

# State of New Hampshire

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**PERSONNEL APPEALS BOARD**  
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## APPEALS OF PATRICIA McCORMACK and KATHLEEN AUSTIN Department of Health and Human Services Retroactive Pay

dated: February 1, 1990

On March 22, 1989, the Personnel Appeals Board heard oral argument in the retroactive pay appeals of Kathleen Austin and Patricia McCormack. Upon review of the evidence in these appeals, the Board made the following findings.

1. Both Austin and McCormack had occupied Case Technician positions at some time during the period between April 26, 1985 (the effective date of upgrading for those qualifying under the terms of the Case Technician career ladder decision) and prior to August 18, 1987 (the date of the Director's decision creating a Case Technician career ladder).
2. Austin and McCormack were both promoted to positions outside the Case Technician class series prior to the Director's August 18, 1987 decision in the Case Technician upgrading request.
3. Neither Austin nor McCormack received retroactive compensation at the higher rate of pay for any work performed as a Case Technician between the dates of April 26, 1985 and August 18, 1987.

During oral argument before the Board, Appellants, through their representatives, had argued that the rationale behind their appeals was identical to those in the appeals of Patricia Cortez. <sup>1</sup> Appellants therefore argued that they should be entitled to retroactive compensation, consistent with the Board's order of November 28, 1988 in the Appeal of Patricia Cortez.

For the purpose of comparison, the Board reviewed the limited documents filed in the Cortez appeal. The Board also considered the Division of Personnel's position on oral argument in the appeals of Austin and McCormack. The Division contended that the retroactive pay adjustment in the Cortez appeal had been made primarily upon a recommendation of the Attorney General's Office, and not upon any substantive or thorough review of the file by the Division itself.

Having reviewed the Cortez file, the Board is inclined to accept the Division's position that little documentation of qualification for retroactive compensation had been reviewed prior to recommendation of award. Nothing in the Board's file indicates that Ms. Cortez did, on August 18, 1987, meet all the requirements which would qualify her for retroactive compensation set forth in the Director's August 18, 1987 decision. Therefore, it is impossible for the Board to determine with any certainty the extent of similarity between the matters of Austin and McCormack, and Cortez. It is equally impossible for the Board to determine the value of the Cortez decision as precedent in its deliberations on either of the instant appeals.

The Board did not find, however, that the appeals of Austin or McCormack should be prejudiced by the lack of evidence, or Findings of Fact and Rulings of Law in the Cortez appeal. Therefore, the Board reviewed these matters on their own merit.

In her letter of August 18, 1987, Director Vogel outlined the criteria by which employees could be promoted as part of the newly established career ladder for Case Technicians. In pertinent part, she stated, "Employees cannot be promoted to the Case Technician II level until they have completed all of the course work, and they have received a formal written recommendation by the Unit Supervisor." The Director's September 22, 1988 request for dismissal of Ms. McCormack's appeal argues that little weight should be given to the promotion recommendation made by McCormack's supervisor in March of 1988, since McCormack had been transferred to Quality Assurance in 1986.

While the Board can certainly understand and support the Director's reasoning, the Board also finds it unreasonable to assume that any supervisor would have made recommendation for "promotion" when, prior to August of 1987, no such avenue for promotion existed. It is equally unreasonable to expect that supervisors would have made such recommendations, or responded to requests for same, when those involved knew of the pending request for upgrading, but were uncertain of the terms upon which such upgradings might be granted. The record in both appeals indicates that neither appellant occupied a Case Technician on August 18, 1987, as both had been promoted to other positions within the agency. Therefore, it is reasonable to infer that the promotion recommendations for both appellants were valid.

The Board hereby denies the Director's request that these appeals be dismissed. The Board grants the appeals to the extent that award of retroactive compensation shall be made only for those hours worked as a Case Technician between the dates of April 26, 1985 and August 18, 1987, but only for such period of time during which the appellant(s) met the promotional criteria discussed above, as set forth in the Director's August 18, 1987 decision.

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Such adjustment shall be made effective the beginning of the pay period following completion of the requirements for promotion.

Documents effecting such adjustment, with copies of supporting documentation, shall be forwarded by the Division of Human Services to the Director of Personnel for approval and signature, with copies of same forwarded simultaneously to the Board for its file.

FOR THE PERSONNEL APPEALS BOARD

  
Patrick J. McNicholas, Esq., Chairman

cc: Stephen J. McCormack, SEA Field Representative  
(on behalf of Kathleen Austin)  
Jean Chellis, SEA Field Representative  
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Jan D. Beauchesne, Commissioner's Office of Management and Budget  
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