

State of New Hampshire



PERSONNEL APPEALS BOARD

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

APPEAL OF BARBARA MORGAN Postsecondary Technical Education

Docket #91-O-31

Response to Appellant's March 27, 1995 Request for Reconsideration

April 26, 1995

By letter dated March 27, 1995, received by the Board on March 28, 1995, Thomas Hardiman, SEA Director of Field Operations, requested reconsideration of the Board's March 8, 1995 decision in the above-captioned appeal. In support of that request, Mr. Hardiman argued that RSA 21-I:58, I requires the Personnel Appeals Board to hear any and all appeals dealing with salary issues, and that the statute grants the Board the authority to order the State to correct any inadequacy in that system of payment.

On the evidence and oral argument offered by the parties at the hearing, the Board voted unanimously to dismiss Ms. Morgan's appeal (Docket #91-O-31). In so doing, the Board found that the issue was beyond the Board's subject matter jurisdiction. In its order dated March 8, 1995, the Board stated, in part:

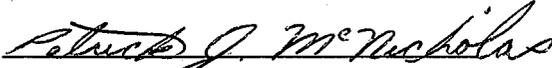
"...[T]he Board will not adopt the appellant's view that RSA 21-I:58 gives the Board unlimited authority to review any and all matters which relate to the employment or compensation of classified employees. The language of RSA 21-I:58 in effect at the time Ms. Morgan's appeal was filed clearly limits the Board's authority to hear appeals by employees "affected by any application of the personnel rules". In the Board's opinion, that authority does not extend to hearing appeals by employees dissatisfied with a decision of a properly appointed arbitrator under the terms and conditions of the Collective Bargaining Agreement, or of the Public Employee Labor Relations Board under the provisions of RSA 273-A. It certainly does not authorize the Board to overrule the New Hampshire Supreme Court."

In its decision, the Board also found that if it had jurisdiction to hear the appeal as filed, the appeal was not timely, and therefore should be dismissed.

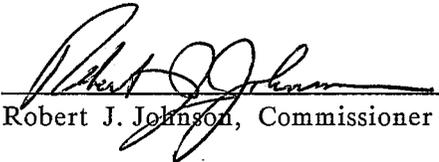
In the instant request for reconsideration, the appellant has failed to offer evidence or argument not already raised at the hearing on the merits and addressed by the Board in its decision dated March 8, 1995. Similarly, the appellant has failed to demonstrate that the Board's decision of March 8, 1995, was either unlawful or unreasonable.

Accordingly, the Board voted unanimously to deny the request for reconsideration, and to affirm its decision of March 8, 1995.

THE NEW HAMPSHIRE PERSONNEL APPEALS BOARD


Patrick J. McNicholas, Chairman


Mark J. Bennett, Commissioner


Robert J. Johnson, Commissioner

cc: Virginia A. Lamberton, Director of Personnel
Thomas F. Manning, Manager of the Bureau of Employee Relations
Thomas F. Hardiman, SEA Director of Field Operations
Stephen J. McCormack, SEA Field Representative

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APPEAL OF BARBARA MORGAN Postsecondary Technical Education Docket #91-O-31

March 8, 1995

The New Hampshire Personnel Appeals Board (McNicholas, Bennett and Johnson) met Wednesday, November 9, 1994, to hear the appeal of Barbara Morgan, an employee of the Department of Postsecondary Technical Education. Ms. Morgan was represented at the hearing by SEA Field Representative Stephen McCormack and SEA Director of Field Operations Thomas Hardiman. Thomas F. Manning, Manager of the Bureau of Employee Relations, appeared on behalf of the State. Without objection from either party, the appeal was heard on offers of proof. The record in this matter consists of the audio tape recording of the hearing, documents submitted by the parties prior to the hearing, and exhibits introduced by the parties at the hearing.

Ms. Morgan's original appeal, filed on her behalf by the State Employees' Association by letter dated April 15, 1991, asked for a hearing to appeal "a final decision by the State" dated April 1, 1991, contained in a letter from Thomas Manning to Mr. McCormack and Mr. Hardiman, describing the legislative history behind enactment of Chapter 231 of the Laws of 1986. Mr. Manning's letter stated, in part:

"As you know, the current salary tables for academic employees were developed as a result of Chapter 231 of the Laws of 1986. Chapter 231 inserted both permanent language within RSA 99:1-a and certain transitional language in session law to provide for a change in the way academic employees were compensated. Dennis Murphy, then of the S.E.A., and I were instrumental in securing favorable action on Chapter 231. ... Both my discussion with Mr. Murphy and my review of the funding analysis indicate that we are correctly compensating full year academic employees."

The statutory language central to this appeal was enacted as Chapter 231 of the Laws of 1986, effective in June, 1986. It read:

"The salary ranges provided herein for academic employees shall apply to those state employees in academic positions who work for an academic year which does not exceed 180 working days. Those academic employees working more than an academic year shall receive a pro rata increase in their salary based upon the number of additional working days per year. The intent of this section is to adjust the salaries of employees working in academic positions. It is not intended to cause changes in academic work schedules."

Defendant's Exhibit #3 illustrates that as early as 1978, both the State and the State Employees' Association agreed that working days meant days on which work was performed. In 1978, the State and the State Employees' Association jointly submitted a Stipulation of Facts to the New Hampshire Supreme Court in Case No. 1978-107 concerning the compensation of academic employees. In pertinent part, the parties agreed as follows:

"Prior to September 1972, most academic personnel in the state classified service worked on an academic year schedule. As of 1972, this schedule consisted of approximately 180 work days, or 200 days including holidays and vacation time. ... A full work year in state service consists of approximately 235 work days, or 260 days including holidays and vacation time." [See Defendant's Exhibit #3]

According to the appellant, the pay schedules implemented by the State never satisfied the statutory requirement that payment be pro rated for those academic employees who work in excess of 180 days per year. The appellant argued that while A180 employees are compensated for 180 scheduled work days, and A216 employees are compensated for 216 scheduled work days, A234 employees may work in excess of 234 days and receive no additional compensation. The State pointed out that employees on the A234 salary schedule are the only academic employees who receive paid holidays and paid annual leave. The State argued that while A234 employees may work more than 234 days per year, they also may work fewer than 234 days per year by utilizing the holidays and annual leave available to them.¹

The issue of receiving additional compensation for days of "work" in excess of 234 per year was raised as early as 1989 in an Arbitration between the State and the State Employees' Association (Appellant's Exhibit 11). Although not entirely on point, the April 26, 1989 Arbitration Decision issued by Milton J. Nadworney highlights the fact that both parties were aware of the 1986 amendment to RSA 99:1-a, that they understood the implications of a salary scheme predicated upon a 180 day academic year with pro rata adjustments for "days worked" in excess of 180 days per year, and that they agreed that "days worked" meant days upon which work was actually performed.

This dispute concerns the correct interpretation of Chapter 231 of the Laws of 1986, amending RSA 99:1-a, which has been in effect since June, 1986. The exhibits offered by the parties demonstrate that this dispute has a lengthy history, and that the appellant has attempted to have the issue resolved in her favor in a variety of forums. Roughly one week after presenting the matter as an appeal to this Board, the appellant, through her representative the State Employees' Association, filed a request for arbitration of a salary grievance arising out of an alleged violation of Article 19.1. of the Collective Bargaining Agreement which stated:

"Employees shall be provided with all the rights and benefits to which they are entitled by law and this Agreement."

A hearing was held on May 27, 1992, before Arbitrator John McCrory at which the parties (the State and the State Employees' Association) submitted testimony, exhibits, and oral statements.

¹ A typical work year for regular, non-academic employees consists of 234 work days, 104 weekend days, 12 paid holidays and 15 days of annual leave, totalling 365 days. If an employee does not take all of his/her available leave, the employee may work more than 234 days. If an employee allows his/her leave to accumulate and takes more than 15 days of accrued leave in a year, that employee may work fewer than 234 days.

Arbitrator McCrory issued his Decision and Award on June 26, 1992. He stated, in pertinent part:

"The meaning of the words 'working days' as used the statute is critical in resolving the dispute. The Association's interpretation suggests that they need not be days that are actually worked. It arrived at the 260 day figure by counting all days during the year that do not fall on a weekend. Or, stated another way, it would count all days that year round employees would be expected to work, unless a holiday is observed or an employee is on approved annual leave. ...

"The Association's interpretation of RSA 99:1-a would treat year round employees differently than 216 day employees. It would count all days that year round employees would be expected to work, unless a holiday is observed or an employee is on approved annual leave. Thus, days that they are not expected to work would be counted as 'working days.' I find no basis in the statutory language for treating 216 day and year round employees differently. The wording contemplates that they will be treated the same for pro rata salary adjustments....

"...The year around employees do not have a fixed schedule as do the other employees. Like non-academic employees they are expected to report for work, unless a holiday is observed or they are on leave. Because of the leave benefit, which is not applicable to other academic employees, there is uncertainty as to the exact number of days a year round employee will actually work in any particular year. But the statute contemplates than an annual salary be fixed for these employees. The Employer's solution is reasonable."

In making his award, Arbitrator McCrory denied the grievance, finding that the current compensation scheme neither violates Article 19.1. of the Agreement nor RSA 99:1-a of the statutes.

After unsuccessfully attempting to alter the salary scheme through arbitration, the appellant filed an unfair labor practice charge with the New Hampshire Public Employee Labor Relations Board on October 21, 1992. The Association alleged that the State was violating the collective bargaining agreement by the manner in which it was compensating 234 day academic employees, and therefore was violating RSA 273-A:5 I (a), (g) and (h). The State filed a motion to dismiss on November 5, 1992.

After a March 25, 1993 hearing, a decision was issued by the PELRB on April 2, 1993, dismissing the charge. In so doing, the PELRB issued the following Decision and Order:

"This case must be dismissed for several reasons, each of which is sufficient to warrant that dismissal. First, the parties appear to have had an agreement 'on the contents of what has become RSA 99:1-a. Finding No. 6. One of the parties cannot now repudiate that agreement. by using the grievance procedure or, for that matter, an unfair labor practice charge. Second, the methodology of paying academic employees has been 'open and notorious,' dating back to 1986 or earlier. This constitutes a past practice to the extent that methodology was not challenged or negotiated when the parties bargained their 1989-91 CBA, current to the present time under its continuing provisions (Article 21.1). If either that interpretation or methodology is unsatisfactory to one of the parties, the remedy is through the negotiations process. Third and finally, this Board said in AFSCME. Local 3438 v. Sullivan County Nursing Home, Decision No 92-156

(October 7, 1992) that 'failing a representation and proof that the arbitration proceedings were unfair or irregular....the objective of encouraging the voluntary settlement of labor disputes will be best served by recognition of an arbitrator's award.' The Union has not shown sufficient grounds to warrant a reversal under Sullivan County, supra.

"For the reasons set forth above, the State's Motion to Dismiss is GRANTED and the charges of ULP are DISMISSED."

The parties represented that the State Employees' Association then appealed the decision of the Public Employee Labor Relations Board to the New Hampshire Supreme Court. The Court declined to hear the case.

In oral argument before this Board, the State asked the Board to consider how many "bites at the apple" the appellant should be allowed. Mr. Manning argued that the parties had a clear understanding of what was meant by the term "working days", noting that the State and the Association had worked together toward passage of legislation in 1986 to achieve an equitable method for calculating the compensation of academic employees. Mr. Manning argued that the Board should affirm and adopt the findings of the PELRB, that the State Employees' Association should not be allowed to repudiate its part in that agreement, or subsequent legislative initiatives and negotiations since none of the underlying facts had changed.

The appellant argued that the statutory language requiring a pro rata adjustment of academic salaries is clear and unambiguous, and that employees on the A234 salary schedule should be compensated for the 260 work days on their schedule. The appellant argued that the Board enjoys broad equitable powers under the provisions of RSA 21-I:58, and should not feel bound by any of the earlier decisions on this issue.

Timeliness and Subject Matter Jurisdiction

The appellant argued that her appeal arises from a "decision" issued by Thomas Manning in his April 1, 1991 letter to the State Employees' Association, and that she had filed a timely appeal of that decision. The Board disagrees. Mr. Manning's letter reiterates the State's position that its original interpretation of RSA 99:1-a as amended by Chapter 231 of the Laws of 1986 was the correct interpretation. While that letter may have been considered a step in the grievance procedure defined by the Collective Bargaining, it does not constitute an application of the personnel rules within the meaning of RSA 21-I:58.

The language of RSA 21-I:58 in effect at the time Ms. Morgan's appeal was filed read as follows:

"Any 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 date of the action giving rise to the appeal."

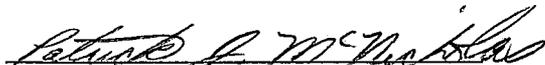
The documents submitted by the parties, as well as their offers of proof, make it clear that Thomas Manning's April 1, 1991 letter is not an interpretation or application of the personnel rules, nor is it a response to allegations or questions by the State Employees' Association about an application of the personnel rules. While the Board might retain jurisdiction to consider the appeal if rules had been adopted to implement the statute, the appellant has failed to cite any

rule or provision thereof from which a timely appeal might be taken. As such, the Board found that the issue is outside its subject matter jurisdiction, and must be dismissed on that basis. Additionally, if the Board did have jurisdiction to consider the matter as it was presented, an April 15, 1991 appeal of a 1986 legislative enactment would have to be dismissed as untimely.

Furthermore, the Board will not adopt the appellant's view that RSA 21-I:58 gives the Board unlimited authority to review any and all matters which relate to the employment or compensation of classified employees. The language of RSA 21-I:58 in effect at the time Ms. Morgan's appeal was filed clearly limits the Board's authority to hear appeals by employees "affected by any application of the personnel rules". In the Board's opinion, that authority does not extend to hearing appeals by employees dissatisfied with a decision of a properly appointed arbitrator under the terms and conditions of the Collective Bargaining Agreement, or of the Public Employee Labor Relations Board under the provisions of RSA 273-A. It certainly does not authorize the Board to over-rule the New Hampshire Supreme Court.

On the evidence and oral argument offered by the parties, the Board voted unanimously to dismiss Ms. Morgan's appeal (Docket #91-O-31), finding that the matter is beyond the Board's subject matter jurisdiction, and that if the Board had jurisdiction to hear the appeal, it was not timely filed.

THE NEW HAMPSHIRE PERSONNEL APPEALS BOARD


Patrick J. McNicholas, Chairman


Mark J. Bennett, Commissioner


Robert J. Johnson, Commissioner

cc: Virginia A. Lamberton, Director of Personnel
Thomas F. Manning, Manager of the Bureau of Employee Relations
Thomas F. Hardiman, SEA Director of Field Operations
Stephen J. McCormack, SEA Field Representative

State of New Hampshire

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PERSONNEL APPEALS BOARD

State House Annex
Concord, New Hampshire 03301
Telephone (603) 271-3261

APPEAL OF BARBARA MORGAN Department of Postsecondary Technical Education Docket #91-0-31

September 26, 1991

The New Hampshire Personnel Appeals Board (McNicholas, Bennett and Johnson) met Wednesday, September 11, 1991, to consider the appeal of Barbara Morgan, an employee of the Department of Postsecondary Technical Education. In her April 15, 1991 Notice of Appeal, filed by SEA Field Representative Stephen McCormack and SEA Director of Field Operations Thomas Hardiman, the appellant requested that the Board schedule a hearing on an alleged violation of the Rules of the Division of Personnel "...whereby these employees receive a salary that is less than required under the pay schedules set by the Division of Personnel, pursuant to RSA 99:1-a." (See Appellant's April 15, 1991, hearing request).

After reviewing the request for hearing itself, and the attachments thereto, the Board found the following:

1. The "action" from which this appeal appears to arise is summarized in the letter of Thomas Manning to Messers. Hardiman and McCormack which states, in pertinent part;

"Both my discussion with Mr. Murphy and my review of the funding analysis indicate that we are correctly compensating full year academic employees.

"...It was agreed that the A000 scale was appropriate for the 'academic year' employees and further agreed that the appropriate scale for 'year round' academic employees would be established by multiplying the A000 salary scale by 1.3. The 1.3 multiplier had been the rate to survive judicial scrutiny during the various court challenges to the pay plan then in existence and appeared to satisfy everyone's sense of what constituted equal pay for equal work."

On the basis of the information supplied by the appellant in the initial filing of her appeal, it is unclear when the agreement addressed above was reached, or when the terms of that agreement were implemented. Accordingly, it is impossible for the Board to determine if a timely appeal of that action has been filed.

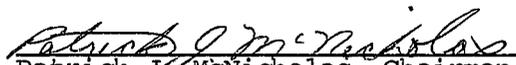
2. RSA 21-I:58 I, provides, in pertinent part, that:

"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 ..."

On the basis of the information supplied by the appellant in the initial filing of her appeal, it is unclear which "rule" she alleges to have been misapplied in determining her rate of pay.

In consideration of the foregoing, the Board voted to treat the instant appeal as an improperly filed Petition for Declaratory Ruling. The appellant is hereby permitted fifteen days in which to file an amended petition in accordance with Per-A 102.02 of the Rules of the Personnel Appeals Board.

THE PERSONNEL APPEALS BOARD


Patrick J. McNicholas, Chairman


Mark J. Bennett


Robert J. Johnson

cc: Virginia A. Vogel, Director of Personnel
Thomas Manning, Manager, Bureau of Employee Relations
Dr. H. Jeffrey Rafn, Commissioner, Postsecondary Technical Education