

# State of New Hampshire



## PERSONNEL APPEALS BOARD

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### *Appeal of Michelle Lemire*

**Docket #2009-L-001**

**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 Michelle Lemire. Ms. Lemire, who was represented at the hearing by SEA Grievance Representative Randy Choiniere, was appealing her layoff, effective November 20, 2008, from her position as a Park Manager I. 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 I positions
6. Undated letter from Ms. Lemire's file from Park Manager III Harry Sloan
7. April 13, 2005 letter from DRED to Director Levchuk
8. May 18,2005 letter from DRED to Governor Lynch
9. December 20,2006 letter from DRED to Ms. Lemire

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 Ms. Lemire's 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 her 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. He argued that the agency's decision to lay off a full-time Park Manager I while there were still part-time employees serving in that class of positions violated the Rules of the Division of Personnel, and that the agency had an obligation to reinstate Ms. Lemire to her Park Manager I position. Mr. Choiniere argued that if reinstatement was not possible, Ms. Lemire 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. Ms. Adams stated that the Park Manager I classification is designed to assist higher level park managers in carrying out their assigned accountabilities, and in identifying positions for lay-off, management decided to

eliminate the assistants while retaining those positions with overall responsibility for park management. As a result, the position of Park Manager I was a classification selected for lay-off. Ms. Adams stated that the appellant received the appropriate notice of layoff, including notification of her rights and benefits as a full-time laid-off employee.

Ms. Adams stated that the appellant was not eligible for reassignment to the vacant Park Manager II position at Monadnock State Park, as that would have resulted in a promotion. Ms. Adams described Monadnock State Park as a year-round revenue-generating park where activity usually picks up in the fall. Ms. Adams said that Ms. Lemire had every opportunity to apply for that position when it was posted. However, she said, there were two other employees at the level of Park Manager II who had been notified of lay-off at the time, and that one of those position incumbents was reassigned to the vacant Park Manager II in lieu of lay-off. With respect to reassignment of another Park Manager I, Ms. Adams indicated that his transfer between positions was not a reassignment in lieu of layoff, as the appellant alleged, but a transfer that occurred annually when the incumbent assumed duties at another facility as a ski instructor.

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 Ms. Lemire's *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 Ms. Lemire's 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 (f) 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-*

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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 Ms. Lemire received notice of *layoff*, there were *twelve part-time seasonal Park Manager 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, Ms. Lemire 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 At least four of the *part-time seasonal employees* had less seniority than the *appellant*.

Although Ms. Lemire's position was listed as a temporary position, the parties agree that she qualified as a permanent employee under the provisions of RSA 98-A:3, which states, "Position Made Permanent. – Any person appointed under a temporary appointment or any person appointed under a seasonal appointment who works the equivalent of 6 months or more, not necessarily consecutively, in any 12-month period shall be deemed to be respectively a permanent temporary employee or a permanent seasonal employee and entitled to all the rights and benefits of a permanent employee in the classified service of the state."

According to RSA 98-A:1, II. "Seasonal appointment" shall mean an appointment made to fill a seasonal position on a full-time basis for the period of appointment. A seasonal appointment is one which may reasonably be anticipated as likely to recur each year for a varying number of months." As for seniority, RSA 98-A:5 provides that, "A permanent temporary or permanent seasonal employee shall accumulate seniority from year to year." There is no

similar provision that would allow part-time employees to accumulate "seniority" for purposes of layoff, which Per 102.53 of the Personnel Rules defines as meaning, "...the last date an employee entered state classified service on a full-time basis, adjusted for periods of uncompensated absences for educational or personal reasons and prior qualifying military experience, and is used for determining personnel actions related to layoff." As such, none of the part-time employees would have had "seniority" for purposes of determining the order of lay-off.

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 Ms. Lemire gave her layoff notice and Mr. Choiniere to the Division of Personnel for assistance.

Ms. Adams made an 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 made an uncontroverted offer of proof 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 Ms. Lemire was laid-off, or notified of lay-off, however, she would have been ineligible for placement in any other state agency through the Division of Personnel.

Appellant's Allegation 6: When the lay off occurred, although there was no discussion about reassigning or demoting the appellant, the agency did reassign Gordon Rose, one of the seasonal Park Managers.

Ms. Adams made an uncontroverted offer of proof that Mr. Rose's transfer to the position of Snow Sports Instructor VI was not a reassignment in lieu of layoff, but a personnel transaction that occurred each year at the end of the camping season when Mr. Rose would assume different responsibilities at Canon Mountain as a Snowsports Instructor.

Appellant's Allegation 7. The Department was actively recruiting to fill a position of Park Manager II before notifying Ms. Lemire of her impending lay-off, and should have given Ms. Lemire assistance by offering her an opportunity for promotion rather than laying her off.

Ms. Adams made an uncontroverted offer of proof that the Park Manager II position was posted so that all employees would have an opportunity to apply for the vacancy. Ms. Adams also made an uncontroverted offer of proof that the position was not filled by selection from a pool of candidates, but by reassignment in lieu of layoff of another Park Manager II whose position was eliminated.

Appellant's Allegation 8. If there truly were no full-time positions available to the appellant, the agency should have offered her work as a laborer in the park from which she was laid-off.

There is no rule requiring agencies to offer laid-off employees any other available part-time work.

#### Decision and Order

Although the agency acted within its authority when it identified full-time Park Manager I positions for lay-off, if the agency intended to retain any part-time or part-time seasonal positions within that classification, it should have offered one of those part-time or seasonal positions to Ms. Lemire before laying her off from her position as a full-time temporary employee.<sup>2</sup>

The Board understands that Ms. Lemire returned to full-time employment with the State of New Hampshire some time after her lay-off as a Park Manager I. As such, the Board determined that she is entitled to compensation for those days that she would have worked as a part-time Park Manager I between the effective date of lay-off and her return to full-time employment. Ms. Lemire also shall retain her eligibility to be recalled to a full-time Park Manager I position if one should become available within three years of the date of her lay-off.

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<sup>2</sup>The Board notes that if it had done so, Ms. Lemire may or may not have qualified for continued benefits under the provisions of HB-2. That, however, is not an issue before this Board, nor is it within the Board's subject matter jurisdiction as it involves a statutory entitlement rather than an application of rules adopted by the Director of Personnel.

For all the reasons set forth above, Ms. Lemire's appeal is GRANTED IN PART.

FOR THE PERSONNEL APPEALS BOARD



Patrick Wood, Chairman

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