general authority of RSA 21-I:46, a petition for writ of certiorari is the proper remedy. See *id.* at 580-81; cf. Appeal of Morton, 158 N.H. 76, 78 (2008)(review of PAB decision governed by RSA 541:13). Accordingly, we confine our review of the PAB's dismissal of the petitioners' appeals to determine whether it "acted illegally with respect to jurisdiction, authority or observance of the law, thereby arriving at a conclusion which could not be legally or reasonably made or acted arbitrarily, capriciously or with an unsustainable exercise of discretion." Petition of Bennett, 151 N.H. 130, 133 (2004); see Higgins-Brodersen, 133 N.H. at 581.

First, both petitioners argue that the PAB had jurisdiction to hear their appeals because they each alleged that they were terminated for discriminatory, "non-merit" reasons in violation of New Hampshire Administrative Rules, Part Per 101 (Part 101). Part 101, which is the "purpose and scope" section for the personnel rules, articulates the purpose and goals that the employment rights and standards are designed to achieve. See, e.g., N.H. Admin. Rules, Per 101.01 (effective April 1998). By providing concrete objectives, the "purpose and scope" provision serves to inform the meaning of the substantive rules that are adopted to accomplish the stated purpose. See, e.g., N.H. Admin. Rules, Per 1101.02 (effective October 2006) (layoff rules require specific procedures be followed when separating an individual from employment). It does not operate as a stand alone provision that vests particular substantive rights, the violation for which would serve as an independent avenue for an affected employee to seek relief. Therefore, we conclude that Part 101 cannot serve as an independent basis to confer jurisdiction upon the PAB. Accordingly, we reject the petitioners' argument that the PAB has jurisdiction under RSA 21-I:46 to hear appeals solely based upon an alleged violation of Part 101.

The petitioners cite New Hampshire Administrative Rules, Per 101.02(b) to support their argument that Part 101 is substantive. This rule provides: "In the case of terms and conditions of employment which are negotiated, the provisions of the collective bargaining agreements shall control." N.H. Admin. Rules, Per 101.02(b). The petitioners, however, fail to provide any developed argument explaining the alleged substantive import of this rule, and accordingly, we decline to address it. See State v. Nadler, 151 N.H. 244, 248 (2004)(court declined to review undeveloped argument).

Second, Blake argues that the PAB has jurisdiction to hear her claim because she alleged that her termination violated New Hampshire Administrative Rules, Per 1002.03 and 1002.08, which govern employment discipline. We disagree. Application of these rules is expressly limited to full-time employees within the state system. See N.H. Admin. Rules, Per 1002.01.

Blake contends, however, that a former version of the administrative rules properly applied the discipline rules to all classified employees, and that the 1998 amendment, which limited the discipline rules to full-time employees, violates the separation of powers doctrine. In particular, she argues that the 1998 amendment conflicts with the legislative directive that the personnel rules for separation and discipline cover all classified state employees. See RSA 21-I:43, II (2000). The question before us in this appeal, however, is limited to whether the PAB correctly determined that Blake's appeal was outside its subject matter jurisdiction. Because Blake relies solely upon the PAB's general authority under RSA 21-I:46, I, to hear and decide "appeals of decisions arising out of application of the rules adopted by the director of personnel," our review is restricted to assessing whether Blake alleged before the PAB that her termination involved a violation or misapplication of a personnel rule. The current discipline rules do not apply to Blake as a part-time employee, and, thus, the PAB correctly concluded that it lacked jurisdiction to consider her appeal. Blake's challenge to whether a particular administrative rule comports with a legislative directive is, therefore, not properly before us in the context of this appeal. The PAB similarly recognized this limitation:

Although the Board agrees that there should be some mechanism for reviewing decisions to dismiss part-time employees where there is evidence of a possible bad-faith termination, the Board does not believe that it can extend its jurisdiction beyond that described in the law and the rules adopted by the Director of Personnel.

Finally, Frappiea argues that the PAB has jurisdiction to hear her claim because she alleged that her termination violated New Hampshire Administrative Rules, Part Per 1100 (Part 1100), governing layoff procedures. However, her pleadings before the PAB alleged that her termination comprised unlawful retaliation for her union-related activity, which is unrelated to Part 1100. The PAB properly concluded that Frappiea failed to explain in her pleadings how or why her layoff constituted a violation or misapplication of the administrative layoff rules. Therefore, we conclude that the PAB correctly determined that it lacked jurisdiction under RSA 21-I:46 to consider her appeal.

Accorclingly, we conclude that the PAB did not err in dismissing the petitioners' appeals.

Affirmed.

BRODERICK, C.J., and DALIANIS, DUGGAN and HICKS, JJ., concurrecl.

**Eileen Fox,
Clerk**

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NH Personnel Appeals Board, #2008-O-002, #2008-T-003

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PERSONNEL APPEALS BOARD

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

Appeal of Pamela Blake

Docket #2008-T-003

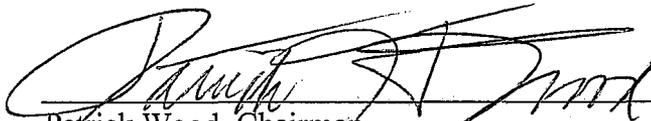
***Department of Safety - Division of Motor Vehicles
Board's Decision on Appellant's Motion for Reconsideration,
Appellee's Objection to Motion for Reconsideration***

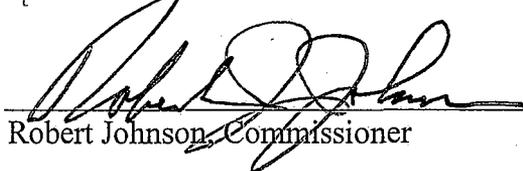
April 25, 2008

By letter dated March 28, 2008, SEA General Counsel Michael Reynolds filed the Appellant's Motion for Reconsideration in the above-titled appeal. By letter dated April 2, 2008, Attorney Sheri J. Kelloway filed the Appellee's Objection to Motion for Reconsideration.

In accordance with Per 208.03 (b), a motion for reconsideration must, "...set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable." Having carefully reviewed the Motion and Objection in light of the pleadings filed by the parties, and the Board's February 27, 2008 Decision dismissing Ms. Blake's appeal as a matter outside the Board's subject matter jurisdiction, the Board voted unanimously to AFFIRM that decision and DENY the Appellant's Motion for Reconsideration. In so doing, the Board found that the Appellant offered insufficient reason for the Board to conclude that its order was unlawful or unreasonable.

THE PERSONNEL APPEALS BOARD


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Robert Johnson, Commissioner

Joseph Casey, Commissioner

cc: Karen Hutchins, Director of Personnel
Michael Reynolds, SEA General Counsel
Attorney Sheri J. Kelloway, Division of Motor Vehicles

State of New Hampshire



PERSONNELAPPEALSBOARD

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

Appeal of Pamela Blake

Docket #2008-T-003

Department of Safety, Division of Motor Vehicles

February 27, 2008

By letter dated October 15, 2007, SEA General Counsel Michael Reynolds requested a hearing on behalf of Pamela Blake, a former part-time employee of the Department of Safety, Division of Motor Vehicles, to appeal Ms. Blake's October 1, 2007 termination from employment as a part-time Counter Clerk for the Division of Motor Vehicles. In support of his request, Mr. Reynolds, argued that Ms. Blake was a regularly scheduled part-time employee on the date of termination, who was dismissed in retaliation for informing a co-employee about that employee's rights under the Collective Bargaining Agreement. He also argued that the termination was effected in retaliation for Ms. Blake's former activities as an SEA Steward.

By letter dated October 25, 2007, Attorney Sheri Kelloway filed the Appellee's Motion to Dismiss and Supporting Memorandum of Law. Ms. Kelloway argued that Ms. Blake's dismissal was "...due to misconduct associated with her work, primarily, conducting personal business during work hours, shutting down her computer early and ceasing to do work prior to the end of the business day, and getting involved with confidential personnel matters during work hours that were none of her concern." Ms. Kelloway asked the Board to dismiss the appeal, arguing that the termination of a part-time employee is outside the Board's subject-matter jurisdiction. Ms. Kelloway argued that RSA 21-I:58 provides a right of appeal to "permanent employees" concerning the application of rules adopted by the Director of Personnel, and that Chapter Per 1000 applies to full-time employees only. Ms. Kelloway argued that that while RSA 21-I:46

does not appear to distinguish between full-time and part-time employees, the Court's decision in Appeal of Higgins-Brodersen, 133 N.H. 576, clarified the issue, indicating that although part-time employees have a right to appeal, those appeals are limited to situations arising out of an application of the personnel rules to the employee while the employee had permanent status. Ms. Kelloway also argued that the Board did not have jurisdiction to hear appeals based on an alleged misapplication of the Collective Bargaining Agreement. Finally, Ms. Kelloway noted that the appeal was filed on behalf of Ms. Blake and the SEA, and asked the Board to remove "SEA" as a party to the appeal, noting that the SEA may represent employees who file appeals, but that the union has no standing of its own.

By letter dated October 31, 2007, Attorney Reynolds filed the appellant's Answer and Objection to State's Motion to Dismiss and Supporting Memorandum of Law. Attorney Reynolds agreed that SEA did not need to be a listed party to the appeal. On the issue of jurisdiction, however, Attorney Reynolds argued that there were obvious factual disagreements between the parties, which could only be resolved by a hearing on the merits of the appeal. Mr. Reynolds argued, for instance, that the appellant believes her termination was based solely upon "her briefly and legitimately answering a co-employee's question about [the] Collective Bargaining Agreement," and that Ms. Blake was not "getting involved with confidential personnel matters during work hours that were none of her concerns." He argued that the Department retaliated against the employee and violated the intent of the personnel rules, the personnel system, and the rules cited in the original appeal. Mr. Reynolds wrote, "This bad faith termination of a classified state employee is exactly the kind of conduct expressly prohibited by Per 101. If there were any doubt about this, one need only refer to the statutory intent that the rules are to apply to 'classified employees,' clearly meaning all classified employees, not just some of them."

On the contrary, a review of those statutes dealing with State employees indicates that the legislature itself differentiates between full-time and part-time employees with respect to their rights and benefits. In accordance with RSA 98-A, in order to attain "permanent"

status, an employee must work full-time. Part-time employees do not accumulate seniority.. RSA 98-A:6 specifically prohibits part-time employees from accumulating sick or annual leave. RSA 21-I:32 excludes part-time employees from the State employee voluntary life insurance benefit. RSA 21-I:46, I provides that, "The personnel appeals board shall hear and decide appeals as provided by RSA 21-I:57 [classification decisions] and 21-I:58 [appeals by permanent employees] and appeals of decisions arising out of application of the rules adopted by the director of personnel..."

Although the Personnel Rules apply to classified employees in general, the rules themselves differentiate between full-time and part-time employees in a number of instances. For example, Per 301.05 addresses reclassification of full-time and part-time temporary positions. Per 901.03(c) and (e) provide a mechanism for granting salary increments to part-time employees that is different from their full-time counterparts. Per 1101.02 discusses the process for layoff, including the layoff of part-time employees. Per 1210 covers leave for part-time employees, and Per 1302.04 explains how part-time employees will be compensated when they work a calendar holiday. On the other hand, Per 1002.01 Forms of Discipline, specifically limits its applicability to full-time employees within the state system.¹

Although the Board agrees that there should be some mechanism for reviewing decisions to dismiss part-time employees where there is evidence of a possible bad-faith termination, the Board does not believe that it can extend its jurisdiction beyond that described in the law and the rules adopted by the Director of Personnel. As the Supreme Court held in the appeal of Colburn v. Personnel Commission, 118 NH (1978), "An agency must follow its own regulations."

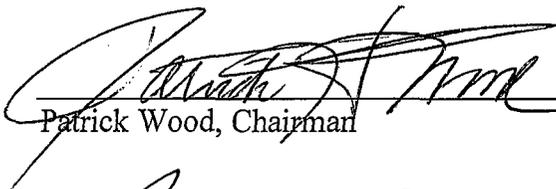
Having reached that conclusion, however, the Board does not believe that the appellant is without recourse or remedy. If the appellant were a member in good standing of the union and a regularly scheduled part-time employee of the Department of Safety at the

¹ "The following disciplinary measures [including dismissal] shall exist for full-time employees within the state system." [Per 102.01 Forms of Discipline]

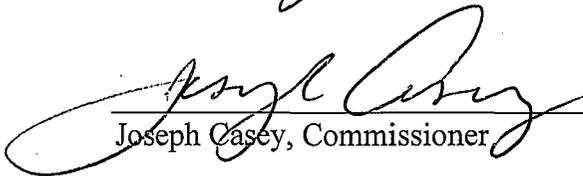
time of her dismissal, and if her termination were a direct result of her union affiliation as she alleges, it would appear that the union could have filed a grievance with the Department of Safety or an unfair labor practice with the Public Employee Labor Relations Board under the provisions of RSA 273-A:5. The appellant also might have sued her employer in superior court for wrongful termination if she could prove that her termination was motivated entirely by bad faith. Finally, she might have filed a complaint with the NH Department of Labor as a Whistleblower if she believed her termination was a result of providing information to another employee about his or her rights under NH State law and the Collective Bargaining Agreement.

For all the reasons set forth above, as well as those reasons articulated in the State's Motion to Dismiss, the Board voted unanimously to DISMISS Ms. Blake's appeal as an action outside the Board's subject matter jurisdiction.

THE PERSONNEL APPEALS BOARD


Patrick Wood, Chairman


Robert Johnson, Commissioner


Joseph Casey, Commissioner

cc: Karen Hutchins, Director of Personnel, 25 Capitol St., Concord, NH 03301
Michael Reynolds, SEA General Counsel, State Employees Association, 105 N.
State St., Concord, NH 03302-3303
Attorney Sheri Kelloway, Division of Motor Vehicles, 23 Hazen Dr. Concord, NH
03301