State of New Hampshire

PERSONNEL APPEALS BOARD
25 Capitol Street
Concord, New Hampshire 03301
Telephone **(603) 271-3261**

APPEAL OF CATHY CHESLEY

Department of Education

Docket #92-O-17

January 31,1997

The New Hampshire Personnel Appeals Board (Bennett, Rule and Barry) met on Wednesday, January 22, 1997, under the authority of RSA 21-I:58, to hear the appeal of Cathy Chesley, a former employee of the New Hampshire Department of Education. Ms. Chesley, who appeared pro se, was appealing the Personnel Director's decision refusing to permit Ms. Chesley to be placed at Step 3 of Salary Grade 27 when she was appointed to the position of Education Consultant in the Department of Education. Virginia Lamberton, Director of Personnel, appeared on behalf of the Division of Personnel. The appeal was made on offers of proof. The record in this matter consists of the audio-tape recording of the hearing, and pleadings and documents submitted by the parties prior to the hearing.

Ms. Chesley argued that the issue underlying her appeal was very narrow, turning on the correct interpretation of former Personnel Rule Per 304.01(d) governing the manner by which an employee would be assigned to the correct step in the new salary grade upon promotion, as well as whether or not the rule had lapsed when the Director's decision was made. The rule stated, "When a qualified employee is promoted, he shall be placed at the lowest step in the new class that will provide an increase of at least the equivalent of one annual increment in his former class." Ms. Chesley, who had been employed as a Program Specialist, salary grade 20, step minimum, was placed at salary grade 27, step minimum, upon promotion to Education Consultant III.

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Ms. Chesley argued that when she applied for the position of Education Consultant, she was an employee of the Human Rights Commission, working in a position for which she was substantially over-qualified. She said that she had accepted that position only as a means of providing additional income during a period when her husband's income was in jeopardy.

Ms. Chesley argued that when she applied for the position of Education Consultant, salary grade 27, she was not seeking "promotion" in the traditional sense. She also argued that her selection for that position should not be defined as a promotion for the purposes of deciding this appeal. She argued that after she learned of the Education Consultant vacancy at the Department of Education, she applied for that position on her own initiative, completed a confidential application for selection, and competed with seventeen other applicants for the position. She argued that if she had not been an employee of another State agency at the time, the Department of Education would have been permitted to hire her at a step above the minimum step in the salary grade. She also argued that by denying the agency's request to place her at a higher than minimum step, the Director of Personnel improperly denied the Department of Education any discretion in determining the appropriate level of compensation for the selected candidate.

Ms. Chesley also argued that under the provisions of the Administrative Procedures Act, specifically RSA 541-A:12 I, Per 304.01(d) had expired or lapsed and therefore could not be applied where it created an action adverse to her. She argued that once the rule had lapsed or expired, the Director lacked any authority to deny the Department of Education's or the Attorney General's request to place her at a step above the minimum in the salary grade.

Ms. Chesley argued that when she was selected for the position, the agency considered her the best qualified of the eighteen applicants. She also argued that both the Commissioner of Education and Chief of the Civil Bureau of the Attorney General's Office had recommended hiring her at a higher step. She asked the Board to find that applying the provisions of Per 304.01(d) created an arbitrary classification, since the rule, even if it had not lapsed, would not have been applied to her situation had she not been a State employee when she was offered the position.

Ms. Chesley argued that Per 304.01 requires that upon promotion, an employee shall be placed at the lowest step in the new class which provides an increase of at least one step in the former class. She argued that the rule was written to protect employees, and should be interpreted as providing a threshold, not a ceiling. She argued that there were serious constitutional issues raised by the practice of hiring outside applicants above the minimum step, but prohibiting State employees from being offered the same level of compensation.

Ms. Larnberton argued that when Ms. Chesley made application for selection at the Department of Education, the appellant was a probationary employee in a temporary, grant-funded position at the Human Rights Commission, who applied for "promotion" as defined by the Rules of the Division of Personnel for selection to the position of Education Consultant. She argued that regardless of Ms. Chesley's claim to being "over-qualified" for the position at the Human Rights Commission, she had been hired in that position at a salary grade 20, step minimum. She argued that under the Rules of the Division of Personnel, when Ms. Chesley was selected for promotion to Education Consultant III, salary grade 27, she received far more than the equivalent of one step in her former salary grade. She argued that Per 304.01 (d) was properly applied by moving Ms. Chesley from salary grade 20, step minimum, to salary grade 27, step minimum.

Ms. Lamberton argued that approval to appoint an employee above the minimum step for the salary grade of any classification is vested in the Director of Personnel, and only upon a showing that there have been bona fide recruitment difficulties for that position. She argued that in this case, there was no difficulty finding a qualified candidate, and she would not have approved appointment above the minimum step for any of the candidates. She also offered to prove through the testimony of Peta Chandler, an employee of the Department of Education business office at the time, that Ms. Chesley had agreed to accept the position at the minimum step in the salary grade. Ms. Lamberton also argued that she had been advised by the Attorney General that although Per 304.03 (d) may have been in effect for more than six years, it remained effective and should be enforced as such until such time that the rule was abolished, amended, or readopted.

Having considered the evidence and offers of proof, the Board found that Ms. Chesley's selection to the position of Education Consultant III was properly defined as a "promotion" within the classified service. Former Per 101.28 defined "Promotion" as meaning "...a transfer of an employee from a position in one class to a position in another class having a higher salary grade." That definition had been in effect since April 15, 1983, and gave all the parties reasonable notice that the transfer of Ms. Chesley from a position in one class to a position in another class having a higher salary grade would constitute a "promotion" and therefore would be subject to Per 304.01(d) in determining the correct step at which to place her in the new salary grade. The Board also found that even in the absence of a rule specifically addressing promotional compensation, the Director would retain the authority granted under RSA 21-I to administer a compensation plan. As such, the Board found that the Director acted appropriately in continuing to apply Per 304.01(d) to this appointment as it had been applied in the past.

The appellant makes an interesting argument with respect to the effective date of Per 304.01(d), and her assertion that in the absence of an effective rule, the Director was obliged to defer to the judgment of the agency. In a letter to the Director dated January 24, 1992, Emily Gray Rice, then Senior Assistant Attorney General, wrote:

> "As you know, the Department of Education has been in the process of trying to hire a consultant to assist with the implemention of the James O. Consent decree... Approximately two weeks ago, the Department determined that it would offer the position to Kathleen Chesley... As I understand it, the only obstacle to [compensating Ms. Chesley above the minimum of salary grade 27] is N.H. Code of Admin. R. Per 304.01 (d), which the Division of Personnel has determined would preclude Ms. Chesley from receiving a salary grade higher than Labor Grade 27, minimum step. I am writing on behalf of this office [the Civil Bureau of the Department of Justice] to urge you as strongly as I can to permit the Department to hire Ms. Chesley at Labor Grade 27, Step 3, notwithstanding her current status as an employee of another department of State government. I firmly believe that hiring Ms. Chesley above the minimum level is in the best interest of

State service, and I would be happy to assist in making this possible in any way that I can."

The Director responded by letter dated January 29, 1992, informing Ms. Rice that she would not waive Per 304.01(d). If, in fact, the Attorney General believed the rule had lapsed and could not be applied in determining Ms. Chesley's level of compensation, it is reasonable to believe that the Attorney General would have raised that argument at that time, either as a party with an interest in the outcome of the appeal, or on behalf of the Department of Education. The fact that the Attorney General did not raise that issue or advise the Personnel Director that she was applying a rule which was no longer in effect lends support to Ms. Lamberton's assertion that she was acting on the Attorney General's advice to continue applying the Rules until such time that they were abolished, amended or readopted.

Finally, if the Board were to accept Ms. Chesley's argument that Per 304.01(d) was not in effect and therefore could not have been applied in this case, it would raise the question of whether the Board had any authority to hear her appeal. RSA 21-I:58 provided for appeals by "permanent employees who are dismissed, demoted suspended or otherwise affected by any decision of the appointing authority or the application of a rule adopted by the director." Ms. Chesley was not a permanent employee. The decision to place Ms. Chesley at the minimum step of salary grade 27 was not a decision of the appointing authority, but a decision arising out of the application of a rule by the Director of Personnel. If Ms. Chesley were correct that there was no rule which could have been applied, there is no application of the rule from which her appeal might arise under the provisions of RSA 21-I:58. Therefore, the Board could lack subject matter jurisdiction to even hear the appeal.

Ms. Chesley failed to persuade the Board that the Director of Personnel improperly applied the provisions of (former) Per 304.01(d) in determining the correct step within salary grade 27 upon Ms. Chesley's appointment to the position of Education Consultant III, or that the Director abused her discretion in refusing to waive the provisions of Per 304.01(d) Therefore, on the evidence, argument and offers of proof, the Board voted unanimously to deny Ms. Chesley's appeal.

THE PERSONNEL APPEALS BOARD

Mark J. Bennett, Acting Chairman

Lisa A. Rule, Commissioner

James J. Barry, Commissioner

cc: Virginia Lamberton, Director of Personnel
Cathy Chesley, Appellant