

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 95-442, Appeal of William Connelly, the court upon November 16, 1995, made the following order:

Appeal from administrative agency is declined. See Rule 10(1).

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NH Personnel Appeals Board
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APPEAL OF WILLIAM CONNELLY

Response to Appellant's Request for Rehearing
Docket #90-O-7
Supreme Court Case No. 92-077

May 25, 1995

On May 24, 1994, Thomas F. Hardiman submitted a Request for Rehearing in the above-captioned appeal. In support of the Request, Mr. Hardiman argued that the Board erred in finding that Mr. Connelly's appeal was untimely because "Mr. Connelly could have known that his pay was being reduced" on May 11, 1990, the date appearing on the payroll manifests offered into evidence by the State. Mr. Hardiman also argued that "because the Board placed such emphasis on the date of the appeal" Mr. Connelly was unable to offer evidence on the merits of his appeal.

In its decision dated June 29, 1993, the New Hampshire Supreme Court specifically ordered the Board to hold "an evidentiary hearing on the motion of the Director of Personnel to dismiss the petitioner's appeal as untimely." On March 23, 1994, the Board convened an **evidentiary** hearing specifically for the purpose of deciding the Director's Motion to Dismiss, and limited its decision to that issue.

On the evidence, the Board found that Mr. Connelly's appeal was untimely. While Mr. Hardiman argued that Mr. Connelly could have known on May 11, 1990 that his rate of pay was being reduced, that theory is inconsistent with Mr. Connelly's own sworn testimony that he did not know his salary was being reduced until he actually saw the reduction in his paycheck the following pay-day.

Mr. Connelly's Request for Rehearing is denied, as the appellant has failed to offer evidence

or argument to support his claim that the Board erred in finding the appeal untimely.

THE NEW HAMPSHIRE PERSONNEL APPEALS BOARD



Mark J. Bennett, Acting Chairman



Robert J. Johnson



Lisa A. Rule

cc: Virginia A. Lamberton, Director of Personnel
Sandra Platt, Administrator, Department of Health and Human Services
Thomas F. Hardiman, SEA Director of Field Operations

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APPEAL OF WILLIAM CONNELLY
Docket #90-O-7
Supreme Court Case No. 92-077
Remanded for Evidentiary Hearing on Motion to Dismiss

May 6, 1994

The New Hampshire Personnel Appeals Board (McNicholas, Johnson and Rule) met Wednesday, March 23, 1994, to hear the above-captioned appeal of William Connelly, an employee of the Department of Health and Human Services. Mr. Connelly was represented at the hearing by Thomas F. Hardiman, SEA Director of Field Operations. The Department of Health and Human Services/Division of Mental Health and Developmental Services, was represented by Clyde Terry, Legal Coordinator. The following persons were called to give sworn testimony:

Virginia A. Lamberton, Director of Personnel
Lisa A. Currier, former Laconia Developmental Services H.R. Coordinator
Richard Crocker, former Laconia Developmental Services Superintendent
Harold Kelleher, former acting Laconia Developmental Services H.R. Coordinator
William Connelly, appellant

The Board (Bennett, Johnson and Rule) had convened a hearing on the merits of Mr. Connelly's appeal on Wednesday, October 9, 1991, at which time the State argued that the matter should be dismissed as untimely. Having heard oral argument on the Motion, the Board issued a written decision on November 12, 1991, dismissing the appeal as untimely. The appellant filed a request for rehearing, dated December 22, 1991, which was received by the Board on December 26, 1991. A written decision denying that Motion was issued by the Board on January 13, 1992.

Appeal of William Connelly
Supreme Court Case No. 92-077
(remanded docket #90-O-7)

The appellant timely filed an Appeal by Petition to the New Hampshire Supreme Court. The Court's Order dated June 29, 1993, stated the following:

Upon consideration of the briefs and oral arguments of the parties, and upon a review of the record, the court concludes that a formal opinion is not necessary for the disposition of this matter. The decision below is vacated and the case is remanded for an evidentiary hearing on the Motion of the director of Personnel to dismiss the petitioner's appeal as untimely.

A hearing on the Motion was convened on March 23, 1994. All testimony was completed on that date. However, the Board voted to hold the record of the appeal open for an additional seven days in order to allow the State to produce certain payroll records for the Board's review. On March 30, 1994, Mr. Terry submitted photocopies of three bi-weekly payroll manifests covering the time period in question. Mr. Terry also submitted a copy of the Supreme Court's decision in Appeal of Michelle Pritchard 137 NH 291 (1993), addressing the appropriate definition of the date of the "action" giving rise to the appeal. A copy of Mr. Terry's letter and attachments was also forwarded to the appellant's representative, SEA Director of Field Operations Thomas Hardiman.

In 1981, the position held by Mr. Connelly at Laconia State School (Laconia Developmental Services) was re-evaluated and downgraded from salary grade 29 to salary grade 25. As provided in (former) Per 304.01(g)¹, Mr. Connelly continued to be compensated at the level of salary grade 29. Again, in 1987, the position held by Mr. Connelly was re-evaluated and downgraded from salary grade 25 to salary grade to salary grade 23, and Mr. Connelly continued to be compensated at salary grade 29. Mr. Connelly retained the same position number both times that his position was reviewed and reallocated downward.

On March 6, 1990, as a result of the downsizing at Laconia Developmental Services, Mr.

¹ Per 304.01(g): Reallocation and Reevaluation -Whenever an employee's position or class is reallocated or reevaluated upward due to a definite change in job content, 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. Should said reallocation or reevaluation be downward, and the employee is receiving a salary which is higher than the maximum for the new class or grade, the employee's salary shall not be reduced but he will not be eligible for normal salary increments in the former grade. If the present salary is not higher than the new maximum, he shall remain at his same salary and will be eligible for salary increase benefits in the new class in accordance with (former) Per 304.04.

Connelly received notice that he was to be laid off.² Because Mr. Connelly had more than 5 years of continuous, full-time service, he was notified that if he did not wish to accept the lay-off, he could exercise his "bumping rights".³ Mr. Connelly met with Lisa Currier, the Human Resources Coordinator at Laconia Developmental Services on March 12, 1990, to discuss his options following his notice of lay-off. Ms. Currier informed the appellant that He was given 5 days in which to notify his department whether or not he intended to accept the lay-off or to exercise his bumping rights. During that meeting, Ms. Currier informed the appellant that although he was receiving compensation at the level of salary grade 29, the position he occupied was allocated as a Senior Psychiatric Social Worker, salary grade 23. Ms. Currier advised the appellant that if he decided to "bump", he could either elect to bump laterally into a Senior Psychiatric Social Worker position at New Hampshire Hospital, or he could elect to bump downward (salary grade 22 or lower) into any other position for which he qualified, provided that the incumbent in the position selected had less seniority than the appellant. Ms. Currier made it clear that because Mr. Connelly's position was being abolished, his salary would no longer be protected at the level of salary grade 29. Mr. Connelly elected to bump into a Senior Psychiatric Social Worker position at New Hampshire Hospital. His first day of work in that position was April 20, 1990.

As the record reflects, Mr. Connelly was aware that if his position was abolished and he was transferred to another position, his salary would not be protected. He testified that "When I saw the paperwork, I began to talk with Rich Crocker, Harold Kelleher, Virginia Lamberton, several Executive Councilors, people from the Retirement Board... I continued to talk with people, ask people and hope."

Mr. Connelly's May 17, 1990 appeal makes no reference to the date of the action giving rise to his appeal. The appeal did allege that he had been denied the right to "bump" laterally into salary grade 29 positions, or downward from salary grade 29, stating, "He was not allowed to bump from his pay status, only from his labor grade and he was not allowed to maintain his salary under the same job title in the same department.

On June 4, 1990, Personnel Director Lamberton (formerly Vogel) wrote to the Board asking that

² (Former) Per 308.05 Lavoff. An appointing authority may lay off an employee within his department whenever necessary by reason of abolition of a position, because of change in organization, lack of work, insufficient funds, or like reasons. Such layoff shall not be considered to reflect discredit on the service of the employee.

³ (Former) Per 304.05 (b)(1) When seniority is the basis for layoff, demotion (bumping) to a lower class in the same department will be authorized only if the employee to be displaced has less seniority and the person exercising this privilege is qualified.

the appeal be dismissed as untimely. In her Motion, Director Lamberton argued that the effective date of the action giving rise to the appeal was April 10, 1990, Mr. Connelly's first date of work at New Hampshire Hospital in a position of Senior Psychiatric Social Worker, salary grade 23. She also stated:

Mr. Hardiman's appeal in behalf of Mr. Connelly is at a minimum twenty-nine days late. If Mr. Hardiman is proposing that it is timely because each and every pay day gives rise to an appeal, I believe the Personnel Appeals Board has answered this question on numerous occasions and as such the appeal should be dismissed.

Following receipt of the Director's Motion to Dismiss, Mr. Hardiman wrote to the Director, stating the following:

I am not proposing that every pay check gives rise to a new appeal, although I personally believe it should do so. I recognize that there is a ruling and we have to live by it until such time as it is modified or changed completely.

I am upset because a state employee tried to work through the system and sought counsel and advice from many people in positions eligible to give advice.

Lisa Currier, Dee Prescott, Superintendent Richard Crocker, director of Mental Health, Don Shumway, Dr. Gorman, Tom Manning, Chet Batchelder, and yourself were just some of the people approached by Mr. Connelly to try and resolve the problem.

Even up to the first adjusted pay check there was hope that the problem would be solved. Mr. Connelly has informed me that he felt everyone was trying to help and that even in his meeting with you there was no discussion of timeliness only a question on the basis for his appeal.

In his Appeal by Petition, the appellant alleged that he first knew that he was being paid at the salary grade 23 rather than salary grade 29 on May 3, 1990, by receipt of his paycheck on that date.⁴

⁴ "...[I]t was not until he was first paid at NHH on May 3, 1990 that he received final 'notice' that he would not continue to receive labor grade 29 pay." See Appeal by Petition, p. 4)

[The appellant] also repeated that he only knew "officially and factually on May 3, 1990" that he would be paid at labor grade 23.

For the time in question, State paydays, and the bi-weekly work periods for which the checks were issued, are as follows:

March 9, 1990 (February 9 - February 22)

April 20, 1990 (February 23 - April 5)

May 4, 1990 (April 6 - April 19)

May 18, 1990 (April 20 - May 3)

According to the Appeal by Petition, Mr. Connelly knew by receipt of his paycheck on May 3, 1990, that he was being paid at the lower rate of pay. Although Mr. Connelly originally testified that his paychecks were received by mail and were generally received the day before payday, a review of Mr. Connelly's personnel records reflects that he did not begin receiving his checks in the mail until 1992. There is no evidence to support a finding that Mr. Connelly received, or could have received the May 4th paycheck on May 3rd. Even if Mr. Connelly had been able to receive his paycheck one day early, for which there is no evidence, the May 4, 1990 check covered the work period of April 6, 1990 through April 19, 1990, when Mr. Connelly was still being paid at salary grade 29. Therefore, if Mr. Connelly was relying upon receipt of his paycheck to determine that his pay had been reduced, the first date upon which he could have made such a discovery was May 18, 1990, one day after the date of Mr. Connelly's original appeal to the Board.

There is no set of facts upon which the Board can find Mr. Connelly's appeal to have been timely. If the date of the action under appeal is Mr. Connelly's notice of lay-off (March 6, 1990) his appeal must have been received by the Board not later than March 21, 1990. If the date of the action under appeal was the date of his meeting with Ms. Currier (March 12, 1990) when he was advised that his salary would be reduced, his appeal must have been received by the Board not later than March 27, 1990. If the date of the action under appeal was the effective date of Mr. Connelly's transfer from Laconia Developmental Services to work at New Hampshire Hospital in a new position of Senior Psychiatric Social Worker (April 20, 1990), Mr. Connelly's appeal must have been received by the Board not later than May 5, 1990. If the date of the action giving rise to the appeal was the date of actual notice to Mr. Connelly that his pay was reduced, then Mr. Connelly's May 17, 1990 appeal was received one day earlier than the date of actual notice claimed by the appellant. The appellant failed to produce evidence which will support a finding that his May 17, 1990 appeal was timely.

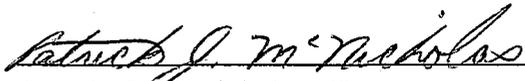
Payroll manifests for the pay days of April 20, 1990, May 4, 1990 and May 18, 1990, submitted into evidence by the State, demonstrate that Mr. Connelly's rate of pay was not reduced until May 18, 1990. Prior to May 18, 1990, Mr. Connelly's paychecks would have been paid at the higher, salary grade 29 rate, and it would have been impossible for him to discover by looking at his paycheck that his rate of pay had been reduced. On May 3, 1990, the date Mr. Connelly

allegedly learned that his pay had been reduced was not a pay day. Had it been, the check Mr. Connelly received would still have been paid at the higher rate.

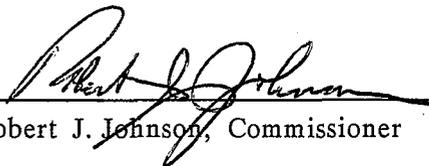
The Board found that April 20, 1990, the effective date of Mr. Connelly's transfer from Laconia Developmental Services, was the date of the action giving rise to the appeal. In order to be timely filed, Mr. Connelly's appeal must have been received by the Board not later than May 5, 1990. Mr. Connelly's appeal was not prepared until some twelve days later on May 17, 1990.

The Board found that Mr. Connelly failed to file a timely appeal⁵, and voted unanimously to dismiss his appeal.

THE PERSONNEL APPEALS BOARD



Patrick J. McNicholas, Chairman



Robert J. Johnson, Commissioner



Lisa A. Rule, Commissioner

cc: Virginia A. Lamberton, Director of Personnel
Clyde Terry, Legal Coordinator, Mental Health and Developmental Services
Thomas Hardiman, SEA Director of Field Operation

⁵ RSA 21-I:58 I: "Any permanent employee who is affected by any application of the personnel rules, except for those rules enumerated in RSA 21-I:46, I and the application of rules in classification decisions appealable under RSA 21-I:57, may appeal to the personnel appeals board within 15 calendar days of the action giving rise to the appeal..."

State of New Hampshire

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APPEAL OF WILLIAM CONNELLY - Docket #91-0-7 Rehearing Request

January 13, 1992

The New Hampshire Personnel Appeals Board (Bennett, Johnson and Rule) met Wednesday, December 4, 1991, to consider the appellant's request for rehearing, dated November 22, 1991, received by the Board on November 26, 1991.

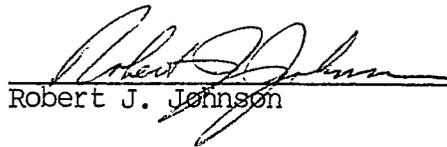
Mr. Connelly's appeal was dismissed as untimely. Per-A 204.06 (b) provides that: "Such motion for rehearing shall set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable." The appellant has offered no substantive grounds upon which to claim that the Board's decision was unlawful or unreasonable. In paragraphs 8 - 8, the appellant argued that he has been treated inequitably by the Department of Health and Human Services, the Division of Personnel and the Personnel Appeals Board, but offered no facts to support such a claim. The appellant also argued that the Rules governing lay-off and bumping expired in March, 1991. Again, the appellant offered no evidence to support such a claim.

Accordingly, the Board voted unanimously to deny the appellant's request, and to affirm its decision of November 12, 1991 dismissing Mr. Connelly's appeal as untimely.

THE PERSONNEL APPEALS BOARD



Mark J. Bennett



Robert J. Johnson



Lisa A. Rule

cc: Virginia A. Vogel, Director of Personnel
Thomas Hardiman, SE.A. Director of Field Operations
Clyde Terry, Division of Mental Health
Jan D. Beauchesne, Division of Human Services

State of New Hampshire

WPPID836



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APPEAL OF WILLIAM CONNELLY Docket #91-O-7 Department of Health and Human Services Division of Mental Health

November 12, 1991

The New Hampshire Personnel Appeals Board (Bennett, Johnson and Rule) met Wednesday, October 9, 1991, to hear the appeal of William Connelly relative to his alleged demotion, effective July 6, 1990. The appellant was represented at the hearing by SEA Director of Field Operations Thomas Hardiman. Virginia A. Vogel, Director of Personnel appeared on behalf of the Division of Personnel. Clyde Terry appeared on behalf of the Division of Mental Health.

Before addressing the merits of Mr. Connelly's appeal, the Board heard oral argument from the parties on the timeliness of Mr. Connelly's appeal. The appeal filed by Thomas Hardiman on May 17, 1990, on the appellant's behalf stated, "We are appealing this action under the provisions of PART Per 308 SEPARATION AND DEMOTION, Per 308.04 (a)." Per 308.04 (a) provides, in pertinent part, "Any permanent employee who is dismissed or demoted or who is suspended may, within 15 calendar days after such dismissal, demotion, or suspension, appeal to the [Personnel Appeals Board] for review thereof."

In his letter to the Director of Personnel dated June 15, 1990, Mr. Hardiman argued, "Even up to the first adjusted pay check there was hope that the problem would be solved." Clearly, the appellant was aware of his situation prior to receipt of his paycheck, however, or he would not have approached Lisa Currier, Dee Prescott, Superintendent Richard Crocker, Director of Mental Health Don Shumway, Dr. Gorman, Tom Manning, Chet Batchelder and the Director of Personnel "...to try to resolve the problem". (See letter of June 15, 1990 from Hardiman to Vogel) Therefore, the Board can not consider the date of the "first adjusted pay check" to be the date of the action giving rise to the appeal.

APPEAL OF WILLIAM CONNELLY

Docket #91-0-7

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Written notice of the action giving rise to the appeal was provided to the appellant on March 6, 1990. He met with the agency's Human Resource Coordinator to discuss the effect of his transfer to New Hampshire Hospital on March 12, 1990. He assumed the position of Senior Psychiatric Social Worker, salary grade 23, on April 20, 1990. Mr. Connelly's appeal to the Personnel Appeals Board, filed under the provisions of Per 308.04(a), was dated May 17, 1990, and was received by the Board on May 18, 1990.

RSA 21-I:58 provides that an appeal to be Board must be filed "within fifteen calendar days of the date of the action giving rise to the appeal". Whether the Board were to consider March 6, 1990, March 12, 1990, or April 20, 1990, to be the date of the action giving rise to the appeal, Mr. Connelly's appeal must be deemed untimely. Mr. Connelly's appeal was not received by the Board until 28 or 13 days after the 15-day filing deadline, based upon the date of notice or effective date of transfer respectively.

Accordingly, the Board voted unanimously to dismiss the appeal of William Connelly (Docket #91-0-7) as untimely.

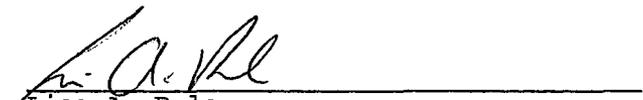
THE PERSONNEL APPEALS BOARD



Mark J. Bennett



Robert J. Johnson



Lisa A. Rule

cc: Virginia A. Vogel, Director of Personnel
Thomas Hardiman, SEA Director of Field Operations
Clyde Terry, Division of Mental Health
Jan D. Beauchesne, Human Resource Coordinator, C.O.M.B./H.H.S.