

State of New Hampshire

WPPID608



PERSONNEL APPEALS BOARD

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

Appeal of:

Thomas Pryor (Docket #90-L-~~8~~⁵)
Thomas Slayton (Docket #90-L-11)
Nita Tomaszewski (Docket #90-L-6)
David R. Ayotte (Docket #90-L-9)
Rebecca Bukowski (Docket #90-L-10)
Elizabeth Donahue-Davis (Docket #90-L-12)

Decision of the Personnel Appeals Board

In Re:

March 30, 1990 Decision of Governor Judd Gregg
Prohibiting Bumping following Lay-Off
Into Classified Positions
In the Developmental Disabilities Council

January 10, 1991

The New Hampshire Personnel Appeals Board (McNicholas, Cushman and Bennett) convened a prehearing conference on Wednesday, June 20, 1990, between the parties in the above-captioned appeals relative to the March 30, 1990 decision of Governor Judd Gregg which exempted classified employees of the Developmental Disabilities Council from "bumping" by more senior employees of the Department of Health and Human Services following notice of lay-off. The purpose of the conference was to narrow the factual issues under consideration, and to consolidate some or all of the cases for the purpose of hearing.

SEA General Counsel Michael C. Reynolds and SEA Field Representative Stephen McCormack appeared on behalf of the appellants. George Dana Bisbee, Associate Attorney General, appeared on behalf of the Department of Health and Human Services and the Developmental Disabilities Council.

In its Memorandum of Law on Behalf of the Commissioner of the Department of Health and Human Services, Attorney Bisbee argues that two issues are raised by the instant appeal:

Developmental Disabilities Council Lay-Off/Bumping Appeals
page 2

1. Whether an administratively attached agency is to be considered as part of the department to which it is attached for the purpose of the bumping process provided for by New Hampshire Code of Administrative Rules, Per. 308.05(b); and
2. Whether the Developmental Disabilities Council is an administratively attached agency to the Department of Health and Human Services.

After due consideration of the submissions by the parties, the Board finds that a determination of whether or not the Developmental Disabilities Council should be defined as an administratively attached agency is not dispositive of the instant appeals. On August 17, 1989, D.D. Council Executive Director Edward Burke requested a legal opinion "regarding the status of the New Hampshire Developmental Disabilities Council, if any, within the laws of the State of New Hampshire". On October 2, 1989, Attorney Geiger responded:

"My understanding is that the council wishes to become detached from the Department of Health and Human Services, separate and distinct from any state agency. ... The State of New Hampshire receives federal funds under 42 U.S.C. §6022(a). That plan must, inter alia, provide for the establishment of a State Planning Council and must designate the state agency responsible for administering the state plan. 42 U.S.C. §6022(b)(1)(A) and (B)."

"...a State Planning Council such as the DD Council may be the designated state agency if the council may be the designated agency under state law. Since, at the present time, I am unaware of any state law which permits the DD Council to be the designated agency (or any other state law addressing the creation of the DD Council or the scope of its responsibilities), the provisions of 42 U.S.C. §6022(b)(1)(B)(i) prohibit the council from adopting the desired alternative administrative model."

In his Memorandum of Law on Behalf of the Commissioner of the Department of Health and Human Services, Attorney Bisbee argues that the Legislature specifically provided in RSA 21-G:5, I and RSA 21-G:10 that administratively attached agencies would function independently of the agency to which they are attached, and that "an independent agency linked to a department should not be viewed as the department itself." The threshold issue, however, lies in the designation of the "agency" under state law which is responsible for administering the state plan.

In his letter of June 13, 1988 to the Commissioner of Administration of Developmental Disabilities, former Governor John H. Sununu stated:

"In accordance with Section 122(e) of PL 100-146, I elect not to change the designation of the Office of the Commissioner, Department of Health and Human Services, to administer funds under this act."

In the Developmental Disabilities Council's State Plan, dated August 15, 1989, the State Planning Council itself stated, "The designated administering agency for the Developmental Disabilities Council in New Hampshire is the Office of the Commissioner, Department of Health and Human Services."

In consideration of the foregoing, and the absence of any evidence that the Developmental Disabilities Council has ever been established as "an agency" within the meaning of RSA 21-G, the Board finds that those persons who report to the Council as administrative staff are employees of the Department of Health and Human Services. As such, persons so employed were subject to the same rules and regulations as all other employees of the Department of Health and Human Services in matters related to lay-off and bumping. Therefore, the appeals of Thomas Pryor (90-L-5), Thomas Slayton (90-L-11) Nita Tomaszewski (90-L-6) David R. Ayotte (90-L-9) Rebecca Bukowski (90-L-10) and Elizabeth Donahue-Davis (90-L-12) are granted.

Even if the Board were to consider the Developmental Disabilities Council to be an agency administratively attached to the Department of Health and Human Services, the outcome would remain unchanged. RSA 21-G:10, I provides that "An agency administratively attached to a department shall: (a) Exercise its powers, duties, functions and responsibilities independently of the department and without approval or control of the department, except as specifically provided by statute..." (Emphasis added) Further, at paragraph III, RSA 21-G:10 states, "Unless otherwise provided by law, the administratively attached agency shall hire personnel in accordance with state personnel laws."

In their letter of March 22, 1990 to Harold Acres, Chairman of the New Hampshire Developmental Disabilities Council, the majority of the non-state agency members of the New Hampshire Developmental Disabilities Council argued that "a conflict of interest exists in the attempt of the New Hampshire Department of Health and Human Services to replace current NHDDC staff with state employees being replaced by recent state personnel reductions." In particular, the Council argued that:

"4. The proposed action would have a serious negative impact upon the Council's totally federally funded budget. Through replacing current Council staff with employees from other units the Council will be required to pay higher salaries and assume responsibility for the accrued benefits of these individuals. In effect, this proposed state action would make the federal government liable for expenses occasioned by the state's financial problems. This would violate PL100-146 Sec. 122 (b)(4)(D). Furthermore, the Council Board would be excluded from the financial decision-making which it is legally required to do."

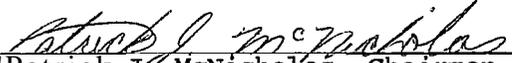
The Council, however, neglected to refer to its own "Memo of Understanding Between the New Hampshire Department of Health and Human Services and the New Hampshire Developmental Disabilities Council" which specifically states under the heading Designation of the Administering Agency Program Unit:

"Consistent with the requirements of P.L. 100-146, the Council shall be free to act as an independent advocate for persons with developmental disabilities. The Office of the Commissioner may draw upon the resources of other departmental units to implement this agreement."

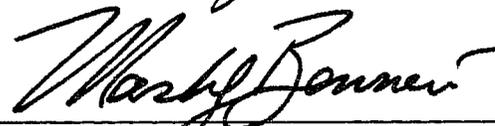
In consideration of the foregoing, the Board finds the Council's claim of violation of PL100-146 Sec. 122(b)(4)(D) to be without merit.

Equally without merit is the Council's argument that a reassignment of staff would hinder the Council's advocacy role. Clearly, the Council is responsible for program design in its role as advocate. Equally clear is the provision which prohibits the Department of Health and Human Services from interfering with the development or implementation of its annual workplan, development of contracts, or selection of grantees. In reviewing the evidence submitted, however, as well as the parties' Joint Partial Stipulation of Facts and the parties' Memoranda of Law, the Board finds nothing to support the Council's claim that the reassignment of classified staff would constitute a conflict of interest. Any employee assigned to the Council who might fail to carry out the Council's workplan and objectives would be subject to the disciplinary provisions of the Rules of the Division of Personnel, regardless of how that employee came to be assigned to the Council.

THE PERSONNEL APPEALS BOARD


Patrick J. McNicholas, Chairman


Robert J. Johnson


Mark J. Bennett

cc: George Dana Bisbee, Senior Assistant Attorney General
Michael C. Reynolds, SEA General Counsel
Virginia A. Vogel, Director of Personnel
Harry Bird, Commissioner, Dept. of Health and Human Services
Jan D. Beauchesne, Human Resource Coordinator, H.H.S./C .O.M.B.

State of New Hampshire

WPPID684



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

REQUEST FOR RECONSIDERATION Jane J. Hunt

re: Pryor, Slayton, Tomaszewski, Ayotte, Bukowski and Donahue-Davis

February 14, 1991

On January 30, 1991, the Personnel Appeals Board received a Request for Reconsideration of its January 10, 1991 decision in the above-captioned appeals. In its decision, the Board found that Governor Gregg's decision exempting the employees of the Developmental Disabilities Council from bumping as a result of lay-offs in the Department of Health and Human Services was improper, and the appeals of Pryor, Slayton, Tomaszewski, Ayotte, Bukowski and Donahue-Davis were granted. SEA General Counsel Michael C. Reynolds filed his Objection to said request on behalf of the above-named appellants on February 6, 1991.

In her Request for Reconsideration, Ms. Hunt states, "To the best of my knowledge, no member of the board or staff of the New Hampshire Developmental Disabilities Council has received written notice of a decision in this matter, but we understand on the basis of hearsay that a decision has been rendered and that today may be the last day for filing any request. I also do not know if such a request has already been filed on behalf of any of the affected parties. I understand I may be one of the parties affected."

In order to properly file a Motion for Rehearing, the following conditions apply:

Per-A 204.06 Rehearings

- (a) "Within twenty (20) days after the date of notice of any order or decision of the Board, any party to the action or proceeding before the Board or any person directly affected thereby, may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order. Such request shall be received by the Board within the twenty-day period." (Emphasis added)
- (b) "Such motion for rehearing shall set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable. "

Ms. Hunt argues that she "may be one of the parties affected". Absent a reasonable representation that Ms. Hunt is a person "directly affected" by the

REQUEST FOR RECONSIDERATION

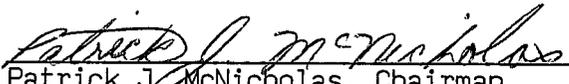
Jane J. Hunt
page 2

Board's January 10, 1991 decision, Ms. Hunt appears to have no standing to appeal from such decision. Further, although Ms. Hunt's Request is timely filed, she has offered no grounds upon which a finding might be made that the January 10, 1991 decision was either unreasonable or unlawful.

Ms. Hunt states that she only had knowledge of the Board's January 10th decision through "hearsay", and that to the best of her knowledge, none of the staff or members of the Developmental Disabilities Council were notified of the Board's decision. The Board notified the Office of the Attorney General as the representative of the Developmental Disabilities Council and Department of Health and Human Services. The Board also directly notified the Commissioner of Health and Human Services and the Commissioner's Office of Management and Budget. As such, proper notice to the affected parties was provided.

Based upon the foregoing, the Board voted to deny the Request for Reconsideration and in so doing, affirmed its decision of January 10, 1991.

THE PERSONNEL APPEALS BOARD


Patrick J. McNicholas, Chairman


Robert J. Johnson


Mark J. Bennett

cc: Michael C. Reynolds, SEA General Counsel
G. Dana Bisbee, Esq., Attorney General's Office
Commissioner Bird, Dept. of Health and Human Services
Jan D. Beauchesne, Human Resource Coordinator, C.O.M.B./H.H.S.
Jane J. Hunt

State of New Hampshire

WPPID758



PERSONNEL APPEALS BOARD

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

Request for Clarification and Enforcement Of the Board's Order Dated January 10, 1991 In the Appeals of:

Pryor, Slayton, Tomaszewski, Ayotte, Bukowski and Donahue-Davis

My 17, 1991

The New Hampshire Personnel Appeals Board (McNicholas, Johnson and Bennett) met Wednesday, My 1, 1991, to consider the April 19, 1991 request filed by Rebecca Bukowski and Elizabeth Donahue-Davis for clarification and possible enforcement of the Personnel Appeals Board's January 10, 1991 decision to deny the Developmental Disabilities Council exemption from the Personnel Rules relative to lay-off and bumping.

Ms Bukowski and Ms Donahue-Davis argued that in March of 1990, Nita Tomaszewski's position was Director of Training (salary grade 23) in the Commissioner's Office of the Department of Health and Human Services. During the lay-offs at the Department of Health and Human Services, Nita Tomaszewski had originally elected to bump into one of the positions in the Developmental Disabilities Council following her notice of lay-off. When the Governor's Office intervened and notified the Department of Health and Human Services that positions in the Developmental Disabilities Council were exempt from bumping within the department, Ms Tomaszewski was reassigned laterally to the position of Director of Training (salary grade 23) for the Bureau of Residential Services. Prior to Ms Tomaszewski's reassignment, that position had been occupied by Ms. Bukowski. Upon notice of the reassignment, Ms Bukowski bumped into a Health Promotion Advisor position (salary grade 22) occupied by Ms Donahue-Davis, who was reassigned laterally into a temporary position at that same salary grade.

Ms Bukowski and Ms Donahue-Davis now argue that because Ms Tomaszewski had originally intended to bump into a position in the Developmental Disabilities Council, and would have done so had the Governor not intervened in the lay-off and bumping process, the Board should now order her to bump into the position she had selected in the Developmental Disabilities Council in April, 1990.

The Board's findings in its order of January 10, 1991 were strictly limited to the Developmental Disabilities Council's relationship to the Department of

Health and Human Services for the purposes of lay-off and bumping. The Board made no findings related to the individual position selections or assignments, and issued no order requiring any of the original bumping decisions to be implemented.

By allowing the original appellant's to bump into positions in the Developmental Disabilities Council if they so chose, the Department of Health and Human Services has complied with the Board's original order. For the Board to respond by "clarifying" or ordering "enforcement" of any conditions not previously imposed would, for all practical purposes, constitute a reconsideration of the Board's January 10, 1991 order. Therefore, the Board must find that Ms. Bukowski's and Ms. Donahue-Davis' request for clarification of the Board's January 10, 1991 order is a late filed Motion for Reconsideration. Accordingly, the Board voted to deny the motion, finding that it is untimely and fails to provide grounds upon which to argue that the Board's order of January 10, 1991, was either unreasonable or unlawful.

THE PERSONNEL APPEALS BOARD


Patrick J. McNicholas, Chairman


Robert J. Johnson


Mark J. Bennett

cc: Virginia A. Vogel, Director of Personnel
Elizabeth Donahue-Davis
Rebecca Bukowski
Dr. Harry Bird, Commissioner, Department of Health and Human Services
George Dana Bisbee, Senior Assistant Attorney General
Michael C. Reynolds, SEA General Counsel