

State of New Hampshire



PERSONNEL APPEALS BOARD

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

Appeal of Kenneth Salzberg

Docket #2010-D-012

NH Human Rights Commission

September 1, 2010

The New Hampshire Personnel Appeals Board (Wood, Bonafide, Johnson and Casey) met in public session on Wednesday, September 1, 2010, to consider the State's July 12, 2010, Motion to Dismiss and for Declaratory Ruling in the above titled appeal, and the Appellant's July 27, 2010, Objection to Appellee's Motion to Dismiss and for Declaratory Ruling.

The undisputed facts are as follows:

1. On February 17, 2010, Mr. Salzberg filed an appeal of a written warning that had been issued to him on February 4, 2010.
2. On June 28, 2010, Mr. Salzberg tendered his resignation from State service, effective two weeks from the date of his letter (State's Exhibit A).
3. The full text of the Appellant's letter of resignation reads, "This is my formal notification that I am resigning my position as Anti-Discrimination Investigator for the Human Rights Commission, effective two weeks from this date."

In his Objection to the State's Motion, Mr. Salzberg argues that he was a full-time employee, as defined by Per-A 102.10 or Per-A 103.13, at the time he filed his appeal, and that he is therefore entitled to a hearing, despite the fact that he has resigned from his position. He also argues that his resignation was given under duress for issues connected to his appeal.

The NH Supreme Court addressed the definition of "employees" in its decision in the Appeal of Carol Higgins-Brodersen and William McCann (1990) 133 N.H. 576, 578. In that decision the Court wrote:

"In reviewing RSA 21-I:58, it is clear to us that the legislature intended to confer upon State employees a specific right of appeal to the Board based upon permanent status. Permanent employees have completed a working-test period and have been recommended for permanent appointment by the proper appointing authority.... The term 'permanent' reflects a degree of mutual commitment between employer and employee and an expectation that their relationship will be long-term. It is quite reasonable for the legislature to accord employees holding permanent status greater opportunity to challenge personnel decisions affecting them. It is also reasonable to conclude that the legislature did not intend RSA 21-I:58 to confer upon such employees a right to challenge all personnel decisions, but only ones involving the application of a personnel rule which affects them while they hold their permanent status."

The letter of warning issued to the appellant under the authority of Chapter Per 1000 clearly affected the appellant while he was still employed on a full-time basis as a "permanent employee." Having left his position voluntarily¹, however, Mr. Salzberg no longer qualifies as a permanent employee whose status as an employee is affected by the warning. After carefully considering the parties' arguments in light of the Board's jurisdiction as defined by RSA 21-I:46, 57 and 58, the Board voted to grant the Motion to Dismiss the appeal, finding that the February 17, 2010, appeal to this Board was rendered moot by the appellant's June 28, 2010, resignation from employment.

In reaching that decision, the Board notes that the appellant is not without recourse. The appellant already enjoys the protection of RSA 275:56, II in addressing the potential or prospective effect that the warning could have on his future employment.

"RSA 275:56, II --If, upon inspection of his personnel file, an employee disagrees with any of the information contained in such file, and the employee and employer cannot agree upon removal or correction of such information, then the employee may submit a written statement explaining his version of the information together with evidence supporting such version. Such statement shall be maintained as part of the employee's personnel file and shall be included in any transmittal of the file to a third party and shall be included in any disclosure of the contested information made to a third party."

Prior to his resignation, the appellant did submit one or more written statements explaining his version of the disputed information along with evidence supporting his version of events. If the appellant were to allow a potential employer access to his file, the State would be required to provide the appellant's statements along with a copy of the disputed warning.

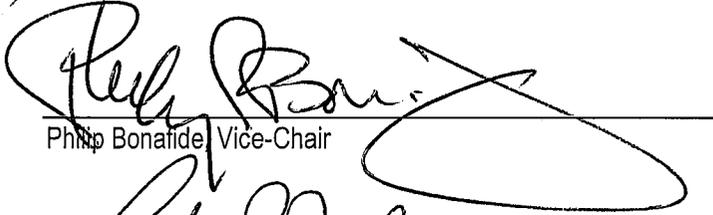
Accordingly, for all the reasons set forth above, the Board voted unanimously to grant the Motion to Dismiss the appeal.

¹ The appellant's assertion that "he tendered his resignation under duress" is irrelevant. If the appellant is alleging that he was forced to resign, he had 15 calendar days from the date of such resignation to file an appeal. No such appeal was filed. As such, that matter is not properly before the Board and has no bearing on the written warning appeal or the Board's jurisdiction to hear and decide that appeal.

The New Hampshire Personnel Appeals Board



Patrick Wood, Chair



Philo Bonafide, Vice-Chair



Robert Johnson, Commissioner



Joseph Casey, Commissioner

cc: Karen Hutchins, Director of Personnel, 25 Capitol St., Concord, NH 03301
Joni Esperian, Executive Director, NH Commission for Human Rights, 2 Chenell Drive, Concord, NH 03301
Kenneth Salzberg, 107 Peterborough Road, Temple, NH 03084