

State of New Hampshire



PERSONNEL APPEALS BOARD
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Appeal of Gregory Ives

Docket #2015-P-002

Department of NH Employment Security

September 9, 2015

The New Hampshire Personnel Appeals Board met in public session on Wednesday, August 12, 2015, under the authority of RSA 21-I:58 and Chapters Per-A 100-200 of the NH Code of Administrative Rules, to hear the appeal of Gregory Ives, the Appellant. The following commissioners sat on this hearing: Charla Stevens, Esq., Norman Patenaude, Esq., and Christopher Nicolopoulos, Esq. The Appellant, who was represented at the hearing by SEA Field Representative Sean Bolton, was appealing his non-selection to the position of Administrator to the Personnel Appeals Board. Assistant Attorney General Elizabeth Mulholland appeared on behalf of the Department of Administrative Services, Division of Personnel (Division).

The representatives of the parties presented their cases on offers of proof. The record of the hearing in this matter consists of pleadings submitted by the parties prior to the hearing and notices and orders issued by the Board. There were no exhibits offered into evidence at the hearing by either party.

Position of the Parties:

The Appellant argued that the Personnel Rules require that the appointing authority fill positions from within the executive branch whenever possible, provided a candidate has the knowledge and capacity for the job. The Appellant asserted that he possessed said knowledge and capacity for the job and the appointing authority's non-selection of him, as an executive branch employee, and the subsequent external posting of the position violated Per 602. The Appellant argued that because he is an executive branch employee and qualified for the position, he should have been selected to fill the Administrator of the Personnel Appeals Board position. The Appellant reviewed his resume for the Personnel Appeals Board and argued that his duties in his position in the executive branch were very similar to the duties and responsibilities listed in the Supplemental Job Description for the Administrator for the Personnel Appeals Board. Essentially, he argued that he was already carrying out similar duties and responsibilities required by the vacancy, simply in a different forum. The Appellant stated that his work evaluations were positive and he was good at his job. As such, he asserted that it was not a reasonable decision not to select him to fill the position, considering his education and work history.

The Appellee does not dispute that the Appellant may be good at his present job. The Appellee did argue, however, that this does not automatically make the Appellant the best fit as the Administrator for the Personnel Appeals Board. The Appellee maintained that the Appellant had the opportunity to demonstrate to the appointing authority that he was the best qualified candidate before anyone outside the executive branch was given the opportunity to do so as the Per Rules dictate. The Appellee asserted that it posted the vacant position "in house" as required Per 402.01 and the Appellant was interviewed before the job was posted outside of the executive branch. The Appellee argued that the Appellant had the opportunity to compete fairly for the position but the appointing authority exercised its discretion and chose not to select the Appellant to fill the position. The Appellee argued that the appointing authority also believed that the Appellant lacked the personal and professional qualifications needed to fulfill all of the responsibilities in

the Supplemental Job Description of the Administrator of the Personnel Appeals Board, and that the appointing authority acted within its' discretion when it did not select the Appellant for the vacant position.

Having carefully considered the arguments offered by the parties, the Board made the following findings of fact and rulings of law.

Findings of Fact:

1. The Appellant applied for the position of Administrator to the Personnel Appeals Board while he was employed by the New Hampshire Employment Security Appeal Tribunal Unit.
2. The Appellant was "certified" as an internal candidate from the executive branch, meaning he met the minimum qualifications required for the position.
3. The position was posted within the executive branch prior to any external posting of the vacant position Per 402.01.
4. The purpose of Per 402.01 is to allow an executive branch employee to apply for a vacant position before recruitment is initiated outside of the executive branch.
5. The Appellant was interviewed prior to the external posting of the position but was not selected to fill the position.
6. The Appellant received notice on March 30, 2015, by way of correspondence, that he had not been selected to fill the position.
7. The position was posted externally on April 6, 2015.
8. The Appellant appealed his non-selection on April 10, 2015.

Rulings of Law:

- A. Per 402.01(a) requires that whenever a vacancy is to be filled the appointing authority shall post the position in house within the executive branch for a period of time of not less than 5 working days.
- B. Per 402.01 (b) states that the purpose for posting the position in-house for a period of 5 working days shall be to allow executive branch employees to apply for a vacant position.

- C. Per 602.02 (a) states: Whenever possible, selection by the appointing authority to fill a vacancy shall be :
- (1) Made from within the executive branch; and
 - (2) Based upon the employee's :
 - a. Possession of the knowledge, skills, abilities and personal characteristics listed on the class specification for the vacant position; and
 - b. Capacity for the vacant position as evidenced by documented past performance appraisals
- D. Per 602.02 (c) states that candidates may be denied selection if, in the opinion of the appointing authority, they are deemed to lack personal or professional qualifications for appointment to the position.
- E. Per 602.03 states that when a vacancy is not filled by selecting an employee within the executive branch, the appointing authority shall notify the director of its intent to commence external recruitment pursuant to Per 404.

Standard of Review:

The NH Code of Administrative Rules, Per-A 207.12 (c), states:

“In appeals involving denial of promotion or selection to a vacancy, the board shall determine if the appellant proves by a preponderance of the evidence that the decision was unreasonable or unlawful because:

- (1) The appellant met the minimum educational and work experience requirements for selection to the vacancy;
- (2) The appellant possessed the personal and professional qualifications for selection to the vacancy; and
- (3) The appointing authority abused its discretion by denying selection to the person best qualified for selection to the vacancy, or that the non-selection decision was unlawful”.

Discussion and Order:

The Appellant argued that his non-selection violated the Personnel Rules because he was qualified for the position and the Rules require that if an executive employee is so qualified then the appointing authority must select an “in house” candidate and need not recruit for the vacancy outside of the executive branch. The Board disagrees. The Personnel Rules grant substantial discretion to an appointing authority to select a candidate who it believes is the best fit for the position and the Board will generally not substitute its judgment for that of the appointing authority. There is no mandate in the Personnel Rules that an appointing authority must hire from within the executive branch. There was no evidence or arguments presented that persuaded the Board that the appointing authority abused its discretion or that the decision not to hire the Appellant was unreasonable or unlawful.

Since the Board was able to reach a decision based upon the appointing authority’s entitlement to use discretion when hiring, the Board need not address the Division’s argument that the Appellant lacked the personal and professional qualifications for the job.

Absent evidence and argument to demonstrate that Mr. Ives’ non-selection was unreasonable or unlawful, the Board voted unanimously to DENY Mr. Ives’ appeal.

THE PERSONNEL APPEALS BOARD

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