

State of New Hampshire



PERSONNEL APPEALS BOARD

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

Appeal of Peter Brunette

Docket #2008-D-002

Department of Health and Human Services, Office of Operations Support

January 23, 2008

By letter dated August 17, 2007, Peter Brunette, an employee of the Department of Health and Human Services, filed an appeal with this Board relative to a performance evaluation issued to the appellant on or about July 26, 2007. The appellant argued that the evaluation process was "intentionally delayed and intended to be punitive rather than corrective," and that the appellant's supervisor used the evaluation process in bad faith to bolster his position during "negotiations with the employee during the informal settlement process." The appellant argued that the evaluation process was conducted "in an arbitrary, capricious and bad faith manner, and was manifestly unfair to the employee; that the process was not conducted properly according to the applicable and binding statutes, rules and policies and that the evaluation documents are impermissibly flawed and insufficient on their face and as a matter of law..." The appellant requested that the Board make various findings and order the following relief:

1. The evaluation process was improper. The increment review document must be withdrawn and a new form prepared and duly executed in accordance with the statutes.
2. The Memorandum of counseling dated June 15, 2007, shall not be placed into the employee's permanent record, and the employer may not incorporate it into the employee's evaluation.

By letter dated August 24, 2007, Frank Nachman, Chief Legal Counsel for the Department of Health and Human Services, Office of Operations Support, submitted the Department of Health and Human Services Motion to Dismiss and Memorandum of Law in Support of the Motion to Dismiss. In that Motion and supporting Memorandum, Attorney Nachman asked the Board to find that:

1. Per 205.08(c) of the Personnel Rules excludes performance evaluations of classified employees from the process of informal settlement of disputes, and from the process of appeal to this Board; and

2. Per-A 203.02 (a) excludes performance evaluations of classified employees from the Board's subject matter jurisdiction.

By letter dated August 27, 2007, Attorney Brunette filed his Objection to Employer's Motion to Dismiss, arguing that the rules did not prohibit the Board from hearing or deciding his appeal, as it was based on the evaluation process and not the content of the evaluation. He argued, in part, "The Board could find that the employer failed to properly train and adequately supervise the supervisor to ensure that the employee would receive proper supervision and a fair and impartial evaluation..."

RSA 21-I:46, I (a) states, "The personnel appeals board shall hear and decide appeals as provided by RSA 21-I:57 and 21-I:58 and appeals of decisions arising out of application of the rules adopted by the director of personnel except those related to: (a) Performance evaluations of classified employees; provided, however, that an employee who is disciplined or has other adverse action taken against him as the result of an evaluation may appeal that action."

The Personnel Rules recognize the written warning as the least severe form of discipline recognized by the Rules of the Division of Personnel. Although the appellant indicates that he received a Memo of Counsel, such memos are not disciplinary, and there is no indication that the appellant has been disciplined or has been subjected to other adverse action, as defined by the Rules of the Division of Personnel.

With respect to the evaluation process, the Board relies on the language of the statute in determining whether or not it has jurisdiction to hear an appeal based on the evaluation process. In this instance, the appellant argues that the Board has jurisdiction to hear his appeal, arguing that he is not appealing the content of his evaluation but the evaluation process as described by the Rules of the Division of Personnel. While RSA 21-I:46 gives the Board the authority to hear appeals based on the application of a rule, it specifically excludes "...decisions ... related to performance evaluations of classified employees. Therefore, the Board finds that the application of rules related to the evaluation process is outside the Board's jurisdiction.

Accordingly, for all the reasons set forth above, the Board voted unanimously to DISMISS the instant appeal as a matter excluded from the Board's jurisdiction under the provisions of RSA 21-I:46..

THE PERSONNEL APPEALS BOARD



Patrick Wood, Chairman



Robert Johnson, Commissioner

Joseph Casey, Commissioner

cc: Karen Hutchins, Director of Personnel, 25 Capitol St., Concord, NH 03301
Frank Nachman, Legal Counsel, Office of Operations Support, Department of Health and
Human Services, 129 Pleasant St., Concord, NH 03301
Peter Brunette, Attorney, 11, 15 Park St., Lakeport, NH 03246