

State of New Hampshire

WPPID939



PERSONNEL APPEALS BOARD

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

APPEAL OF CONRAD CHAPMAN

Docket #91-0-27
Motion for Hearing on Issues 2 and 3

May 21, 1992

The New Hampshire Personnel Appeals Board met Wednesday, April 29, 1992, to consider Appellant's March 30, 1992 Motion for Hearing on Issues 2 and 3, which the appellant supplemented by letter dated April 20, 1992 in which he advised the Board he was in the process of gathering information to address discrepancies in the appellant's and New Hampshire Hospital's computation of over-time worked by the employee who replaced the appellant during the period of his lay-off as a Security Officer.

The Board's Order of March 19, 1992, only held the issue of overtime in abeyance pending receipt of information from New Hampshire Hospital on over-time previously worked by the appellant and by his replacement in the position of Security Officer. In requesting that information, the Board expressed no opinion on whether or not payment of overtime to Chapman was necessary to make him whole ¹ in accordance with the Board's September 11, 1991 Order. Since Article 6.1.3 of the Collective Bargaining Agreement allows the employer absolute discretion in determining when overtime hours may be reduced or eliminated, and Chapman's overtime assignments prior to layoff were expressed as "averages" and not regular assignments, there may not be an entitlement to any payment. In any event, the Board does not find that a hearing on the issue of overtime is warranted now in light of what appears to be discussion between the parties on a mutually acceptable remedy.

^{1/} "The Division of Personnel shall adjust his seniority date accordingly and Chapman shall be entitled to the consequences thereof as of that date. Any dispute regarding the implementation of this order may be brought back before the Board by motion of either party. The Board retains jurisdiction for that limited purpose." P.A.B. Order, Appeal of Conrad Chapman, Docket No. 91-0-17, September 11, 1991.

APPEAL OF CONRAD CHAPMAN
Docket #91-0-27
Motion for Hearing on Issues 2 and 3

The appellant's request for a hearing on the issue of attorney's fees does not qualify as a properly filed Motion for reconsideration, and does not allege that the Board's decision of September 11, 1991 or March 19, 1992 was unreasonable or unlawful.

Accordingly, the Board voted to deny Appellant's Motion dated March 30, 1992.

THE PERSONNEL APPEALS BOARD



Mark J. Bennett, Acting Chairman



Lisa A. Rule

cc: Virginia A. Vogel, Director of Personnel
A. G. O'Neil, Jr., Esq., Normandin, Cheney and O'Neil
Normandin Square, 213 Union Ave, P.O. Box 575
Laconia, NH 03247-2575

State of New Hampshire

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PERSONNEL APPEALS BOARD

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

APPEAL OF CONRAD CHAPMAN

Docket #91-0-27

Response to Appellant's Motion for Orders
Implementing Decision Dated September 11, 1991

March 19, 1992

The New Hampshire Personnel Appeals Board' (McNicholas and Johnson) met Wednesday, February 26, 1992, to consider the above-captioned Motion filed by Attorney O'Neil on behalf of Conrad Chapman, the State's January 31, 1992 response to said Motion, and Attorney O'Neil's February 14, 1992 Answer.

The Board voted to order the following:

1. **Mr.** Chapman's request for reinstatement to his former position as a security officer, and for payment of the differential between the rate of pay received and the rate of pay which would have been received had he not been laid off as a security officer is granted.

2. **Mr.** Chapman's request for payment of costs and attorney's fees in the amount of \$8,000 is denied.

3. **Mr.** Chapman's request for payment of over-time shall be held in abeyance pending receipt from New Hampshire Hospital of the following information:

a) **How** many over-time hours did **Mr.** Chapman work in each of the 26 bi-weekly pay periods prior to the effective date of layoff?

b) Were over-time hours available to **Mr.** Chapman during his employment as a Mental Health Worker Trainee and as a Radio Dispatcher? If so, did **Mr.** Chapman work any over-time hours in those positions?

c) **How** many over-time hours were worked by the employee who replaced **Mr.** Chapman as the Security Officer?

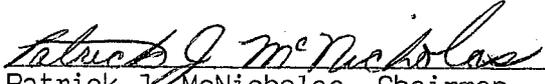
APPEAL OF CONRAD CHAPMAN

Docket #91-0-27

Response to Appellant's Motion for Orders
Implementing Decision Dated September 11, 1991
page 2

New Hampshire Hospital shall provide the information requested above within 15
calendar days of the date of this order.

THE PERSONNEL APPEALS BOARD


Patrick J. McNicholas, Chairman


Robert J. Johnson

cc: Virginia A. Vogel, Director of Personnel
A. G. O'Neil, Jr., Esq.
Stephen Judge, Assistant Attorney General
Mark Chittum, New Hampshire Hospital

State of New Hampshire

WPPID838



PERSONNEL APPEALS BOARD

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

RESPONSE TO REQUEST FOR REHEARING Appeal of Conrad G. Chapnan Docket #91-O-27

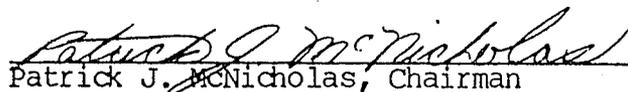
November 12, 1991

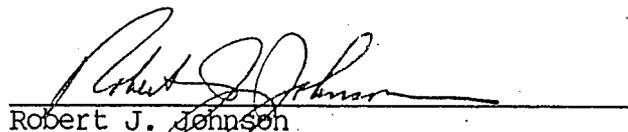
The New Hampshire Personnel Appeals Board (McNicholas, Johnson and Bennett) met Wednesday, October 9, 1991, to consider the Division of Personnel's Motion for Rehearing, filed on behalf of the Director of Personnel by her attorney, Stephen J. Judge, on September 30, 1991. The Board also considered the Appellant's Objection to Appellee's Motion for Rehearing, filed on his behalf by his attorney, A.G. O'Neil, Jr., on October 7, 1991.

Specifically, the Director argued that the Board has no equitable powers to expand the 15 day jurisdictional limit of RSA 21-I:58, I, and that the Board had properly determined in its original decision that Chapman's appeal was untimely. The appellant argued that fundamental fairness required the Board to hear his appeal, because no "full, clear and adequate" notice of the Director's decision was provided to Chapman.

In consideration of the record before it, the Board voted to deny the Director's Motion for Rehearing. In so doing, the Board voted to affirm its Order of September 11, 1991.

THE PERSONNEL APPEALS BOARD


Patrick J. McNicholas, Chairman


Robert J. Johnson


Mark J. Bennett

cc: Stephen J. Judge, Assistant Attorney General
A. G. O'Neil, Jr., Esq.; Normandin, Cheney & O'Neil
P.O. Box 575, Laconia, NH 03247

State of New Hampshire



PERSONNEL APPEALS BOARD

State House Annex
Concord, New Hampshire 03301
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Appeal of Conrad Chapman

Docket No. 91-0-27

September 11, 1991

Conrad Chapman is, and was at all pertinent times, an employee of New Hampshire Hospital. Mr. Chapman has been employed in various positions in state service between 1985 and the present, with a gap in his employment beginning upon his resignation from state service in 1987, and ending with his subsequent reapplication and reemployment on August 5, 1988. This date was established as the pertinent date for the computation of seniority. Per 308.06(b). However, that date is in dispute as it relates to Mr. Chapman's seniority for purposes of layoff, which is the subject of this appeal.¹

Prior to commencing a career in state service, Mr. Chapman completed a twenty plus year career in the United States Air Force. It is undisputed that Mr. Chapman's successful military career consisted of five separate successive four-year enlistment periods spanning continuously the period from January 8, 1957, and ending with an honorable discharge on October 31, 1977.

¹ Various procedural and preliminary matters have previously been considered by the Board and are adequately addressed in the Board's Orders of May 8, 1991, and April 11, 1991, contained in the record of this appeal.

On March 16, 1990, Mr. Chapman was notified by the Commissioner of Health and Human Services that he was to be laid off (apparently due to various state budgetary constraints). He was advised of his' seniority date and that he could appeal that date to the Director of Personnel within seven days if he believed it to be incorrect. Chapman wrote to the Director on March 19, 1990, challenging his seniority date on the basis that he should be given seniority credit for his military service. The Director determined that Chapman was ineligible for additional credit and so advised Sharon Sanborn, the Director of Human Resources at New Hampshire Hospital, where Chapman worked. No written notice was provided to Chapman, although it is contended that Sanborn so advised him and further advised him of his right of appeal to this Board.² Ultimately, Chapman did file an appeal to this Board.³

Two issues are thereby before us for decision:

1. Is Chapman's appeal timely?

² On April 6, 1990, Chapman was demoted in lieu of layoff to another position at New Hampshire Hospital, and has remained employed by the State in various positions ever since.

³ Please see the Board's Order of April 11, 1991, dismissing Chapman's appeal. Reconsideration granted May 8, 1991. Chapman raises a number of statutory, constitutional and equitable grounds in support of his Motion for Reconsideration. On all the facts alleged in that motion and discussed in our Order of April 11, 1991, equity warrants that Chapman be afforded a hearing, and that is the basis for our Order of May 8, 1991, granting reconsideration. The Board does not rule on any of Chapman's claims set forth in his Motion for Reconsideration, and it becomes unnecessary to do so in light of our Order of May 8, 1991, and our decision today.

2. Was Chapman entitled to additional seniority credit at the time of his layoff due to his military service?*

I. Timeliness.

At first blush, in light of our Order of May 8, 1991, this issue would appear to be moot because the appellant got his hearing. However, principles of equity and justice for Chapman, and for others, require us to address the procedure followed here which is at the root of the timeliness issue irrespective of the fact that Chapman was ultimately afforded a hearing, to which he had a substantive right, unless he waived it by procedurally failing to seek it. However, waiver presupposes adequate notice was afforded to Chapman, and would be afforded to others similarly situated, in order to permit the conclusion to be drawn that the appellant knew he had an appeal right, and how and by when he must exercise it, if he was not to **lose that** right.

In this case, Chapman was clearly advised of his seniority date and how to appeal it to the Director of Personnel by the letter of layoff given him by the Commissioner of Health and Human Services on March 16, 1990. Chapman understood this and appealed by correspondence of March 19, 1990. It is here that the system breaks down. On April 2, 1990, the Director of Personnel notified Sharon Sanborn of her determination on the seniority issue. She

⁴ This issue does not appear to be rendered moot by **Chapman's** demotion in lieu of layoff, although no evidence was presented on the point, because a different seniority date could have affected the layoff decision itself, or the available demotional employment opportunities open to Chapman at the time of his layoff.

did not notify Chapman, although it is alleged that Sanborn orally notified him the next day. We are told at hearing that Chapman was formerly an agency personnel officer at the New **Hampshire** Department of Corrections, that he clearly knew the procedure in seniority determination cases, and that he failed to follow up and perfect his appeal to this Board. While all of that may be true, the Board considers the system for preserving and ascertaining employees' rights, of which it is a part, to be deficient if such fundamental principles as whether notice to an employee of a determination affecting him, and what and when he must do something about it, must be established by an evidentiary hearing on a case by case basis. The question of uniformity in the future nags at us. The record of dealings between Chapman and the Division of Personnel clearly show a man seeking to appeal, and to seek review of the Director of Personnel's position respecting his seniority claim.

Accordingly, on equity grounds the Board finds the instant appeal timely filed. For the future, the Board expects that adequate notices will be afforded to appellants of determinations so that it can be presumptively likely that persons seeking to exercise their appeal rights can do so without having to fight an uphill battle in a procedural mountain range. This means, in the instant case, that the Director of **Personnel's** determination on April 3, 1990, should have been communicated to Chapman in writing addressed to him, and should have contained written notice of his right to appeal to this Board, and the time frame and procedure

therefore. We believe that the clarity such procedures bring to the existing system of review will speed decisions and lessen untoward impacts upon both the state and its employees.

II. Seniority Credit

The parties have afforded the Board the benefit of much argument on this point. They have covered federal law on the reemployment of veterans, state law on **veterans'** "preferences," the definitions of "time of war" and the like, and our rules in both areas (hiring and layoff) where veterans' "preferences" apply.

A recurrent issue raised by the parties is the applicability of RSA 283 to the instant situation. The question of applicability of this, and other statutory enactments, must be seen to include the issues of whether or not they apply only to hiring, or whether their application is broader, encompassing retention and layoff as well. Many of the parties' arguments relate to these questions, and they are important questions of public policy regarding veterans, but they are not questions which we need to address to any great degree in order to decide Mr. Chapman's appeal.

While the parties have compared and contrasted personnel provisions of the N.H. Code of Administrative Rules with various statutes in an endeavor to interpret one or the other, neither party has questioned the lawfulness of those provisions of the Code as they relate to veterans and veterans' preferences. Accordingly,

we interpret them on their face in accordance with their plain meaning. Such an interpretation resolves this appeal.⁵

We note at the outset that the Rules of the Division of Personnel provide for **veterans'** preference in sections pertinent to both the hiring and layoff of veterans. Per 301.13; 308.05(a)(2). This is not inconsistent with RSA 283, as we have previously said, but that may be so simply because RSA 283 may not apply to retention or layoff, but only to initial employment "preferences." Similarly, these rules do not appear to be obviously inconsistent with RSA 21-I or 97. (Note, RSA 21-I:42). We need not, and do not, reach those questions. We turn instead to Per 308.05(a)(2), which deals expressly with the issue of Veterans Preferences in layoffs, and is contained in Per 308, the Code section pertinent to all layoffs. Per 308.05(a)(2) provides in its entirety:

"(2) Veterans Preference. Permanent employees, for each full month of verified service for the original length of a draft, enlistment period, or federalization in the armed forces of the United States during a period of war or armed conflict as defined by statutory enactment, who have been honorably discharged or separated from such service, shall be given one month of seniority credit."

As has been noted, the Code deals with **veterans'** preferences in hiring and layoff. Per 301.13 provides, in essence, for a veteran to have additional points added to any passing earned

⁵ We have read with some interest, but without wholly adopting the same as our view, **Appellant's** Memorandum in Support of Conrad Chapman's Claim for Veterans Preference as to Seniority, ¶ 1-13.

rating achieved in an examination for entrance into the state classified service. Per 301.13(a).⁶ This is significant in that the Code provides for an apparently comprehensive system of preferences for veterans. Veterans receive additional points to facilitate their selection for a position at the time of hiring (Per 301.13) and a "preference" (discussed below) when being laid off. (Per 308.05(a)(2)). But "points" as afforded by Per 301.13 are not "months of seniority credit" as afforded by Per 308.05(a)(2). Receiving points helps with hiring, it does not particularly affect the risk of layoff, or the order of layoff.⁷

Accordingly, for the veterans preference in layoff afforded by Per 308.05(a)(2) to have any meaning in the apparent scheme of preferences afforded to veterans by the Code, it must stand alone, independently of Per 301.13, and at the time of the layoff of a qualifying veteran, afford a "preference" to that veteran which could affect whether or not the veteran is indeed laid off. This it does by adjustments to the veteran's seniority date, as that may put the veteran on more favorable ground vis a vis other employees,

⁶ Chapman received ten points on account of a service connected disability of ten percent or greater. Per 301.13(b).

⁷ But note, Per 308.05(b), not applicable to our consideration here, noting that ability can affect the order of layoff in certain cases. We do not express any opinion about whether veterans' preference hiring points afford the veteran any advantage under this provision.

who may become by operation of this provision, less senior than the veteran, and hence, subject to layoff when the veteran is not.⁸

With this background we deal with Per 308.05(a)(2) in light of the evidence adduced at hearing on June 26, 1991. The section pertains to permanent employees, which Chapman was at the time of layoff. It affords him one month of seniority credit for each full month of verified service for the original length of, in his case, an enlistment period in the Air Force during a period of war, "war" to be as defined in RSA 72:28, the "statutory enactment," referenced in the section. Chapman was honorably discharged, as required by the section, from the Air Force on October 31, 1977.

Chapman's circumstances, by example, help to illuminate the meaning of the words of the section. He served five four-year enlistment periods in the Air Force. His enlistment period was not twenty years. Accordingly, to read the phrase "original length" correctly, it must be done in light of the phrase it modifies, "enlistment period." Thus, an "enlistment period" commencing during a time of war entitles Chapman to seniority credit for its "original length," to wit, four years (48 months).⁹ This is so because the original length (48 months) of Chapman's enlistment

⁸ The Board expresses no opinion as to the advantages, disadvantages or propriety of any system of preferences in a merit employment plan, such as New Hampshire's. That is ultimately a policy question for the general court.

⁹ We express no opinion as to the meaning of this rule in cases where there are enlistment periods commencing during times of different wars, as determined by statutory enactment.

period running from January 8, 1965 until January 7, 1969, occurred during the Vietnam Conflict, a period of war or armed conflict as defined by RSA 72:28. Subsequent enlistment periods also began during the Vietnam Conflict, but they were not the "original length" of a period so beginning, rather they were subsequent lengths or periods. To read Per 308.05(a)(2) differently renders the section effectively meaningless, or as conferring a benefit of greater scope than the plain language could rationally be seen to have intended.¹⁰

III. Order.

The Board finds that appellant, Conrad Chapman, was entitled to 48 months of seniority credit pursuant to Per 308.05(a)(2) on the date of his layoff from state service, April 5, 1990.

The Division of Personnel shall adjust his seniority date accordingly and Chapman shall be entitled to the consequences thereof as of that date. Any dispute regarding the implementation of this order may be brought back before the Board by motion of either party. The Board retains jurisdiction for that limited purpose.

A. Requests for Findings and Rulings.

To the extent consistent with the foregoing, and read in light thereof:

Appellant's: Request for Findings No. 1-9 are granted; Ruling No. 3 is granted, Nos. 1, 2, 4, 5 and 6 are denied.

¹⁰ Note, Appellant's Memorandum in Support, ¶ 13, cited in Footnote 5, supra.

Appellee's: Requests for Findings No. 1-11, and 13-15 are granted, No. 12 is denied as unsupported by the evidence; Rulings No. 1-3, 6 and 7 are granted, Nos. 4, 5, and 8-11 are denied.

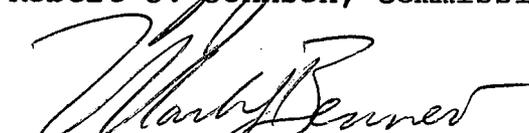
Requests for Findings and Rulings that could not be granted in toto have been denied.

Date: Sept 11, 1991

The Personnel Appeals Board


Patrick J. McNicholas, Chairman


Robert J. Johnson, Commissioner


Mark J. Bennett, Commissioner

cc: Virginia A. Vogel, Director of Personnel

Sharon A. Sanborn, Director of Human Resources, N.H. Hospital

A. G. O'Neil, Jr., Normandin, Cheney and O'Neil P.A.

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State of New Hampshire

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PERSONNEL APPEALS BOARD

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

APPEAL OF CONRAD CHAPMAN Response to Appellant's Motion for Rehearing Docket #91-O-27

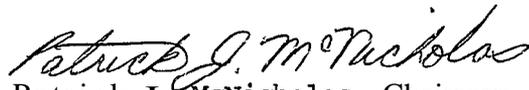
May 8, 1991

The New Hampshire Personnel Appeals Board (McNicholas, Johnson and Bennett) met Wednesday, May 1, 1991, to consider the Motion for Rehearing filed by Attorney A. G. O'Neil, Jr., on behalf of Conrad Chapman regarding his appeal of adjustment to seniority based on military service.

In consideration of the grounds provided by the appellant, the Board voted to grant the appellant's request that he be afforded a public hearing to address his alleged entitlement to an adjustment to his seniority date based upon veteran's credit, but to deny his request that the Board schedule a prehearing conference to simplify the issues. The Board also voted to deny the appellant's request for reimbursement for "reasonable costs and attorneys' fees", and to hold his remaining requests for relief in abeyance.

The Board will hear *Mr.* Chapman's appeal on Wednesday, May 29, 1991 at 1:30 a.m. in Room 401, State House Annex, Concord, New Hampshire. The Board has scheduled one hour for this hearing. Motions for continuance, postponement or special scheduling will only be considered for exceptional circumstances. Any such motions must be made in writing and be received by the Board within seven (7) calendar days in order to be considered.

THE PERSONNEL APPEALS BOARD


Patrick J. McNicholas, Chairman


Robert J. Johnson


Mark J. Bennett

cc: Virginia A. Vogel, Director of Personnel
A. G. O'Neil, Jr., Normandin, Cheney and O'Neil

State of New Hampshire

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PERSONNEL APPEALS BOARD

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

APPEAL OF CONRAD CHAPMAN

Docket #91-0-27

Appeal of Veterans' Preference

April 11, 1991

The New Hampshire Personnel Appeals Board (McNicholas, Johnson and Bennett) met Wednesday, April 3, 1991, to consider the appeal filed by Attorney A. G. O'Neil, Jr., on behalf of Conrad Chapman relative to the Personnel Director's refusal to grant him "veteran's preference in determining his seniority status for the purposes of a lay-off that occurred in March of 1990".

In support of his request for a hearing before the Board, the appellant argued that he had received official notice of lay-off on March 6, 1990, which notice also informed him he had seven days in which to file an appeal to challenge the correctness of his seniority date. The appellant argued that he then filed a timely appeal of his seniority status, arguing that the provisions of RSA 283 would require the adjustment of his seniority date to include any periods of time during which the appellant, as a member of the armed forces, served "in a time of war" or during a period of armed conflict. The appellant referred to correspondence dated August 2, 1990 and March 8, 1990, from the Director of Personnel, but attached neither for the Board's review.

Regarding the August 2, 1990 letter from the Director of Personnel to the appellant, he argues that,

"On August 2, 1990 the claimant did receive a letter from the Director, Virginia Vogel, which for the first time notified him that his appeal had been rejected. However, even the Director has cast doubt on whether this letter represented a formal decision on his appeal where in her letter dated March 8, 1991, she states 'even if one were to construe my letter of August 2, 1990 to Mr. Chapman as a 'decision, the last possible date by which he might have filed an appeal with the Personnel Appeals Board would have been August 19, 1990'. It should be noted here that the Director's letter dated August 2 was a response to questions raised in the claimant's letter dated July 16, 1990 (see Exhibit C attached), rather than a decision on his appeal filed in March of 1990."

Appellant also argued that the August 2, 1990 letter of the Director to Mr. Chapman was deficient and should not be deemed a decision in that it failed to apprise Mr. Chapman that he had fifteen days in which to file a further appeal. The Board finds this argument to be without merit, knowing of no statute or administrative rule which requires the Director to provide such notice.

By letter dated April 8, 1991, the Director of Personnel forwarded to the Board copies of the above referenced correspondence and attachments. Upon review of that correspondence, the Board finds that Mr. Chapman had ample notice of the denial of his appeal. Appellant's argument that he was unrepresented by counsel until February, 1991, has no bearing upon the requirement that his appeal be timely filed.

The Director's letter of August 2, 1990, read in conjunction with the prior correspondence, clearly constitutes a decision denying Mr. Chapman's claim for veterans' preference in the establishment of his seniority date. As such, an appeal filed any time after August 17, 1990, must be deemed untimely.

The Board also reviewed the appeal as filed in light of the correspondence received from the Director to determine if, for good cause shown, the Board should waive the timely filing requirement and consider Mr. Chapman's appeal on the merits.

Mr. Chapman argued that the Director of Personnel erred in refusing him "Veteran's Preference" as defined by RSA 283:4, and that "...to the extent that Per 308.05 (a)(2) can be read as requiring initial enlistment during time of war in order to qualify for veteran's preference is in direct conflict with the statute which is its source and therefore unenforceable."

The Code of Administrative Rules principally addresses "Veterans' Preference" at Per 301.13:

"(a) All persons, after serving in the armed forces of the United States during a period of war, as defined by statutory enactment, who have been discharged or separated from such service, under honorable conditions or the widows of such persons, shall have 5 points added to any passing-earned rating they achieve in an examination for entrance to the state classified service."

RSA 283 and Per 301.13 are clearly designed to provide veterans with preference in employment, and the rule as adopted satisfies the statutory requirement that preference be given to those veterans who served a minimum of 90 days in active duty during any qualifying period of war or armed conflict. The statutory history of RSA 283, reviewed at Attorney O'Neil's suggestion, reflects a clear intent on the part of the legislature to provide preference to veterans during the initial employment and selection process. The Board does not find the limitation on qualifying service for the purposes of determining seniority and the order of lay-off to be in conflict with the provisions of RSA 283, or the legislative intent in providing veterans preference in employment.

APPEAL OF CONRAD CHAPMAN, Docket #91-O-27
Appeal of Veterans' Preference
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Accordingly, finding no good cause to waive the timely filing requirement, the Board voted unanimously to dismiss *Mr. Chapman's* appeal as untimely.

THE PERSONNEL APPEALS BOARD


Patrick J. McNicholas


Robert J. Johnson


Mark J. Bennett

cc: A. G. O'Neil, Jr., Esq.
Normandin, Cheney and O'Neil

Virginia A. Vogel, Director
Division of Personnel

Sharon Sanborn, Human Resource Director
New Hampshire Hospital

Civil Bureau - Attorney General's Office