State of New Hampshire

PERSONNEL APPEALS BOARD
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APPEAL OF THOMAS SLAYTON
Docket #92-O-10
Department of Health and Human Services

May 21, 1997

On February 14, 1997, the New Hampshire Personnel Appeals Board received appellant's Motion to Reconsider its January 31, 1997 decision in the appeal of Thomas Slayton. Having reviewed the Motion in conjunction with the Board's decision in this matter, the Board voted to deny the Motion. The appellant failed to provide evidence or argument supporting the claim that the appeal should be deemed timely. The appellant also failed to persuade the Board its decision was either unlawful or unreasonable in light of the facts in evidence.

THE PERSONNEL APPEALS BOARD

Mark J. Bennett, Acting Chairman

Lisa A. Rule, Commissioner

James J. Barry, Commissioner

cc: Virginia A. Lamberton, Director of Personnel
Jean Chellis, SEA Field Representative
Sandra Platt, Human Resources Administrator, Department of Health and Human

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Docket #92-O-10

January 31,1997

The New Hampshire Personnel Appeals Board (Bennett, Rule and Barry) met on Wednesday, January 22, 1997, under the authority of RSA 21-I:58, to hear the appeal of Thomas Slayton, a former employee of the Department of Health and Human Services. Mr. Slayton was represented at the hearing by SEA Field Representative Jean Chellis. Sandra Platt, Human Resources Administrator, appeared on behalf of the Department of Health and Human Services. Mr. Slayton was requesting reimbursement of lost wages associated with lay-off and bumping within the Department of Health and Human Services.

The appeal was made on offers of proof by the representatives of the parties. The record in this matter consists of the audio-tape recording of the hearing, any documents or pleadings submitted by the parties prior to the hearing, and additional exhibits entered into evidence at the hearing. Before taking up the merits of the appeal, the Board heard oral argument on the State's Motion to Dismiss and the Appellant's Objection to that Motion. The Board then informed the parties that it would take the motion under advisement and hear the merits of the case since the parties were prepared to make their presentations, so that the Board would be able to decide the appeal on the merits if the Motion was ultimately denied.

TDD Access: Relay NH 1-800-735-2964

Basis for the Appeal

On March 30, 1990, during the preliminary stages of a reduction in force within the Department of Health and Human Services, Governor Judd Gregg issued an order informing then Commissioner Mary Mongan that the Developmental Disabilities Council was an administratively attached agency whose employees were not employees of the Department of Health and Human Services. He further directed that employees of the Developmental Disabilities Council would be exempt from being "bumped" or displaced by other, more senior employees of the Department of Health and Human Services.

When Governor Gregg's order was issued, the appellant, Thomas Slayton, was employed as a Public Education Coordinator, salary grade 25, assigned to the Division of Public Health Services. He was not permitted to bump into a position of that title and grade at the Developmental Disabilities Council and, instead, was reassigned to the position of Health Promotion Adviser, salary grade 22.

Appeals were filed before this Board[1] in which the appellants argued that Governor Gregg's order improperly denied them the opportunity to bump. On June 20, 1990, the Board convened a pre-hearing conference at which the appeals were consolidated. The Board heard oral argument by the parties. SEA General Counsel Michael Reynolds appeared on behalf of the appellants. Assistant Attorney General George Dana Bisbee appeared on behalf of the Department of Health and Human Services and the Developmental Disabilities Council. Both parties also submitted memoranda of law in support of their positions.

On January 10, 1991, the Board issued an order in which it found that there was no evidence that the Developmental Disabilities Council had ever been established as "an agency" within the meaning of RSA 21-G, and that those persons who reported to the Council as administrative staff were employees of the Department of Health and Human Services. As such, the Board found that Developmental Disabilities Council employees were subject to lay-off and bumping by more senior employees of the Department of Health and Human Services. The Board made no specific findings with respect to the individual position selections or assignments of the appellants who had been reassigned or laid-off, nor

[1] Thomas Pryor (Docket #90-L-5), Thomas Slayton (Docket #90-L-11), Nita Tomaszewski (Docket #90-L-6), David R. Ayotte (docket #990-L-9), Rebecca Bukowski (Docket #90-L-10), and Elizabeth Donahue-Davis (docket #90-L-12)

did it issue an order requiring any of the original bumping decisions to be implemented. Neither party filed a timely Motion for Rehearing or Reconsideration.

On April 4, 1991, Health and Human Services Commissioner Harry Bird wrote to Thomas Slayton, informing him that he would be permitted to exercise his bumping rights and would be assigned to the position of Public Education Coordinator in the Developmental Disabilities Council, displacing Thomas Pryor. He was advised that the effective date of his reassignment would be April 19, 1991.

On April 19, 1991, two of the original appellants filed a request for clarification of the Board's order, asking the Board to enforce the original bumping elections which had been made prior to Governor Gregg's March 30, 1990, order. On May 17, 1991, the Board issued a decision in which it found that the request was untimely. In its decision, the Board also noted that the findings in its order of January 10, 1991, were strictly limited to the Developmental Disabilities Council's relationship to the Department of Health and Human Services. The decision stated, in part:

> "By allowing the original appellants to bump into positions in the Developmental Disabilities Council if they so chose, the Department of Health and Human Services has complied with the Board's original order. For the Board to respond by 'clarifying' or ordering 'enforcement' of any conditions not previously imposed would, for all practical purposes, constitute a reconsideration of the Board's January 10, 1990, order. Therefore, the Board must find that Ms. Bukowski's and Ms. Donahue-Davis' request for clarification of the Board's January 10, 1991, order is a late filed Motion for Reconsideration. Accordingly, the Board voted to deny the motion, finding that it is untimely and fails to provide grounds upon which to argue that the Board's order of January 10, 1991, was either unreasonable or unlawful."

On June 19, 1991, approximately two months later, Mr. Slayton wrote to Jan Beauchesne, Human Resources Coordinator for the Department of Health and Human Services, asking for reimbursement for lost wages he experienced from April 27, 1990 to April 19, 1991, as a result of his assignment to the position of Health Promotion Advisor, salary grade 22. Ms. Beauchesne responded by letter dated July 2, 1991, informing Mr. Slayton that there was no provision of which she was aware whereby she could

authorize reimbursement for lost wages while he was working at the salary grade 22 position. She also stated, "If you feel you need to take further action I would suggest you contact either Dr. Bird or John Poirier of the Commissioner's Office."

Two months later, on September 4, 1991, Mr. Slayton sent a letter to Harry Bird, Commissioner of Health and Human Services, repeating his request for reimbursement. That letter was almost identical to the letter which he had sent to Ms. Beauchesne on June 19, 1991. Assistant Commissioner John Poirier responded by letter dated October 7, 1991, advising Mr. Slayton that there was no provision for the requested reimbursement. He concluded his letter saying, "It is my opinion that no further action can take place, unless and until the Personnel Appeals Board determines that your salary should be adjusted for that time period."

On the Merits

Ms. Platt argued that between April 27, 1990, and April 19, 1991, Mr. Slayton worked as a Health Promotion Adviser, salary grade 22. She argued that while it was unfortunate that he suffered a diminution of wages during that period of time, the Department of Health and Human Services was without authority to compensate him at salary grade 25 for work performed at salary grade 22. She argued that the appellants were represented by counsel at the June 10, 1990, hearing. She argued that neither the appellants nor the State made a timely Motion for Reconsideration or Rehearing of the Board's January 10, 1991, decision, nor did they made a timely request for an order requiring the implementation of specific bumping or salary grade assignments.

Ms. Chellis argued that Mr. Slayton's reassignment from a salary grade 25 position to a salary grade 22 position was the result of a political decision, and that under the provisions of RSA 21-I:58, he therefore should be entitled to reinstatement without loss of pay. She argued that Mr. Slayton's reassignment was a direct result of Governor Gregg's intervention in the bumping process within the Department of Health and Human Services, and that absent such intervention, Mr. Slayton would have suffered no loss of pay during the period of April 27, 1990 to April 21, 1991. She asked the Board to find that Mr. Slayton's assignment to the position of Health Promotion Advisor was based on politics, and that he was therefore entitled to reimbursement for lost wages, as well as interest on the amount of wages lost from April 27, 1990, to the date of the Board's decision in this matter.

While the Board finds the appellant's argument to be an interesting one, a more careful reading of RSA 21-I:58 reveals that appellants are entitled to reinstatement without loss of pay as follows:

> "If the personnel appeals board finds that the action complained of was taken by the appointing authority for any reason related to politics, religion, age, sex, race, color, ethnic background, marital status, or disabling condition, or was taken in violation of a statute or of rules adopted by the director, the employee shall be reinstated to the employee's former position or a position of like seniority, status, and pay."

In this instance, there is no evidence that the appointing authority made any decision with respect to Mr. Slayton's assignment or compensation for reasons of politics. The agency attempted to implement a lay-off in accordance with its understanding of the Rules of the Division of Personnel. After seeking the advice of the Attorney General, the Governor's office intervened, ultimately asserting that the Developmental Disabilities Council was an administratively attached agency exempt from bumping. The Board heard that appeal and made findings to the contrary.

In its decision, the Board made no specific order directing the agency with respect to assignment or compensation of any of the individual appellants, or others who might have been affected by that decision. There is no evidence to suggest that the agency failed to implement the order of the Board, or that the agency refused to allow persons who elected to bump into the Developmental Disabilities Council to do so.

Motion to Dismiss

By letter dated January 10, 1997, Sandra Platt, Human Resources Administrator for the Department of Health and Human Services, moved for dismissal of Mr. Slayton's appeal on the basis that it was not timely filed. Ms. Platt argued that the appellant had an opportunity to request reconsideration or rehearing of the Board's January 10, 1991, decision, but failed to do so. She argued that the appellant was notified on April 4, 1991, that he would be permitted to bump into the position of Public Education

Coordinator in the Developmental Disabilities Council, and that his assignment to that position would commence on April 19, 1991. She argued that Mr. Slayton failed to request any reimbursement of wages for the previous year within fifteen days of the April 4, 1991, notice of assignment, or the April 19, 1991, effective date of his reassignment. Ms. Platt further argued that Mr. Slayton failed to take a timely appeal as a result of the Board's May 17, 1991, decision in which it denied Ms. Bukowski's and Ms. Donahue-Davis' Request for Clarification and Enforcement.

In her Objection to the Motion to Dismiss, Ms. Chellis argued that there was no decision from which Mr. Slayton might have taken a timely appeal until October 7, 1991, when Mr. Slayton's request for reimbursement was denied by Assistant Commissioner John Poirier. She argued that after his reassignment to the position of Public Education Coordinator for the Developmental Disabilities Council, and until June 1991, Mr. Slayton was "busy settling into new surroundings." She argued that Mr. Slayton's April 19, 1991, letter to Jan Beauchesne made it clear that he had not yet been denied any reimbursement for lost wages. She argued that Jan Beauchesne's July 2, 1991, letter was not a denial of his request, but notice that she was unable to assist him and that he could seek assistance from the Commissioner or the Commissioner's office. She argued that the letter did not set forth any time frame within which such a request had to have been made. She argued that until Mr. Slayton received the October 7, 1991, letter from John Poirier, he had no way of knowing that the department would not grant his request.

While the Board considers the State's Motion to Dismiss an untimely motion, it does set forth reasonable grounds upon which to find that Mr. Slayton's appeal is untimely. Mr. Slayton did not move for rehearing, reconsideration or clarification of the Board's January 10, 1991, decision. Mr. Slayton's first request for retroactive compensation was made on June 21, 1991, in a letter to Jan Beauchesne, some 164 days after the Board's decision in this matter.

On April 4, 1991, Mr. Slayton was informed that his decision to bump into the position of Education Coordinator at the Developmental Disabilities Council had been approved, and that he would be assigned to that position effective April 19, 1991. Under the then effective Rules of the Division of Personnel, if Mr. Slayton believed that he was entitled to additional compensation for the previous year in which he had been assigned to, and worked as, a Health Promotion Advisor, salary grade 22, he had fifteen calendar days in which to appeal to this Board, or fifteen working days in which to request an

adjustment by the Department of Health and Human Services under the provisions of the Rules of the Division of Personnel. He made no such request until June 19, 1991, 75 calendar days after his notice of assignment to the Developmental Disabilities Council, and 60 days after the effective date of that assignment. When Mr. Slayton received a response to his request from Jan Beauchesne on or about July 2, 1991, he waited another 62 days before sending his request to the Commissioner of Health and Human Services.

On the facts in evidence, the Board finds that Mr. Slayton's request is untimely. For the reasons set forth above, the Board voted unanimously to deny Mr. Slayton's appeal. Even if the Board were to find that his appeal was timely, which it does not, there is neither evidence nor argument to persuade the Board that his appeal should be granted on the merits. There is no evidence that any action of the appointing authority was taken for reason of politics. Mr. Slayton performed the work of a Health Promotion Advisor, salary grade 22, and was compensated accordingly.

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