

State of New Hampshire



PERSONNEL APPEALS BOARD
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Appeal of Ladrie and Lockhart

Docket #94-O-2

New Hampshire State Liquor Commission

June 30, 1998

The New Hampshire Personnel Appeals Board (Bennett, Johnson and Rule) met on April 23, 1997, under the authority of RSA 21-I:46 and RSA 21-I:58, to hear the appeals of Alan Ladrie and Richard Lockhart. Margo Steeves, SEA Field Representative appeared for the appellants. George Liouzis, N. H. State Liquor Commission Human Resources Administrator and Virginia Larnberton, Director of Personnel, appeared for the State. Mr. Ladrie and Mr. Lockhart were appealing the Liquor Commission's decision denying them "recall" as former laid-off Retail Cashiers, salary grade 7, to the position of Retail Store Clerk II, salary grade 10. The appeal was heard on offers of proof by the representatives of the parties. The record consists of the audio tape recording of the hearing, pleadings submitted by the parties, and notices and orders issued by the Board.

The material facts are not in dispute.

1. Both appellants were laid-off from positions of Cashier/Clerk, salary grade 7, when the Liquor Commission eliminated that classification of positions from its workforce during a reduction in force.
2. For a period of three years following the date of lay-off, both appellants were eligible for recall under the provisions of Per 1101.05 of the Rules of the Division of Personnel.

3. Because their lay-offs were a direct result of mandatory budget reductions, the appellants also were eligible for appointment to vacancies in agencies statewide under the provisions of former HB-1506, enacted as Chapter 261:1, Laws of 1990.
4. In 1993, the Liquor Commission asked for approval to fill a number of vacant positions, including Retail Store Manager II, Retail Store Clerk II, Store Supervisor/Manager and Senior Liquor Investigator.
5. By letter dated April 26, 1993, Personnel Director Virginia Lamberton notified the Commission that she and her staff had reviewed the master recall list established under Chapter 261, and had determined that there were no individuals qualified to fill those positions. The Commission was then authorized to commence normal recruitment procedures.
6. On August 26, 1993, the State Employees' Association wrote to Human Resources Administrator George Liouzis requesting informal settlement under the provisions of Per 202 of the Rules of the Division of Personnel, arguing that Mr. Ladrie and Mr. Lockhart had been "denied promotion to a posted position," and that under the provisions of Per 602.02(b) of the Rules, the appellants were entitled, as former laid-off employees, to selection. Attached to that correspondence was a copy of Chapter 261:1, Laws of 1990.
7. Mr. Liouzis responded by letter dated October 5, 1993, stating that recall applied only to positions in the classification from which the appellants were laid-off. He wrote that the appellants were not entitled to be "recalled" to positions of Retail Store Clerk II, salary grade 10, since they had been laid off from positions of Cashier/Clerk, salary grade 7. In support of that position, he quoted Per 1101.05 of the Rules of the Division of Personnel which states, "Recall shall apply only to laid off employees who return to the same classification within the same agency."
8. The Association subsequently appealed to the Liquor Commissioners, arguing that under a conservative interpretation of Chapter 261:1, II, the appellants were entitled to selection for vacancies in other classifications before any outside candidates could be recruited.
9. On October 15, 1993, the Commission responded that all of the positions of Retail Store Clerk II had been filled either by transfers of full-time permanent employees, selection of former full-time employees who had been laid-off from the agency, or appointment of current part-time employees. The Commission wrote that Per 602 of the Rules did not mandate selection in any

order of priority, only that the appointing authority first consider its in-house candidates and former laid-off employees before seeking candidates from outside the agency.

10. On October 25, 1993, the Association wrote to the Director of Personnel, requesting informal settlement of the dispute under the provisions of Per 202 of the Rules of the Division of Personnel. In that letter, the Association argued that the provisions of Chapter 261 mandated the appointment of laid-off employees to any vacancy for which they met the minimum qualifications.
11. The Director responded by letter dated November 17, 1993, stating that requests for informal settlement applied only to those decisions involving the application of rules adopted by the Director, not the implementation of the provisions of a law such as Chapter 261. The Director wrote that the Division's practice in implementing the law had been to determine the labor grade the employee held at the time of lay-off, and to offer placements under Chapter 261 in vacancies at the same labor grade or lower than their previous salary grade. She wrote, "The master lay-off list was not intended to force agencies to promote former laid-off workers over current and full-time employees. However, Per 602.02 Filling Vacancies Within An Agency, provides for both Mr. Ladrie and Mr. Lockhart to be considered in-house applicants for all vacancies for which they are qualified."
12. The Association timely filed an appeal with the Board, arguing that the Director of Personnel violated Chapter 261 by refusing to include Mr. Ladrie and Mr. Lockhart on the master recall list for any vacancies for which they met the minimum qualifications. The Association also argued that under the provisions of Per 602.02 of the Rules of the Division of Personnel, before an agency could select a probationary or part-time employee for a vacancy, the agency must first select any former, full-time laid-off employees who met the qualifications for the position.

Rulings of Law:

- 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 employee, provided such recall occurs within 3 years from the original layoff date.' [Per 1101.05 (a)]

B. "Recall shall apply only to laid-off employees who return to the same classification within the same agency." [Per 1101.05 (b)]

C. Rehiring of Laid Off State Employees

I. For purposes of this act, "laid off" means any person laid off between January 1, 1990 and December 1, 1990, as a result of 1990, 1:16 or any other state law.

II. It is the intent of the legislature that any position which becomes available in a department or establishment, as defined in RSA 9:1, shall be filled, if possible, by a state employee laid off, as defined in paragraph I, if such person is not currently employed by the state of New Hampshire and if he meets the minimum qualifications for the position. Such position may also be filled by any person who as a result of bumping was laid off as a result of the layoff process pursuant to 1990, 1:16, or any other state law, if such person is not currently employed by the state of New Hampshire and if he meets the minimum qualifications for the position."

III. 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 shall request the director of the division of personnel to identify in order of seniority the state employees laid off or bumped pursuant to 1990, 1:16 or any other state law 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." [Chapter 261, Laws of 1990]

D. "Whenever possible, selection by the appointing authority to fill a vacancy shall be made from within an agency and shall be based upon the employee's: (1) Possession of the knowledge, skills, abilities and personal characteristics listed on the class specification for the vacant positions; and (2) Capacity for the vacant position as evidenced by documented past performance appraisals." [Per 602.02 (a)]

E. "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 three years; (3) Probationary employees; and (4) Part-time employees." [Per 602.02 (b)]

F. "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..."

Decision and Order

The issues presented here for the Board's consideration appear relatively simple at first blush. The several grounds upon which the appellants have claimed entitlement to relief, however, and the Board's authority to grant relief under the existing statutory scheme, make the matter more complicated than it initially appears.

RSA 21-I:58 makes it clear that the Board's statutory jurisdiction is limited to those matters arising out of the application of rules adopted by the Director of Personnel. Accordingly, appeals arising out of the appellants' claim of recall rights under the provisions of Per 1101, or to selection under Per 602, would fall within the Board's jurisdiction. Issues related to the appellants' placement on the "statewide recall list" or to their appointment to vacancies in their own or other agencies under the provisions of Chapter 261 would not, since they arise out of the application of a statute, not the application of a rule'.

The Board found that the agency was under no obligation to re-hire the appellants in positions of Retail Store Clerk II, salary grade 10. The appellants were laid off from positions of Cashier, salary

¹ The Board does not have subject matter jurisdiction to decide the merits of the appeal with respect to the appellants' entitlements under the provisions of Chapter 261. However, if the Board has such jurisdiction, the Board would have denied their appeal. In its notice of appeal, the Association argued that the appellants were entitled to placement in any vacant position for which they met the minimum qualifications, regardless of the labor grade of the vacancy. The Association argued that the Director had violated Chapter 261 by, "...interpreting Chapter Law according to Per 1101.05 rather than as written." On the contrary, read literally, the statute provides no entitlement to either appellant. Chapter 261:1, I, and II make no distinction between full-time and part-time employment. Both of the appellants are employed by the Liquor Commission on a part-time basis. If the Director were to have applied the statute "literally," current employment, even in a part-time capacity, would have disqualified the appellants from any consideration other than recall under the provisions of Per 1105, or selection under the provisions of Per 602. Practically speaking, it appears that the Director acted prudently in carrying out her statutory obligations under Chapter 261 in conformance with the applicable lay-off, bumping and recall provisions of the Rules of the Division of Personnel.

grade 7. As such, they were entitled to be recalled, in order of seniority, to any positions within that classification which the Liquor Commission was authorized, and chose, to fill. According to Mr. Liouzis, when the agency undertook a reduction in force, it eliminated the classification of Cashier. Therefore, there were no positions to which the appellants might have been recalled under the provisions of Per 1101.05 (b). However, as laid-off employees, for a period of three years following the date of lay-off, the appellants were entitled to apply as in-house candidates for any other vacancies within the agency. Both Mr. Ladrie and Mr. Lockhart met the minimum qualifications for Retail Store Clerk II, and applied for vacancies in that classification when they occurred.

In its notice of appeal, the Association wrote, "Per 602.02 of the Administrative Rules, Division of Personnel states that former full-time agency employees who have been laid off within the past three years shall be selected before probationary and part-time employees." (Emphasis supplied.) The Board does not agree. Per 602.02 (b) does not mandate the order of selection, merely the order of consideration. It states, "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:..." (Emphasis added.) There is no evidence to suggest that part-time employees were considered before the Commission had considered its full-time and former full-time laid-off employees. Therefore, absent evidence that the agency abused its discretion in selecting the candidates it deemed best qualified" the appeal is denied.

For the reasons set forth above, the Board voted unanimously:

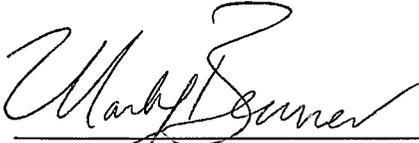
To dismiss the appeal of entitlement to referral or placement under the provisions of Chapter 261, Laws of 1990, as a matter outside the Board's jurisdiction;

To deny the appeal of non-selection to a vacancy under the provisions of Per 602 of the Rules of the Division of Personnel; and

² In the absence of specific evidence with respect to the appellants' qualifications relative to those of the other candidates, the Board assumes that the Commission selected those it considered best qualified by virtue of their documented past performance, and their possession of the knowledge, skills, abilities and personal characteristics as listed on the class specification for Retail Store Clerk II.

To deny the appeal of recall rights under the provisions of Per 1101.05 of the Rules of the Division of Personnel.

THE PERSONNEL APPEALS BOARD



Mark J. Bennett, Chairman



Robert J. Johnson, Commissioner



Lisa A. Rule, Commissioner

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