

State of New Hampshire

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PERSONNEL APPEALS BOARD

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

APPEAL OF LAURA SCHEIBEL Division of Human Services

Response to Appellant's Motion for Reconsideration
Docket #90-0-14
Date: December 19, 1990

By letter dated November 29, 1990, SEA Field Representative Stephen J. McCormack filed a Motion for Reconsideration of the Board's November 13, 1990 decision dismissing the appeal of Laura Scheibel, a former part-time employee of the Division of Human Services. In her original letter of appeal, Ms Scheibel had requested that the Board order her to be paid, pro rata, under the provisions of RSA 98-A:6 (pay in lieu of annual leave). Ms Scheibel had been displaced by a laid-off employee prior to reaching her anniversary date of employment.

On November 13, 1990, the Board dismissed Ms Scheibel's appeal, noting that the appellant had initially asked that the Board hold her appeal in abeyance pending the outcome of a similar case then pending before the New Hampshire Supreme Court. The original letter of appeal stated, "In this instance, because there is currently a Supreme Court appeal filed with regard to what RSA 98-A:6 actually provides for, it is requested that the New Hampshire Personnel Appeals Board pend any decision on this matter until after the New Hampshire Supreme Court decides the appeal of Carol Higgins-Brodersen and William McCann. Pursuant to RSA 21-I:46, this appeal is sent to the Personnel Appeals Board."

Upon receipt of the Court's decision in that matter affirming the Board's dismissal of their appeal, the Board issued its November 13th order dismissing Ms Scheibel's appeal on the same bases. In its order, the Board made specific note of (1) Ms Scheibel's part-time status at the time of the decision to deny her prorated pay in lieu of annual leave and (2) the fact that the claim was based upon a statutory entitlement, not a provision of administrative rule. In that order, the Board cited as its rationale the New Hampshire Supreme Court's Order of August 27, 1990 in the appeal of Carol Higgins-Brodersen and William McCann (N.H. Supreme Court Case No. 89-139), portions of which were reproduced in the Board's notice of dismissal.

In her motion for reconsideration, the appellant now argues that were it not for the lay-off of certain permanent employees of the Division of Human Services, and the displacement of certain part-time employees by laid-off full

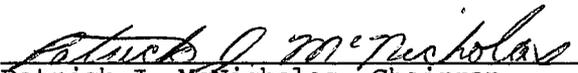
Response to Appellant's Motion for Reconsideration
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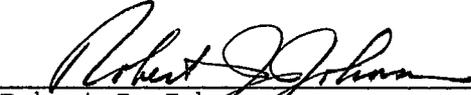
time employees, Ms. Scheibel (1) would have continued to work her same part-time schedule, (2) would have reached her anniversary date of employment, and (3) would have satisfied the requirements of RSA 98-A:6, entitling her to payment in lieu of annual leave. She therefore contends that the Rules of the Division of Personnel governing lay-off, and not the provisions of RSA 98-A:6, are the basis of her appeal.

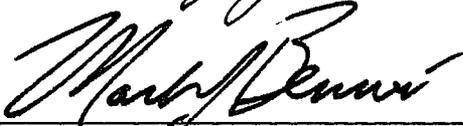
The appellant asks the Board to reverse its earlier order on the basis of conjecture rather than fact. While it is possible that Ms. Scheibel would have continued to work her same part-time schedule had there not been lay-offs, it is equally possible that she would not. Had lay-offs at the Department of Health and Human Services not taken place, any number of other circumstances might have occurred to preclude Ms. Scheibel's completing 975 hours of work by her anniversary date of employment, or from reaching her anniversary date of employment regardless of how many hours she had worked part-time. As such, the Board can not treat appellant's representation of what might have occurred as facts for the purposes of hearing and deciding the instant appeal under the provisions of N.H. RSA 21-I:46.

The appellant has failed to meet her burden of demonstrating that the Board's earlier order was either unreasonable or unlawful in light of the facts presented. Therefore, the Board voted to affirm its order of November 13, 1990, dismissing Ms. Scheibel's appeal.

THE PERSONNEL APPEALS BOARD


Patrick J. McNicholas, Chairman


Robert J. Johnson


Mark J. Bennett

cc: Stephen J, McCormack, SEA Field Representative
Richard Chevrefils, Director, Division of Elderly and Adult Services
Jan D. Beauchesne, Human Resource Coordinator, HHS/COMB
Virginia A. Vogel, Director of Personnel
Civil Bureau - Office of the Attorney General

State of New Hampshire

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APPEAL OF LAURA SCHEIBEL Division of Human Services

Docket #90-0-14
dated: November 13, 1990

By letter dated April 10, 1990, SEA Field Representative Stephen J. McCormack filed an appeal on behalf of Laura Scheibel, a former part-time employee of the Division of Human Services, requesting that the Board order her to be paid under the provisions of RSA 98-A:6 (pay in lieu of annual leave), upon her notice of lay-off prior to her anniversary date of employment, July 1, 1990.

Mr. McCormack argues that Ms. Scheibel's appeal " ...is an appeal by a part-time employee, and that the Board has jurisdiction over appeals of part-time employees, at least in certain circumstances." *Mr.* McCormack then asked that the Board hold the matter in abeyance, noting that the Supreme Court had not yet issued an order in the matter of Carol Higgins-Brodersen and William McCann (N.H. Supreme Court Case No. 89-139).

In the Higgins-Brodersen and McCann appeal, the State Employees' Association has argued that the Appeals Board had jurisdiction to hear appeals by part-time employees, and that the Board also had subject matter jurisdiction inasmuch as the issue under consideration related to payment of annual leave defined by Per 307.03 N.H. Code of Administrative Rules. The Board had dismissed the appeal of Higgins-Brodersen and McCann (1) finding that their appeal was not within the Board's subject matter jurisdiction, and (2) that the action under appeal was not as a result of an application of the Personnel Rules, but rather one of statutory entitlements for certain part-time employees.

Following a dismissal of the original appeal, the appellants had filed a motion for reconsideration. Again, the Board declined to hear the appeal, stating its opinion that it lacked jurisdiction.

In its decision of August 27, 1990, the New Hampshire Supreme Court affirmed the Board's decision. Several pertinent passages from that order are reproduced below:

"In reviewing RSA 21-I:58, it is clear to us that the legislature intended to confer upon State employees a specific right of appeal to the Board based upon permanent status. Permanent employees have completed a working-test period and have been recommended for permanent appointment by the proper authority. See N.H. Code of Admin. Rules, Per 101.26. The

term "permanent" reflects a degree of mutual commitment between employer and employee and an expectation that their relationship will be long-term. It is quite reasonable for the legislature to accord employees holding permanent status greater opportunity to challenge personnel decisions affecting them."

"It is also reasonable to conclude that the legislature did not intend RSA 21-I:58 to confer upon such employees a right to challenge all personnel decisions, but only ones involving the application of a personnel rule which affects them while they hold their permanent status. . ."

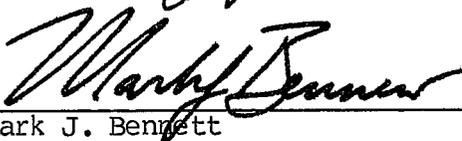
"A party seeking to set aside the decision of an administrative agency bears the burden of showing that the decision was clearly unreasonable or unlawful. RSA 541:13; see Appeal of Dep't of Safety, 123 N.H. 284, 285, 461 A.2d 98, 99 (1983). After reviewing the record, we conclude that the Board did not act unreasonably or unlawfully in ruling that, for an employee to have a right of appeal under RSA 21-I:58, the personnel rule in question must have been applied to the employee while permanently employed. We hold that the Board did not err in ruling that it lacked jurisdiction, under RSA 21-I:58, over claims arising from the petitioners' part-time employment."

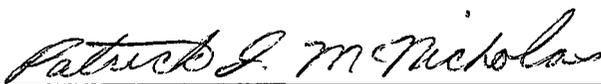
"Upon review, we conclude that the petitioners' claims are founded upon RSA 98-A:6 (Supp. 1989) and do not arise out of an application of the personnel rules. We therefore hold that the Board's conclusion, that it lacked jurisdiction to hear their appeals under RSA 21-I:46, was both legal and reasonable. See Appeal of Tamm, 124 N.H. at 110-11, 469 A.2d at 1293. "

In consideration of Ms. Scheibel's part-time status at the time of the decision to deny her prorated pay in lieu of annual leave, and the claim for compensation on the basis of a statutory entitlement, the Board dismisses the appeal.

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