

State of New Hampshire



PERSONNEL APPEALS BOARD

25 Capitol Street
Concord, New Hampshire 03301
Telephone (603) 271-3261

Appeal of Jessica Paul

Docket#2009-L-003

Department of Resources and Economic Development

*Personnel Appeals Board Decision on Appellant's Motion for Reconsideration/Rehearing,
DRED's Motion for Late Entry of Objection to Motion for Reconsideration/Rehearing, and
DRED's Objection to Motion for Reconsideration/Rehearing*

February 2, 2010

On November 25, 2009, the Personnel Appeals Board received the Appellant's Motion for Reconsideration/Rehearing of the Board's October 29, 2009 decision denying Jessica Paul's appeal of her layoff from employment, effective February 13, 2009, from her position as a Program Assistant I in the Department of Resources and Economic Development. On December 7, 2009, the Board received the agency's Motion for Late Entry of Objection to Motion for Reconsideration/Rehearing along with the agency's Objection to Motion for Reconsideration/Rehearing. On December 23, the Board received the Appellant's Response to Objection to Motion for Reconsideration/Rehearing.

The Board voted to grant the agency's Motion for Late Entry of Objection, then reviewed both the Appellant's Motion, the agency's Objection, and the Appellant's Response to Objection in light of the Board's decision.

In accordance with the provisions of Per-A 208.03 (c), any 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."

In support of the Motion for Reconsideration/Rehearing, the Appellant reiterated each of the issues that she raised at the hearing on the merits of the appeal, and which the Board fully considered in reaching its decision to deny her appeal. Those issues included the Appellant's argument that she was entitled to present live witness testimony so the witnesses could share their observations and perceptions of Commissioner Bald's alleged hostility toward her in order to prove that she was targeted for layoff. While it is clear that the Appellant disagrees with the conclusions

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reached by the Board, that disagreement does not constitute good cause for a rehearing. Similarly, the fact that the Appellant believes that the Personnel Rules should be interpreted as she would interpret them, or that the agency should be required to engage in some level of fiscal and organizational analysis, disclosure and negotiation beyond that described in the rules does not establish a basis upon which to conclude that the decision or order complained of is unlawful or unreasonable. The Appellant's repeated assertion that she "never waived her right to a full evidentiary hearing pursuant to applicable rules and RSA 541-A..." does not change the underlying facts as set forth in the Board's decision denying her appeal. The Board determined that the appeal involved an application of rules adopted by the Director of Personnel related to layoff, and the appellant was entitled to a hearing on offers of proof as set forth in Per-A 207.02 (b)(6). After hearing the parties' offers of proof, the Board determined that live witness testimony was not necessary in order to address any relevant matters involving the credibility of witnesses, or to understand or fairly assess the arguments at issue. The Appellant's representative made an offer of proof that there were witnesses who were present at a meeting attended by both Commissioner Bald and Ms Paul, that Commissioner Bald was angry with Ms. Paul when she challenged his judgment at that meeting about how and when to staff the various State parks to address funding shortfalls, and that Commissioner Bald threatened to lay off personnel from Ms. Paul's part of the organization instead in order to achieve the required savings. Even if the Board were to hear live testimony confirming that offer of proof, it would not affect the Board's conclusion that Ms. Paul's layoff was occasioned by a lack of funding in the Department of Resources and Economic Development, that the Commissioner had the right to determine which class or classes of positions would be affected by a reduction in force, and that the Appellant was laid off along with other personnel in her same classification within her division in order of seniority.

For all the reasons set forth above, as well as the reasons articulated in the agency's Objection, the Board voted unanimously to DENY the Appellant's Motion for Reconsideration/Rehearing and to affirm its order dated October 29, 2009, denying Ms. Paul's 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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Docket #2009-L-003

Department of Resources and Economic Development

October 29, 2009

The New Hampshire Personnel Appeals Board¹ 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 Jessica Paul. Ms. Paul, who was represented at the hearing by SEA Grievance Representative Jeffrey Brown, was appealing her layoff, effective February 13, 2009, from her position as a Program Assistant 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. Appeal of Pritchard, 137NH291
2. PAB decision in the Appeal of Robert Joyce, Docket #92-T-15
3. RSA 21-I:58
4. RSA 98-A
5. SEA Request for Information dated March 27, 2009
6. DRED's response to original Request for Information dated March 30, 2009

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

7. Correspondence from SEA to DRED clarifying information request and requesting information not previously provided, dated April 3, 2009
8. Grievance file of Ms. Paul, with 32 attachments
9. Supplemental Job Description for Ms. Paul's position of Program Assistant I

State's Exhibit:

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, and Fund Balances

Position of the Parties

SEA Grievance Representative Jeffrey Brown argued that Ms. Paul's separation from service was not a true layoff, but a constructive discharge effected in response to the appellant's continuing efforts to point out inefficiencies and violations within the agency, and in retaliation for the appellant's union activity. Mr. Brown argued that Ms. Paul's position had been budgeted for the next three fiscal years, and that the agency failed to provide any justification for laying her off when there were less senior employees within the department whose positions were not eliminated or identified for layoff. He also argued that the department's decision to lay her off from her position violated Per 601.01 (c) of the personnel rules by describing her position as "temporary," even though the appellant had served in that position on a full-time basis for more than twelve months, entitling the appellant to designation as a "permanent" employee.

Mr. Brown stated that the appellant's supplemental job description was not updated and did not provide an accurate statement of her duties and responsibilities. As such, he argued, the agency could not have conducted a meaningful analysis of her position in relation to other positions within the agency. Mr. Brown also argued that the agency violated the Rules of the Division of Personnel by failing to disclose how the agency selected the Program Assistant I classification for lay-off, and that by failing to disclose that information, the agency essentially admitted that they conducted no real analysis.

Mr. Brown made an offer of proof that the appellant's supervisor, Michael Housman would testify that he wanted the appellant's position to be made permanent. He also argued that Ms. Paul's position was assigned to Retail within the Parks Division, and that Mr. Housman had been directed to look at Parks Operations in terms of any budget reductions.

Mr. Brown argued that the agency never attempted to assign the appellant into a vacant position or offer her a demotion, even though the agency assigned another of her co-workers to a position as a Clerk at Cannon Mountain. He stated that Ms. Paul had experience working as a clerk and would have been able to fill that position. Mr. Brown said that until he contacted the Division of Personnel directly, no efforts were made to place the appellant into a position for which she qualified.

Finally, Mr. Brown argued that Commissioner Bald threatened Ms. Paul during a meeting while lay-offs were being discussed, telling her that the next time there were layoffs, he would be coming after her department. Mr. Brown argued that the other four or five people "on the other side of the table" would testify that Commissioner Bald was angry because of the "specter of the LBA audit," and that he was angry with the appellant for trying to find those efficiencies that the LBA audit required. He argued that Commissioner Bald's statement to Ms. Paul was a direct threat to target her in the next round of layoffs.

Sandra Adams, Human Resources Administrator for the Department of Resources and Economic Development, argued that although the appellant may have believed that management was hostile to her, or that she had been targeted, Ms. Paul was one of three individuals laid off from the classification of Program Assistant I within the Division, and that the layoffs were based strictly upon the employees' seniority in their full time positions. Ms. Adams argued that the agency looked at full-time positions, regardless of funding source or whether the positions were considered "temporary or permanent." Ms. Adams said that the agency's analysis was made from the perspective of how positions functioned within the agency, noting that Program Assistant I positions were designed to assist in operating and administering retail and campground programs, including assisting in the training of retail staff, and preparation and distribution of purchase orders and payments. Ms. Adams argued that the agency could not justify the estimated cost of a Program Assistant I position at approximately \$45,000 a year, when the purpose of the position was to support program managers, who would remain responsible for the work overall. Ms. Adams argued that in an effort to cut back on costs, the department looked at each of the classifications designed to assist managers in the field and in the office structure, and determined that their elimination would be least disruptive to operations overall.

Ms. Adams argued that before notifying the appellant of layoff, the agency did attempt to reassign or demote, noting that the only available positions were part-time positions that would not have afforded the appellant any of the rights or benefits of full-time employment.

Ms. Adams said that while Ms. Paul did bring both her concerns and recommendations to management, those were never considerations in determining which positions would be eliminated. She argued that seniority alone was the

basis for layoff once the agency had identified those classifications within the agency that would be subject to a reduction in force. Ms. Adams also agreed that Ms. Paul's position had been put into the budget; however, with the agency facing a deficit in excess of \$2 million, the department felt it would be inappropriate to continue to fill support positions when there were higher level positions in each program area with overall responsibility. Ms. Adams reiterated that Ms. Paul was the least senior Program Assistant I in Parks and Recreation and was therefore identified for layoff, along with two other Program Assistant I incumbents within the division.

Ms. Adams and Commissioner Bald objected to the appellant's references to the "specter of the audit" as well as the assertion that the appellant was laid off because of her attempts to point out inefficiencies or problems within the agency, or problems that Ms. Paul disclosed about improper cash-handling by a co-worker. Commissioner Bald stated that he specifically asked the appellant for information about the co-worker and that the co-worker was then disciplined accordingly. Commissioner Bald stated that the same was true of the audit. Commissioner Bald argued that when the agency requested an LBA audit, the agency knew that it would require considerable work and that the findings would identify problems in administration of the agency. He said that the purpose of the audit to help the agency identify ways to improve operations,

Commissioner Bald also objected to Mr. Brown's characterization of any discussions with Ms. Paul as a threat. Commissioner Bald argued that the discussion in his office was about layoffs in general, and the appellant was critical of his pressure on people working in the field, and pressure on Park Managers to create savings by not staffing their part-time positions. Commissioner Bald denied telling Ms. Paul that he would look to her office for the next layoffs, but asked instead if the appellant was suggesting that he should take positions from Park Headquarters instead. Commissioner Bald said that he was very much aware of the appellant's union activity and understood that someone might suggest that Ms. Paul had been laid off for that reason. However, he said, had he specifically avoided certain classifications simply because one or more of the incumbents were active in the union, it would have been unfair to the rest of the staff. He reiterated that positions were examined in terms of function and cost, and stated that decisions about which positions should be identified for the reduction in force were operational decisions. Commissioner Bald said that in effecting the layoffs, the agency was trying to maximize savings without crippling the organization's ability to operate the Park System and its programs.

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. Paul'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. Paul'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 layoffs in the classification of Program Assistant I.

Ms. Adams made an uncontroverted offer of proof that agency staff working with the Supervisor of Parks Operations assisted the Commissioner in deciding which positions in any facet of Parks Operations, including Retail, could be eliminated without completely crippling operations of the various State Parks programs. 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: The agency treated Ms. Paul as a temporary employee despite the fact that she had occupied her position for more than twelve months, thereby entitling her to treatment as a permanent employee.

Ms. Adams made an uncontroverted offer of proof that Ms. Paul was accorded all the rights and benefits of any full-time employee, and that her assignment to a "temporary" position did not affect her seniority in comparison to other full-time employees within the classification of Program Assistant I. Although Ms. Paul'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."

Appellant's Allegation 4: 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. Paul received her layoff notice and Mr. Brown contacted 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, but found that there were no other full-time vacancies within the agency 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 help the agency reassign or demote 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. Paul was actually laid-off, or notified of lay-off, she would have been ineligible for placement in any other state agency through the Division of Personnel?

Appellant's Allegation 6 Ms. Paul was targeted for lay-off as a result of her union activities and her participation in pointing out inefficiencies and possible violations of policies and procedures within the agency.

Assuming arguendo that Commissioner Bald was angry during his meeting with Ms. Paul and other staff concerning layoffs throughout the agency, or that Commissioner Bald said he might look in Ms. Paul's "office" the next time that lay-offs were contemplated, it would not provide sufficient evidence for the Board to conclude that the appellant was specifically targeted for layoff. The evidence reflects that Ms. Paul was one of three Program Assistant I incumbents

² The record reflects that within a month of her lay-off, Ms. Paul was placed by the Division of Personnel in a full-time position through the statewide recall process.

who were laid off, and that the layoffs occurred in order of seniority within that classification within the division as required by the Rules of the Division of Personnel..

Decision and Order

The Board found that Ms. Paul's layoff was effected in compliance with the Rules of the Division of Personnel. The Board further found insufficient evidence to support the appellant's allegations that she was targeted for layoff, or that the agency failed to accord her the rights or benefits to which she was entitled under the law or the Rules of the Division of Personnel. Therefore, for all the reasons set forth above, the Board voted unanimously to DENY Ms. Paul's appeal.

FOR THE PERSONNEL APPEALS BOARD



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