

State of New Hampshire



PERSONNEL APPEALS BOARD
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Concord, New Hampshire 03301
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APPEAL OF BETTE J. RIORDAN
DOCKET #98-o-14
RESPONSE TO APPELLANT'S MOTION FOR RECONSIDERATION
AND
STATE'S OBJECTION THERETO

October 20, 1999

By letter dated September 29, 1999, SEA Field Representative Linda Chadbourne filed a Motion for Reconsideration of the Board's September 9, 1999, decision in the above-captioned appeal. The State's Objection was received by the Board on October 5, 1999.

In her Motion, Ms. Chadbourne wrote that the Board's refusal to award back pay appeared to be, "...an attempt to 'punish' Ms. Riordan because the Board allegedly was not kept informed of the status of the grievances." She further argued that, "Even if the SEA did agree to waive any rights to monetary relief in the PAB forum beginning January 7, 1998, Ms. Riordan should at least be entitled to retroactive pay from the period November 1, 1997 to January 7, 1998." The appellant's allegation and argument are without merit.

The original notice of appeal filed by the SEA on behalf of Ms. Riordan and others on December 8, 1997 stated, "...we make this appeal to preserve our members' rights, and request that no hearings be held, *if at all*, until after arbitration. We simultaneously object to the State's position that these are PAB appeals, and state that the State's taking of this position is done in bad faith and is an unfair labor practice." (Emphasis added.)

The Board denied the appellant's request to hold no hearings, and by order dated December 23, 1997, the Board directed the parties to appear on January 7, 1998 for a hearing on the merits of the appeal. The State Employees' Association promptly filed an objection by letter dated December 31, 1997, alleging that, "The 'fast track' scheduling of these hearings strongly suggests an effort in support of the State's position, thereby denying the appellants their right to a fair hearing. The State is attempting to thwart the arbitration process by imposing collaterally binding decisions of the PAB on the arbitrator."

At the scheduled meeting on January 7, 1998, the Board allowed the parties to offer arguments why the appeal should or should not be continued. The appellants insisted that if the Board were to hear the appeals and issue an order adverse to the appellants, it would prejudice any subsequent arbitration under the terms of the Collective Bargaining Ameenent. The State argued that the Board had jurisdiction to determine the appellants' seniority, that the appeals were ripe, and that delay would pose a financial liability should one or more of the appeals be granted. Over the State's objection, the Board agreed to continue the appeals, but only after establishing a number of conditions that included the appellants' agreement that, "... any potential award involving monetary relief would not include the period of the stay."

The appellants were to have filed a status report within 90 days in order to facilitate the scheduling of the appeal. The appellants failed to do so. Finding that the appellants had failed to satisfy the specific conditions upon which the continuance had been granted, the Board re-scheduled the matter for a hearing on the merits.

"The Board scheduled the matter for hearing April 21, 1999. The appellants' representative requested a continuance for personal reasons. That request was granted and the matter was rescheduled for a hearing on May 26, 1999. The parties requested a further continuance, asserting that they were moving toward settlement on some if not all of the pending appeals. The Board agreed to continue the matter, but only with the parties' agreement that any and all pending appeals would be settled by, or heard on June 30, 1999. At the June 30, 1999, meeting,

the two remaining appellants again requested that the appeal be postponed. That request was denied." [PAB Order, September 9, 1999]

From the date the appeal was originally filed through the actual last date of hearing, the appellant attempted to prevent the Board from hearing the case and deciding the appeal. Therefore, it is only reasonable to consider the period of the stay to include the period of November 1, 1997 through January 7, 1998. Therefore, the appellant's request for compensation for the period of November 1, 1997 until January 7, 1998 is DENIED.

In her Motion for Reconsideration, Ms. Chadboume wrote:

"Immediately [after the Board's September 9, 1999 decision] the Department of Health and Human Services offered Ms. Riordan an open position of Program Specialist IV, position #40538. The position previously occupied by Ms. Riordan was #16955. The Board has inaccurately attempted equitable consideration on the restoration of the position, which is not acceptable. Ms. Riordan should be awarded the very position she previously held, position #16955."

Ms. Riordan's appeal was predicated solely upon the claim that the Program Specialist IV classification is generic, that she was not the least senior employee in the Program Specialist IV classification, and that when lay-offs occurred she should have been retained because of her seniority. The evidence reflects that duties were reassigned to other positions and that the appellant's position no longer exists as a Program Specialist IV. Therefore, the appellant's request for reinstatement to the same position number is DENIED.

RSA 21-I:58 states, in pertinent part:

"...In all cases, the personnel appeals board may reinstate an employee or otherwise change or modify any order of the appointing authority, or make such other order as it may deem just."

Ms. Chadbourne argued that the Board's decision should have been issued no later than August 15, 1999, and that at a minimum, the appellant should be entitled to compensation retroactive to that date. The Board agrees in concept that the appellant could have been entitled to compensation retroactive to August 16, 1999¹ upon her reinstatement to a position of Program Specialist IV. However, the appellant has refused reinstatement. The Board rules, therefore, that the appellant is entitled to retroactive pay from August 16, 1999, through the date she refused reinstatement.

When Ms. Riordan's appeal was filed, and throughout the period of appeal, the appellant argued that she was entitled to reinstatement as a Program Specialist IV. The Board granted her appeal, ordering that, "Ms. Riordan shall be reinstated to a position of Program Specialist IV for which she qualifies within any division or any unit of the Department of Health and Human Services." [See PAB Decision, September 9, 1999, Appeal of Bette J. Riordan.] By letter dated September 17, 1999, Ms. Chadbourne informed the Department of Health and Human Services that Ms. Riordan had declined reinstatement to such a position because of, "...short notice of the offer as well as her commitment to her current job." By deciding to refuse the appointment, the appellant has prevented the State from carrying out the Board's order. The appellant has failed to persuade the Board that such refusal should expose the State to a continuing financial liability, or entitle the appellant to any compensation while she voluntarily carries out "...her commitment to her current job" rather than accepting reinstatement.

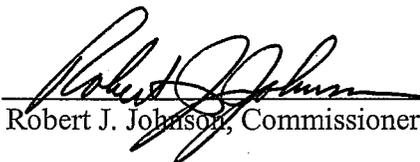
¹ August is the first business day immediately following the 45th day after the hearing,

In general, a request for reconsideration must either allege that the Board has made an error of law or must present additional facts that were not available for the Board's review when the appeal was decided. In order to request a rehearing, the party dissatisfied with the Board's order must set forth every ground upon which it is alleged that the Board's decision is unlawful or unreasonable. The Board may grant a rehearing if, in its opinion, good reason for such rehearing is stated in the motion. In this instance, the appellant has offered neither argument nor evidence that the Board's decision is unlawful or unreasonable. She simply disagrees with the result. Accordingly, the Board voted to DENY the Motion for Reconsideration.

THE PERSONNEL APPEALS BOARD


Patrick H. Wood, Chairman


E. A. Rule, Commissioner


Robert J. Johnson, Commissioner

cc: Thomas F. Manning, Director of Personnel, 25 Capitol St., Concord, NH 03301
Linda Chadbourne, SEA Field Representative, PO Box 3303, Concord NH 03302-3303
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APPEAL OF BETTE J. RIORDAN

DOCKET #98-O-14

DEPARTMENT OF HEALTH AND HUMAN SERVICES

September 9, 1999

The New Hampshire Personnel Appeals Board (Wood, Rule and Johnson) met on Wednesday, June 30, 1999, under the authority of RSA 21-I:58, to hear the appeal of Bette J. Riordan, a former employee of the Department of Health and Human Services, concerning her lay-off from employment as a Program Specialist. Linda Chadboume, SEA Field Representative, appeared on Ms. Riordan's behalf. Attorney Frank Nachman appeared on behalf of the State.

The appeal was heard on offers of proof by the representatives of the parties. The record of the hearing in this matter consists of the pleadings submitted by the parties prior to the appeal, notices and orders issued by the Board, the audio tape recording of the hearing on the merits of the appeal, and documents admitted into evidence at the hearing, described by the parties as follows:

STATE'S EXHIBITS

- A. A photocopy of House Bill 32, Chapter 310 of the Laws of 1995
- B. Correspondence from the State Budget Assistant of September 24, 1997 indicating Fiscal Committee approval of transfer of DHHS funds
- C. The Department of Health and Human Services seniority list
- D. Correspondence of November 4, 1997 from Virginia Lamberton of the New Hampshire Division of Personnel to Nathan Sanborn
- E. The Department of Health and Human Services organizational charts

- F. Department of Health and Human Services organizational chart published in the New Hampshire Health and Human Services Quarterly Report on Reorganization
- G. New Hampshire Department of Health and Human Services Quarterly Report on Reorganization
- H. Letter of November 18, 1997 from Commissioner Terry Morton to Neal M. Kurk, Chair of the Fiscal Committee of the General Court, and to Governor Jeanne Shaheen

APPELLANT'S EXHIBITS

- A. Information packet for Ms. Riordan
- B. Health and Human Services Seniority List dated 9/26/97
- C. Copy of Chapter 301 House Bill 32 - Final Version

In the pleadings originally submitted by the appellant, Ms. Chadbourne argued that Ms. Riordan's lay-off, effective November 30, 1997, violated Per 1101.02 (b) of the Rules of the Division of Personnel in that there were Program Specialist IV incumbents employed by the Division for Children and Youth Services who were not laid off from their positions despite the fact that they had less seniority than the appellant. She argued that Per 1101.02 (e) permits an appointing authority to retain less senior employees only in, "...very unusual instances of an individual possessing unique credentials that are necessary to carry out a legislative mandate..." Ms. Chadbourne argued that there had been no evidence offered by the State that any of the less senior employees possessed "unique credentials" that would warrant their continued employment at the expense of a more senior employee's lay-off.

In the written "Offers of Proof" submitted at the hearing, Mr. Nachrnan argued that, "...the job classifications for Andrew Tkach, Elise Smith and Julianne McConnell, all Program Specialists IV, were unique and distinct from that of Ms. Riordan." He also argued that, "Because the job descriptions put Ms. Riordan, Mr. Tkach, Ms. Smith, and Ms. McConnell each in a distinct and unique job classification as Program Specialist IV, Ms. Riordan's job classification was unique within her job classification in her division." In support of that argument, Mr. Nachman offered into evidence a letter dated November 4, 1997, from Personnel Director Virginia Lamberton to

Nathan Sanborn in which she discussed the "scope of work" section of the supplemental job descriptions to differentiate between positions within a generic job classification. Mr. Nachman argued that "Each of the job classifications cited by Ms. Riordan as less senior also has unique qualifications set forth in the applicable supplemental job description," thus demonstrating further "the unique character of each of the positions."

On the evidence, argument and offers of proof, the Board made the following findings of fact and rulings of law.

Findings of Fact:

1. House Bill 32, codified as Chapter 310 of the Laws of 1995, gave the Commissioner of Health and Human Services broad powers to reorganize the Department of Health and Human Services.
2. As enacted, Chapter 310 of the Laws of 1995 gave the Commissioner authority to transfer funds with the approval of the legislative fiscal committee, and the power to reassign **and** transfer personnel within the department.
3. House Bill 32 authorized the Commissioner of Health and Human Services "...to reallocate or reclassify any position within the department of health and human services, in consultation with the director of personnel, to implement the 1995 Department of Health and Human Services Reorganization Act."
4. On September 24, 1997, the legislative budget committee approved the transfer of approximately \$213,000,000 into fund accounts to support the department's reorganization.
5. The Commissioner did not reallocate or reclassify positions of Program Specialist IV within the Division for Children, Youth and Families held by Ms. Riordan, Ms. McConnell, Mr. Tkach or Ms. Smith to implement the reorganization.
6. On October 1, 1997, 58 Health and Human Services employees received notice that they were to be laid off effective November 30, 1997.
7. Ms. Riordan was laid off from a position as Program Specialist IV assigned to the Division for Children, Youth and Families (formerly Children and Youth Services).
8. Ms. Riordan's seniority date was January 29, 1986.

9. Ms. Riordan had more seniority within her classification within her division than three other employees classified as Program Specialist IV but who were not laid off.
10. Program Specialist IV Julianne McConnell's seniority date was October 28, 1994.
11. Program Specialist IV Andrew Tkach's seniority date was December 16, 1988.
12. Program Specialist IV Elise Smith's seniority date was December 20, 1987.
13. The State offered no evidence that Ms. McConnell, Mr. Tltach or Ms. Smith possessed "unique credentials necessary to carry out a legislated mandate."
14. Absent evidence of unique credentials or the need for same within the classification of Program Specialist IV assigned to the Division for Children, Youth and Families, the agency was subject to the provisions of Per 1101.02 (e), allowing seniority to govern the order of layoff.

State's Requests for Findings of Fact and Rulings of Law

The State's proposals #1, #2 and #3 are granted. The State's proposals #4, #5 and #6 are denied.

Discussion

Many positions in the classified service can be described as "unique." However, in spite of the differing roles and responsibilities associated with individual positions, they can be arranged into "...group[s] of positions which have the same class specification and whose 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." [See Per 102.13, Rules of the Division of Personnel.] Although each of the positions in question was assigned to a different program within the Division for Children, Youth and Families, they were all classified as Program Specialist IV. The positions occupied by Ms. Riordan and Ms. McConnell both required a Master's degree and four years of experience. Those held by Mr. Tkach and Ms. Smith each required a bachelor's degree and 5 years of experience. If the positions occupied by Ms. Riordan, Ms. McConnell, Mr. Tltach and Ms. Smith were "distinct and unique job classification[s]" as the State asserted, then it would be reasonable to conclude

that the Commissioner of Health and Human Services would have reclassified them to distinct and unique job classes under the authority of RSA 21-I:56, IV.

Decision and Order

Having failed to make a distinction by classification, the agency failed to persuade the Board that seniority should not apply to all positions of Program Specialist IV within the Division for Children, Youth and Families. The State also failed to persuade the Board that Ms. McConnell, Mr. Tkach or Ms. Smith possessed any "unique credentials" necessary for the department to carry out a legislated mandate. Finally, the State offered no evidence that Ms. Riordan did not or could not have met the minimum qualifications for any of the positions of Program Specialist IV within her division that were occupied by less senior employees. Therefore, on the evidence, argument and offers of proof, the Board voted unanimously to GRANT Ms. Riordan's appeal.

At the hearing on the merits of Ms. Riordan's appeal, Ms. Chadbourne asserted that the appellant had lost over ten thousand dollars in wages since the date of her lay-off. She asked the Board to order the Department of Health and Human Services to compensate Ms. Riordan at salary grade 24, maximum step, for a period of two years.

The requested remedy is DENIED. The remedy in this instance must be tempered by decisions initially made by the appellant to postpone the hearing on the merits of the appeal from its originally scheduled hearing date on January 7, 1998. At that time, the appellants¹ requested that the matter be postponed pending the outcome of arbitration on the issue of lay-off under the terms of the then effective Collective Bargaining Agreement. The State objected, but agreed that the matter could be postponed so long as the appellants were willing to waive any possible monetary award for the period of the stay. The appellants insisted that an adverse ruling by the Board might prejudice their pending grievances, and that they were willing to forego any

¹ Initially, appeals were filed by twelve of the affected employees. Ultimately, eleven of the twelve cases were either settled or withdrawn, leaving only Ms. Riordan's appeal to be decided by this Board.

monetary relief during the period of delay. With the parties' agreement, the Board granted the request to continue the hearing under the following conditions:

1. *"The Board has statutory jurisdiction to hear appeals of decisions by the appointing authority or the Director of Personnel arising out of the application of rules adopted by the Director. The Board does not find that there is an overlap in jurisdiction [between Rules and the Collective Bargaining Agreement], and agreed to grant the stay solely for purposes of judicial economy.*
2. *Whereas both the State and the Board were ready to proceed, any delay in hearing the appeal is attributable solely to the appellants, any potential award involving monetary relief would not include the period of the stay.*
3. *The appellants would provide a status report within 90 days in order to facilitate scheduling the appeal for hearing.*
4. *On or before the date of the arbitral award, the parties would file stipulations of fact so that the issues would be more clearly focused when the appeal is heard.*
5. *The Board reserved the right to amend its order as justice and equity might require."*
[See March 3, 1999, Order of the Personnel Appeals Board in the Appeal of Health and Human Services Employees Docket #98-O-9 through 98-O-20.]

In March, 1999, during a review of its pending cases, the Board found that the appellants had not filed a status report on the progress of their grievances although that report was due on or about April 7, 1998. The Board also found that the parties had not filed any stipulations to narrow the factual issues. The Board then discovered that neither party had advised the Board that the Arbitrator had issued an opinion and award on or about June 30, 1998. The Board scheduled the matter for hearing April 21, 1999. The appellants' representative requested a continuance for personal reasons. That request was granted and the matter was rescheduled for hearing on May 26, 1999. The parties requested a further continuance, asserting that they were moving toward settlement on some if not all of the pending appeals. The Board agreed to continue the matter, but only with the parties' agreement that any and all pending appeals would be settled by, or heard on June 30, 1999. At the June 30, 1999, meeting, the two remaining

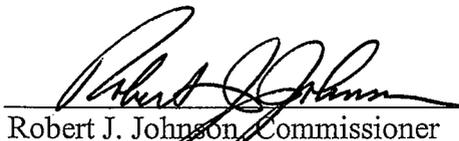
appellants again requested that the appeal be postponed. That request was denied. As a result, Ms. O'Connor withdrew her appeal and Ms. Riordan went forward with a hearing on the merits, over her objection that the Board would grant no further continuances.

Had the matter been heard when it was originally scheduled, the appellant might have been restored to a position of Program Specialist IV, salary grade 24, within several months of the effective date of lay-off. However, having insisted repeatedly that the matter be continued, and having agreed to waive any entitlement to compensation for the period of the stay, the Board denies the appellant's request for compensation. Ms. Riordan shall be reinstated to a position of Program Specialist IV for which she qualifies within any division or any unit of the Department of Health and Human Services. She shall be compensated at the grade and step appropriate to the position and her length of service with the agency. Her compensation shall be adjusted effective the date of this decision.

THE PERSONNEL APPEALS BOARD


Patrick H. Wood, Chairman


Lisa A. Rule, Commissioner


Robert J. Johnson, Commissioner

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