

State of New Hampshire



PERSONNEL APPEALS BOARD

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APPEAL OF RICHARD HENDERSON

Division of Public Health Services - Bureau of Vital Records
Department of Health and Human Services

Docket #94-T-4

April 5, 1995

94-T-404

The New Hampshire Personnel Appeals Board (Bennett, Johnson and McGinley) met Wednesday, December 14, 1994, to hear the appeal of Richard Henderson, a former probationary employee of the Division of Public Health Services, Bureau of Vital Records and Health Statistics. Mr. Henderson, who was represented at the hearing by Attorney Leslie Nixon, was appealing his July 30, 1993 termination from employment (effective August 19, 1993) from his position of Planning Analyst prior to completion of his probationary period for allegedly failing to meet the work standard. Sandra Platt, Administrator in the Commissioner's Office of Administration and Finance, appeared on behalf of the Department of Health and Human Services.

At the outset of the hearing, Ms. Nixon asked the Board to rule on her request for production of Charles Sirc's personnel file. Ms. Nixon argued that the real problem with Mr. Henderson's performance was the performance of his supervisor, Charles Sirc. She argued that Mr. Sirc, who has since left State service, had been disciplined for his own conduct, and that his own work record should be considered in assessing the validity of his complaints about Mr. Henderson. Ms. Platt objected to the appellant's request, arguing that Mr. Sirc's personnel record was confidential, and that he had not given his approval to release the record to Ms. Nixon. She also argued that two of Mr. Sirc's supervisors were available as witnesses to answer questions about Mr. Sirc's employment with the Division of Public Health Services. The Board decided to treat Ms. Nixon's request as a motion for production of documents, and to deny the motion because of the availability of witnesses competent to testify on the relevant issues.

Ms. Nixon also asked for permission to file requests for findings of fact and rulings of law. The Board advised both parties that it would accept such requests at any time prior to the close of the hearing.

Ms. Platt asked the Board to exclude the testimony of Carol Paris and an affidavit of Fred Wilcox. Ms. Platt said that she had spoken with Ms. Nixon on the Friday preceding the hearing and had reminded her that all witnesses and evidence which the appellant intended to offer had to be disclosed not later than Friday afternoon. She said she had not received notice from Ms. Nixon until she received a facsimile transmission late on Monday, December 12, 1994, that she intended to call Ms. Paris and offer the affidavit of Mr. Wilcox. Ms. Nixon withdrew her request.

Mr. Henderson was employed as a Planning Analyst in the Bureau of Vital Records and Medical Statistics from September 25, 1992 until his termination on July 30, 1993, for allegedly failing to meet the work standard. The "Scope of Work" appearing on the appellant's Supplemental Job Description defined the position's responsibilities as follows:

Analyzes statistical data and the methods of collecting and processing such data to implement the health data collections, analysis and dissemination functions of the Bureau of Vital Records and Health Statistics, Division of Public Health Services.

As a Planning Analyst, Mr. Henderson was responsible for a variety of computer programming, systems analysis and technical assistance functions, including but not limited to the following:

Gives technical assistance and consultation to public and private agency personnel in the design of data collection methods and the analysis and/or applications of data and statistics.

Maintains liaison with local, state and national agencies, both public and private, for program administration, evaluation, planning, research, data exchange and related activities.

Evaluates current data collection procedures. Develops, initiates and maintains new automated processes for data collection and analysis to include system design, information flow, writing PC based software and modifying and revision of forms.

Visits local registrars and hospitals throughout the state to present automated systems for data collection of vital records. Implements where possible. Provides training where necessary.

Those accountabilities were listed on the supplemental job description which Mr. Henderson signed on September 29, 1992. The job description which he signed also contained a disclaimer statement which read, "This supplemental job description lists typical 'examples of work and is not intended to include every job duty or responsibility specific to a position. An employee may be required to perform other related duties not listed on the supplemental job description provided that such duties are characteristic of that classification." (State's Exhibit 1)

In the performance evaluation which the appellant received at the time of termination, Mr. Sirc cited the appellant's inability to write workable programs in Clipper as another of the problems with the appellant's work performance. Mr. Henderson admitted that when he was interviewed for the position of Planning Analyst, he was aware that some of the required programming duties would necessitate his working in "Clipper", a program with which he was familiar, but not knowledgeable. He testified that he was unaware a working knowledge of "Clipper" was an essential duty of the position. Mr. Henderson testified that his prior programming experience was in d-Base, Fortran, Cobol and Basic, and that part of the pre-employment performance test for the position of Planning Analyst had required him to write a small program in d-Base.

Mr. Henderson testified that the complaint about his participation in developing the "abstract" program was an example of his supervisor's lack of computer experience. Mr. Henderson testified that it is routine during the development of new software for a program to be tested first with staff who can point out problems with the program, allowing the programmer to then work out "the bugs" before the program is distributed to the end users. He testified that

complaints from staff about the "Abstract" program he had written were really nothing more than suggestions for improving the program during the development phase. He testified that the program was well received in the field once it had been modified and streamlined.

Mr. Henderson was criticized in his evaluation for being unable to complete three computer and software installations per day in Town and City Clerks' offices. Mr. Sirc wrote that the expectation for that quantity of work was based upon the number of installations which other Programming Analysts had been able to complete per day. Mr. Henderson testified that because Mr. Sirc did not understand computers and programming, he had unreasonable expectations for the number of system installations that could be completed in a day's time. He testified that none of the other Planning Analysts had been expected to make more than two system installations (hardware and software) per day, and that it was unreasonable to believe that he could do so when he was also being expected to provide programming services, training and technical assistance. The Board agrees. Without proof that other Planning Analysts had been expected to make three system installations per day, and had regularly been able to perform that amount of work, it was unreasonable to hold Mr. Henderson to that standard.

Mr. Sirc noted in the evaluation which was given to the appellant at the time of termination from employment that the appellant was "...not responsive in providing deadlines for tasks when requested by his supervisor." In his signed statement, Mr. Sirc stated, "...Rich was never able to meet his own time frames. The time taken to complete work assignments far exceeded the time frame agreed upon." Mr. Henderson testified that Mr. Sirc's expectations were unreasonable, and that any complaints about his failure to meet those expectations by completing work in a timely fashion were unfounded. However, both Ms. Grady and Ms. Bonenfant testified credibly that they had to complete work which Mr. Henderson was unable to finish on time.

In response to allegations that he failed to provide necessary follow-up and training, Mr. Henderson testified that he was limited to one visit per Clerk's office, and was therefore unable to provide the level of training and consultation demanded of him. He also testified that Karen Grady, the Planning Analyst who had developed the software being installed in the Town Clerks' Offices, frequently made modifications to the program without telling him about the changes. He testified that when he was then asked for advice or technical assistance, he sometimes was unable to provide it because he didn't know what changes might have been written into the software program.

Mr. Henderson testified that his performance evaluation contained a number of internal inconsistencies. His overall performance was rated as not meeting expectations. In several categories, he was rated as meeting expectations, while similar expectations elsewhere in the evaluation were rated as not meeting expectations. Among the examples he cited were the ratings for devoting time to work as needed to get the job done, which was rated as meeting expectations, and completing the necessary amount of work required of the position, which was rated as not meeting expectations.

Mr. David Solet, Mr. Sirc's immediate supervisor, testified that when a draft of the evaluation was first presented to him for review and approval, Mr. Sirc had marked each category as below expectations. He testified that he asked Mr. Sirc to try to find at least something positive to say about Mr. Henderson. He testified that Mr. Sirc revised the evaluation, marking fifteen of the thirty-two categories "meets expectations". However, in the attached narrative Mr. Sirc said that the appellant had been unable to perform at a level consistent with the requirements of the job. He said that when Mr. Henderson was hired, there were reservations about his

programming abilities, and that those reservations had been discussed with the appellant. He stated, "I find Mr. Henderson personable and I believe he tries very hard to perform the task assigned. Unfortunately his technical skills are not adequate to carry out the job responsibilities."

That assessment of Mr. Henderson's work performance is consistent with the testimony of Ms. Bonenfant and Ms. Grady, both of whom are experienced programmers. They described Mr. Henderson's programs as somewhat cumbersome and amateurish. One of the examples Ms. Grady offered involved the "Abstract" software written by Mr. Henderson. She testified that the program would not allow the user to "escape" from certain data screens without printing the document being edited or turning off the computer completely. Ms. Grady also testified that computer users become accustomed to using certain keystrokes to complete certain functions, i.e., striking the "Enter" key executes the command, striking the "Escape" key cancels the current command. She testified that in one of the programs Mr. Henderson wrote, the user had to strike the "Escape" key to execute the command, suggesting his lack of familiarity with the technical aspects of programming.

Ms. Grady also testified that she believed some of Mr. Henderson's performance problems were attributable to poor use of time at work. However, since time management was not one of the areas listed as deficient in his performance evaluation, and Ms. Grady had no supervisory authority over Mr. Henderson, the Board gave that aspect of her testimony no weight.

Kathleen Henderson, the appellant's wife, testified that for a period of approximately four months, before they were married, she and Mr. Henderson both worked in the Bureau of Vital Records. Mrs. Henderson testified that she never had heard complaints about her husband's performance, and believed his termination was the result of personal, not professional differences between Mr. Henderson and Mr. Sirc. Mrs. Henderson testified that it was "common" for employees in the Bureau to do personal favors for Mr. Sirc, such as plowing his driveway or mowing his lawn. She testified that Mr. Sirc and another employee frequently went out together looking at cars. Mrs. Henderson testified that Mr. Henderson was not "a socializer", and for that reason, he was never really accepted within the Bureau. She said that he was never personally involved with the rest of the staff in the office, and that he had refused to run personal errands for his supervisor, Mr. Sirc, on State time.

Mr. Henderson testified that his failure to be part of Mr. Sirc's "thing" and his response to a request for a personal favor from Mr. Sirc were the real basis for his termination from employment. Mr. Henderson testified that late one afternoon while his supervisor was on vacation, Mr. Sirc called the office from Lake Winnepesaukee to ask for a favor. Mr. Sirc first spoke to Steve Wirtz, who then transferred the call to Mr. Henderson. Mr. Henderson testified that Mr. Sirc had told him he was at Lake Winnepesaukee, just a few hundred yards from where Mr. Henderson kept his own boat. He testified that Mr. Sirc said he had dropped his keys into the lake and needed a spare set from his home. He testified that Mr. Sirc asked him to leave work, pick up the spare keys, and bring them to the lake for Mr. Sirc. Mr. Henderson testified that he refused, because he was not willing to run a personal errand for his supervisor, particularly on work time.

There was no evidence that Mr. Henderson reported this alleged incident to anyone before his termination from employment. Mr. Henderson did not raise this issue in his original appeal to this Board or at any time during the October 19, 1994 prehearing conference convened by the Board to establish the scope of the hearing. Accordingly, the Board gave it little weight in its consideration of the appeal.

Standard of Review

Per 1001.02 Dismissal During Initial Probationary Period

(a) At any time during the initial probationary period an appointing authority may dismiss an employee who fails to meet the work standard provided the dismissal is not:

- (1) arbitrary
- (2) illegal
- (3) capricious; or
- (4) made in bad faith.

Ms. Nixon argued on behalf of her client that using "Clipper" to write or revise software never appeared on Mr. Henderson's supplemental job description and therefore could not be considered in assessing his work performance. Similarly, Ms. Nixon argued that Mr. Henderson was never informed in writing on his supplemental job description that there would be deadlines associated with his work assignment.

The Board does not agree. First, the evidence reflects that when Mr. Henderson interviewed for the position, he was informed that some of his work assignments would involve the use of "Clipper". In spite of his complaint that he had not received formal training in Clipper, Karen Grady was available to answer questions and give him assistance. Mr. Henderson offered no evidence that he ever requested additional training.

The Board also does not believe that job descriptions need to include language warning employees that they are expected to complete their assignments on time. Per 801.03 (a)(2) of the Rules provides constructive notice of deadlines inherent in all employees' work. The rule requires all supervisors to rate their employees' performance in the area of quantity of work, "...including the capacity to complete assignments on time..." Anyone employed in a professional capacity, such as that of Planning Analyst, should understand that work assignments are subject to deadlines, and that repeated failure to meet those deadlines constitutes unsatisfactory work.

The Board found that in spite of Mr. Henderson's past work experience in information systems management, he did not possess the specific technical knowledge necessary to successfully perform the duties of his position as a Planning Analyst in the Bureau of Vital Records and Health Statistics. Insofar as Mr. Henderson failed to produce the quantity and quality of work required of him in that position, the Chief of the Bureau of Vital Records and Health Statistics acted within his authority when he discharged Mr. Henderson for failing to meet the work standard prior to completion of the probationary period.

Appellant's Requests for Findings of Fact and Rulings of Law

FINDINGS:

#1 is granted to the extent that it lists some, but not all, of the applicable requirements contained in Per 301.03 for defining the duties and responsibilities of a position in State service. Per 301.03 (11) also requires the use of a disclaimer statement which states, "The supplemental job description lists typical examples of work and is not intended to include every job duty and responsibility specific to a position. An employee may be required to perform other related duties not listed on the supplemental job description provided that such duties

are characteristic of that classification."

#2 is granted to the extent that it lists some, but not all, of the requirements contained in Per 801.02 for evaluating an employee's performance. Per 801.02 (D) also includes the following provision, "...If the employee's performance is rated 'below expectations,' the supervisor shall also include comments and recommendations for the employee's improvement, unless the employee is a probationary employee being dismissed under Per 801.07(b)." (Emphasis added).

#3 is granted to the extent that it lists some, but not all, of the requirements contained in Per 801.04 for performing professional and technical employee evaluations. In addition to the requirements of Per 801.04 (8) e., Per 801.04 (8) also provides for evaluation of an employee's Initiative, safety, appearance and leadership.

#4 is granted to the extent that it lists some, but not all, of the conditions for termination of probationary employees. Per 1001.02 (a) also authorizes an appointing authority to dismiss an employee during the initial probationary period if that employee "fails to meet the work standard."

#5 and 6 are granted.

#7 is granted only to the extent that it lists portions of the accountabilities appearing on Mr. Henderson's supplemental job description. Technical assistance to be provided was "...in the design of data collection methods and the analysis and/or applications of data and statistics." Data collection and analysis included "...system design, information flow, writing PC based software and modifying and revision of forms."

#8 is granted, but is not dispositive of the appeal. (See #1 above)

#9 and #10 are granted.

#11 is granted after deleting the words "consisted solely of a walk" and replacing them with the words "took place while walking".

#12 is denied. The Rules of the Division of Personnel contain no rule Per 801.03(d).

#13 is denied.

#14 is granted only to the extent that it includes some, but not all, of the reasons for Mr. Henderson's termination from employment.

#15 is denied. Clerks who complained of Mr. Henderson's performance were identified at the hearing. Neither time requirements nor knowledge of Clipper needed to be identified in the supplemental job description.

#16 is denied. There was insufficient evidence to support such a finding.

#17 is denied.

The Board found that there was sufficient evidence that Mr. Henderson failed to meet the work standard, and was therefore subject to termination from his employment under the provisions of Per 1001.02. Although the discussion between Mr. Henderson and Mr. Sirc in the parking lot

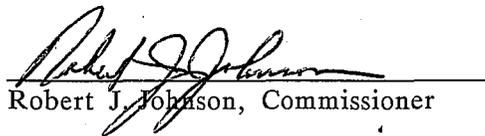
does not appear to have been the most appropriate method of discussing the appellant's impending termination, there was evidence that the parking lot provided one of the few places where Mr. Sirc and Mr. Henderson could talk privately. While the meeting was casual and somewhat unorthodox, the Board found that it satisfied the minimum requirements of Per 1001.02 (1). The appellant did receive written notice of his termination, which specified the reasons for his termination from employment, and was properly advised of his rights to appeal the termination to this Board.

On the evidence, the Board voted unanimously to deny Mr. Henderson's appeal, finding that he was dismissed prior to completion of his initial probationary period for failing to meet the work standard. The appellant failed to offer sufficient evidence to persuade the Board that his termination was arbitrary, illegal, capricious, or made in bad faith.

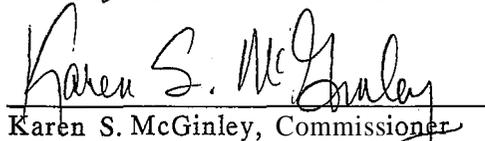
THE PERSONNEL APPEALS BOARD



Mark J. Bennett, Acting Chairman



Robert J. Johnson, Commissioner



Karen S. McGinley, Commissioner

cc: Virginia A. Lamberton, Director of Personnel
Sandra Platt, Administrator, Health and Human Services
Leslie Nixon, Esq., Nixon, Hall and Hess P.A.