State of New Hampshire

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

APPEAL OF CHARLES SIRC
Docket #93 -D-22
Division of Public Health Services

October 8, 1995

The New Hampshire Personnel Appeals Board (Bennett, Johnson and Rule) met Wednesday, August 23, 1995, to hear Charles Sirc's appeal of a January 7, 1993 letter of warning issued to him for allegedly failing to follow established Division of Personnel Rules on the posting of vacant positions, and for displaying insubordinate behavior. Mr. Sirc, who has left State service, was represented at the hearing by Thomas F. Hardiman, SEA Director of Field Services. Sandra Platt, Administrator, appeared on behalf of the Division of Public Health Services. The record in this matter consists of the audio tape recording of the hearing and documents and exhibits submitted by the parties prior to the hearing. The appeal was made by offers of proof.

Before addressing the merits of the appeal, Mr. Hardiman expressed his opinion that the Board had improperly granted the State's Motion for Reconsideration, arguing that the failure of the State's representative to properly or fully review that Motion did not constitute grounds upon which to grant the request for reconsideration. For the record, the Board noted that its order of August 15, 1994 stated, in part:

> "Ms. Platt did not appear for the scheduled [July 13,19941 hearing. Mr. Hardiman stated that when the parties had received the Board's notice of scheduling, he had contacted Ms. Platt by telephone to discuss the possibility of having the matter dismissed. He stated that he had offered to file a Motion to Dismiss and that Ms. Platt told him she would support such a motion.
>
> "In the absence of an objection from the State, the Board granted the Motion to Dismiss. In so doing, the Chairman noted that the Board would reduce the order to writing and forward it to the parties, <u>allowing the Department of Health and Human Services to file a Motion for Reconsideration if there was any misunderstanding between the parties about the substance of the avvellant's Motion to Dismiss</u>." (emphasis added)

The appellant did not file a Motion for Reconsideration of, or an objection to, the Board's August 15, 1994, order which established the conditions under which it would accept a motion for reconsideration from the State. The appellant did not file an objection to the State's Motion for Reconsideration which it filed on August 16, 1994, nor did the appellant object to the Board's July 17, 1995, order scheduling the matter for a hearing on the merits of the appeal.

After reviewing the documents submitted by the parties prior to the hearing and considering the parties' oral arguments and offers of proof, the Board made the following findings of fact and rulings of law:

FINDINGS OF FACT

1. On January 7, 1993, John Bonds, Assistant Director for Planning in the Division of Public Health Services, issued a letter of warning to Charles Sirc, who was then Chief of the Bureau of Vital Records and Health Statistics, for failure to follow established Division of Personnel Rules and for insubordinat'e behavior arising out of the hiring of a part-time employee.

2. On October 4, 1992, Mr. Sirc made an offer of part-time employment to Ms. Sandy Letellier to begin work October 16, 1992 on a 30 hour/per week schedule as a Secretary Typist I in the Bureau of Vital Statistics and Health Records. Ms. Letellier accepted the position on October 4, 1992.

3. On October 6, 1992, four days after ,offering the position to Ms. Letellier, Mr. Sirc submitted a form 170 to his supervisor, John Bonds, requesting approval to fill the part-time secretarial position in his bureau. He also submitted a memorandum to Jan Beauchesne, then the Agency Personnel Officer, requesting approval to fill the position 30 hours per week by hiring Ms. Letellier. Mr. Sirc did not advise Mr. Bonds that Ms. Letellier had been offered, and had accepted, the position and that she intended to start work on October 16, 1992.

4. On October 7, 1992, Mr. Bonds telephoned Mr. Sirc to advise him that hiring Ms. Letellier would be delayed unless he could fund both the salary and benefits associated with the position. Mr. Sirc did not inform his supervisor that he had already made an offer of employment to Ms. Letellier, nor did he withdraw or in any way amend or condition his offer of employment to her upon learning that there were insufficient funds to cover the benefits she would be entitled to receive as a 30 hour/week employee.

5. In response to Mr. Bonds' a request for funding information, Mr. Sirc forwarded to Mr. Bonds a memorandum dated October 8, 1992, outlining the projected costs in class 50 and class 60 funds by adding Ms. Letellier to the staff in the Bureau of Vital Records and Health Statistics.

6. The memorandum was returned to Mr. Sirc requesting further information. Mr. Sirc responded by memorandum to Mr. Bonds dated October 12,1992, in which he identified a projected shortfall of $5905 in the FY 93 5150-060 benefits account. Mr. Sirc concluded his October 12, 1992 memorandum asking, "Can you please pursue the possibility of obtaining unused funds in this class from another account within the budget, as we discussed, or other options that may be available:"

7. Mr. Bonds responded by memorandum dated October 16, 1992, that there were insufficient funds to employ Ms. Letellier, and that her hiring had to be postponed until sufficient funding could be arranged to cover the cost of her benefits as a 30 hour per week employee.

8. Ms. Letellier reported to work on the morning of October 16, 1992, and worked for several hours before being informed by Mr. Sirc at approximately 1:30 p.m. that he would be unable to allow her to continue working until the funding issue had been resolved. He wrote to Mr. Bonds three days later, stating that he had not understood that his Bureau would be unable to hire Ms. Letellier. He stated that the October 16, 1992, memorandum from Mr. Bonds had not been received until that afternoon after Ms. Letellier had already begun working, and that until receiving the memorandum, he had received no written notice advising him that he should not fill the position. He also asked Mr. Bonds for suggestions on how to pay Ms. Letellier for the hours she had worked.

9. By memorandum dated October 19, 1992, Mr. Sirc wrote to Mr. Bonds, complaining that Mr. Bonds had not apprised him until October 16, 1992, that Ms. Letellier could not be hired. He stated, in part, "I am particularly concerned that your decision to not hire was not made clear sooner than today [October 16th]. We did discuss this issue at various times previously. Furthermore, I am not certain how we will pay her for the morning's work she performed. I will be working on the spending plan per your October 16,1992 memo. However, in the interim, do you have any suggestions on how the above work can be performed and by who and how do you intend to pay for the time she worked? I will await your directions in this regard."

10. By letter dated November 23, 1993, Ms. Letellier wrote to Dr. Mehan, then Director of the Division of Public Health Services, advising him that she still had not received payment for the hours she had worked on October 16, 1992. She informed Dr. Mehan that she had been working two other part-time jobs when Mr. Sirc offered her the part-time position, and that she had left those jobs in anticipation of working for the Bureau of Vital Records and Health Statistics until she returned to college in California the following spring. Ms. Letellier also explained that Mr. Sirc had offered her the position on October 2, 1992, and that she had accepted the job on October 4, 1992.

Mr. Hardiman argued that positions are routinely filled without being posted, citing a position at the Department of Transportation and another at the Department of Education which were filled without first being posted. He also argued that a position in the Commissioner's Office at Health and Human Services was filled without posting. He said that part-time positions are not posted as a matter of practice, and that Mr. Sirc should not have received a warning for violating a rule or policy regarding the posting of a part-time position when agencies routinely violate the same provision.

Mr. Hardiman argued that whether or not the warning was valid at the time it was issued, it was unfair to retain the warning in Mr. Sirc's file after it had expired as a basis for further discipline, particularly since Mr. Sirc had enjoyed a long career with the State prior to his moving out of New Hampshire. He argued that it was unfair to use the warning as a means of blocking Mr. Sirc's return to State government should he wish to apply for a job with the State at a later date, since Mr. Sirc had been a long-term employee, and had occupied a highly responsible position at the time of his resignation from State service.

Ms. Platt argued that the issues associated with Mr. Sirc's letter of warning were more complex than had been portrayed by Mr. Hardiman. She argued that Mr. Sirc chose to fill a part-time position when he knew that there were insufficient funds to cover the payment of benefits, and when he knew that his supervisor had not approved hiring anyone to fill the position until the funding issues could be resolved. Ms. Platt also argued that Mr. Sirc deserved a warning for his conduct in that the initial offer of employment to Ms. Letellier was made, and accepted, before Mr. Sirc had even requested permission to fill the part-time vacancy. Ms. Platt argued that the extent of the problem caused by Mr. Sirc's conduct also warranted retaining the warning in his file, in that the woman to whom Mr. Sirc had offered employment gave up two other part-time positions in order to be able to take the job at the Division of Public Health Services, that she was informed on the afternoon after she had reported to work that she could not continue working, and did not even receive payment for the work which she had performed until John Bonds ordered Mr. Sirc to find a means of compensating her.

Ms. Platt agreed that the letter of warning would no longer be effective as a basis for disciplinary action if Mr. Sirc were still an employee of the State. However, she argued that the State had an interest in maintaining the accuracy and integrity of its files. She argued that while the presence of a warning in Mr. Sirc's file would not automatically bar him from employment with the State at a later date, there were some issues of "management style" which had arisen during Mr. Sirc's tenure as Chief of the Bureau of Vital Records and Health Statistics which should remain a part of his record, and which should be available for review by a potential employer in one of the State agencies.

RULINGS OF LAW

A. Per 402.01 (a) of the Rules of the Division of Personnel states, "Whenever a vacancy is to be filled within an agency as defined in Per 101.02, the appointing authority shall post an in-house notice for a period of not less than 5 working days. The posting notice shall be attached to a copy of the class specification for the vacant position..." Per 402.01 (a) does not define "vacancy" as either part-time or full-time, and it is therefore unclear if the Rules require the posting of each and every "position" or only those positions which are considered full-time. Mr. Sirc's failure to "post" the position of Secretary Typist was not, in and of itself, a violation of Per 402.01 (a).

B. The Department of Health and Human Services utilized an internal agency. form 170 when notifying the Personnel Office of a vacancy to be posted, requesting approval to

transfer an employee, requesting permission to fill a position, notifying the personnel office of a termination, requesting approval for employee leaves of absence, and requesting approval for appointment to a position in "acting" status. Completion of the form was an integral part of the hiring process at the Division of Public Health Services. By making an offer of employment to Ms. Letellier prior to requesting approval to fill the part-time position of Secretary Typist, Mr. Sirc violated the Department's procedures for hiring.

C. Per 1001.03 (a) of the Rules of the Division of Personnel states, "An appointing authority shall be authorized to use the written warning as the least severe form of discipline to correct an employee's unsatisfactory work performance ..." As the Chief of the Bureau of Vital Records and Health Statistics, Mr. Sirc was responsible for ensuring proper management of expenditures within the appropriated funds available for operation of his Bureau.

Mr. Sirc's offer of part-time employinent to Ms. Sandy Letellier before receiving approval to hire her, with full knowledge that there were insufficient funds available in his budget to compensate her and pay the cost of her benefits, constituted unsatisfactory work and violated the requirements for filling the position which his supervisor and his department's business office had established under the Rules of the Division of Personnel.

D. Mr. Sirc's behavior following his receipt of Mr. Bonds' October 16, 1992 memorandum was accurately described as "insubordinate" inasmuch as he demonstrated an unwillingness to submit to authority. Mr. Bonds did not claim the appellant to have been "willfully insubordinate", an offense for which an employee may be discharged without prior warning under the provisions of Per 1001.08(b)(6). Instead, Mr. Sirc was reprimanded for his conduct under the provisions of Per 1001.03 (a), which permits an appointing authority to use the letter of warning as the least severe form of discipline to correct an employee's unsatisfactory work performance.

E. Per 1501.03 (a) provides that, "The appointing authority may place any one or more of the following documents in an employee's agency personnel record: ...(6) copies of documents pertaining to disciplinary actions." Per 1501.03 (b) provides that, "The following documents shall be placed in the employee's permanent personnel record at the division of personnel: *(5)* copies of documents pertaining to disciplinary action ... [and] (6) decisions of the personnel appeals board or a court relating to the employee." Accordingly, the agency and the Division of Personnel may maintain information relating to Mr. Sirc's written warning in his personnel record, even though the warning is no longer effective for the purpose of additional discipline.

DECISION AND ORDER

The Board voted unanimously to deny Mr. Sirc's appeal. The Rules provide for the issuance of a written warning as the least severe form of discipline to correct an emvlovee's unsatisfactorv work performance. As Chief of the Bureau of Vital Records and Health Statistics, Mr. Sirc was aware of funding constraints within the agency. He also was aware of steps he was required to take in order to fill the position, ,including his making a request to the Personnel Office at the Department of Health and Human Services. In spite of those facts, Mr. Sirc had made an offer of employment to Ms. Letellier before requesting, or receiving, permission to fill the position. When issues concerning sufficient funding were raised, Mr. Sirc did not advise either his own supervisor or the business office that Ms. Letellier had already accepted the position and would be starting work on October 16, 1992, with or without the funding issues being resolved. As the individual charged with the responsibility of managing his bureau's finances, Mr. Sirc displayed very poor judgement in failing to apprise his supervisor of his offer of employment to Ms. Letellier, and in relying upon Mr. Bonds to locate a source of funding for that position for him.

THE PERSONNEL APPEALS BOARD

Mark J. Bennett, Acting Chairman

Robert J. Johnson, Commissioner

Lisa A. Rule, Commissioner

cc: Virginia A. Lamberton, Director of Personnel
Sandra L. Platt, Administrator, HHS, COAF
Thomas F. Hardiman, SEA Director of Field Operations

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APPEAL OF CHARLES SIRC
Docket #93 -D-22

August 15,1994

The New Hampshire Personnel Appeals Board (McNicholas, Bennett and Rule) met Wednesday, July 13, 1994, to hear the appeal of Charles Sirc, a former employee of the Department of Health and Human Services, Division of Public Health Services, regarding a January 7, 1993 letter of warning issued to him for failure to follow established Division of Personnel Rules and for insubordinate behavior arising out of the proposed hiring of a secretary for'the Bureau of Vital Records. The appellant was represented by Thomas Hardiman, SEA Director of Field Operations. Sandra Platt, Administrator, was the representative of record for the Department of Health and Human Services. Both parties were notified by order dated June 29, 1994, that this matter was scheduled for hearing on Wednesday, July 13, 1994.

On July 6, 1994, Mr. Hardiman filed a "Motion to Dismiss" on behalf of the appellant, asking that the Board dismiss the letter of warning and order that it be removed from the appellant's personnel file. In support of that request, Mr. Hardiman argued that the appellant had separated from State service, that he no longer resided in the New England area, and that because he had filed an appeal of his warning prior to leaving State service, the letter should be removed from his record, allowing him to have a "clear employment record with the State of New Hampshire."

Ms. Platt did not appear for the scheduled hearing. Mr. Hardiman stated that when the parties had received the Board's notice of the scheduling, he had contacted Ms. Platt by telephone to discuss the possibility of having the matter dismissed. He stated that he had offered to file a Motion to Dismiss and that Ms. Platt told him she would support such a motion.

In the absence of an objection from the State, the Board granted the Motion to Dismiss. In so doing, the Chairman noted that the Board would reduce the order to writing and forward it to the parties, allowing the Department of Health and Human Services to file a Motion for

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Reconsideration if there was any misunderstanding between the parties about the substance of the appellant's Motion to Dismiss.

THE PERSONNEL APPEALS BOARD

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Mark J. Bennett, Commissioner

Lisa A. Rule, Commissioner

cc: Virginia A. Lamberton, Director of Personnel
Thomas F. Hardiman, SEA Director of Field Operations
Sandra Platt, Administrator, Health and Human Services