

# State of New Hampshire



## PERSONNEL APPEALS BOARD

25 Capitol Street  
Concord, New Hampshire 03301  
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### ***Appeal of Philip Byers***

***Docket#2009-L-002***

### ***Department of Resources and Economic Development***

October 29, 2009

The New Hampshire Personnel Appeals Board<sup>1</sup> met in public session on Wednesday, April 15, 2009, under the authority of RSA 21-I:58 and Chapters Per-A 100-200 and Chapter 1100 of the NH Code of Administrative Rules, to hear the appeal of Philip Byers. Mr. Byers, who was represented at the hearing by SEA Grievance Representative Randy Choiniere, was appealing his layoff, effective November 20, 2008, from his position as a Park Manager II. Human Resources Administrator Sandra Adams and Commissioner George Bald appeared on behalf of the Department of Resources and Economic Development. Assistant Attorney General Anne Edwards also filed an appearance on behalf of the State in order to assist at the hearing.

The hearing was conducted on offers of proof by the representatives of the parties. The record of the hearing in this matter consists of pleadings submitted by the parties prior to the hearing, orders and notices issued by the Board, the audiotape recording of the hearing on the merits of the appeal, and previously submitted documents entered into evidence as follows:

#### Appellant's Exhibits:

1. Original appeal to the Board with attachments
  - October 30, 2008 layoff notice
  - In-house posting for position #18118
  - PAB Decision, Appeal of Robert Joyce, Docket #92-T-15
2. RSA 98-A
3. March 26, 2009 request for information

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<sup>1</sup> The Board (Wood, Bonafide, Johnson, Casey and MacKay) sat *en banc*, without objection by either party.

4. DRED response to March 26, 2009 request for information
5. "State file" of Park Manager II positions dated 10/30/2008
6. Partial record for Maintenance Mechanic II, Russell Blaney
7. Class Specification for Maintenance Mechanic II
8. Color Photo of Mr. Byers clearing tree limbs after an ice storm after the effective date of layoff

State's Exhibits:

1. State of New Hampshire Department of Resources and Economic Development Division of Parks and Recreation Revenues of the State Park Fund Audit Report, September 2008
2. Division of Parks and Recreation Fund Balances

Position of the Parties

Mr. Choiniere argued that before initiating a lay-off, the agency had an obligation to substantiate its claim of insufficient funding for Mr. Byers' specific position and should not be allowed to rely on evidence of funding deficits within the Division of Parks and Recreation in general as sufficient justification for the lay-off. Mr. Choiniere argued that the agency should have conducted a careful analysis of each and every position, particularly when viewed in light of the findings and recommendations in the Legislative Budget Assistant's audit report. Mr. Choiniere argued that the agency continually failed to satisfy its obligations under the Rules of the Division of Personnel in that it never reviewed lists of vacant positions with the appellant or discussed with him any opportunities for transfer or demotion in lieu of layoff. He also argued that the State failed to work with the Division of Personnel, as the Personnel Rules require, in an effort to transfer or demote the appellant in lieu of layoff.

Mr. Choiniere argued that the appellant's situation was unique in that, on April 11, 2008, while the appellant was working as a Park Manager II, the agency hired Russell Blaney as a Maintenance Mechanic II. Mr. Choiniere argued that Mr. Byers could perform all the duties assigned to Mr. Blaney, and questioned why the agency would hire a part-time Maintenance Mechanic II rather than assigning that work to Mr. Byers and allowing Mr. Byers to retain his full-time position as a Park Manager II.

Ms. Adams argued that the department looked at all position titles and alternatives in an attempt to reassign employees to vacancies before effecting a layoff. She stated that there was a vacant Park Manager II position at Monadnock State Park on the date that Mr. Byers was notified of layoff, and if Mr. Byers had been the most senior Park Manager II at the time, he would have been assigned to that position. However, she said, the more senior Park Manager II incumbent was assigned to that vacancy. Ms. Adams stated that there were no other positions of Park

Manager II into which he could have been reassigned, and no Park Manager I vacancies into which the appellant might have been demoted. Ms. Adams stated that Mr. Byers did return to the agency part-time as a Laborer effective December 18, 2008, to assist with clean-up at Pawtuckaway State Park following an ice storm. She stated that the appellant received a salary increment in February 2009, as a seasonal employee based on his prior service. Ms. Adams stated that as of March 9, 2009, Mr. Byers had been promoted into a part-time seasonal Park Manager II position, salary grade 12. She stated that although the position does not have benefits associated with it, it does qualify as employment within the agency.

Ms. Adams stated that the agency conducted meetings internally in order to determine what options were available, stating that there were no vacant positions into which the appellant could have been demoted without making him a seasonal employee without access to benefits. She also argued that in determining which positions to retain and which to eliminate, the costs of retaining two part-time employees in different classifications was lower than the cost of retaining one full-time employee because of the cost of benefits associated with full-time employment. She also asked the Board to note that although the position of Maintenance Mechanic II was at the same salary grade as the Park Manager II classification, it was not the same title. As such, the agency did not lay-off a full-time permanent employee while retaining part-time employees in the same classification.

Mr. Choiniere argued that the agency violated the Rules of the Division of Personnel by notifying the appellant of lay-off from his full-time Park Manager II position while there were still part-time employees serving in that classification within the agency, and that the agency had an obligation to reinstate Mr. Byers to his Park Manager II position. Mr. Choiniere argued that if reinstatement was not possible, Mr. Byers should be offered opportunities for recall and rehire, and should be "made whole" with respect to wages lost as a result of the lay-off.

Ms. Adams argued that when the agency began the task of identifying positions for lay-off, the Parks Division was running more than \$2 million "in the red." She argued that field staff, in cooperation with the Supervisor of Parks Operations, determined that some positions needed to be retained if the parks were to remain in operation and provide viable means of generating revenue, while others could be eliminated without completely crippling the operation, and that the only Park Manager II positions remaining on the effective date of lay-off were filled by full-time employees with more seniority than the appellant. Ms. Adams stated that the agency determined that it could no longer sustain the appellant's position of full-time Park Manager II. Ms. Adams stated that the appellant received the appropriate notice of layoff, including notification of his rights and benefits as a full-time laid-off employee, as well as notice that he would be eligible for recall for a period of three years from the date of lay-off to any full-time Park Manager II position within the agency should such position become available.

Having carefully considered the evidence, arguments and offers of proof made by the parties, the Board found the following with respect to the Appellant's specific allegations:

Appellant's Allegation 1: The Department failed to provide adequate evidence of *insufficient* funding to warrant Mr. Byers' *layoff*.

The Department provided evidence of growing deficits within the Division of Parks and Recreation which, in the opinion of the appointing authority, necessitated a reduction in force. Although the appellant claims that the Department failed to prove that there was insufficient funding for Mr. Byers' specific position, Per 1101.01 imposes no such requirement. It states, "An appointing authority may lay off an employee only when such layoff becomes necessary because of one or more of the following reasons: (a) Abolition of a position; (b) Change in organization; (c) Decline in agency work load; (d) Insufficient funding; (e) Change in state law; or (9) Change in federal requirements." The rule does not require an appointing authority to produce a position by position funding analysis before the appointing authority can institute a reduction in force as a means of reducing overall expenditures in a particular division or agency.

Appellant's Allegation 2 The Department should have analyzed all Park positions before *initiating any lay-offs* in the *classification* of Park Manager II.

Ms. Adams made an uncontroverted offer of proof that field staff working with the Supervisor of Parks Operations assisted the Commissioner in deciding which positions could be eliminated without completely crippling operations of the various State parks. The rules impose no requirement for the appointing authority to undertake or document a specific position-by-position analysis before it can effect a reduction in force, nor do the rules require an appointing authority to consult individual employees or negotiate with them before notifying them of layoff.

Appellant's Allegation 3 On the date *that* Mr. Byers received *notice of layoff*, there were *twelve part-time* seasonal Park Manager II incumbents, and the notice of *layoff* made no mention of those *positions as potential lay-offs*.

In accordance with Per 1101.03 (b), "In the case of temporary fill-in, seasonal part-time, part-time, or intermittent employees, advance written notice of layoff shall not be required." As a full-time employee, Mr. Byers was entitled to at least fourteen days notice of layoff and would have received notice before part-time employees in the same classification. The rule imposes no requirement for the agency to give one employee written notice regarding any

other employee(s) identified and scheduled for layoff, nor would it be appropriate under the terms of the Personnel Rules or the Right-to-Know law to do so.

Appellant's Allegation 4 On the date he received notice of layoff, the employer did not mention the possibility that Mr. Byers might be reassigned to a vacant Park Manager II position at Monadnock State Park.

The evidence reflects that the Park Manager II vacancy at Monadnock State Park was filled by the reassignment of another Park Manager II incumbent with more seniority than the appellant.

Appellant's Allegation 5: The Department never discussed with the appellant the possibility of reassignment to a vacant position, or demotion to a vacant position, nor did the department attempt to have the Division of Personnel assist in assigning the appellant to another position somewhere within the agency or within State service until after Mr. Byers received his layoff notice and Mr. Choiniere contacted the Division of Personnel for assistance.

Ms. Adams made an uncontroverted offer of proof that the vacant Park Manager II position was filled by the reassignment of another Park Manager II incumbent who had more seniority than the appellant. Ms. Adams made a further uncontroverted offer of proof that the Department did look at positions throughout the department to determine if there were any positions into which the appellant could be reassigned. Reassignment to any of the available positions, however, would have resulted in a promotion, which would violate the Personnel Rules. Ms. Adams stated that there were no other full-time vacancies into which the appellant could have been demoted or reassigned. As such, there was no assistance that the Division of Personnel could have provided to assist the agency in reassigning or demoting the appellant within the Department of Resources and Economic Development.

Authority for the Division of Personnel to assign employees from one agency into vacant positions in another agency is the result of a legislative enactment providing for the re-hiring of laid-off employees. Until Mr. Byers was laid-off, or notified of lay-off, however, he would have been ineligible for placement in any other state agency through the Division of Personnel.

The Board found that the agency did not document its internal discussions or any assistance sought from the Division of Personnel; however, the Rules do not require that notice of lay-off address or document those activities.

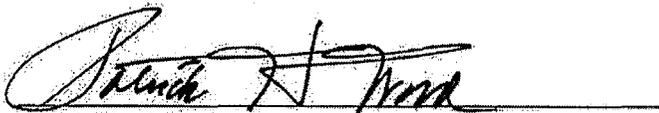
Appellant's Allegation 6: The appellant could have performed the work of the part-time Maintenance Mechanic II position assigned to his park, and the agency should have allowed the appellant to continue working full-time, performing the duties of any other part-time positions assigned to that park if there truly were no full-time positions available to the appellant; otherwise, the agency should have offered him work as a laborer in the park from which he was laid-off or should have assigned him to the position of Maintenance Mechanic.

There is no rule requiring agencies to offer laid-off employees any other available part-time work, or to lay-off other part-time workers in other classifications in order to support full-time positions that would otherwise be subject to lay-off. The evidence reflects that Mr. Byers did return to the agency as a part-time laborer, that he received a salary increment in that position based on his prior service, and that he was promoted to a temporary, seasonal Park Manager II position when it became available.

#### Decision and Order

On all the evidence, argument and offers of proof, the Board found that the Department of Resources and Economic Development complied with the Rules of the Division of Personnel in effecting the appellant's lay-off from his position of full-time Park Manager II. The evidence further reflects that Mr. Byers was rehired by the agency into a part-time position for which he qualified after the effective date of his lay-off, that the agency afforded him the rights and benefits to which he was entitled by granting him a salary increment as a part-time employee when it was due, and that he was then promoted to Park Manager II in a seasonal position when such position became available. Therefore, for all the reasons set forth above, the Board voted unanimously to DENY Mr. Byers' appeal.

FOR THE PERSONNEL APPEALS BOARD

  
Patrick Wood, Chairman

cc: Karen Hutchins, Director of Personnel, 25 Capitol St., Concord, NH 03301  
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Appeal of Philip Byers  
Docket #2009-L-001  
Page 6 of 6