

State of New Hampshire



PERSONNEL APPEALS BOARD
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NH PERSONNEL APPEALS BOARD DECISION ON APPELLANTS' PETITION FOR ORDER PURSUANT TO RSA 21-I:46 AND/OR DECLARATORY RELIEF PURSUANT TO PER-A 201.03

Ignacio Gandarilla – Docket #2010-O-001
Evelyn Clark-Smith – Docket #2010-O-002
Cheryl Murray – Docket #2010-O-003
Tami Wickens – Docket #2010-O-004

February 10, 2010

The New Hampshire Personnel Appeals Board (Wood, Johnson, and Bonafide) met in public session on Wednesday, February 3, 2010, under the authority of RSA 21-I:58, RSA 541-A:31 and Chapters Per-A 100-200 of the NH Code of Administrative Rules, to consider the Appellants' Petition for Order Pursuant to RSA 21-I:46 and/or Declaratory Relief Pursuant to Per-A 201.03. For purposes of considering the pleadings and the Appellants' requested relief, the Board voted upon its own motion to consolidate the appeals as filed.

In their request, the Appellants assert that after they were laid off from their full-time classified positions, the New Hampshire Division of Personnel refused to rehire them into classified State positions for which they qualified, because the positions they sought to fill were at a higher labor grade than the classified positions from which they were laid off. The Appellant's argue that such refusal to rehire, regardless of salary grade, constitutes a violation of Chapter 144:65, Laws of 2009.

The Appellants further argue that they are entitled to a hearing under the provisions of RSA 21-I:46 as they were affected by the "application" of rules, including Per 602 and Per 404, when the Division of Personnel allowed State agencies to advertise vacancies and engage in both internal and external recruitment when those vacancies could be filled by rehiring laid-off employees who meet the minimum qualifications for those positions, regardless of the salary grade of the positions in question.

Finally, the Appellants argue that it is "virtually impossible to ascertain all of the individuals similarly-situated" as a result of layoffs who have not received notice that they are not being considered for various positions because of the assigned salary grade. They therefore request that the Board issue a declaratory ruling that the Division of Personnel should not be

applying the personnel rules to allow agencies to engage in internal or external recruitment to fill vacant positions, and they ask that the Board treat the appeals as a class action.

Jurisdiction

In reviewing the Rules, the Board found that there are no provisions addressing the re-employment of laid-off employees, except for the rules governing recall within the employee's own agency. Per 102.45 defines "Recall" as "reemployment to the same class in the same agency following layoff." These Appellants are not alleging an application of the recall provisions set forth in Per 1101.06, nor are they asking to be recalled to positions in their same classifications in their same agencies. Instead, they are appealing the Division of Personnel's refusal to rehire them or assign them to work in positions at higher salary grades in classifications other than those from which they were laid off. Assignment to another classification appears in the rules at Per 1101.02 (9, which provides that an employee may be reassigned to a vacant position within his or her own agency in lieu of layoff as long as the employee meets the qualifications for the position and the reassignment does not result in a promotion. At the time of their appeals, these Appellants had already been separated from service. While it appears that the Division of Personnel may have applied the same principles in determining which positions would be made available to laid-off employees under the provisions of Chapter 144:65, Laws of 2009, the rule regarding reassignment does not apply to individuals already separated from service.

On August 27, 1990, the New Hampshire Supreme Court affirmed a decision of the NH Personnel Appeals Board in the Appeal of Carol Hiaains-Brodersen and William McCann, 133 N.H. (1990) regarding the Board's jurisdiction to hear and decide appeals arising out of the application of a statute. In its decision, the Court wrote:

"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 appeal under RSA 21-I:46, was both legal and reasonable."

Having found that there are no rules specifically governing the rehire process for laid-off employees, or placement of employees under the provisions of Chapter 144:65, Laws of 2009, the Board found that it lacks jurisdiction to consider these appeals. For the same reason, the Board declines to issue a declaratory ruling.

Class action

RSA 21-I:46, I, authorizes the Personnel Appeals Board to "hear and decide appeals as provided by RSA 21-I:57 and 21-I:58 and appeals of decisions arising out of application of the rules adopted by the director of personnel." While

the Board can consolidate appeals that have been timely filed in order to improve administrative efficiency in hearing and deciding those appeals, neither the statutes nor the Board's own administrative rules authorize the Board to recognize current and potential appellants as a class, as the Appellants have suggested. As such, the Board denies the Appellants' request to treat their appeals as a class action.

For all the reasons set forth above, the Board voted to DENY the Appellants' Appellants' Petition for Order Pursuant to RSA 21-I:46 and/or Declaratory Relief Pursuant to Per-A 201.03.

THE NEW HAMPSHIRE PERSONNEL APPEALS BOARD



Patrick Wood, Chair



Philip Bonafide, Vice-Chair



Robert Johnson, Commissioner

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