

State of New Hampshire



PERSONNEL APPEALS BOARD

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APPEAL OF MAURICE TANDY Docket #93 - T-25 Department of Employment Security

April 20, 1994

The New Hampshire Personnel Appeals Board (McNicholas, Bennett and Rule) met Wednesday, January 26, 1994, to hear the appeal of Maurice Tandy, a former part-time employee of the Department of Transportation. Mr. Tandy was represented at the hearing by Attorney Stephen Gaige. The Department of Employment Security was represented by Attorney Charles Bradley.

Mr. Tandy was terminated from a position of part-time Interviewer Trainee at the Department of Employment Security effective February 10, 1993. By letter dated February 14, 1993, Mr. Tandy requested a meeting with Commissioner John Ratoff, Department of Employment Security to appeal his dismissal, claiming that it was unfair and unjustified. The Commissioner responded by letter dated March 10, 1993, informing Mr. Tandy that because he was a part-time employee, he had no rights of appeal. He also noted that after reviewing information concerning Mr. Tandy's termination, he had concluded that the discharge decision was not arbitrary, capricious, contrary to law or made in bad faith. He concluded by advising Mr. Tandy that no further action would be taken by him or the Department of Employment Security.

On March 20, 1993, Mr. Tandy requested a hearing before the Personnel Appeals Board to appeal his dismissal from employment. In that letter he argued that his status at the time of his dismissal was "permanent" and that he was therefore entitled to a hearing before the Board on the merits of his appeal. The Department of Employment Security, through its representative Attorney Charles Bradley, then filed a Motion to Dismiss, dated March 30, 1993. In that Motion, the Department offered the following grounds for dismissal of the matter:

The Personnel Appeals Board lacks subject matter jurisdiction over the Petition of Maurice Tandy because Maurice Tandy was a part-time employee of the Department of Employment Security and as such is not entitled to the benefit of the Rules and Regulations of the Division of Personnel.

The Personnel Appeals Board lacks jurisdiction over the Petition of Maurice Tandy because the petition fails to state a claim upon which relief may be granted because Maurice Tandy was a part-time employee of the Department Security and as such is not entitled to the benefit of the Rules and Regulations of the New Hampshire Division of Personnel.

The Petition of Maurice Tandy fails to plead a case which on its face establishes that

the Commissioner of the Department of Employment Security or his authorized agents acted in a manner that may be characterized as arbitrary, illegal, capricious or in bad faith.

A prehearing conference was scheduled by the Board on October 27, 1993, at which time Mr. Bradley and Mr. Gaige were given an opportunity to offer argument on the pending Motion, and were asked to address the amount of time which would be required for a hearing on the merits if the Motion to Dismiss were to be denied. Attorney Bradley argued that because of Mr. Tandy's part-time status, he was not entitled to the benefit of the Personnel Rules with regard to his dismissal. He cited RSA 21-I:58 which provides the right of appeal to "any permanent employee who is affected by any application of the personnel rules...." He argued that in his status as a part-time employee, Mr. Tandy did not have the right to a hearing, and argued that on that basis alone, the Board lacked subject matter jurisdiction to hear the appeal. He cited the decision of the Supreme Court in the Appeal of Higgins-Brodersen, 133 NH 576, 578 (1990), arguing that the Court in dicta only, states that part-time employees appear subject to RSA 21-I:46, but that the dicta does not permit the Appeals Board to affirmatively determine that it has the power to hear the appeals of part time employees.

Mr. Bradley argued that the Board lacked jurisdiction over the Tandy petition because he had failed to state a claim upon which relief might be granted, quoting from New Hampshire Practice, Civil Practice and Procedure § 353, p. 247. He argued that the Board must grant the Motion to Dismiss because the appellant had failed to state any claim upon which relief might be granted, even if the Board were to assume that all the appellant's "well-pleaded allegations" and reasonable inferences to be drawn therefrom are true and can be proved. In the instant case, Mr. Bradley argued that the appellant had failed to state a basis upon which he was entitled to the benefit of the Rules of the Division of Personnel, and therefore had failed to state a basis upon which relief might be granted.

Mr. Bradley also argued that even if the Board were to determine that it had subject matter jurisdiction to hear the appeal of Maurice Tandy, and that he could state a claim upon which relief could be granted, the only standard which could be applied in assessing the propriety of the termination would be that standard applied to appeals by probationary employees, that an employee may be discharged for any failure to meet the work standard, provided that the termination is not arbitrary, illegal, capricious, or made in bad faith.

Mr. Bradley argued that the appellant's petition failed to plead a case which, on its face, establishes that the Commissioner of the Department of Employment Security or his authorized agents acted in a manner that might be characterized as arbitrary, illegal, capricious or in bad faith. He argued that in Mr. Tandy's own petition, he states that during the discussion which ultimately led to his dismissal, he "was so focused on his own personal situation concerning DVOP preference that he failed to recognize that he was being engaged in a discussion concerning how he would handle the issue of preference with respect to other veterans' programs if he was hired at the Laconia DVOP." Mr. Bradley argued that this was precisely the problem that Mr. Tetler addressed in his letter of discharge to Mr. Tandy. Mr. Bradley argued that the appellant had failed to plead a case which, on its face, establishes that the department acted in a manner which was arbitrary, illegal, capricious or in bad faith, citing the case of Gilmore v. Cumberland Farms, Inc. (USDC-NH NO-90-296, dec. 3-30-92), in which the Federal District Court granted summary judgment in favor of the employer:

"[I]n evaluating claims for wrongful discharge, courts have been careful not to interfere with the employer's right to make business decisions and to choose the best

personnel for the job."

Attorney Gaige argued that Mr. Tandy's termination arose from his application for a position in the Department of Employment Security, his claim to veteran's preference for that position, and that he was more qualified for the position than others. He stated that in the course of trying to prove his entitlement to preference, he had contacted Tom Norris, another employee of the Department of Employment Security, providing him information to show that if he was not selected for the position, it would violate certain of the federal grant requirements for the program. In the process, he released information which was "confidential", but believed such a release of information was permissible because Mr. Norris was also a Department of Employment Security employee. On that basis, Mr. Gaige argued that the termination was illegal.

Attorney Gaige also argued that Mr. Tandy's personnel records showed him to be "permanent", and that as such, he should be considered a permanent part-time employee, entitled to relief under both the provisions of RSA 21-I:58 and the Rules of the Division of Personnel. He suggested that if the facts were viewed in the light most favorable to the appellant, the Board should consider Mr. Tandy to be a permanent employee entitled to a hearing on the merits of his appeal. He said that Mr. Tandy's appeal was clearly distinguishable from Higgins-Brodersen, and that no law specifically precludes part-time employees from the right to appeal.

After hearing arguments by both parties, the Board took the Motion under advisement and tentatively set the matter for hearing. The parties agreed that if the matter were to be heard on the merits, it would require at least a day and a half. The matter was tentatively scheduled for hearing on January 26, 1994 and February 2, 1994.

The Board did not issue a decision on the pending motion prior to the January 26, 1994 hearing date. The parties were asked to review their positions on the Motion to Dismiss before proceeding. Both Mr. Bradley and Mr. Gaige reiterated their respective arguments. Following those presentations, the Board recessed briefly to deliberate on the motion.

After considering the respective arguments on the matter of the Board's jurisdiction, the Board voted to dismiss Mr. Tandy's appeal. The Board found that it lacked subject matter jurisdiction to hear Mr. Tandy's appeal. RSA 21-I:58 confers upon permanent employees the right to request a hearing before the Personnel Appeals Board when such employees are "affected by any application of the Personnel Rules". Mr. Tandy was not a permanent employee within the statutory meaning of "employee". The statutes describe three different classifications for achieving permanent status.

RSA 98-A:1 Terms Defined. The following terms shall be construed as follows:

- I. "Temporary appointment" shall mean an appointment made to fill a temporary position on a full-time basis for the period of appointment.
- II. "Seasonal appointment" shall mean an appointment made to fill a seasonal position on a full-time basis for the period of appointment. A seasonal appointment is one which may reasonably be anticipated as likely to recur each year for a varying number of months.
- III. "The equivalent of 6 months or more" shall mean the equivalent of 130 or more regularly scheduled work days, not necessarily consecutive, provided that whenever an employee of the racing commission or greyhound racing commission is employed on any day on a per diem basis he shall be deemed to

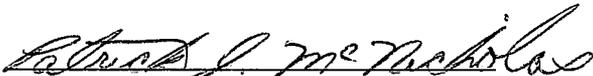
- have worked one day.
- IV. "Full-time basis" shall refer to employment calling for not less than 37-1/2 hours work in a normal calendar week or calling for not less than 40 hours work in a normal calendar week with respect to positions for which 40 hours are customarily required.
- V. "Part-time basis" shall refer to employment calling for less than 37-1/2 hours work in a normal calendar week or calling for less than 40 hours work in a normal calendar week with respect to positions for which 40 hours are customarily requested.

RSA 98-A:3 Position Made Permanent. Any person appointed under a temporary appointment or any person appointed under a seasonal appointment who works the equivalent of 6 months or more, not necessarily consecutively, in any 12-month period shall be deemed to be respectively a permanent temporary employee or a permanent seasonal employee and entitled to all the rights and benefits of a permanent employee in the classified service.

The statutes contain no similar proviso for part-time employees, nor is there any definition for "permanent part-time", regardless of the phraseology which the Department of Employment Security may have used in describing the nature of the position Mr. Tandy had held on a part-time basis during the period of his employment as an Interviewer Trainee. Accordingly, the Board found that he was not entitled to the same consideration as a full-time probationary, full-time permanent, permanent temporary, or permanent seasonal employee.

Having considered the arguments offered by the parties, the Board voted to grant the Department of Employment Security's Motion, thereby dismissing Mr. Tandy's appeal.

THE PERSONNEL APPEALS BOARD


Patrick J. McNicholas, Chairman


Mark J. Bennett, Commissioner


Lisa A. Rule, Commissioner

cc: Virginia A. Lamberton, Director of Personnel
Charles Bradley, III, Counsel, Department of Employment Security
Stephen Gaige, Esq., Silverman, Penna, Pike and Gaige, Attorneys and Counselors at Law