

# State of New Hampshire



## PERSONNEL APPEALS BOARD

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### Appeal of Trooper John Cody

#### NH Department of Safety -- Division of State Police

Docket #2004-P-003

August 22, 2005

The New Hampshire Personnel Appeals Board (Wood, Johnson, Bonafide, and Reagan)<sup>1</sup> met in public session on Wednesday, June 22, 2005, to hear the appeal of John Cody, an employee of the Department of Safety, Division of State Police. The matter was originally scheduled for hearing on May 25, 2005, then postponed at the request of the parties. The appellant, who was represented at the hearing by Attorney James Donchess, was appealing his non-selection for promotion. Attorney Marta Modigliani appeared on behalf of the Department of Safety.

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 and memoranda submitted by the parties, the audio tape recording of the hearing on the merits of the appeal, and documents admitted into evidence. The documents were marked as follows:

#### State's Exhibits (as described by the State)

1. Cody Timeline
2. State Police Sergeant Classification
3. Sergeant Postings
4. August 8, 2003, notification pursuant to Per 602.02
5. Step I Grievance
6. Step II Grievance

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<sup>1</sup> With the agreement of the parties, the Board sat *en banc*.

7. Step III Grievance
8. Step IV Grievance
9. Sergeant Promotional Vacancy Posting
10. PSU-03-016
11. PSU-03-019
12. Pool of Applicants' Recommendation for Sergeant Positions
13. Performance Evaluation of 9/19/03
14. Performance Evaluation of 2/19/04
15. Performance Evaluation of 2/8/05
16. Commander Endorsement of Lieutenant Welch for Troop B Sergeant
17. Performance Evaluation of 9/19/03
18. Performance Evaluation of 2/19/04
19. Performance Evaluation of 2/8/05 .
20. Commander Endorsement of Lieutenant Welch for Troop B Sergeant

Appellant's Exhibits

- A. Photocopy of a transmittal to "John" from Lieutenant David J. Eastman
- B. Endorsement of Commander, Lieutenant Eastman, dated 16/21/2001, for John M. Cody for a vacancy for Troop D Uniform
- C. Performance Summary, with attachments, dated 9/19/2003
- D. Endorsement of Commander, Mark Mudgett, dated 5/21/03, for John M. Cody for a vacancy in Troop B
- E. Memo from TFC John M. Cody to Colonel Gary M. Sloper dated 5/22/2003
- F. Professional Standards of Conduct, Directive Number G0.35.001 effective January 1, 1994
- G. Email message from Marta Modigliani to James Donchess concerning records of recommendations for promotion

Attorney Donchess objected to admission of State's Exhibit 1, arguing that the State's timeline included events that took place after the decision not to promote Trooper Cody and events after the appellant filed a complaint regarding animus on the part of Lieutenant Conte. Because they were after-the-fact, he argued, they were not relevant to an August 2003 decision not to select him for promotion. He further argued that the appellant objected to anything beyond the date of the non-selection decision. He argued that because of his complaint, the appellant received a recommendation in September 2003. He said that the appellant did not object to the performance evaluation completed in September 2003, but would object to the relevance of evaluations in 2004 and 2005.

Attorney Modigliani argued that according to the appellant, but for the animus of Lieutenant Conte, he would have been considered the most qualified candidate for promotion. She argued that after the appellant's transfer from Major Crime to Troop B, he received annual evaluations, and a lieutenant other than Lieutenant Conte made the same recommendation that Lieutenant Conte had made. To the extent that there was an allegation of animus, she argued, events occurring after the promotional decision were very relevant.

Attorney Donchess argued that the Division of State Police failed to evaluate the appellant's performance for more than a year, and in doing so, failed to provide the documents by which the appellant's past performance could be properly judged. He argued that by failing to evaluate the appellant's performance, the Division of State Police also failed to apprise the appellant of any shortcomings they may have perceived and did not then give him an opportunity to correct his work performance. Finally, he argued that the appellant's supervisor doomed the appellant's application for promotion, as no one in the Division of State Police was ever promoted who was not "recommended with confidence." Attorney Modigliani admitted that the appointing authority did not provide the appellant with written performance evaluations, but argued that the absence of an evaluation was not the reason the agency did not select the appellant for promotion.

The Board decided that the question of animus might be more appropriate in a claim of damages. With respect to the decision that was made, however, the Board decided to limit its review of State's Exhibit 1 to those events that preceded the decision not to select.

Attorney Donchess indicated that State's Exhibits 2-13 could be admitted without objection, although the appellant objected to State's Exhibits 14, 15, 16, because they post-dated the non-selection decision.

The Board decided to admit State's Exhibit 1 subject to the limitation described above. State's Exhibits 2-13 were admitted without objection. The Board voted to hold State's Exhibits 14-16, to which the appellant objected as irrelevant to the issues at hearing, unless they were later shown to be relevant.

Attorney Modigliani objected to Appellant's Exhibits A and B as irrelevant to the promotional qualifications on appeal. She argued that they related to a posting two years prior to the postings at issue on appeal.

Attorney Donchess argued that the exhibits were relevant, because they supported the appellant's contention that things were fine and the appellant was recommended for promotion to Sergeant before Lieutenant Conte arrived. When Lieutenant Conte came in, things changed dramatically, he argued, because of Lieutenant Conte's anti-union animus. He argued that the previous lieutenant had recommended the appellant for promotion; afterwards, with Lieutenant Conte making the recommendations, the appellant saw his career "fall apart." Attorney Donchess argued that when the appellant applied in May 2001 for promotion to supervising Sergeant of Road Troopers, he was recommended with confidence, whereas in August 2003, he was not recommended with confidence for three positions with the same classification and duty assignments.

The Board decided to hold Appellant's Exhibits A and B in abeyance unless and until they could be shown to be relevant to the issue at hand.

The State had no objection to Appellant's Exhibit C, but objected to Appellant's Exhibits D and E. Attorney Donchess argued that Appellant's Exhibits D and E showed Lieutenant Conte's animus toward the appellant.

To the extent that Appellant's Exhibits D and E deal with the issue of alleged animus, the Board agreed to admit them. Attorney Modigliani renewed her objection and reasserted that the State should then be allowed to offer its evidence of recommendations from

another lieutenant that were similar to the recommendations Lieutenant Conte had made. The Board noted that objection. The Board then admitted Appellant's Exhibit F and G without objection.

After considering the evidence, arguments and offers of proof, the Board made the following findings of fact and rulings of law:

Findings of Fact

1. In June, 2003, the appellant made application for promotion to five separate positions of Sergeant. Because the positions vary by both location and assignment, the supplemental job descriptions for those positions are slightly different from one another.
2. When an officer applies for promotion, his troop commander makes a recommendation with respect to the application and forwards to the command staff his/her assessment of the applicant as "not recommended," "recommended," or "recommended with confidence." For each of the positions, Lieutenant Conte gave the appellant a promotional assessment of "recommended."
3. Consistent with their promotional process, upon receipt of all promotional candidates' applications, State Police Command Staff review and discuss the applications, ultimately making up to three recommendations per posted position to the Colonel.
4. In making their recommendations, Command Staff will sometimes consult the candidates' supervisors. If a unit commander attempted to sabotage a promotion, one of the Captains on the Command Staff or the Colonel himself could call to see why the recommendation for that particular candidate was different from what they would have expected.
5. Once the Colonel has received the Command Staff's recommendations, he conducts his own review and makes his recommendations to the Commissioner. To the surprise of the Board, the testimony revealed that Colonel does not have the authority to make the final selection decision.

6. The Division of State Police did not provide Trooper Cody with the required annual performance evaluations.
7. Trooper Cody was aware of performance issues that might have been recorded on a written performance evaluation, as he had been counseled by his own commander and Colonel Sloper, and had what Sergeant Mudgett would describe as lion-disciplinary counseling and frequent "venting sessions."
8. The appellant was entitled to have his performance formally evaluated. However, an outstanding assessment of his performance in the position he held at the time of his application for promotion would not necessarily guarantee him a promotion.
9. Competition for promotion to sergeant is intense. There were approximately forty applicants for promotion to five vacancies. Some officers applied for promotion to only one of the vacancies; others applied for promotion to any of the five vacancies.
10. There are frequently candidates who are "recommended with confidence" who are not successful in their application for promotion.
11. Apart from his assertion of anti-union animus, there is no evidence to support the appellant's assertion that he would have been promoted but for Lieutenant Conte's failure to assess him as "recommended with confidence."
12. The appellant received notice, by letter dated August 8, 2003, that he was not selected for promotion. In his letter, Captain Wiggin wrote, "Although you possess many excellent qualifications, they do not meet the needs of the Division for the particular position or positions for which you applied and accordingly you were not selected."
13. At the time he applied for promotion, Trooper Cody had more than sixteen years of experience as a member of the Division of State Police. His experience included assignments to patrol, canine, and major crime units. He has four years experience as a military police officer, is a certified paramedic, and holds an associate's degree. He currently works executive security for the governor.

#### Rulings of Law

- A. According to Per 602.02 (a) of the NH Code of Administrative Rules (Rules of the Division of Personnel), "Whenever possible, selection by the appointing authority to

fill a vacancy shall be made from within an agency and shall be based upon the employee's: (1) Possession of the knowledge, skills, abilities and personal characteristics listed on the class specification for the vacant position; and (2) Capacity for the vacant position as evidenced by documented past performance appraisals." Although the Division of State Police failed to provide the appellant with timely or regular written performance appraisals, he was cognizant of how his performance was assessed by his supervisors and members of the Command Staff.

- B. Per 602.02 (c) of the NH Code of Administrative Rules (Rules of the Division of Personnel) directs the appointing authority to select "The most qualified candidate for the position, in the opinion of the appointing authority..."
- C. According to Per 602.02 (d) of the NH Code of Administrative Rules (Rules of the Division of Personnel), "Candidates may be denied selection if, in the opinion of the appointing authority, they are deemed to lack personal or professional qualifications for promotion."
- D. Per 602.02 (e) provides that, "If an employee is not selected after applying for a posted position, the appointing authority shall notify the employee in writing and shall state the reason(s) why the employee was not selected." Captain Wiggin's letter of August 8, 2003, provides the required notification.
- E. In accordance with Per-A 206.12 (c) of the NH Code of Administrative Rules (Rules of the Personnel Appeals Board), "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..."

### Decision and Order

While the Board agrees that the Division of State Police was required, as a matter of rule and law, to provide the appellant with regular and timely written evaluations of his performance, their failure to do so does not automatically entitle him to promotion. The evidence reflects that the appellant received counseling and was aware of why the

Division might have considered him less qualified for promotion than some of the other candidates.

On all the evidence, the appellant failed to persuade the Board that the Division of State Police acted unreasonably or unlawfully in denying him promotion to the rank of Sergeant. The evidence clearly reflects that there were a substantial number of applicants for very few promotional vacancies. The appellant failed to persuade the Board that he was clearly the most qualified candidate for one or more of those positions, or that the agency abused its discretion in denying him promotion.

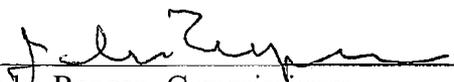
Accordingly, the Board voted unanimously to DENY the appeal.

THE PERSONNEL APPEALS BOARD

  
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Patrick Wood, Chair

  
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Robert Johnson, Commissioner

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Philip Bonafide, Commissioner

  
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John Reagan, Commissioner

cc: Karen Levcliulc, Director of Personnel  
Attorney James Donchess  
Attorney Marta Modigliani