

# State of New Hampshire



**PERSONNEL APPEALS BOARD**  
25 Capitol Street  
Concord, New Hampshire 03301  
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## ***APPEAL OF ROBERT LETELLIER***

***DOCKET #98-0-010***

***DEPARTMENT OF HEALTH AND HUMAN SERVICES***

***November 5, 1998***

The New Hampshire Personnel Appeals Board (Bennett, Johnson and Rule) met on August 5, 1998, under the authority of RSA 21-I:58, to consider the appeal of Robert Letellier, a former employee of the Department of Health and Human Services. Mr. Letellier, who was represented at the hearing by SEA Field Representative Linda Chadbourne, was appealing the Division of Personnel's refusal to certify him as meeting the minimum qualifications for the position of Ombudsman, and to refer him for employment in that classification to the Client Assistance Program of the Governor's Commission on Disability. Personnel Director Lamberton appeared on behalf of the State and argued that Mr. Letellier, as a former employee of the State, had no standing to appeal that decision.

In its Notice of Scheduling dated July 1, 1998, the Board advised the parties that in the interest of promoting administrative and judicial economy, the Board had voted to take the State's Motion under advisement, and allow the parties to offer oral argument on the State's Motion to Dismiss and the Appellant's Objection. The Board also advised the parties that it would allow them to present their evidence on the merits of the appeal so that the appeal might be decided without the need of further hearing in the event that the Board voted to deny the Director's Motion to Dismiss for Lack of Jurisdiction.

The record of the hearing in this matter consists of pleadings submitted by the parties, orders and notices issued by the Board, the tape recording of the hearing, and documents admitted into evidence as follows:

### State's Exhibits

- A. Job specification, Ombudsman
- B. Job Application of Robert Letellier
- C. Application of an individual certified as meeting the qualifications for Ombudsman (with personally identifying information redacted)
- D. Application of an individual certified as meeting the qualifications for Ombudsman (with personally identifying information redacted)
- E. Application of an individual certified as meeting the qualifications for Ombudsman (with personally identifying information redacted)
- F. Application of an individual certified as meeting the qualifications for Ombudsman (with personally identifying information redacted)
- G. Application of an individual certified as meeting the qualifications for Ombudsman (with personally identifying information redacted)

### Appellant's Exhibits

- A. Ombudsman Generic Job Description
- B. Job Posting for Ombudsman Position at Governor's Commission on Disability
- C. R. Letellier Application and Supporting Documents

### **Position of the Parties**

#### Appellant's Position

Ms. Chadbourne argued that RSA 21-I:46 authorizes the Board to hear appeals arising out of the application of rules adopted by the Director of Personnel, and appeals concerning violation of an employee's statutory rights. Ms. Chadbourne argued that the Director's refusal to certify Mr. Letellier's application for the position of Ombudsman constituted an application of the Personnel Rules, and the Director's refusal to refer the appellant for employment constituted a violation of HB-

1506.1 Therefore, she argued, the appellant had standing to appeal under the provisions of RSA 21-I:46.

On the merits of the appeal, Ms. Chadbourne argued that when Mr. Letellier saw the Ombudsman job posting advertised to the general public, he contacted the Division of Personnel to find out why he had not been referred for the position. She said that he was told he did not meet the minimum qualifications, but no one would explain why his qualifications were not acceptable. Ms. Chadbourne argued that the appellant's education and experience would have made him a strong candidate for the position, and that by failing to even consider his application, the Division of Personnel violated his rights under both the Rules and statutes.

Ms. Chadbourne argued that the Ombudsman position has been filled, and that the appellant was not interested in displacing the current incumbent. She argued that the only appropriate remedy would be to compensate the appellant at the rate of salary grade 23, step maximum, retroactive to the date of the original posting, and to continue paying him at that rate until the next such position became available, or until such time as the appellant accepted a "suitable position."

#### State's Position

In her Motion, and in oral argument, Ms. Lamberton argued that RSA 21-I:46 authorizes the Board to hear and decide appeals as provided in RSA 21-I:57 and 21-I:58. She argued that although 1997, 351:50 required her to assist Mr. Letellier in securing re-employment with the State, and although Per 602.02(c)(2) entitled Mr. Letellier to consideration as an "in-house" candidate for vacancies occurring in the department from which he was laid off, he could not be considered an "employee" subject to the Board's jurisdiction in this instance. She argued that those rights do not extend to former employees, and Mr. Letellier had become a "former employee" by virtue of his lay-off on November 30, 1997.

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<sup>1</sup> HB-1506 was enacted as 1990, 261:1, and later amended by 1991, 4:10 and 355:103, and 1997, 351:50.

On the merits of the appeal, Ms. Lambert-ton argued that the appellant's work experience was not appropriate for the position of Ombudsman. Ms. Lambert-ton described the vacancy as a position requiring extensive advocacy experience, and that none of the appellant's work history was as an advocate. She asked the Board to compare the appellant's application with others that certified as meeting the minimum qualifications, and note the differences in the types of experience listed. Ms. Lambert-ton argued that because the appellant held a Master of Social Work degree, he had been credited with the appropriate undergraduate educational credits, and given an additional two years of credit for experience because of the education/experience equivalency provided in the specification. However, she argued, the appellant did not have three additional years of experience as an advocate or representing clients in adversary hearing proceedings, or in coordinating programs for the disabled, elderly or disadvantaged.

Ms. Lambert-ton argued that even if the Board were to find that the appellant had standing to appeal the certification and referral decisions, the Board could not legally order the State to implement the appellant's suggested remedy. Specifically, she asked who the appellant expected to pay him. She also asked how long the appellant expected the State to compensate him at salary grade 23, maximum step, to stay at home until the he found a job he considered "suitable." She noted that he already had declined eleven other positions that required a Master of Social Work degree.

Ms. Lambert-ton asked the Board to dismiss the appeal for lack of subject matter jurisdiction with respect to both certification of his application and referral for employment in another agency under the provisions of 1997, 351:50.

### **Findings of Fact and Rulings of Law**

None of the material facts are in dispute:

1. On or about November 30, 1997, Mr. Letellier was laid off from his position of Chief, Bureau of Child Care Standards, salary grade 26, at the Department of Health and Human Services.
2. As a laid-off State employee, under the provisions of Per 1001.05 of the Rules of the Division of Personnel, Mr. Letellier was entitled to be "recalled" to the same classification from which he

was laid off within the Department of Health and Human Services if such position became available.

3. Because Mr. Letellier's lay-off occurred between July 1, 1997, and June 30, 1999, his name also was placed on the "Master Recall List" developed by the Division of Personnel under the authority of 1990,261:1 and later amended by 1991, 4:10 and 355:103, and 1997, 351:50.
4. The Division of Personnel had referred Mr. Letellier to eleven position openings after he had been identified as an individual subject to lay-off. He declined each of them.
5. On or about April 30, 1998, Mr. Letellier noticed a posting for the position of Ombudsman, salary grade 23, assigned to the Governor's Commission on Disability.
6. Mr. Letellier inquired of the Division of Personnel why he had not been referred for placement in that position under the conditions set forth above.
7. The Division of Personnel did not refer Mr. Letellier for employment in that position based upon their determination that his experience was not appropriate to satisfy the minimum qualifications for the position of Ombudsman as posted.
8. The posting listed the minimum qualifications as follows: "Applicants must possess a minimum of a Bachelor's degree from a recognized college or university with a major study in pre-law, nursing, public health, social work, public administration or gerontology. Each additional year of approved formal education may be substituted for one year of required work experience. Applicants must possess five years experience working as an advocate or representing clients in adversary hearing proceedings or in coordinating programs for the disabled, elderly or disadvantaged or in related-type work. Knowledge of the rehabilitation field and laws pertaining to individuals is preferred."
9. Mr. Letellier's formal education includes a Bachelor of Business Science degree (major in management information systems), and a Master of Social Work degree (major in casework).
10. On his résumé, Mr. Letellier listed the positions he has held as follows: Administrator Medicaid Provider Relations, Director Tobacco Prevention Program, Chief Bureau of Child Care Standards and Licensing, and Social Service Consultant.
11. In his "Professional Profile," admitted into evidence as part of SEA Exhibit C, Mr. Letellier described himself as an "experienced, innovative, proficient Administrator" with "proven experience in: Regulatory Administration, Program Development and Evaluation, Medicaid Management Information Systems, Social Casework (Protective, CFS, Placement, VR and Adult

Services), Grant Development and Management, Budgeting, Consultation, Provider Relations, Supervision, Contracts."

12. The appellant did not submit an application specifically for the position of Ombudsman, relying instead upon the Division of Personnel's certification and referral.
13. At the time of the Director's decision that Mr. Letellier did not meet the minimum qualifications for the position of Ombudsman, Mr. Letellier was not an employee affected by a classification decision within the meaning of RSA 21-I:57, nor was he a "permanent employee affected by any application of the personnel rules" as described by RSA 21-I:58.

Having considered the evidence, arguments and offers of proof, the Board made the following rulings of law:

- A. Per 602.02 (c) of the Rules of the Division of Personnel establishes the order of consideration for in-house applicants for a vacancy as follows: "The most qualified candidate for the position, in the opinion of the appointing authority, shall be selected from designated groups of employees considered in the following order: (1) Full-time employees; (2) Former full-time agency employees who have been laid off within the past 3 years; (3) Probationary employees; and (4) Part-time employees."
- B. Per 1101.06 (a) and (b) of the Rules of the Division of Personnel defines a laid-off employee's rights to be recalled as follows: "(a) If the reasons for a layoff no longer apply, employees shall be recalled to the same agency from which the employees were laid off according to the same seniority order which the appointing authority applied to lay off the employees, provided such recall occurs within 3 years from the original layoff date." (b) "Recall shall apply only to laid off employees who return to the same classification within the same agency."
- C. 1990, 261:1 states, in pertinent part, "It is the intent of the legislature that any position which becomes available in a department or establishment... shall be filled, if possible, by a state employee laid off... if such person is not currently employed by the state of New Hampshire and if he meets the minimum qualifications for the position... Before filling any position, regardless of the funding source, the head of a department or establishment shall recall the employees laid off from his department by classification and seniority. Once the names in the department and classification have been exhausted, the head [sic] shall request the director of the division of personnel to identify in order of seniority the state employees laid off or bumped... who meet the

minimum qualifications for the vacant position. If more than one laid off or bumped employee is qualified for the position the position shall be filled in order of seniority."

- D. RSA 21-I:46, I, defines the powers and duties of Personnel Appeals Board as follows: "The personnel appeals board shall hear and decide appeals as provided by RSA 21-I:57 and 21-I:58 and appeals of decisions arising out of application of the rules adopted by the director of personnel."
- E. RSA 21-I:57 establishes the rights of an employee or employer or both to appeal a classification decision of the Director. "Allocation Review. The employee or the department head, or both, affected by the allocation of a position in a classification plan shall have an opportunity to request a review of that allocation... The employee or department head, or both, shall have the right to appeal the director's decision to the personnel appeals board in accordance with mles adopted by the board under RSA 541-A. If the board determines that an individual is not properly classified in accordance with the classification plan or the director's rules, it shall issue an order requiring the director to make a correction."
- F. RSA 21-I:58 defines the appeal rights of permanent employees. "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 mles 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. ..."

### **Decision and Order**

On the evidence, oral argument and offers of proof, the Board voted to dismiss Mr. Letellier's appeal as an issue outside the Board's subject matter jurisdiction. The reasons for such dismissal are two-fold.

First, the Board found that it does not have jurisdiction to hear Mr. Letellier's complaint with respect to any statutory entitlement for employment referrals to other State agencies. That matter arises out of the application of a statute (1997, 351:50), not the application of a personnel rule, and therefore falls outside the subject matter jurisdiction of this Board.

A similar issue arose in 1992, in the Appeal(s) of Paul Ingersoll (PAB Docket #91-O-7 and #92-O-2). In that case, the appellant argued that the Board had jurisdiction to hear and decide the appeal under the provisions of RSA 21-I:46 and RSA 21-I:58. The Board found that the issue involved rights following lay-off that the appellant claimed under the provisions of HB-1506. The Board found that it lacked subject matter jurisdiction because the claims involved the "...interpretation of an alleged statutory entitlement, not the application of a personnel rule." The Board's decision dismissing the appeal for lack of subject matter jurisdiction was then appealed to the NH Supreme Court (Case No. 93-052). In a decision dated October 4, 1994, the Court affirmed the Board's decision.<sup>2</sup>

The Board disagrees with the State's position that because Mr. Letellier is no longer a State employee, he has no standing to appeal any issue related to his employment with the State. RSA 21-I:46 provides that, "The personnel appeals board shall hear and decide appeals as provided by RSA 21-I:57 and 21-I:58 and appeals of decisions arising out of application of the rules adopted by the director of personnel." Although he is no longer a State employee, he has certain rights as a laid-off employee, including recall to his same classification within the agency from which he was laid-off, and eligibility to apply for positions within the agency from which he was laid off. Therefore, the Board found that those matters could be subject to appeal to this Board under the general provisions of RSA 21-I:46.

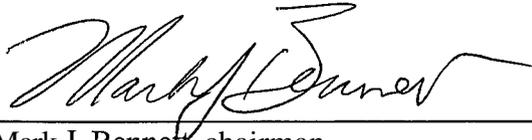
That notwithstanding, the Board also found that it lacks jurisdiction to decide the issue of Mr. Letellier's certification for the classification of Ombudsman.. Mr. Letellier is not an employee affected by the classification or allocation of a position in the classified service, and is not appealing a decision that was made while he held permanent status as a State employee. Therefore, he has no standing to appeal under the provisions of RSA 21-I:57 or RSA 21-I:58. In this instance, neither his right to be recalled nor his right to be considered as an in-house applicant are at issue. Therefore, on the evidence, oral argument and offers of proof, the Board voted to dismiss Mr. Letellier's appeal as a matter outside the Board's subject matter jurisdiction.<sup>3</sup>

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<sup>2</sup> See also: Appeal of Higgins Brodersen, (1990) 133 N.H. 576,578 A2d 868

<sup>3</sup> Were the Board to have reached the merits of the appeal, the Board would have affirmed the Director's decision that the appellant did not meet the minimum experience requirements for the position of Ombudsman.

THE PERSONNEL APPEALS BOARD



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Mark J. Bennett, chairman



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Lisa A. Rule, Commissioner

cc: Virginia A. Lamberton, Director of Personnel, 25 Capitol Street, Concord, NH 03301  
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