

State of New Hampshire



PERSONNEL APPEALS BOARD
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APPEAL OF KAY OPPENHEIMER

DOCKET #98-O-8

DEPARTMENT OF HEALTH AND HUMAN SERVICES

February 19, 1998

The New Hampshire Personnel Appeals Board (Bennett, Johnson, Wood, Rule and Barry)¹ met on Wednesday, January 7, 1998, under the authority of RSA 21-I:46, to hear the appeal of Kay Oppenheimer, a former part-time attorney employed by the Office of Program Support, Department of Health and Human Services. Ms. Oppenheimer, who was represented at the hearing by Attorney James Allmendinger², was appealing her lay-off, effective October 15, 1997. Attorney Peter Odom, Chief Staff Attorney for the Department of Health and Human Services, and Virginia Lamberton, Director of the Division of Personnel, appeared on behalf of the State. The record in this matter consists of the audio tape recording of the hearing, orders and notices issued by the Board and pleadings submitted by the parties.

In her October 29, 1997, letter of appeal, Ms. Oppenheimer argued that the Department of Health and Human Services violated the Rules of the Division of Personnel by failing to consider length of service in determining which two of the four part-time attorneys employed by the Office of Program Support would be subject to lay-off. Specifically,

¹ RSA 21-I:45 provides that the Board shall consist of 3 members and 2 alternate members, and that 2 members shall constitute a quorum. The Board agreed to hear this matter *en banc*.

Ms. Oppenheimer's appeal was filed pro se. In the absence of an objection by the State, the Board accepted Attorney Allmendinger's late-filed notice of appearance at the hearing.

she alleged that the Department of Health and Human Services violated Per 103.01 (a) and (f) by selecting her for lay-off, since she had been working for the State of New Hampshire more than two years longer than the two part-time attorneys who were not laid-off. She also argued that the Department of Health and Human Services failed to apply Per 1101.02 (b) by ignoring length of service in determining the appropriate order of lay-off for part-time attorneys in the Office of Program Support.

On November 4, 1997, the Department filed a Motion to Dismiss, citing the New Hampshire Supreme Court's decision in Appeal of Higgins-Brodersen, 133 N.H. 576,581 (1990), arguing that the Board did not have jurisdiction to hear the appeals of part-time employees. Ms. Oppenheimer filed an objection by letter dated November 17, 1997, arguing that the Court decision denying the petitioners' appeal was not predicated upon their part-time status, but upon the rule that had been applied.

Based on the pleadings of the parties and in light of Appeal of Higgins-Brodersen, 133 N.H. 576 (1990), the Board decided not to rule on the State's motion to dismiss but instead asked the parties to be prepared to address the following two questions at the Board's meeting scheduled for January 7, 1998: 1. Whether or not part-time employees are covered by the seniority provisions of the Rules of the Division of Personnel, and if so, 2. Why the Department failed to use seniority among the part-time attorneys in determining the order of lay-off.

Without objection by either party, the appeal was heard on offers of proof. At the close of the hearing, Mr. Odom submitted both a summary of the Department's Offer of Proof, and the Department's Request for Findings of Fact and Rulings of Law.

After amending the Department's pleadings to reflect that Ms. Oppenheimer was laid off effective October 15, 1997, rather than November 30, 1997, the Board voted to grant the State's Requests. The Board made additional findings and rulings as follows:

1. RSA 98-A establishes the statutory rights of temporary, seasonal and part-time State employees.
2. RSA 98-A :1, I defines a temporary appointment as, "...an appointment made to fill a temporary position on a full time basis for the period of appointment."
3. RSA 98-A:1, II defines a seasonal appointment as, "...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."
4. RSA 98-A:IV defines "full time basis" as "...employment calling for not less than 37-1/2 hours work in a normal calendar week or calling for not,less than 40 hours work in a normal calendar week with respect to positions for which 40 hours are customarily required."
5. RSA 98-A:3 defines when a position shall be deemed "permanent." It states, "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."
6. RSA 98 makes no provision for appointment of "permanent part-time" employees.
7. RSA 98-A:5 provides that, "A permanent temporary or permanent seasonal employee shall accumulate seniority from year to year."
8. RSA 98 makes no provision for accumulation of seniority by part-time employees.
9. Having determined that a layoff is necessary by reason of abolition of a position, change in organization, decline in agency work load, insufficient funding, change in state law or change in federal requirements [Per 1101.01 (a) - (f)] an appointing authority "...shall first determine, by division, the class or classes to be affected in his [or her] agency." [Per 1101.02 (a)]

10. "No permanent employee shall be laid off from any position while there are any temporary fill-in, part-time, original provisional or probationary employees serving in the same class of position within the same division of the agency." [Per 1101.02 (c)]
11. Per 101.13 of the Rules of the Division of Personnel defines "class" or "specific classification" as meaning "...a group of positions which have the same generic class specification and whose character of duties, responsibilities, and minimum qualifications are sufficiently similar so that the same schedule of compensation and the same tests of fitness can be applied to each position in the group."
12. By definition, classes of positions are determined by job function., not by the position incumbents' employment status as full-time or part-time employees, and part-time status does not qualify as a "class" within the meaning of Per 1101.02 (a) and (b).
13. The specific provisions addressing the lay-off of part-time employees are as follows:
 - "No permanent employee shall be laid off from any position while there are any temporary fill-in, part-time, original provisional or probationary employees serving in the same class of position within the same division of the agency." Per 1101.02(d)
 - "In the case of temporary fill-in, seasonal part-time, part-time or intermittent employees, advance written notice of layoff is not required." Per 1101.03

After reviewing the information presented and the arguments of the parties, the Board finds that the relevant State law does not provide for accumulation of seniority by part-time employees. Since there are no such rules that apply to the Appellant's case, the Board ruled that it had no jurisdiction under the current Rules of the Division of Personnel to rule on the issues raised by the Appellant relating to her seniority.

The Board did, however, question the Appellant to determine whether her appeal would constitute a claim that she had been subject to some form of unlawful discrimination. Appellant provided no evidence of such discrimination and the Board found no evidence of such discrimination.

Based on the above, the Board granted the State's motion to dismiss the appeal of Ms. Oppenheimer.

FOR THE PERSONNEL APPEALS BOARD



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