

State of New Hampshire



PERSONNEL APPEALS BOARD

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APPEALS OF:
Claude Allard
(Docket #94-L-1)

and

David St. Cyr
(Docket #95-O-1)

Department of Postsecondary Technical Education

June 15, 1995

The New Hampshire Personnel Appeals Board (McNicholas, Johnson and Rule) met Wednesday, May 3, 1995, under the authority of RSA 21-I:58, to hear oral argument on the State's motions to dismiss the above-captioned appeals, and the appellants' requests for disposition of these appeals without evidentiary hearing. Michael C. Reynolds, SEA General Counsel, appeared on behalf of the appellants. Assistant Attorney General William C. McCallum appeared on behalf of the Department of Postsecondary Technical Education. During the course of the hearing, the parties agreed that any documents being offered by either party could be admitted into the record as exhibits without objection.

The appellants, former employees of the New Hampshire Department of Postsecondary Technical Education who were laid off from their positions, were appealing the Department's refusal to allow them to bump into positions for which they might qualify in any of the other colleges or institutions in the system, other than the colleges from which they were laid-off. The State contended that each of the colleges and the technical institute are separate "divisions" of the Postsecondary Technical Educational System, and that under the provisions of Per 1002 of the Rules of the Division of Personnel, effective April 27, 1992, laid-off employees eligible to bump are limited to bumping within their own division.

Mr. McCallum stated that it has been the constant practice and understanding of the department that each college functions separately. Each of the professors is responsible for establishing a curriculum, so that similarly titled courses in two different colleges might have very different instructional programs. He argued that the department's "clients" are tuition-

paying students, and that if employees¹ were permitted to bump between colleges, students could be subjected to a change in instructional staff during the course of a semester. Mr. McCallum also argued that it would be fundamentally unfair for a college which was meeting its revenue projections to be forced to accept staff as a result of a lay-off from another college which was not meeting its revenue projections.

RSA 188-F:2, establishing the Department of Postsecondary Technical Education, states:

"There shall be a department of postsecondary technical education which shall be governed by a board of governors. The department shall be a state agency and shall consist of the office of the commissioner, the New Hampshire technical institute, the 6 technical colleges, and the police standards and training council."

Mr. McCallum argued that although RSA 188-F does not specifically define the colleges, the technical institute or Police Standards and Training as separate divisions of the Department of Postsecondary Technical Education, their functions within that department, as well as their internal organization, are consistent with the definition and description of "division" appearing in RSA 21-G:5 VII:

"'Division' means the principal unit within a department, which is directly responsible to the department level and is concerned with related major functional programs and activities."

Mr. McCallum argued that each of the institutions within the Department of Postsecondary Technical Education serves a different client population, tailoring their programs to meet the business needs of the geographic region in which the college is located. As an example, he compared the programming at the college in Berlin, which is principally intended to meet the needs of the tourism and forestry industries, to the type of technical training and education offered at the college in Nashua, which is more specific to business and manufacturing. Mr. McCallum noted that although they are not statutorily defined as divisions, each of the colleges is listed separately by name in RSA 188-F, each has an individual line in the budget, and each has its own revenue sources in addition to State funding. Mr. McCallum argued that each institution manages its own revenue sources, independently seeks appropriate accreditation, and develops programs to meet the specific needs of the region. He explained that if revenue projections for any one of the colleges is not met, it is up to that college to reduce costs by adjusting the programming, and in some instances, laying-off employees from those programs.

Mr. McCallum argued that administration for each of the institutions is also consistent with the statutory definition and description of divisions. RSA 21-G:6 II (a) states, "The principal unit of the department shall be the division; and each division shall be headed by a director."

¹ Not all employees of the Department of Postsecondary Technical Education are academic personnel.

RSA 21-G:8 provides for the appointment of an unclassified employee to serve as the director of a division.

"Division directors shall serve terms of 4 years. Such terms shall end on March 31 of an even-numbered year. Initial terms for some directors may be for approximately 2 years so that the terms of one-half of the directors will end one year after a commissioner's term commences and one half 3 years after that date." (RSA 21-G:8 IV)

"Each commissioner shall nominate for appointment by the governor, with the consent of the council, each division director within his department, for all departments established after July 1, 1983, except as otherwise provided by law. Each division director shall be an unclassified employee." (RSA 21-G:8 II)

Mr. McCallum argued that appointment of the presidents for the colleges and technical institute is also consistent with the statutes describing organization of executive branch departments. He said that the college and technical institute presidents, as well as the Director of Police Standards and Training are unclassified employees appointed by the Governor and Council for a term. RSA 188-F:8 states the following:

"Presidents of the Institute and Colleges. The commissioner shall nominate, subject to approval by the board of governors, a president of the technical institute and presidents of the 6 technical colleges who shall be confirmed by the governor and council. Presidents shall be qualified by education and experience and shall serve at the pleasure of the board of governors."

Mr. Reynolds argued on behalf of the appellants that the colleges within the Department of Postsecondary Technical Education are not separate, statutorily defined divisions, in spite of any similarities which the colleges might have with legislatively created divisions of a department or agency. Mr. Reynolds argued that there are also substantial differences between statutorily created "divisions" and the colleges established within the Postsecondary Technical Education System. He argued that the most notable difference was that division directors are unclassified employees, appointed for a four year term, whereas the presidents of the colleges and the technical institute are unclassified employees who serve "at the pleasure of the board of governors." [RSA 188-F:8] Mr. Reynolds also argued that geographic location, different educational missions and separate funding were insufficient reasons to find that the colleges are actually "divisions" for the purposes of lay-off and bumping. He asked the Board to compare the Department of Postsecondary Education with the Division of Mental Health, which has offices and institutions in diverse geographic regions, serving very different client populations, and operating as separate and distinct budgetary units. He contended that in spite

of the obvious differences between the work performed by various units of that division, all of those units are part of the same statutorily created division.

Mr. Reynolds argued that while any lay-off is potentially disruptive, the possibility of disrupting services provided to students by changing faculty during a term was irrelevant to the question of whether or not the colleges should be considered separate divisions of the Department of Postsecondary Technical Education for the purposes of bumping by laid-off employees. Furthermore, Mr. Reynolds argued that any possible disruption would be minimized by the requirement that an employee wishing to bump another employee within the department would have to be certified as meeting all the minimum qualifications for the position into which the more senior employee wished to bump.

He argued that differences in programming between colleges was a certification issue, not a bumping issue, and that if an employee was not qualified to teach in a particular discipline or curriculum, he or she would be prohibited from bumping on that basis. Mr. Reynolds also argued that while lay-off and bumping may create a hardship for the employer, there is an even greater hardship for the laid-off employee.

Mr. Reynolds argued that the case must be decided on the plain language of the statutes and the plain language of the Rules. The Board agrees.

Much of the State's argument relies upon the independence of each college in funding its programs, and in determining when a program should be modified or eliminated. The Board reviewed the exhibits offered by the State entitled "Department of Postsecondary Technical Education - A. Statutes Establishing Board of Governors and Department of Postsecondary Technical Education RSA 188-F, particularly with regard to funding schemes and transfer of funds within and between PAU's.

RSA 188-F:14 states:

"The department shall submit an operating budget based on program appropriation units or other budgetary units required by the general court. Each institution of the department and the commissioner's office shall be considered a separate budgetary unit. The department shall submit its budget in the same format and at the same time as other state agencies. However, the board of governors is authorized to transfer funds between line items within any budgetary unit. By October 31 of each fiscal year, the department shall submit a report to the joint fiscal committee detailing all transfers made during the last fiscal year and the reasons for them. Transfers of funds between budgetary units shall be made in accordance with procedures and restrictions applying to all other

agencies."

In further reviewing the issue of funding for the various programs offered throughout the system, the Board found that RSA 188-F:14-b I, II, and V permit the Commissioner of the Department of Postsecondary Technical Education to transfer funds, equipment and personnel as follows:

"I. Receive for disbursement, with the prior approval of the fiscal committee and the governor and council, any actual excess over the estimate of income received from students enrolled in the vocational training division which shall be used only for the administration and operation of programs offered by that division."

"II. Receive for disbursement, with prior approval of the fiscal committee and the governor and council, any actual excess over the estimate of income received from students enrolled in the technical-education division which shall be used only for the administration and operation of programs offered by that division."

"V. With prior approval of the board of governors and the fiscal committee, transfer or eliminate instructional programs as student, business, and geographic areas needs change, as well as transfer such associated personnel, equipment, and instructional program appropriations between and among the several functional units within the department in order to enable the department to respond rapidly to changing needs for technical education and training."

RSA 188-F:14c also provides for creation of a nonlapsing account:

"Notwithstanding any other provision of law to the contrary, revenue received in excess of the legislative estimates in the technical education and vocational training divisions of the New Hampshire technical institute and the technical colleges, as well as net unexpended general fund appropriation balances at the close of the fiscal year, shall be placed in a continuing nonlapsing account. Funds in this account may be used only with the prior approval of the fiscal committee and with the approval of the governor and council in order to establish or enhance, or both, program offerings that will meet the needs of both the students and business and industry with the greatest degree of effectiveness and responsiveness. If the legislative estimates are not met for a fiscal year, then effective the immediate year following, the commissioner, upon prior approval of the fiscal committee and the governor and council, shall notify the bureau of accounts as to which line item appropriations, in which functional units and the specific amounts to be reduced in order to compensate completely for the prior fiscal

year's revenue deficit or shall utilize such funds as may be available in the continuing nonlapsing account to satisfy all or a portion of such deficit."

The statute makes frequent reference to the "technical education" and "vocational training" divisions of the New Hampshire Technical Institute and the technical colleges. While RSA 188-F:14 permits the transfer of funds between budgetary units, or colleges, RSA 188-F:14c strictly limits the use of excess revenues from the "technical education division" to "technical education" program operation and administration, and the use of excess revenues from the "vocational training division" to "vocational training" program operation and administration.² However, in making the functional distinction between the technical education and vocational education divisions, the Board had no evidence that the legislature ever formally created such divisions, or provided for appointment of a director for either of those "divisions".

Upon review of the relevant statutory language, the Board found that the Department of Postsecondary Technical Education is a single unit, without separate divisions as described by RSA 21-G. As such, any employee who is laid off as a result of abolition of a position, change in organization, decline in agency work load, insufficient funding, change in state law or change in federal requirements, may exercise his option to bump another employee in any of the offices or institutions of the department, provided that the laid-off employee has been continuously employed on a full-time basis, without a break in service, for at least ten years, and is qualified by virtue of education and experience to displace a less senior employee in the class to which he or she elects to bump. An academic employee who is to be laid off from a position in one college because of program changes or lack of funding may not bump another academic employee in another college if he or she does not qualify to assume the full course load of the individual to be bumped.

While the State argued that instructors develop their own curricula, and bumping between the colleges could subject students to a change in curriculum during the middle of a term, the Board found that the same would apply to bumping within a college. It would appear that the appropriate remedy in that instance would be to require instructors to adhere to a more standardized curriculum, not to deny long-term employees the opportunity to exercise privileges afforded to other long-term employees within State government.

The Board appreciates the agency's commitment to its students, as well as its belief that because the students make direct payment in the form of tuition for the services they receive, they are

² Neither the Commissioner nor the Board of Governors is authorized to transfer any funds from the Police Standards and Training Council Training Fund, or any other funds granted to the Police Standards and Training Council, to any other budgetary unit.

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entitled to expect continuity in the services they receive. However, that same principle applies to all other agencies and the clients they serve. Whether clients pay for the services they receive in the form of a direct payment, such as a tuition payment, or in a less obvious or direct fashion, as with fees, fines or penalties, they all expect services to be provided without disruption.

The Department of Postsecondary Technical Education shall re-examine the qualifications of Mr. Allard and Mr. St. Cyr, as well as their seniority, to determine if they would have qualified to bump another employee in any of the colleges at the time of their separation from service. Their reinstatement, if warranted, shall be accomplished in accordance with the provisions of RSA 21-I:58 with regard to payment of lost wages and benefits. If either of the appellants would not have qualified to displace another employee, they shall be considered for recall to a position in the same classification from which they were laid-off in any of the colleges or institutions for a period of three years from the date of lay-off. The parties shall advise the Board, in writing, within 30 days of the date of this order, of any action taken in implementing this order. They shall also advise the Board if further hearing is required to dispose of these matters. Otherwise, both cases will be considered closed.

The Board ruled as follows on the Technical Colleges' First Motion for Findings of Fact and Rulings of Law:

Findings of Fact:

1 - 12, 14 - 18, 20, and 21 are granted.

13 is granted to the extent that the Commissioner and Board of Governors can authorize the transfer of personnel and personnel costs between the colleges and the institute.

19 is neither granted nor denied. The record reflects that appointment by Governor and Council is for a specified term, however, the statute reflects that the presidents serve at the pleasure of the Board of Governors.

22 is granted, after replacing the words "would be detrimental" with the words "could be detrimental".

Rulings of Law:

1 - 11, 13 and 14 are granted.

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12 is denied. While the factual findings support the conclusion that each of the institutions within the system enjoys a substantial degree of autonomy, the facts do not support the conclusion that each of the institutions is a legislatively defined division.

15 is denied as set forth in the decision above.

THE PERSONNEL APPEALS BOARD


Patrick J. McNicholas, Chairman


Robert J. Johnson, Commissioner


Lisa A. Rule, Commissioner

cc: Virginia A. Lamberton, Director of Personnel
Michael Reynolds, SEA General Counsel
William McCallum, Assistant Attorney General
Stephen J. McCormack, SEA Field Representative