

State of New Hampshire



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

APPEAL OF LIONEL MACEACHERN

DOCKET #98-O-6

Department of Revenue Administration

April 2, 1998

The New Hampshire Personnel Appeals Board (Bennett, Johnson and Wood) met on Wednesday, March 18, 1998, under the authority of RSA 21-I:58, to hear the appeal of Lionel MacEachern, a former Real Estate Appraiser (salary grade 22). Mr. MacEachern was appealing his status on the statewide "recall" list as a result of lay-offs within the Property Appraisal Division of the Department of Revenue Administration. Val Berghaus, General Counsel for the Department of Revenue Administration, and Personnel Director Virginia Lamberton appeared on behalf of the State. Mr. MacEachern appeared *pro se*. The appeal was made on offers of proof by the representatives of the parties. The record in this matter consists of notices and orders issued by the Board, pleadings submitted by the appellant, and the audio-tape recording of the hearing on the merits.

Mr. MacEachern asserted that on April 15, 1997, employees in the Property Appraisal Division of the Department of Revenue Administration were given official notification of a lay-off that would be effective in July, 1997. The affected employees met on April 17, 1997, with the Assistant Director of the Property Appraisal Division to discuss the events necessitating the lay-off, and on May 7, 1997, with Jo Bunten of the Division of Personnel who discussed the employee's options and rights prior to and after the effective date of the lay-off. The employees also met on June 13, 1997, with representatives of several State agencies that would be providing job seeking and job placement services. Mr. MacEachern alleged that during more than one of these meetings, the employees subject to lay-off were advised that if they voluntarily transferred to another position prior to the effective date of lay-off, they would forfeit their rights to be recalled to the positions from which they had been

laid off, and would also forfeit the right to be placed in a vacancy in another State agency under the provisions of HB-2.¹

Mr. MacEachern stated that in late June, 1997, the Department of Revenue Administration posted a vacant Auditor position (salary grade 15) in the Audit Division. Although he was the least senior employee facing lay-off, Mr. MacEachern did not apply for the position as posted. He asserted that James Commerford, a more senior Appraiser, did apply for the vacancy and was offered the position. He argued that by doing so, Mr. Commerford voluntarily removed himself from the statewide "recall" list authorized by HB-2. Mr. MacEachern argued that despite having warned employees that voluntary transfers prior to lay-off would result in their removal from the "recall" list, the Department of Revenue Administration later allowed Mr. Commerford's transfer to be treated as a demotion in lieu of lay-off so that he would be eligible for placement in another agency by the Division of Personnel. He also argued that by returning Mr. Commerford to the list of employees subject to lay-off, the Division of Personnel moved Mr. MacEachern from second to third place on the seniority list for placement in one of only two vacant position at the Department of Transportation. He asked the Board to find that Mr. Commerford was not entitled to be treated as a laid-off employee for purposes of recall or placement under the provisions of HB-2. He further asked the Board to order the State to reimburse him for all lost wages and benefits during his period of lay-off, and order the restoration of all accumulated annual and bonus leave for which he received payment at the time of lay-off.

Personnel Director Lambertson explained that under the Rules of the Division of Personnel, when a lay-off becomes necessary within a department or agency, the appointing authority first must identify the class or classes of positions to be affected, and then lay off employees within that class on the basis of their seniority. If the reasons for lay-off no longer apply and the appointing authority elects to fill one or more positions within the affected classification(s), laid-off employees are entitled to be recalled to their former classification, on the basis of seniority, for a period of three years following the date of lay-off.

Ms. Lambertson explained that in addition to the recall provisions of the Personnel Rules, the State had enacted legislation providing for the placement of certain laid-off employees in other agencies as

¹ During the hearing, the parties referred to HB-32. However, correspondence between Ms. Lambertson and Mr. MacEachern dated July 18, 1997, attached to Mr. MacEachern's pleadings, identifies the legislation as HB-2. Neither party provided the statutory language for the Board's review.

vacancies occurred. She said that under the provisions of HB-2, appointing authorities must notify the Director before filling any vacancy so that the Director can determine if there is a laid-off employee qualified to fill the position. When such employees are identified, they are given the opportunity, on the basis of seniority, to be placed in the vacant position before an agency may be permitted to fill the position by ordinary recruitment methods.

Ms. Lamberton said that her agency had been working to secure placement prior to a break in service for the three Property Appraisal Division employees who were scheduled for lay-off in mid-July. She stated that none of the three employees had bumping privileges, and that Mr. MacEachern had the least seniority of the three. Ms. Lamberton said she became aware of two upcoming vacancies at the Department of Transportation (at salary grade 18), and realized they could probably provide ideal placements for two of the three appraisers without their suffering a substantial loss of pay or benefits. She said that when she learned that James Commerford, the most senior of those employees, had accepted a demotion in lieu of lay-off, it seemed unfair that he should suffer a seven grade reduction in pay (salary grade 22 to salary grade 15) and lose his place on the lay-off list to facilitate placement of another employee with substantially less seniority in a position at salary grade 18.

Ms. Lamberton said she was able to persuade the Department of Revenue Administration to retain Mr. Commerford until the end of July until the position at the Department of Transportation became available. She stated that Mr. MacEachern was subsequently placed in a position at salary grade 19 at the Department of Employment Security.

Ms. Lamberton argued that the relief Mr. MacEachern was seeking was outside the Board's jurisdiction. Ms. Lamberton said that upon separation due to a lay-off, affected employees are receive full payment for all of their accumulated annual leave and bonus leave, and payment for one third of their accumulated sick leave up to a maximum of 30 days. She argued that by asking for reinstatement of all lost pay and benefits, and reinstatement of all accumulated leave, Mr. MacEachern had requested compensation above and beyond any losses he might actually have suffered and would, in fact, receive a double recovery.

Ms. Lamberton argued that the Board's jurisdiction was limited to determining whether or not Mr. MacEachern's lay-off had been accomplished in accordance with the Director's rules. She noted that the legislature had never required adoption of any administrative rules for management of the

statewide "recall," nor had any such rules been adopted. She argued that the Division carefully applied the principles of placement on the basis of seniority, consistent with the legislative intent, and that it would be unfair for the Board to find that Mr. Commerford should be denied the benefit of the law simply because after receiving notice of his impending lay-off, he accepted a demotion rather than suffer a break in service. Ms. Lamberton said that when the position at the Department of Transportation became available on August 1, 1997, her office transferred Mr. Commerford to that position in keeping with his placement on the seniority list of those employees who had been selected for lay-off but had not yet been placed in another vacancy.

The pertinent facts are as follows:

1. Both Mr. MacEachern and Mr. Coinmerford received official notice of a proposed lay-off in the Property Appraisal Division of the Department of Revenue Administration on April 15, 1997.
2. Both Mr. MacEachern and Mr. Commerford were employed as Property Appraisers, salary grade 22.
3. Mr. MacEachern and Mr. Commerford were scheduled for lay-off at the close of business on July 17, 1997.
4. Mr. Commerford had more seniority than Mr. MacEachern.
5. Mr. Coinmerford would not have applied for a position with a substantially lower salary grade except as a means to avoid a break in service.

Insofar as there are no administrative rules that specifically address the question of Mr. MacEachern's placement on the lay-off list, the only rules upon which the Board can rely are the following provisions of Per 1101 of the Rules of the Division of Personnel.

A. "An appointing authority shall give written notice of the proposed layoff and the reasons therefor to the affected employee(s) and to the director [of personnel] at least 14 calendar days before the date the layoff becomes effective." [Per 1101.03 (a)]

B. "Except for very unusual circumstances of an individual possessing unique credentials that are necessary for the agency to carry out a legislated mandate seniority shall govern the order of lay-off." [Per 1101.02 (e)] See also Per 1101.02 (b): "Each employee whose position is in an affected class shall be considered with other employees in the same class within a division of an agency in

accordance with their seniority, whether the employee is in a duty or leave status, or on Workers' Compensation."

C. "Prior to lay-off, appointing authorities, with the assistance of the division of personnel, should attempt to reassign an employee into a vacant position under the following circumstances: (1) The reassignment does not result in a promotion; and (2) The employee being reassigned qualifies for the vacant position." [Per 1101.02 (f)]

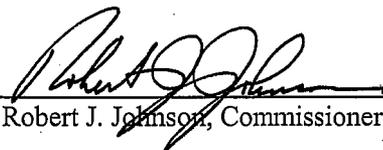
The Board found that Mr. Commerford's transfer to a job with a substantially lower salary grade was in effect a demotion in lieu of layoff. See Per 101.20 "Demotion" and Per 101.34 "Layoff." As such, the Board found Mr. Commerford was entitled to the full benefits of HB-2.

The Board found that Mr. MacEachern's lay-off, placement on the seniority list for statewide recall, and compensation at the time of lay-off were accomplished in compliance with the applicable administrative rules. Accordingly, the Board voted unanimously to deny Mr. MacEachern's appeal, finding that he is not entitled to the requested relief..

THE PERSONNEL APPEALS BOARD



Mark J. Bennett, Chairman



Robert J. Johnson, Commissioner



Patrick H. Wood, Commissioner

cc: Virginia A. Lamberton, Director of Personnel, 25 Capitol St., Concord, NH 03301
V. Hummel Berhaus, Revenue Counsel, Dept. of Revenue Administration, 61 S. Spring St.,
Concord, NH 03302-0457
Lionel MacEachern, 231 Hackett Hill Rd., Hooksett, NH 03106

State of New Hampshire



PERSONNEL APPEALS BOARD

25 Capitol Street
Concord, New Hampshire 03301
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Appeal of Lionel MacEachern
Docket #98-O-6
Department of Revenue Administration

October 3, 1997

The New Hampshire Personnel Appeals Board (Rule, Johnson and Wood) met on Wednesday, September 17, 1997, under the authority of RSA 21-I:58, to consider the appeal of Lionel MacEachern. By order dated September 4, 1997, the Board voted to allow the appellant ten calendar days in which to furnish a more specific statement. The Board also advised the appellant that failure to provide that statement in a timely fashion would result in the immediate dismissal of his appeal.

Having received no statement from the appellant within the required ten days, the Board unanimously voted to dismiss the appeal.

THE PERSONNEL APPEALS BOARD

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Lisa A. Rule, Acting Chairman

Handwritten signature of Patrick H. Wood in cursive.

Patrick H. Wood, Commissioner

Handwritten signature of Robert J. Johnson in cursive.

Robert J. Johnson, Commissioner

cc: Virginia A. Lamberton, Director of Personnel
Stanley Arnold, Commissioner, Dept. of Revenue Administration
Lionel MacEachern

State of New Hampshire



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Appeal of Lionel MacEachern

Docket #98-O-6

Department of Revenue Administration

September 4, 1997

The New Hampshire Personnel Appeals Board (Rule, Johnson and Wood) met on Wednesday, August 13, 1997, under the authority of RSA 21-I:58, to consider the appeal of Lionel MacEachern, a former employee of the New Hampshire Department of Revenue Administration. Mr. MacEachern asserted that his appeal was "not applicable to the scheduled lay-off within the Property Appraisal Division of the Department of Revenue, but lies solely in the handling and manipulation of one individual on the lay-off list." Mr. MacEachern alleged that because the Division of Personnel and the Department of Revenue Administration failed to keep him fully apprised of another employee's status on the lay-off list ultimately had a direct and adverse effect on his rights.

Per-A 202.02 (b) of the Rules of the Personnel Appeals Board provides that any notice of appeal "shall state the action complained of, and shall contain a detailed description of why the appellant believes the action was inappropriate." While it is clear that the appellant believes he should not have been laid off, it is unclear what "action" forms the basis for the appeal, what rule the appellant believes was misapplied or misinterpreted, and what remedy he seeks. It also appears that the appellant failed to provide a copy of his notice of appeal to the Department of Revenue Administration, in violation of Per-A 206 of the Rules of the Personnel Appeals Board.

The Board, upon its own motion and as set forth in Per-A 202.02 of the Rules of the Personnel Appeals Board, will allow the appellant ten calendar days from the date of this order in which to

furnish a statement citing the specific action or actions complained of. His statement shall explain why he believes those actions were inappropriate. He also shall state specifically the relief or remedy sought.

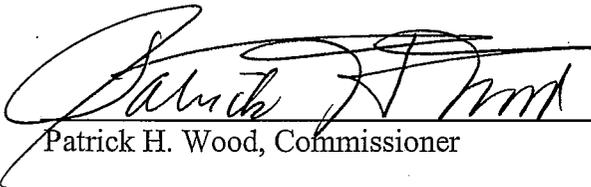
Failure to provide an amended appeal within ten days, and/or failure to provide a copy of that statement to the Department of Revenue Administration, shall result in the immediate dismissal of this appeal.

Upon receipt of the appellant's submission, the Department of Revenue Administration and/or the Division of Personnel shall have ten days in which to file a response to the allegations.

THE PERSONNEL APPEALS BOARD



Lisa A. Rule, Acting Chairman



Patrick H. Wood, Commissioner



Robert J. Johnson, Commissioner

cc: Virginia A. Lamberton, Director of Personnel
Stanley Arnold, Commissioner, Dept. of Revenue Administration
Lionel MacEachern