

State of New Hampshire



PERSONNEL APPEALS BOARD
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APPEAL OF BRENDA CONNOLLY
DOCKET #98-P-6
NEW HAMPSHIRE STATE DEPARTMENT

October 15, 1998

The New Hampshire Personnel Appeals Board (Rule, Johnson, and Wood) met on July 22, 1998, and August 19, 1998, under the authority of RSA 21-I:58, to hear the appeal of Brenda Connolly, an employee in the Secretary of State's Office. Ms. Connolly, who was represented at the hearing by Attorney John Vanacore, was appealing her non-selection for promotion to the position of Records Control Clerk. Assistant Attorney General Martha Moore appeared on behalf of the State. The appeal was made on offers of proof by the representatives of the parties.

The record in this matter consists of the audio tape recording of the hearing, notices issued by the Board, pleadings received from the parties, and documents admitted into evidence as follows:

Appellant's Exhibits

- 1 Performance Summary for Brenda M. Connolly dated August 15, 1995

State Exhibits

- A Memorandum with attachments dated January 23, 1998 announcing job posting
- B Records Control Clerk Job Application of Brenda Connolly
- C Records Control Clerk Job Application of Julie Place

- D Records Control Clerk Job Application of Jacqueline Tocci
- E Records Control Clerk Job Application of Gail Fraser
- F Records Control Clerk Job Application of Diane Blad
- G Job Description for Records Control Clerk
- H March 4, 1998 letter to Brenda Connolly listing reasons for non-selection
- I February 12, 1998 letter from Brenda Connolly requesting the reasons for non-selection
- J Job Description for Word Processor Operator I
- K Memorandum of June 13, 1995 from Gloria Fournier to Brenda Connolly, Julie Place and Dianna Northcott
- L June 19, 1998 letter from Anthony B. Stevens to Personnel Appeals Board Re: Brenda Connolly
- M June 24, 1998 letter signed by Jane E. Northcott

The State filed a Motion to Seal Exhibits, requesting that the Board seal the employment applications of the five employees, including the appellant, who had applied for promotion to the position of Records Control Clerk. In support of that motion, the State argued that applications are confidential records not subject to public inspection. The State requested that the Board protect those records and prohibit their dissemination to anyone other than appellant's counsel.

The Board noted that its records are generally open to inspection by the public, and that it rarely grants requests to seal any part of the record. However, in this instance, in the absence of any objection from the appellant, the Board granted the motion.¹

The State also asked the Board to rule on its pending Motion to Dismiss in which it argued that Ms. Connolly's appeal was untimely and failed to specify grounds of appeal. For the reasons set forth below in its Decision and Order, the Board voted unanimously to deny that motion.

¹ Usually, instead of requesting that the Board seal some or all of the record, parties will ask the Board to receive such evidence with personally identifying information redacted.

Having considered the documentary evidence, oral argument and offers of proof, the Board made the following findings of fact:

1. By memorandum dated January 23, 1998, Robert P. Ambrose, Deputy Secretary of State, posted notice of two positions to be filled within the department: Records Control Clerk position #11365 and Clerk III, position #8T001.
2. Ms. Connolly was one of five applicants for the position of Records Control Clerk who were certified as meeting the minimum qualifications for consideration.
3. On February 10, 1998, Ms. Connolly received verbal notification from Gloria Fournier, Administrative Assistant, that she had not been selected for promotion.
4. On February 12, 1998, Ms. Connolly submitted to Ms. Fournier a written request for a letter explaining why she had not been selected for the position.
5. In a letter dated March 4, 1998, Ms. Fournier and Deputy Secretary of State Robert Ambrose wrote to Ms. Connolly that she had not been selected for promotion because of her "inability to complete work in the Uniform Commercial Code Division and the work expected of [her] on trade names in the Corporation Division and because of [her] unprofessional behavior which [they] had discussed on several occasions." The letter stated, "...it was felt that [she] lack[ed] the personal and professional qualifications for promotion."
6. Throughout her employment in the Secretary of State's Office, Ms. Connolly received only one performance evaluation.
7. The single performance evaluation received by Ms. Connolly on August 17, 1995, rated Ms. Connolly as meeting expectations in all categories, including quantity of work, quality of work, job knowledge, communications, dependability, cooperation, initiative, safety, and appearance.
8. Ms. Fournier wrote in the August, 1995, performance summary for quantity of work, "This position does not allow much opportunity to do other work but she [Ms. Connolly] is willing when asked to do other assignments."
9. Under quality of work Ms. Fournier wrote, "Uniform Commercial Code filings have recently begun to be converted to an imaging system. She (Ms. Connolly) is very interested and helpful in this project. Because of the conversion, the workload is very heavy."

10. For the category of job knowledge, Ms. Fournier wrote, "Because of the heavy workload, she (Ms. Connolly) has not had an opportunity to be involved in the data entry for the conversion. We hope to have her more involved as the project progresses if enough support staff is available."
11. In that section of the evaluation provided for "...additional comments job related and specific to job performance," Ms. Fournier wrote, "Takes a genuine interest in doing her work and relates well with other employees and the general public. This position requires a lot of contact with the public in person and by telephone. She is courteous and helpful when assisting the public."
12. In a letter addressed to the Board dated June 19, 1998², Assistant Secretary of State Anthony Stevens wrote that he regularly observed and had an opportunity to assess the work process and output of the UCC office staff over a three year period from 1995 to the present.
13. The appellant made an uncontroverted offer of proof that during the time that she was assigned to the UCC office, Mr. Stevens had not visited her work area more than a half-dozen times.
14. In his June 19, 1998 letter, Mr. Stevens wrote that he had recommended staffing changes in that office because Ms. Connolly "...was not pushing to get required work done promptly, and that her output was not satisfactory."
15. That assessment is inconsistent with the performance review signed by both Ms. Fournier and Deputy Secretary of State Robert Ambrose in August, 1995, and there is no evidence that Ms. Connolly received notice any time thereafter that her work product was unacceptable.
16. In an unsworn statement dated June 24, 1998, Administrative Assistant Jane Northcott related several incidents, some dating back at least as far as 1996, in which the appellant demonstrated poor judgment, poor communications skills, lack of tact, and a volatile temper. Ms. Northcott wrote, "It was also my opinion that Brenda should not be selected for the Records Control Clerk position. I believe the right persons were selected for the benefit of the office."

² The Board has no record of correspondence received from Mr. Stevens prior to August 14, 1998, when his letter, marked as Defendant's Exhibit L, was received from Assistant Attorney General Moore.

17. One of those selected was Ms. Northcott's daughter.

Rulings of Law

- A. "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." Per 602.02 (a)
- B. "The most qualified candidate for the position, in the opinion of the appointing authority, shall be selected from designated groups of employees..." Per 602.02 (b)
- C. "Candidates may be denied selection if, in the opinion of the appointing authority, they are deemed to lack personal or professional qualifications for promotion." Per 602.02 (c)
- D. "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 reasons why the employee was not selected." Per 602.02 (d)
- E. RSA 21-I:42, XIII provides for performance evaluation of classified employees as follows:
 - a) All full-time classified employees shall be evaluated on a regular basis.
 - b) Evaluations shall be in writing and shall be conducted at least annually.
 - c) Evaluations shall be conducted by an employee's immediate supervisor.
 - d) Evaluations shall be based upon specific written performance expectations or criteria developed for the position in question and employees shall be made aware of these performance expectations in advance of any evaluation.
 - e) The evaluation format shall include a narrative summary on the employee's performance.
 - f) Employees shall be permitted to participate in the evaluation process, shall be given a copy of their evaluation, and shall have an opportunity to comment, in writing, on their evaluation, and such comments will be included in the employee's permanent record.
 - g) Employees shall have a right to nonconcur, in writing, with their evaluation.
 - h) Employees shall certify, in writing, that they have reviewed their evaluation.
 - i) Evaluation reports shall be reviewed by the supervisor of the official completing the evaluation who shall concur or nonconcur in writing with each evaluation report.
- F. "The employee's supervisor shall rate an employee's performance as 'meets' expectations' when the employee has met job-related requirements satisfactorily. If the employee performs above expectations, the supervisor shall explain in the narrative section reserved for

comments what additional, unexpected work the employee has performed and how this work has contributed to the success of the goals of the agency." Per 801.02 (a)(1)

- G. "The employee's supervisor shall rate an employee's performance 'below expectations' when the employee has not met job-related requirements satisfactorily and shall be required to make immediate improvement. The supervisor shall explain in the narrative section reserved for comments what action the employee shall be required to take to improve performance and how this action relates to the requirements of the position as stated in the employee's supplemental job description." Per 801.02 (a)(2)

Ruling on State's Motion to Dismiss

In its Motion, the State argued that RSA 21-I:58, I accords employees who are affected by any application of the personnel rules a right to appeal to the personnel appeals board within 15 days of the action giving rise to the appeal. The State argued that Ms. Connolly had verbal notice of non-selection on February 10, 1998, and had fifteen days from that date in which to file a timely appeal. The State further argued that the March 4, 1998, letter to Ms. Connolly was merely to provide her with "the written reasons for her non-selection," and did not constitute an action subject to appeal under the provisions of RSA 21-I:58. Therefore, the State argued, Ms. Connolly's appeal rights expired on February 25, 1998, and an appeal filed any time thereafter must be dismissed as untimely. The Board does not agree.

Per 602.02(d) reads as follows: "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 reasons why the employee was not selected." In this instance, the appointing authority failed to provide timely written notice of non-selection or the reasons therefor as required by Per 602.02(d) until March 4, 1998. Therefore, the Board found Ms. Connolly's March 11, 1998, appeal, filed within fifteen days of the March 4, 1998, notice of non-selection, to be timely.

The State also asked the Board to dismiss the appeal because of the appellant's, "...fail[ure] to provide any grounds for challenging the decision to promote another candidate to the position of Records Control Clerk." In support of that request, the State argued that under Per-A 202.01 (b) of the Board's Rules, a properly filed appeal must state the action complained of and contain a detailed description of why the appellant believes the action was inappropriate.

Ms. Connolly's appeal was filed with the Board and with Secretary of State William Gardner on March 11, 1998. Attached thereto was the March 4, 1998, letter to Ms. Connolly advising her that she had not been selected for promotion. The parties to the appeal were notified by order dated June 27, 1998, that the matter had been scheduled for a hearing on July 22, 1998, on the merits of her appeal of non-selection for promotion. The State's Motion to Dismiss was not received in the Division of Personnel until the scheduled date of hearing. In light of the more than four months that elapsed between the filing of Ms. Connolly's appeal and the first scheduled hearing date, the Board found the State's Motion to be untimely.

Furthermore, Per-A 201.03 of the Board's Rules provides that, "In the interest of expediting a hearing, or for other good cause, the Board may, unless otherwise precluded by law, suspend the requirements or provisions of any rules in this Chapter on application of a party or on the Board's Motion." In light of the State's failure to comply with the provisions of RSA 21-I:42 XIII generally and with Per 602.02 (c) of the Rules of the Division of Personnel, the Board found that dismissing the appeal for lack of specificity would not be equitable or just. Accordingly, the Board voted to deny the State's Motion to Dismiss.

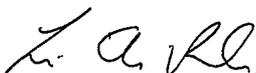
Decision and Order

Although there is evidence of discussions between Ms. Connolly and her supervisors about deficiencies in her work, the evidence reflects that the appointing authority failed to carry out its statutory obligation to provide the appellant, at least once annually, with a written evaluation of her job performance. It is not surprising that Ms. Connolly believed that a personality conflict between herself and her supervisor was the only impediment to her receiving a promotion. An

agency's failure to apprise employees of deficiencies in their performance, and to offer them both constructive criticism and positive feedback is all but inexcusable. Even if there were no statute or administrative rule mandating annual performance evaluations, sound management practice alone requires nothing less. The State's employees are a valuable resource. When they are poorly managed, their value to the State as an organization is diminished. When employees have occasion to question the integrity of the selection system in large part because of the agency's failure to meet its own statutory obligations, the system itself is diminished. The agency's representation that it simply does not do written performance evaluations is unacceptable.

Appointing authorities, however, have broad discretion in determining which candidates are best qualified for selection to any vacancy. Ms. Connolly failed to offer any evidence that her qualifications, either personally or professionally, exceeded those of the successful candidate. Therefore, on the evidence, argument and offers of proof, the Board voted unanimously to deny Ms. Connolly's appeal.

THE PERSONNEL APPEALS BOARD



Lisa A. Rule, Acting Chairperson



Robert J. Johnson



Patrick H. Wood

cc: Virginia A. Lamberton, Director of Personnel
Martha Moore, Assistant Attorney General
William Gardner, Secretary of State
Attorney John Vanacore