

State of New Hampshire



PERSONNEL APPEALS BOARD
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APPEAL OF STEVEN P. DUBOIS ***DEPARTMENT OF TRANSPORTATIONS***

Docket #2003-P-001

September 17, 2003

The New Hampshire Personnel Appeals Board (Wood, Johnson and Rule) met on Wednesday, November 13, 2002, under the authority of RSA 21-I:58, to hear the appeal of Stephen Dubois, an employee of the Department of Transportation who was appealing his April 18, 2002 notification of non-selection for promotion to the position of Administrator, Bureau of Construction. Attorney Shawn Sullivan appeared for the appellant. Attorney Margaret Fulton, Assistant Attorney General, appeared on behalf of the Department of Transportation.

The record of the hearing in this matter consists of pleadings submitted by the parties prior to the hearing, the audio tape recording of the hearing on the merits of the appeal, notices and orders issued by the Board, and documents admitted into evidence as follows:

State's Exhibits

1. Supplemental Job Description for Civil Engineer VII #20071, (with attachments),
2. Memo from Fran Buczynski dated February 22, 2002, request to post position
3. Response memo from JoAn Bunten on request to post position, dated March 4th, 2002
4. Departmental posting for the position CE VII #20071
5. Copy of Rules of Personnel Chapters 400, 500, 600, and Department Of Transportation Policy 201.08
6. Application log sheet and certification for the position CE VII #20071
7. Cover memo to the appointing authority, from Maureen Arsenault dated March 14, 2002
8. Interview questions and scoring sheet and certification for M. Dubois, dated April 4, 2002

9. Affidavit of Robert Greer with attached memo from David Brillhart dated April 8,2002
10. Affidavit of David J. Brillhart
11. Affidavit of Theodore Kitsis
12. Memo from David Brillhart to Robert Greer, dated April 8,2002, giving a summary of the interview with M. Dubois

Attorney Sullivan objected to the introduction of Affidavit # 9, as a self-serving statement. The Board overruled the objection and admitted Affidavit #9, for the purpose of explaining M. Greer's understanding of the Rules of the Division of Personnel that he had to follow to make the decision to select a candidate for the position.

Attorney Sullivan then objected to the introduction of Affidavit #10 because he argued that M. Brillhart's notes were already introduced in Exhibit #8. The board overruled the objection and admitted Affidavit #10, for the purpose of showing M. Brillhart's understanding of the decision process for selection of the candidates, and explaining the numbering and comments used on the memorandum that he had previously presented, introduced as Exhibit #8.

Attorney Sullivan objected to the introduction of Affidavit #11, on the basis that it was lacking credibility. The board overruled the objection and accepted Affidavit #11 into evidence.

Appellant's Exhibits

- A. Letter to M. Greer from M. Dubois dated May 2,2002, as the original appeal of the non-selection decision.
- B. Letter to Commissioner Murray from M. Dubois dated May 20,2002.

The State objected to the introduction of Appellant's Exhibits A and B, as irrelevant. The board overruled the objections and admitted the exhibits into evidence.

Appellant Dubois argued that the case raised four issues:

- The appointing authority ignored the results of the interview and selected someone that was actively solicited after the posting was closed,
- The selection process violated the Division of Personnel Rules and DOT Policy 201.08,
- The appointing authority failed to provide due process when DOT refused to release the selection committee's memorandum when requested in April 2002,
- The appointing authority engaged in pre-selection by actively soliciting the application of the successful candidate.

Attorney Fulton stated that the 4 issues were intertwined and therefore addressed together in the offers of proof. She then stated that M. Dubois was an employee of DOT as a Civil Engineer VI. He was a supervisor of systems planning and was appealing his non-selection for Administrator of the Bureau of Construction (Civil Engineer VII, Position #20071), selected in April 2002.

Attorney Fulton argued that 4 employees, including M. Dubois, timely applied and were certified for this position. The posting was made following the procedures of Per 400 of the Rules of the Division of Personnel and proper applications were completed by all 4 employees, then forwarded to Robert Greer, the appointing authority (exhibits 4, 5, 6). The State argued that the examination of the applications was made in compliance with Per 501.06, via structured interviews, and all applicants were asked the same questions and scored accordingly (exhibit 8).

Attorney Fulton argued that prior to the structured interview, the appointing authority did not give any information to any of the candidates to avoid any unfair advantage, even though he was approached by more than one candidate for specific information regarding the position.

The Department admitted that some co-workers or superiors may have given encouragements to one or more candidates, but argued that it did not violate the Personnel rules or represent pre-selection of that candidate. The Department also admitted that M. Greer had encouraged Theodore Kitsis to apply for the vacant position. M. Greer nevertheless allegedly understood that the entire selection process was necessary and that he needed to consider all 4 candidates under Per 600.

Attorney Fulton also argued that M. Greer was no longer with the state having retired in June 2002, and therefore could not have been expecting any benefits from pre-selecting or soliciting anyone, and would have gained nothing by placing a particular person in the vacant place instead of M. Dubois. M. Greer was with the DOT for 29 years and was Director for 12 years. She argued that the appointing authority found the recommendation from the interviewing committee to be weak at best, based on the information contained within their memorandum. She argued there was no bias on his part, in the selection of the candidate.

Attorney Fulton, citing Affidavit #10, argued that M. Brillhart, Chairman of the Interviewing Committee was working with the appointing authority as assistant director and understood the selection criteria involved in the process of choosing a candidate.

Attorney Fulton, citing affidavit #11, argued that M. Kitsis, the selected candidate, had timely applied and was a qualified candidate. She argued that he was an employee of DOT for 10 years and had not been pre-selected or actively solicited by the appointing authority for the position.

Attorney Fulton argued that the Committee did not reach any definitive conclusion as to which candidate was the best qualified, and let M. Greer know that no candidate stood out from the others. The Committee also recommended that the appointing authority conduct further interviews of the candidates, because the recommendation was so indefinite.

Attorney Fulton argued that all 3 non-selected candidates were notified systematically of the non-selection and had been judged on the same criteria. M. Greer apparently relied on the fact that none of the other applicants had the management or leadership skills that the selected candidate had, thus qualifying him for the position.

Attorney Fulton then argued that under Per 602.02 (e) of the Rules of Personnel and Section 16.3 of the Collective Bargaining Agreement, the appointing authority must provide a written notice to the non-selected candidates, with the reasons for the non-selection. She then stated that under Per 202.02 however, there was no requirement for the communication of the commission's memorandum to the non-selected candidates. There was due process in this procedure.

Attorney Fulton argued that the selection was hard because all candidates were working for the department for at least 10 years and had qualified backgrounds for the position. They were independently certified as being qualified for this position.

Attorney Fulton argued that according to the grading sheet from the Selection Committee, M. Dubois did not get the highest score overall, after the interview. The appointing authority followed Per 602 and DOT Policy 201.08, she said, by choosing a suitable candidate based upon a review of the written application, prior work history, evaluations, attendance history, abilities and personal professional attributes of the candidates. Attorney Fulton indicated that the notice of non-selection sent to M. Dubois explained that the appointing authority selected the candidate who he thought had better traits and skills at that time.

Attorney Fulton argued that the structured interview represents only one part of the total review of a candidate's qualification for the position. Moreover, there was no requirement in DOT Policy 201.08 that the appointing authority must rely solely on the committee's recommendation. It would have negated the opportunity for the appointing authority to give his opinion and exercise his discretion. Attorney Fulton added that it was within the discretion of the appointing authority as to who was the most qualified candidate. She also noted that under Per 602.02, a candidate may be denied selection if, in the opinion of the appointing authority, they are deemed to lack personal or professional qualification for the promotion. The appointing authority also had to consider what was in the best interest of the department, she said.

Attorney Fulton argued that the burden of proof in this action was on M. Dubois to show that he should have been awarded this promotion; nevertheless, he could not provide any evidence that the appointing authority's decision not to select him was arbitrary, done with malice, in bad faith or was unlawful.

Attorney Fulton argued in conclusion, that the rules were followed and M. Greer, as the appointing authority, had the discretion to select the person who in his professional opinion was the most suitable candidate for the position.

The DOT requested that the selection of the other candidate be upheld and the appeal be denied.

Attorney Sullivan argued for the Appellant that this was a case where the appointing authority abused his discretion in denying selection to the most qualified person.

Attorney Sullivan argued that there was abuse of discretion from M. Greer in selecting M. Kitsis, who, he suggested was not the most qualified person. Attorney Sullivan proposed to demonstrate that all the basic steps of the selection were only *pro forma* because the authority actually pre-selected the candidate.

Attorney Sullivan argued that the position was a Civil Engineer VII, salary grade 34 and represented a \$6,000 salary raise for M. Dubois. Appellant worked in the Bureau of Construction for 8 ½ years and he stated that the promotion would have been a logical step forward for him, whereas M. Kitsis, the selected candidate, did not have any experience within the bureau.

Attorney Sullivan argued that Bruce Marshall, a member of the Interviewing Committee, rated M. Dubois 1st over M. Kitsis 4th and Jim Marshall rated appellant 2nd over M. Kitsis, 4th. M. Brillhart was the only one that gave a tie between both candidates with a number 1 rating. Attorney Sullivan argued that in consideration of all the ratings, the least qualified person was selected for the position, M. Kitsis.

Attorney Sullivan argued that there was no evidence to negate the recommendation by the committee to promote M. Dubois for the position. Attorney Sullivan argued that there was no recommendation for M. Kitsis and the assessment of his qualifications was much weaker than the one for M. Dubois.

Attorney Sullivan noted M. Kitsis' declaration stating that he put his application in because "he was told to". He argued that there was no reasonable explanation for what trumped M. Dubois' qualification. In the absence of such evidence, he argued, the Board should conclude that there was an abuse of discretion in this decision.

Attorney Fulton answered by repeating that the appointing authority had absolutely nothing to gain from this decision, there was no pre-selection, and M. Greer would not have wanted to leave on such a bad note after 29 years of service. Attorney Fulton argued that there was no evidence showing lack of credibility of M. Kitsis or M. Greer.

Attorney Fulton argued that construction experience was not a requirement for this position. Department experience was not a key requirement either for most positions, nor was it required by the supplemental job description, the class specification, or any of the requirements posted for the position. Attorney Fulton argued that M. Kitsis has been with the department for 18 years and has proved that he could jump into and take over key positions.

Attorney Fulton then addressed Attorney Sullivan's observation that the Attorney General's office had given only one affidavit from the Interviewing Committee. Because M. Brillhart was the chairman of the committee and, as such, the key person, he was the appropriate person to give an affidavit.

Attorney Fulton then argued that the Personnel Rules required that the appointing authority use his discretion in deciding which candidate is best qualified and best suited to a position. The subjectivity of that opinion is specifically contemplated and discussed in Per 602.02. The State requested that the candidate's selection be upheld and the appeal be denied.

Attorney Sullivan for the appellant argued that M. Dubois was the most qualified and M. Kitsis the least.

After questions from Board members, the State specified that all 4 candidates were equally qualified and it was unusual for the DOT to conduct further interviews after a committee's recommendation. It was not the general standard.

Attorney Sullivan replied that M. Greer did not however conduct the recommended interview. He then argued that under Per 501.06 structured interviews may be held as the way to gather

information and determine who is the most qualified candidate. By not conducting the follow-up interview, however, he argued, the appointing authority failed to make a thorough assessment.

After questions from Board member M. Johnson, Attorney Fulton explained M. Kitsis' background as a Chief Consultant design, project manager, final design supervisor and Civil Engineer IV.

Facts not in dispute:

- The selection process was met on its face. No objection has been raised under the Personnel Rules as to the posting, qualification of the candidates, conducting of interviews.

Rulings of Law

NH R.S.A.

RSA 21-I:58, I

"Any permanent employee who is affected by any application of the personnel rules, except for those rules enumerated in RSA 21-I:46, I and the application of rules in classification decisions appealable under RSA 21-I:57, may appeal to the personnel appeals board within 15 calendar days of the action giving rise to the appeal. ..."

"...If the personnel appeals board finds that the action complained of was taken by the appointing authority for any reason related to politics, religion, age, sex, race, color, ethnic background, marital status, or disabling condition, or on account of the person's sexual orientation, or was taken in violation of a statute or of rules adopted by the director, the employee shall be reinstated to the employee's former position or a position of like seniority, status, and pay..."

"...In all cases, the personnel appeals board may reinstate an employee or otherwise change or modify any order of the appointing authority, or make such other order as it may deem just."

Division of Personnel Rules

Per 202.02 (c) Step III: decision by appointing authority:

“...Within 15 calendar days of the meeting between the appointing authority, the supervisor, and the employee and, if applicable, the division director, the appointing authority shall notify the employee, the supervisor and, if applicable, the division director in writing of the decision and reason(s) therefor, to: (a) Amend the action in dispute; or (b) Affirm the action in dispute.”

“...If an appointing authority fails to provide a written decision to the employee within the time periods established by this rule, the employee shall have the option to notify the appointing authority in writing that the employee has elected to: (a) Request a review by the director under Per 202.03; or (b) Request a hearing before the board.”

Per 501.06. Structured Interviews

“...When a structured interview forms a part of the total review for a position, the director shall appoint, or authorize the appointing authority to appoint, a structured interview board...”

“...A member of a structured interview board shall rate the candidate solely on the basis of the candidate's responses to standardized job-related questions asked within the structure of the interview and not on any prior personal knowledge the member has of the candidate.”

“...Candidates for each position requiring a structured interview shall be examined in a uniform manner ...”

Per 602.02. Filling Vacancies Within an Agency.

“...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."

"...Candidates may be denied selection if, in the opinion of the appointing authority, they are deemed to lack personal or professional qualifications for promotion."

"...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."

Collective Bargaining Agreement

Section 16.3 "An employee who is not selected after applying for a posted position shall be informed in writing of his/her non-selection and, if requested, the reason therefore within a reasonable period of time."

The Position of the Parties

The appellant argued that the appointing authority abused his discretion in selecting M. Kitsis, who was not the most qualified candidate whereas M. Dubois was the most qualified.

Appellant admitted that the selection process was met on its face but argued that it was only *pro-forma*.

Appellant argued that the selected candidate had no experience within the Bureau, and had been ranked behind M. Dubois by the members of the Committee. There was nothing going against the recommendation from the Committee for selection of M. Dubois, therefore, the appointing authority abused his discretion by not selecting appellant.

The State argued that all the candidates were certified for the position and had timely applied. The structured interviews and the selection process were conducted in compliance with Per 501.06, Per 602. All 4 candidates were equally qualified; the choice was tight.

The State argued that the appointing authority did not have to rely solely upon the recommendation from the Interviewing Committee. It remained within the appointing authority's discretion to decide who was the most suitable candidate. In the opinion of the appointing authority, M. Dubois was not the candidate with the best traits and skills. The selected candidate had management and leadership skills that no other candidate possessed, thus qualifying him for the position. The State denied any accusation of pre-selection.

The State argued that M. Dubois received proper notification of his non-selection but was not entitled to receive a copy of the committee's memorandum.

M. Dubois could not show enough evidence supporting his argument of alleged abuse of discretion by the appointing authority.

Decision and Order

The Rules of the Division of Personnel provide broad discretion to appointing authorities to determine which of the candidates are best qualified for promotion to a particular vacancy. Under ordinary circumstances, in order to prevail in a promotional appeal, an appellant would need to demonstrate by a preponderance of the evidence that he or she was the best qualified candidate and that the appointing authority abused its discretion by selecting a candidate who was neither qualified nor suitable for selection to the vacancy.

In this case, the appellant did not assert that the candidate selected for promotion was unqualified, nor did the appellant prove that he was the best qualified candidate. The evidence reflects that the candidates were all considered to be equally qualified. Mere encouragement to apply for a position being insufficient, the appellant also failed to prove that a pre-selection occurred, in favor of the chosen candidate.

The evidence further reflects that the recommendation from the interviewing Committee was not binding upon the appointing authority's final decision. The appointing authority would retain its discretion to select the candidate who, in the opinion of the appointing authority, is most qualified. The Department of Transportation found the selected candidate to have the best management and leadership skills, and that Mr. Dubois did not have the best traits and skills at the time of selection.

Therefore, on all the evidence and arguments, the Board voted unanimously to DENY Mr. Dubois' appeal.

THE PERSONNEL APPEALS BOARD


Patrick H. Wood, Chairman


Lisa A. Rule, Commissioner


Robert J. Johnson, Commissioner

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