

The State of New Hampshire

Supreme Court

No. 99-191 *Appeal of Sargeant James Kelleher*

TO THE CLERK OF NH PERSONNEL APPEALS BOARD
#99-D-9

*I hereby certify that the Supreme Court has issued the following order
in the above-entitled action:*

*June 4, 1999. Appeal from administrative agency is declined. See
Rule 10(1).*

June 30, 1999

Attest: *Carol A. Belmain*
Carol A. Belmain, Deputy Clerk

State of New Hampshire



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

Appeal of James Kelleher

Docket #99-D-9

Response to Appellant's Motion for Rehearing and State's Objection

March 3, 1999

On February 2, 1999, the Board received the Appellant's Motion for Rehearing in the above-titled appeal, that the Board had denied by decision dated January 6, 1999. The State's Objection to that Motion was received by the Board on February 2, 1999.

In general, a request for reconsideration or rehearing must either allege that the Board has made an error of law or must present additional facts that were not available at the original hearing. In order to request a rehearing, the party dissatisfied with the Board's order must set forth all grounds upon which it is alleged that the Board's decision is unlawful or unreasonable.

Having reviewed the Motion and Objection in conjunction with the Board's decision in this matter, the Board voted unanimously to DENY the Appellant's Motion and to AFFIRM its decision for the reasons set forth in the State's Objection.

THE PERSONNEL APPEALS BOARD

Handwritten signature of Mark J. Bennett in cursive.

Mark J. Bennett, Chairman

Handwritten signature of Lisa A. Rule in cursive.

Lisa A. Rule, Commissioner

Handwritten signature of James J. Barry in cursive.

James J. Barry, Commissioner

- c Virginia A. Lamberton, Director of Personnel, 25 Capitol St., Concord, NH 03301
- Atty. James Donchess, 60 Main St., Nashua, NH 03060
- Maj. Kevin P. O'Brien, Dept. of Safety, Division of State Police, 10 Hazen Dr., Concord, NH 03305

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James Kelleher - Docket #99-D-9

Department of Safety - Division of State Police

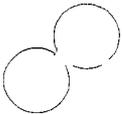
(Hearing on Offers of Proof)

January 6, 1999

The New Hampshire Personnel Appeals Board (Bennett, Rule and Barry) met on Wednesday, December 16, 1998, under the authority of RSA 21-I:58, to hear the appeal of James Kelleher. Sgt. Kelleher, who was represented at the hearing by Attorney James W. Donchess, was appealing his demotion from Sergeant II, salary grade 22, to Sergeant I, salary grade 21, effective April 10, 1998, when he was transferred from his assignment as Commander of the Aviation Unit to the Narcotics Investigation Unit. Executive Major Kevin O'Brien and Personnel Director Virginia Lamberton 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 pleadings submitted by the parties, notices and orders issued by the Board, the audio tape recording of the hearing on the merits, and documents admitted into evidence as follows:

State's Exhibits

- A. February 28, 1997, letter from Personnel Director Lamberton to Safety Commissioner Flynn
- B. March 7, 1997, letter from Personnel Director Lamberton to State Police Colonel Barthelmes
- C. Personnel Action Form effective 2/23/97
- D. April 14, 1998, memo from Captain O'Brien to Safety Business Office
- E. Personnel Action Form effective 3/27/98
- F. Class Specification for State Police Sergeant II, established 8/1/97

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- G. May 28, 1998, letter from Sgt. Kelleher to Col. Barthelmes
 - H. June 8, 1998, memo from Captain O'Brien to Sgt. Kelleher
 - I. June 15, 1998, memo from Sgt. Kelleher to Commissioner Flynn
 - J. June 16, 1998, memo from Commissioner Flynn to Sgt. Kelleher
 - K. June 19, 1998, memo from Sgt. Kelleher to Personnel Director Lamberton
 - L. June 29, 1998, letter from Director Lamberton to Sgt. Kelleher
 - M. July 8, 1998, memo from Sgt. Kelleher to Director Lamberton
 - N. July 31, 1998, letter from Director Lamberton to Sgt. Kelleher
 - O. Supplemental Job Description for State Police Sergeant I signed by Sgt. Kelleher on 4/13/98
 - P. Special Order dated 4/1/97, effective 3/1/97, assigning Sgt. Kelleher to Aviation Unit
 - Q. Special Order dated 11/14/96, effective 11/8/96, transferring certain State Police employees
 - R. Division of State Police Certificate of appointment dated December 17, 1993
 - S. Division of State Police Certificate of Appointment dated September 2, 1988
 - T. Division of State Police Certificate of Appointment dated August 15, 1975
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The material facts are not in dispute:

1. Sgt. Kelleher has been employed by the New Hampshire Division of State Police since August 15, 1975. (Ex. T)
 2. He was promoted from the rank of Trooper to the rank of Corporal on September 1, 1988. (Ex. S)
 3. He was promoted from the rank of Corporal to the rank of Sergeant on December 17, 1993. (Ex. R)
 4. Effective November 8, 1996, Sgt. Kelleher was transferred from the Major Crime Unit to the Aircraft (Aviation) Unit. He was named Commander of that Unit effective March 1, 1997. Ex. P, Ex. Q) As a result his having been assigned command of the unit, Sgt. Kelleher was reclassified from Sergeant I, salary grade 21, to Sergeant II, salary grade 22, effective February 28, 1997. (Ex. C)
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5. The reclassification was the result of a change in assignment, not the selection of an applicant to a posted vacancy.
6. On the same day, the Director of Personnel approved the Division of State Police reorganization, reclassifying State Police Sergeant positions from a single classification at salary grade 21 to Sergeant I, salary grade 21, and Sergeant II, salary grade 22. (Ex. A) The letter approving the reorganization did not specify that the classifications of Executive Major and Sergeant II would be limited to temporary classifications.
7. On March 7, 1997, the Director of Personnel wrote to State Police Colonel Barthelmes clarifying her approval of the reorganization, explaining that the classifications of Sergeant II and Executive Major would be temporary. She wrote that those job titles and salary grades would apply only for the period of time that the individual so classified assumed additional duties as specified by the Director of State Police. Her letter stated, "When the assignment is removed, the trooper will return to his/her prior rank unless there is another issue pending such as a disciplinary demotion to a non-supervisory classification." (Ex. B)
8. By letter dated April 14, 1998, Captain O'Brien advised the Safety Business Office that effective May 1, 1998, Sgt. Kelleher's classification would be changed from Sergeant II to Sergeant I, and that he had signed the Supplemental Job Description for that position. (Ex. D, Ex. O)
9. Neither Sgt. Kelleher's reclassification to Sergeant II nor his reassignment to duties as a Sergeant I resulted in his changing position numbers.

Position of the Pal-ties

Attorney Donchess argued that Per 102.20 of the Rules of the Division of Personnel defines "demotion" as "transfer of an employee from one position to another position having a lower salary grade," and that by its very definition, Sgt. Kelleher's transfer and reduction in salary must be considered a demotion without notice and without cause. Attorney Donchess argued that Per 1001.07 requires the agency, prior to demoting an employee, to first meet with the employee, review the evidence supporting the demotion, and allow the employee an

opportunity to refute that evidence. Finally, he argued, the agency must provide written notice of the demotion, and an explanation of the employee's rights to appeal the demotion.

The State argued that the reduction in Sgt. Kelleher's salary was not a demotion, but a return to his original salary at the completion of his assignment to command the Aviation Unit. The State argued that the Rules provide for temporary reclassifications and reallocations, and that it was clear from the Director's letter of March 7, 1998, that employees reclassified to either Sergeant II or Executive Major would receive the higher salary only for the period of time that they were required to perform duties at the higher level.

The State argued that the practice of increasing and reducing an officer's salary to reflect changes in his actual work assignment, such as assignment to the Governor's security detail, under cover detective assignments, or assignment as an Assistant Troop/Unit Commander has been ongoing. Maj. O'Brien argued that the Division of State Police had discussed the transfer with Sgt. O'Brien before the effective date, and that it was clear to him that when his transfer to the Narcotics Unit was effective, he would no longer be classified as a Sergeant II and therefore would not be entitled to that level of compensation.

Rulings of Law:

- A. Per 102.20 of the Rules of the Division of Personnel defines "demotion" as, "a transfer of an employee from one position to another position having a lower salary grade."
- B. Per 1001.07 of the Rules of the Division of Personnel describes the process required for disciplinary demotion, "... (1) In lieu of termination; (2) Pending the outcome of an investigation of alleged criminal wrongdoing which is in conflict with the assigned duties of the employee's position; or (3) For [a variety of other] offenses..."
- C. Per 102.46 of the Rules of the Division of Personnel defines reclassification as "... a determination by the Director that a position be assigned to a class different from the one in which it was previously assigned."

- D. Per 102.44 defines "reallocation" as "...a determination by the director that the salary grade assigned to a class be reevaluated in relation to the position classification plan established under RSA 21-I:42, II."
- E. Per 303.07(a) of the Rules of the Division of Personnel provides for the temporary reclassification or reallocation of a position, "...when a job assignment of limited duration affecting more than 10 percent of the total working time has been delegated to the position."

Decision and Order

On the evidence, oral argument and offers of proof, the Board found that Sgt. Kelleher's assignment to command the Aviation Unit, and his classification as a Sergeant II, was temporary, and that he was entitled to compensation at the higher level only while he was performing duties at the higher level.

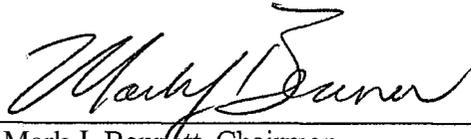
The appellant failed to offer evidence that the reduction in his salary at the time of his reassignment should be deemed a disciplinary demotion. Apart from his assertion that his transfer "...coincided with questions the Division raised regarding a trip [he] took to California for an air show..." the appellant failed to offer any evidence that his reassignment to the Narcotics Unit, and compensation at the level of Sergeant I, salary grade 21, should be deemed a disciplinary demotion.

Both the Director of Personnel and the Executive Major for the Division of State Police asserted that there were no positions permanently assigned to the classification of Sergeant II. The parties agree that there was no posting for the position of Aviation Unit Commander, and that Sgt. Kelleher never made application for "promotion" to that position. He was simply assigned duties at the higher level and compensated accordingly. The parties also agree that Sgt. Kelleher received no formal written notice that his salary grade would be reduced upon reassignment, although he did sign the supplemental job description for Sergeant I. While the Board considers it unfortunate that neither the Department nor the Division of Personnel notified Sgt. Kelleher in writing that his assignment and increased

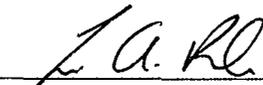
salary was temporary, there appears to be no requirement for them to have done so. There is evidence that a number of job assignments within the Division of State Police entitle employees to increased compensation when they take on roles outside their classification, and that they are returned to their original salary when the assignment is concluded. However, there is no evidence that such return to grade, or refusal to continue compensating an employee at the higher rate after the assignment is concluded, is or should be considered a disciplinary action.

Therefore, on the evidence, arguments and offers of proof, the Board voted unanimously to deny Sgt. Kelleher's appeal, finding that his reassignment to Sergeant I was not a disciplinary demotion.

THE NEW HAMPSHIRE PERSONNEL APPEALS BOARD



Mark J. Bennett, Chairman



Lisa A. Rule, Commissioner



James J. Barry, Commissioner

cc: Virginia A. Lamberton, Director of Personnel
Attorney James Donchess
Maj. Kevin O'Brien, Division of State Police