State of New Hampshire

**PERSONNELAPPEALSBOARD**
State House Annex
Concord, New Hampshire 03301
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Appeal of Robert LeClair

89-O-2

Robert LeClair (appellant) appeals a denial of his request for compensation at salary grade 17 for the time he served as a Recreational Therapist II (promotional position) for the Department of Corrections (department). Mr LeClair's regular employment is as a Correctional Officer/Recreation Aide for the department, salary grade 13.

The appellant contends that he was ordered to fulfill the duties of the promotional position by his superviscr and is, accordingly, entitled to the increased compensation on an "equal pay for equal work" theory, although it is contended by the department that he could not be temporarily promoted to the promotional position as he fails to meet the minimum qualifications therefor. Note, Per 304 (d) and (f); see generally, Petition of the State Employees' Association of New Hampshire, Inc., Thomas Robinson, et al., 129 NH 536 (1987), relied upon by the appellant.

The case being properly before us, and no objection to our jurisdiction being made by any party, we are asked to determine whether or not the appellant is eligible to receive pay at the higher grade for the pertinent time. The appellant is represented by Stephen McCormack, Field Representative, New Hampshire SEA. The department is represented by Michael Brown, Staff Attorney. The record in this appeal consists of the file (89-0-2) of the Board, the tape recording of the hearing held November 29, 1989, and the documents and evidence submitted thereat, said documents contained in the file. The Division of Personnel, represented by its Director, Virginia Vogel, objected to appellant's exhibit 1, the decision in the Robinson matter, supra, and our order implementing it. We admit appellant's 1 over the objection, which had been made on relevancy grounds, although we do not thereby imply that Robinson is apposite to the instant appeal, and find that it is not. We dispose of this appeal on equitable grounds alone.

We are generally of the view that an employee who does not meet the minimum qualifications for a position cannot perforce "perform" that position, even if purporting to do so voluntarily, by order of a supervisor, or otherwise. (Compare and note, for example, the literal text of appellant's Exhibit 9 and 10). Thus, absent equitable considerations respecting compensation, the employee would be ineligible for compensation in the hypothetical position and no unequal pay for similar work would

result, as the work cannot be presumed to be similar. However, analyses involving equities are not so simple, and we reach a different conclusion in this case, to which we now return.

Upon inquiry from the Board, appellant waived objection to only two members of the Board sitting (Commissioners Bennett and Cushman), and to Commissioner Bennett sitting on the panel, whc knows of the appellant, and to some degree, the appellant's working conditions generally, through pervious employment many years ago.

During the course of the hearing, the appellant testified that he was asked to perform the duties of the promotional position by Jim Hamilton, former Director of the Secure Psychiatric Unit, his supervisor, and Deborah Sargent, then incumbent in the promotional position, before she left that employ. The appellant did this, and assumed some supervisory duties as a consequence.

On cross examination he admitted that he did not possess a Bachelor's Degree, was not certified by the National Therapeutic Recreation Society (see appellant's Exhibit 10, requiring both qualifications), but that he did have, by virtue of his regular position, one year of experience in the field of recreational therapy prior to assuming the duties, in his view, of the promotional position.

Jim Hamilton testified that he had indeed asked the appellant to assume the duties of the promotional position. He

felt the appellant was qualified to fill in until a new Recreational Therapist II was selected.

On questioning by Ms. Vogel, he testified that one of his duties was to follow state personnel rules, that he had generally consulted these prior to making any appointment, but did not do so in this instance, as it was a rather temporary appointment. He did not require the appellant to complete an employment application for the promotional position, have it reviewed, and hopefully, certified by the Division of Personnel, or otherwise formally process the appointment. Hamilton knew that the appellant was not a certified Recreational Therapist, but contends that he did not know that he was ineligible to fill the Recreational Therapist II position. He was of the view that patients of the unit would suffer a reduction of services if a temporary appointment of the type made here could not occur.

Closing remarks were received from all concerned. The appellant contends that if all temporarily promoted persons must meet minimum qualifications for the positions to which they are temporarily promoted, then the state will be seriously impacted in the provision of services. He contends that if that is our view, the Division of Personnel should be ordered to make that clear by some general direction or rule to all agencies of the state.

The department asserts that the question of compensation was never addressed prior to the "temporary promotion" at issue here.

It is the department's view that the appellant's work assignment was purely voluntary and that no supplementary compensation is warranted.

The Division of Personnel reminds that its rules have been around, substantially unchanged, for more than 30 years, and employees and state agencies are generally aware of them and what they mean. There is an agency personnel officer at the department who could have provided guidance in this instance, and the agency should not have asked an employee to do a job unless it was able to compensate him for it. It was incumbent upon Mr. Hamilton to fill in, or cause a suitable temporary appointment to occur, rather than to ask an employee who was not technically qualified to perform the job.

In our view, on all the evidence as we heard it, the Division of Personnel's position is closest to the mark. The appellant was asked, ordered, or unwittingly volunteered, to fill the promotional position and did so with the assent of all concerned (although the Division of Personnel and the APO may have been without knowledge thereof). There is not question that this situation worked out reasonably satisfactorily, and no party contends that it did not. There is no question raised that the appellant reasonably filled the Recreational Therapist II position from September 23, 1988 through approximately December 5, 1988. Accordingly, the appellant shall be paid the difference between his regular wages as a Correctional Officer/Recreational

Aide (Salary Grade 13) and an recreation Therapist II (Salary Grade 17) for that period subject to the Rules of the Division of Personnel pertinent to payment for temporary appointments/promotions. See, Per 304.01 (d)(5).

In so ruling, we do not find that the appellant was eligible or qualified for this temporary promotion, or that such promotions are available under the rules of the Division of Personnel to persons who do not meet the minimum qualifications for the promotional position. We expect that cases of this unusual variety will not recur, and leave to the state agencies and the division of Personnel the matters of screening applicants and complying with the Rules of the Division of Personnel. We find only, that equitably, the appellant was suffered to perform a job for which he was not fairly paid, because of what we trust are unusual actions by the department. Equity dictates this result. Note, Robinson, supra, at page 543.

A state employee who does not meet the minimum qualifications for a position may not be temporarily appointed to that position, except as provided expressly in the Rules of the Division of Personnel. No rule permits the "promotion" presented in this appeal. (Note generally, the requirement that an employee meet minimum job qualifications to hold any appointment: Per 101.23, 101.28, 101.37, 302.06(b), 302.15(b), 302.16, 302.19, 304.01. We consider appeal rights to exist under the circumstances of the instant appeal.!

Payment to the appellant for differential compensation is ordered as aforesaid, otherwise the appeal is denied for the reasons set forth above.

19 January 1989

THE PERSONNEL APPEALS BOARD

Mark J. Bennett, Esq.
Sitting as Chairman

George R. Cushman
Commissioner

DATE ISSUED: February 26, 1990

cc: Stephen J. McCormack
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