

State of New Hampshire



PERSONNEL APPEALS BOARD

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APPEAL OF SYLVIA GALE

DOCKET #99-O-1

DEPARTMENT OF HEALTH AND HUMAN SERVICES

January 6, 1999

The New Hampshire Personnel Appeals Board (Wood, Johnson and Barry) met on Wednesday, September 16, 1998, under the authority of RSA 21-I:52, I, to hear the appeal of Sylvia Gale, an employee of the Department of Health and Human Services. Ms. Gale, who was represented at the hearing by SEA Field Representative Kate McGovern, was appealing the Department's June 12, 1998, request that she resign from her position as a member of the Board of Directors of the Neighborhood Health Center for Greater Nashua (hereinafter "Center"). Douglas McNutt and John Wallace appeared on behalf of the Department of Health and Human Services. The appeal was heard on oral argument and offers of proof by the representatives of the parties. The record in this matter consists of pleadings submitted by the parties, orders and notices issued by the Board, and the audio tape recording of the hearing on the merits of the appeal.

The State asserted that the Board had no jurisdiction to hear Ms. Gale's appeal, arguing that RSA 21-I:52 applies only to circumstances involving "...remunerative elective public office, or [] other employment..." Therefore, the State argued, because Ms. Gale receives no compensation for her service as a member of the Center's Board of Directors, she is not entitled to a hearing on the merits of her appeal, or to any remedy under the provisions of RSA 21-I:52.

Ms. McGovern argued that Ms. Gale should not be deprived of the right to a hearing under RSA 21-I:52 simply because she receives no compensation from the Neighborhood Health Center. On the merits of the appeal, Ms. McGovern argued that without evidence of a real and substantial conflict created by Ms. Gale's service on the Center's Board of Directors, the Commissioner's order for her to resign from that position violated the appellant's rights to freedom of association, freedom of speech and due process. She asked the Board to find that the appellant could not be deprived of those rights without proof of "a compelling State interest."

RSA 21-I:52 states, in pertinent part:

"No employee in the state classified service shall hold any remunerative elective public office, or have other employment, either of which creates an actual, direct and substantial conflict of interest with his employment, which conflict cannot be alleviated by said employee abstaining from actions directly affecting his classified employment. Determination of such conflict shall be made by the personnel appeals board after the parties are afforded rights to a hearing pursuant to RSA 21-I:58. The burden of proof in establishing such a conflict shall be upon the party alleging it. No action affecting said employee shall be taken by the appointing authority because of such public office or other employment until after a full hearing before and approval of such action by the personnel appeals board. If an actual, direct and substantial conflict of interest, which cannot be alleviated by abstention by the employee, is found by the personnel appeals board, the board must approve any action proposed by the appointing authority; and the employee shall be given a reasonable amount of time to leave his public office or other employment or otherwise end the conflict before the appointing authority initiates that action."

If the Board were to read the statute as narrowly as the State has suggested, agencies would have almost unlimited authority to adopt policies regulating an employee's activity outside of the work place, provided that the activity involved no compensation for the employee. The Board believes a more reasonable reading of RSA 21-I:52 views employment in the larger context as an

"activity in which one engages or is employed."¹ Although Ms. Gale receives no compensation for her work on the Center's Board of Directors, the Board considers her 10 years of service to that organization to be an activity contemplated by the language of RSA 21-I:52. Accordingly, the Board finds that it does have subject matter jurisdiction to hear and decide Ms. Gale's appeal.

The material facts are not in dispute:

1. Ms. Gale has been employed by the Department of Health and Human Services for approximately eighteen years. She is currently assigned to serve as a Child Protective Service Worker Coordinator in the Special Investigations Unit of the Office of Family Services of the Department of Health and Human Services.
2. Ms. Gale has served without compensation as a member of the Board of Directors for the Neighborhood Health Center for Greater Nashua, for approximately ten years.
3. As a health care provider, the Center has received funding through one or more bureaus of the Department of Health and Human Services; however, none of the funds have been obtained through the Division for Children Youth and Families, the Division to which Ms. Gale is assigned.
4. As a Child Protective Service Worker Coordinator, Ms. Gale is not responsible for reviewing, approving or rejecting funding requests for the Neighborhood Health Center for Greater Nashua, or for auditing any funds that the Center may receive.
5. Commissioner Terry Morton adopted a policy, effective November 20, 1997, entitled "Conflict of Interest with Department Employment," the purpose of which was, "...to make DHHS employees aware of laws and regulations relative to conflicts of interest, and to prevent or eliminate potential conflicts of interest caused by Department of Health and Human Services employees' activities outside of the Department."
6. By letter dated June 12, 1998, DHHS Administrative Policy Manager Susan Novalc notified Ms. Gale that, "The determination has been made that your service on the Board

¹ Webster's New Collegiate Dictionary

of Directors, Neighborhood Health Center for Greater Nashua does create... a conflict of interest or appearance of conflict of interest.”

7. Ms. Gale was asked to resign from the Board of Directors of the Neighborhood Health Center, and to notify the Office of Administration within ten days that she had resigned.
8. By letter dated July 1, 1998, Ms. Gale appealed that decision to Commissioner Morton, who responded by letter dated July 13, 1998, denying the appeal. In so doing, Commissioner Morton wrote, "We feel very strongly that the decisions we make regarding our contract agencies – which ones to fund, how much financial support to provide, where to expand or consolidate programs – need to be objective and free from actual bias as well as the appearance of bias. The fact that a Departmental employee has a role in overall administration of an agency may influence our decisions one way or another. Likewise, the presence of a Departmental employee on a Board may influence the decisions of other Board members about activities relating to the Department even though the Departmental employee abstains from voting on a particular issue. The fact that you are a well respected colleague and valued member of this Department makes it even more likely that our dealings with the local agency will not be free from bias and we do not find a basis for rescinding the request that you resign from the Board of the Neighborhood Health Center.”

Standard of Review

RSA 21-I:52 places the burden upon the party alleging a conflict of interest to prove that "...an actual, direct and substantial conflict" of interest exists "with [an individual's] employment, which conflict can not be alleviated by said employee abstaining from actions directly affecting his [or her] classified employment.”

Decision and Order

The Department of Health and Human Services' policy defines "conflict of interest with his or her employment" as meaning, "any activity, regardless of remuneration, which creates an actual,

direct and substantial conflict of interest with a person's roles and responsibilities as an employee of the Department." The policy also defines the "appearance of a conflict of interest" as meaning that, "the service or membership by an employee of the Department on the board of directors or other policy-making, advisory or fund-raising committee or task force of a provider agency would lead a reasonable person to conclude that such service creates a conflict of interest with the employee's roles and responsibilities as an employee of the agency." The State's "Code of Ethics for Executive Branch Employees"² defines a conflict of interest as, "a situation, circumstance, or financial interest which has the potential to cause a private interest to interfere with the proper exercise of a public duty."

Ms. Gale's position specification describes her duties as, "...supervising, assuring and coordinating the implementation of Children, Youth and Families program objectives at the district office..." to which she is assigned. The "Characteristic Duties and Responsibilities" listed on the class specification include the following:

- Provides supervision, training, and program coordination to assigned Child Protective Service Worker staff, Case Technicians, family case aides, and other staff in a district office to assure the provision of Child Welfare Services.
- Assigns work to subordinate staff to coordinate the appropriate distribution of the workload.
- Conducts conferences and staff meetings to inform staff of agency decisions, explain policy changes, and to resolve unit issues.
- Collects, analyzes and prepares data for Regional Administrators for budgetary compliance purposes.
- Initiates inter-agency/community development activities to enhance the provision of services to children.
- Evaluates the work performance of staff to determine compliance with assigned job responsibilities.

² Executive Order 98-1

In order to conclude that Ms. Gale's service on the Center's Board of Directors represents a conflict of interest with her position as a Child Protective Service Worker Coordinator, or the appearance of a conflict of interest, the agency needed to provide evidence that such service affects Ms. Gale's ability to carry out the basic purpose and characteristic duties of her position. The Department failed to do so.

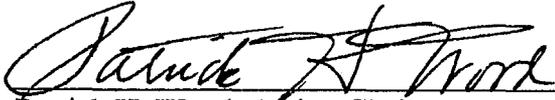
In his letter to Ms. Gale, Commissioner Morton explained his rationale for requiring her resignation from the Center's Board of Directors by saying that other persons responsible for making funding decisions could be influenced by the fact that a well-respected colleague of theirs had "a role in overall administration" of the Neighborhood Health Center. He also suggested that decisions made by the Neighborhood Health Center itself could be influenced by the fact that a Health and Human Services employee was serving on the Board of Directors.

The Board makes no specific findings with respect to those concerns raised by Commissioner Morton, except to the extent that neither scenario involves a conflict of interest, or the appearance of a conflict of interest, on the appellant's part. Commissioner Morton has asked Ms. Gale to abandon a decade-long commitment to her community to allay his agency's concerns about how well others inside and outside of the agency will carry out their own responsibilities. As well-founded as those concerns may be, they have nothing to do with Ms. Gale's ability to carry out her own duties as a Child Protective Service Worker Coordinator while serving on the Board of Directors of the Neighborhood Health Center.

For the reasons set forth above, the Board found that Ms. Gale's service on Center's Board of Directors does not create a conflict of interest or the appearance of a conflict of interest as defined by the department's policy, the State's Code of Ethics for Executive Branch Employees, or the language of RSA 21-I:52.

Therefore, on all the evidence, argument and offers of proof, the Board voted unanimously to GRANT Ms. Gale's appeal.

THE PERSONNEL APPEALS BOARD


Patrick H. Wood, Acting Chairperson


Robert J. Johnson, Commissioner


James J. Barry, Commissioner

cc: Virginia A. Lamberton, Director of Personnel
John Wallace, Department of Health and Human Services
Douglas McNutt, Department of Health and Human Services
Kate McGovern, SEA Field Representative