

State of New Hampshire



PERSONNEL APPEALS BOARD

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Concord, New Hampshire 03301
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APPEAL OF STEPHEN R. FOSTER *DEPARTMENT OF HEALTH & HUMAN SERVICES*

Docket #2003-P-003

September 8, 2003

The New Hampshire Personnel Appeals Board (Wood and Johnson) met on Wednesday, November 13, 2002, under the authority of RSA 21-I:58, to hear the appeal of Stephen Foster, an employee of the Department of Health and Human Services who was appealing his May 20, 2002 notification of non-selection for the position of Administrator of Planning Coordination #OCPH053, in the Department of Health and Human Services, Office of Community and Public Health. The parties agreed that the Board would rule with only 2 members being present.

Attorney Donald Taylor appeared for the appellant, however, M. Foster presented his arguments and proofs on his own behalf. Attorney John Martin and Human Resources Administrator Karen Hutchins appeared on behalf of the Department of Health and Human Services.

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:

Appellant's Exhibits

1. Appellant's letter of June 4, 2002 with exhibits attached:
 - The letter of non-selection from Dr. Jose Montero, dated May 20, 2002.
 - Appellant's May 28, 2002 e-mail to Dr. Jose Montero.
 - E-mail exchange of February 26, 2002 between appellant and Diane Teft.

- Dr. Jose Montero's June 3, 2002 reply to appellant's May 28, 2002 e-mail, and the structured interview form attached to that reply.
 - E-mail exchange of June 3, 2002 between appellant and Dr. Jose Montero.
 - External posting for position #OCPH053, Administrator of planning coordinator.
2. Division of personnel Class Specification for Administrator of Planning Coordination.
 3. June 26, 2002 appeal to Kathleen Dunn
 4. July 1, 2002 letter from Kathleen Dunn to appellant
 5. July 12, 2002 appeal to Donald Shumway
 6. July 12, 2002 letter from Donald P. Taylor to Donald Shumway
 7. July 22, 2002 letter from Donald P. Taylor to Thomas Manning, requesting Declaratory Ruling
 8. July 30, 2002 Declaratory Ruling from Thomas Manning to Donald P. Taylor
 9. July 23, 2002 letter from Stephen R. Davis to Donald P. Taylor
 10. August 6, 2002 letter from Donald P. Taylor to Thomas Manning
 11. August 30, 2002 letter from Thomas Manning to Donald P. Taylor
 12. Copy of Appellant's application for the position
 13. E-mail message from Dr. Jesse Greenblatt dated July 19, 2002 subject "New Chief of the Bureau of Emergency Preparedness and Response"
 14. E-mail message from Karen Hutchins dated October 11, 2002
 15. Copy of a letter from Karen Hutchins to Donald P. Taylor dated November 1, 2002
 16. Extracts from "State of New Hampshire 2002 Public Health Preparedness and Response to Bio-terrorism Cooperative Agreement Work plan" dated April 15, 2002.
 17. Appeal of Cheryl Corson, Department of Health and Human Services, PAB # 00-P-5

Attorney Martin offered no additional document into evidence, and offered no objection to admission of the Appellant's exhibits.

Attorney Martin stated that M. Foster was hired by the Department of Health and Human Services as a Radiological Health Physicist I, a labor grade 22 position, on February 3, 2000. He had recently been promoted to the level II of that same position, a labor grade 23. Attorney Martin argued that on December 6, 2001 the department posted the position of Administrator of Planning Coordination #OCPH-O53, a new position within the Department, at a labor grade 30. From December 6 to 12, 2001. This position was posted internally but the Department did not receive any application from internal recruitment, so they subsequently posted the position externally.

Attorney Martin argued that on January 15, 2002, M. Foster applied for this position joining the other 18 candidates. Two of them withdrew their applications and a total of 14 candidates were interviewed for the position. M. Foster was one of them. Attorney Martin argued that the interviews were conducted by a three person panel, composed of Jose Montero, Stephanie Miller and Charles Smith. Doctor Jose Montero and Doctor Jesse Greenblatt drafted the questions for these interviews. Attorney Martin argued that usually this position did not require structured interviews, however, this panel used interviews to gain consistency and efficiency in the selection of the most qualified candidate.

Attorney Martin explained that of the 14 persons interviewed, only 4 were selected for the position by the panel, during the 1st round of this process. M. Foster was one of the 10 candidates that had not been selected during the initial interview. The 4 remaining candidates went to an interview with Dr. Greenblatt. Out of these 4, 2 were not selected at the second step of the process. The last 2 people went to the 3rd stage of the process, which was a final interview with Katie Dunn, Director of the Community and Public Health and Brook Dupee, her Assistant Director. One of these two candidates was the successful candidate for the job.

Attorney Martin argued that not being hired for a job could be frustrating and disappointing. There was always a person walking away unhappy. He argued that it did not however show any flaw in the process. It was the common procedure. The Department argued that M. Foster was qualified for the position but all the other 13 interviewed candidates were qualified as well. Only

the most qualified person was selected for the position. M. Foster needed to prove a fundamental flaw in the hiring process that rendered the process unfair as it was applied to him. No evidence in this case showed any fundamental flaw in the process applied to M. Foster. The process was fair in every aspects.

Attorney Martin declared that he was going through the same issues as those raised by M. Foster in his appeal.

1. A statement made by the interview panel suggested to Appellant that he has been a victim of age discrimination.

Attorney Martin argued that the comment from the panel cited by M. Foster as discriminatory was that they were looking for someone that would be "around for a while." Appellant thought it was a reflection of the concern that he was 52 years old. The Department argued that there was no merit for that contention. No one could look at the comment, in the context of that interview, and reasonably conclude that age was in issue. Attorney Martin argued that each candidate was asked what his or her long term goals were, with respect to this position, and to employment with the department in general. It was made clear that the Department was planning on putting a significant amount of time and resources, training and orienting the successful candidate for this position. This was the sole reason why they wanted someone "around for a while."

Attorney Martin then argued that a person of M. Foster's age could be working for another 10 or 13 years in this position and thereby qualify for the requirement. He also asserted that this issue was raised with all 14 candidates and therefore demonstrates that there was no merit to this contention. Finally, he added that the selected candidate was the same age as M. Foster.

2. None of the people from the panel was technically familiar with the nature of the work that the position required.

Attorney Martin argued that it was a 3 person panel composed of Dr. Montero, Chief of the Bureau of Disease Control, Stephanie Miller, Chief of the Bureau of Communicable Disease Surveillance, and Charles Smith, a senior administrator who also runs the alert network.

Attorney Martin said that the Center for disease control was funding this position. Their expectation was that this position would be related to bio-terrorism and public health emergency preparedness and response, he added. Each of the panel members was familiar with the Center's expectations for this position, and each of them had extensive experience in the field of emergency preparedness and response.

Attorney Martin went through the backgrounds of the panel members. Dr. Montero had extensive experience in the field of disease surveillance, he wrote the department's protocol for disease surveillance and was a member of the anti-terrorism task force trained extensively on the issue of bio-terrorism, particularly for medical staff of hospitals. M. Smith was coordinator of the health alert network, responsible for the State-wide communication disease network, and developed the emergency response system. Ms. Miller was the supervisor for all bio-terrorism surveillance and detection activities; she also authored the disease surveillance section of the federal grant application. Attorney Martin argued that it would have been difficult to find three people with more relevant experience and better able to conduct these interviews.

There was no merit to the contention that these people were not qualified to draft the questions asked and conduct the interviews.

3. No member of the interview panel had the technical knowledge of the position enabling them to select or develop the interview questions.

The questions were drafted by Dr. Montero and Dr. Greenblatt. Attorney Martin argued that they were more than qualified to develop the questions asked in this case.

4. M. Foster argued that because he had to explain emergency preparedness to members of the interview panel, it had been unfairly held against him during the interview process.

Attorney Martin argued that appellant's point on that issue was unclear. Every candidate was asked to explain emergency preparedness and response. The purpose of the questions was to solicit information from the persons, to see how they would respond to a case of emergency. Attorney Martin argued that if appellant was alleging he had to explain emergency preparedness and response to the members of the panel because they did not have a sound basis of the issues,

there was only a very little substance that he could have offered them, in view of their qualifications.

Appellant raised the issue of the qualification of the panel in an email to his administrator, and was concerned that the information contained in the email may have upset the interview panel. Attorney Martin answered that none of the members of the panel saw the email prior to the interview or the decision of non-selection.

Attorney Martin then raised one significant concern that the panel had during the interview. He said M. Foster conveyed the attitude that he alone knew all the answers and nobody else was competent. He argued that M. Foster came out as a "know-it-all," and his statements were insulting to the employees within the department, who devoted a significant amount of time and energy to the department of emergency preparedness and response.

Attorney Martin argued that this position was in some respects, political. He added that the job required the successful candidate to work with a wide variety of people, coming from very different backgrounds. The Department was therefore looking for a team player, a leader, a "people person" able to elicit opinions and listen to those opinions. He argued that M. Foster's attitude did not convey the impression that it was necessary for him to do that because he already "knew all the answers." He argued that this attitude had the interview panel to believe that appellant would tell people what to do instead of finding out what their thoughts or opinions were.

Attorney Martin stated that the job was a management and supervisory position which required leadership, management skills and a "team player" type of person. Appellant showed that he had the technical knowledge for the position but the Department found he lacked some of the other required traits or was not the most skilled candidate. Attorney Martin argued that it was an important factor in the panel's decision of non-selection.

5. The letter of non-selection lacked real or tangible reasons for non-selection and was not in compliance with the Rules of Personnel.

The Department conceded that the letter to M. Foster was lacking in specifics and should have contained greater details as to the reasons for the non-selection. However, Attorney Martin argued that the hiring process and the selection were complying with the Rules of Personnel. The lack of details in the letter to M. Foster did not change the outcome of the legal process, or suggest that the process was flawed or should have been different. The department has made some efforts since the non-selection, to provide greater explanation about the decision.

6. The public statements made by him at a union sponsored political forum were improperly held against him in the selection process.

Attorney Martin argued that there was no merit to this argument because nobody from the panel was aware of the fact that M. Foster had attended this forum or made any statement at that forum. This was not a factor whatsoever, in the decision of the panel.

7. The Department violated the Personnel Rules because the vacancy was not filled from within the department.

Attorney Martin argued that there was no merit to this contention because appellant failed to apply during the period of internal recruitment. Nobody else applied internally and, therefore, the position was posted externally. 14 qualified people applied for the position. Attorney Martin argued that it was therefore up to the panel to use their discretion and determine who was the most qualified person for the position. They felt that M. Foster was not the most qualified, he said. Attorney Martin admitted that appellant was qualified, but added that at least 4 other candidates were more qualified than him at that time.

8. The interview and selection process was flawed and the focus was too narrow in relation to the position's title.

Attorney Martin argued that there was no merit to that contention because the focus of the interview was exceptionally broad. 17 questions were asked to each of the candidates and 2

hours were allowed for each of them. M. Foster's interview lasted around 1 ½ hours. Attorney Martin stated that the questions that were asked to the candidates:

- Experience and knowledge regarding planning for emergencies and public health.
- What did they see as the most important public health policy issue associated with planning for emergencies and public health.
- What agencies they thought should be involved in such a procedure, and how the candidate would involve and coordinate them.
- Experience developing a policy or procedure for a program or organizational unit.
- Experience developing a consensus document.
- Experience in technical writing or editing of technical writing.
- Drafted an application for a grant (involvement and copy of the grant)
- Describe any public health program that they would have written.
- Describe any public speaking experience.
- Which of the positions that they held in the past required the most contacting and collaboration with colleagues and the public.

Attorney Martin argued that this point was one of significance importance to the panel because the candidate needed to be able to work collaboratively with a large number of individuals. The job required coordination and collaboration.

- Experience planning and developing activities and programs with health care organizations.
- Experience in conducting and facilitating meetings.
- Describe their staff management style including their ability to motivate staff.
- Experience with strategic planning.
- Which position held in the past required them to be highly organized.
- What their ideal supervisor/staff relationship would be.
- In which positions have they been most aware of the role of public laws, rules and regulations, and the role that they play.

Attorney Martin argued that the scope of the interviews was very broad and necessarily so, given the nature of this position. It was a new and very important position and Attorney Martin argued that the Department was looking for a well grounded person, one who demonstrated the type of leadership and collaborative skills required for the position.

9. Steps 11 and 111 of the process of informal settlement were not followed.

The Department argued that appellant had no appeal rights related to the non-selection because he applied after the internal posting period, once the position has been posted externally.

Attorney Martin argued that it was the Department's understanding that an employee could only appeal a non-selection decision if he applied for a position posted internally. He asserted that their interpretation of the rules has been confirmed by numerous other State agencies.

Attorney Martin argued that this issue did not suggest that the interview process or the hiring process were flawed, or that the outcome of those processes should have been different.

10. M. Foster met the minimum education and work experience requirements for selection for this position.

The Department did not negate that appellant was qualified, but argued that all 14 interviewed candidates met the education and work experience requirements for that position. Attorney Martin argued that the board selected the most qualified candidate and it was not M. Foster. Indeed at least 4 candidates were more qualified than he was.

Attorney Martin then argued that selection for this position would have been a significant jump in the career of Mr. Foster, from a non-supervisory position to a position of leadership and management within the Department. A jump of 7 labor grades.

The Department argued that the selection process actually worked exceptionally well for them. They hired an excellent candidate, who is doing excellent work in the field of emergency preparedness and response. Attorney Martin added that the Personnel Rules afforded the appointing authority a significant amount of discretion for the hiring decisions and in this case, the appointing authority did not abuse its discretion.

Attorney Martin said that the Board should not be second guessing the panel's final decision but limit their inquiry as to whether or not there was a flaw in the process, rendering it unfair as applied to M. Foster. He argued that the evidence in this case demonstrated that there was no fundamental flaw in the recruitment, interview or selection process. It was fair as applied to Mr. Foster and the other candidates.

Attorney Martin concluded by arguing that the decision for the non-selection of M. Foster should stand.

After questions from the Board, Attorney Martin explained that the Department upon receipt of the applications, decided to interview all the candidates, look at their answers to the questions, their experiences and then, make a decision. At the time M. Foster received his non-selection letter, the final selection was not yet made. However, the decision has been made to limit the group of candidates to the 4 that looked particularly qualified for the position. Dr. Greenblatt then interviewed these 4 and out of them he found 2 to be exceptionally qualified. He passed them to Katie Dunn and Brook Dupee for the final decision.

After questions from the Board and a few minutes discussion, Attorney Martin explained that the decision maker was a different person at every stage of the selection, but that they all had the authority to make appointments of employees.

M. Foster addressed all his issues one after another and argued:

1. A statement made by the interview panel suggested to Appellant that he has been victim of age discrimination.

M. Foster argued that he used the same test as for race discrimination: "If it feels like discrimination, it is discrimination." Appellant stated that Dr. Montero made an age related comment during the interview and it seemed that the answer to the question was already determined because it was obvious that Dr. Montero was committed to his job with the Department and was "going to be around for a while".

2. None of the people from the panel was technically familiar with the nature of the work that the position required.

M. Foster argued that the panel lacked sufficient knowledge and awareness about the matter. Because of his experience and background, appellant's input would have been better than secondary, he said. He also argued that none of them demonstrated that they had any idea about what emergency preparedness really was because the questions of the interview were only focusing on one subject: biology; whereas terrorism activity includes also nuclear, radiological and chemical activities.

M. Foster argued that no member of the panel expressed a real qualification or knowledge in other matters than biology.

3. No member of the interview panel had the technical knowledge of the position enabling them to select or develop the interview questions.

Appellant argued that the questions asked by the panel were narrow in scope because the persons of the panel themselves were narrow in their understanding of the subject matter.

4. The letter of non-selection lacked real or tangible reasons for non-selection and is not in compliance with the Rules of Personnel.

M. Foster reminded the Board about the Department's agreement that the letter from Dr. Montero was less than whole as far as the expectations. He said he agreed with it and had the feeling that he has been thrown away for no just reason.

5. The public statements made by him at a union sponsored political forum were improperly held against him in the selection process.

M. Foster argued that because he attended a political meeting and talked publicly about issues needing to be dealt with by the next Governor, he was unfairly treated by the panel, due to the nature of his statements.

Attorney Martin responded that this issue was irrelevant because the panel was not informed about the meeting and did not hear appellant's political comments.

M. Foster argued that he felt that the letter of rejection came right after his comment and therefore was related to it.

The Board responded that none of the panel members was aware of the comments, so this issue was not relevant.

6. The Department violated the Personnel Rules because the vacancy was not filled from within the department.

Appellant argued that this matter was settled by M. Manning's declaratory ruling, giving him the right to bring an appeal of the decision of non-selection.

The board declared that it was a moot point at that time.

M. Foster added that at no time since the interview and the decision of non-selection did he get a proper response to his requests of information or complaints. He said he had also been denied a meeting with Dr. Greenblatt.

7. M. Foster met the minimum education and work experience requirements for selection for this position.

M. Foster argued that the selection process under the Personnel Rules required that the opinion of the appointing authority be restrained and constrained if a candidate had "the personal and professional qualifications." The appointing authority should limit his/her opinion or decision on how far it could go.

M. Foster argued that during his preparation for the hearing before the Personnel and Appeals Board, he requested some documents from the Department and the appointing authority, but they refused and responded that he did not need these documents. He asked for the resumes of the panel members, copies of the completed structured interviews rating forms, a copy of the State's document showing the policy requirements regarding the personnel selection process, and a copy of the administrative rules establishing whether or not a candidate will be required to have a structured interview. Appellant argued that therefore he could not get to the heart of the issue

about his non-selection. He added that it also affected the quality of the case that he was able to present to the Board.

Appellant argued that in the State of New Hampshire Work Plan, admitted as evidence, they talked about nuclear, chemical and biological matters whereas the interview only tested the biological part. He said it was a double standard between the rule and the interview process. M. Foster's last argument was that responses from the Department were not given in a timely fashion. The Dr. Greenblatt and M. Manning letters did not respect the 15 days deadline.

Attorney Martin rebutted by arguing that the position was funded through the Center for Disease Control, who perceived this position largely but not exclusively, as a bio-terrorism position. Therefore, the interview questions were more general in their scope; they were not only talking about bio-terrorism but also emergency preparedness in more general terms.

Attorney Martin argued that appellant's presentation about the interview underscored the primary concern of the panel: M. Foster's attitude showing "I know how to do it and you don't know." Or when he stated that the panel did not have a clue about emergency preparedness and response. That represented the main concern of the panel about selecting M. Foster.

Attorney Martin then addressed the issue of the response given to M. Foster by the Department. He argued that the Department did not think that M. Foster had a right to appeal and therefore, did not answer or meet with M. Foster earlier. Tom Manning issued his decision on July 30th, giving M. Foster the right to appeal. M. Foster could then have started the informal process, but he chose to appeal directly to the Personnel and Appeals Board.

Another argument from Attorney Martin was that the documents asked for by appellant were not relevant to his non-selection for the position. He added that a lot of other documents were given to appellant. Ms. Hutchins added that the documents asked for were State-wide policies and procedures for selection and recruitment, above and beyond the Personnel Rules and that she forwarded these requests to Sara Willingham, Dennis McCabe and Tom Manning at the Division

of Personnel. All the answers were given to M. Foster. Attorney Martin argued that when the documents were not provided to appellant, an explanation was given.

After a question from the Board, Attorney Martin stated that the resumes were not communicated to appellant because the Department felt that it was personal information. He added that two resumes were published by mistake in the grant received by M. Foster. He should not have gotten this information because it was against the Department policy to give out resumes.

The Board expressed that the Department should provide an answer to candidates asking about the qualifications of the panel members and their familiarity with the technicalities of the job. The answer should be given by other ways than resumes.

Appellant argued that he has been kept out of the process by lack of information on what he was entitled to, or not. He has been disfranchised from the whole process and did not know exactly what was the process. He argued that he was entitled to know about the selection process, and even more because he was a steward in the Union.

M. Foster argued that the selected candidate was not more qualified for the position than he was. The standard the other candidate was submitted to must have been lesser than the one for him, he said. M. Foster argued that the selected candidate did not have any experience about emergency preparedness and control although the job description required it.

Attorney Martin answered that the selected candidate met the minimum qualifications and had other strengths that the Department thought were important for the position. He had a great deal of supervisory and management experience, he appeared to be able to collaborate with other people and motivate people. Two important points for the Department, argued Attorney Martin.

The Board asked if the job requirements were specifically expressed by the Government. Dr. Montero answered that the federal mandate was initially for bio-terrorism. A second grant

broadened the scope of the mandate and the services and activities requested were expended with time.

The Board then asked if the panel ever thought that they lacked knowledge, background or information about the subjects talked about during the interviews. Dr. Montero answered that he felt confident about the way the panel handled the interviews and considered that the members had the proper qualifications to conduct the process.

M. Foster argued that if the extension of the grant occurred during the interview process, it was a big inequality. Dr. Montero responded that the extension to the second federal grant occurred before the beginning of the interviews.

Rulings of Law

NHR.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) therefore, 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."

The Position of the Parties

Appellant argued that the appointing authority used age discrimination against him by stating that they wanted someone "around for a while" and did not select him because of his age. He argued that the interview panel lacked proper education and experience in the field of preparedness and response. M.¹ Foster argued that none of the people from the panel was familiar with the nature of the work, he said, because they focused only on biology whereas terrorism prevention also includes nuclear, chemical and radiological activities.

M. Foster argued that the letter of non-selection gave too little explanations about the non-selection, and therefore did not comply with the Personnel Rules. He added that the answers to his questions about the non-selection were not timely given.

Appellant argued that the statements he made during a recent political forum, were improperly held against him during the selection process.

He argued that he has been denied proper rights of information to appeal the non-selection.

M. Foster finally added that he had the required education and work experience for the position, and should have been selected. He had the best experience whereas the selected candidate did not have enough education and experience in the field of emergency preparedness and response. He argued that the appointing authority should be limited in his opinion for the selection of candidates.

Attorney Martin responded that the Department was planning on putting forth a lot of effort and resources to train the successful candidate and therefore, wanted an employee that would be there "for a while."

The Department explained that the panel was composed of 3 persons: Dr. Montero, Stephanie Miller and Charles Smith. These people had extensive experience in the field of bio-terrorism, disease surveillance and emergency preparedness and control. It would have been difficult to find three people with more relevant experience.

Attorney Martin argued that all candidates were asked the same questions during the structured interviews and asked to explain emergency preparedness and control. He said that M. Foster raised a concern among the interview panel, regarding his attitude. He argued that the non-selection was due in large part to it. The Department was looking for a team-player, a "people person" able to elicit opinions and listen to them. Mr. Foster did not appear to be the person with the best profile for this position, even though he was technically qualified.

The Department admitted that the letter of non-selection lacked detailed explanations for the decision but argued that it was complying with the Personnel Rules. The Department did not give more response to the requirements for explanations from M. Foster because they thought he was not entitled to a right of appeal.

Attorney Martin dismissed the issue of discrimination due to a political commentary made by M. Foster at a forum on the basis that none of the interview panel members had knowledge of these statements. Attorney Martin also contested the merits to the contention that the Personnel Rules were violated because the vacancy was not filled from within the department. He argued that appellant's application came after the time allowed for internal recruitment and therefore, there was no violation of the Rules.

Attorney Martin argued that the scope of the interview was broad and necessarily so, due to the nature of the position.

Decision and Order

The Rules of the Division of Personnel provide broad discretion to appointing authorities in determining 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 asserted he was the most qualified candidate and that the candidate selected for the position lacked the required education and experience in emergency preparedness and response. The Department showed that the candidates were all considered to be qualified and that the selected candidate had some personal and professional skills that made him more suitable for the position. The Department met the legal requirements for the selection of a candidate.

The appointing authority would retain its discretion to select the candidate who, in the opinion of the appointing authority, is the most qualified. The Department of Health and Human Services found Mr. Foster to lack certain personal and professional qualifications for promotion.

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

THE PERSONNEL APPEALS BOARD

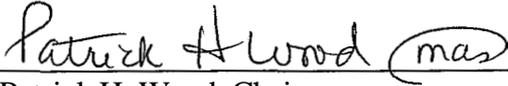

Patrick H. Wood, Chairman


Robert J. Johnson, Commissioner

cc: Thomas F. Manning, Director of Personnel, 25 Capitol St., Concord, NH 03301.
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Karen Hutchins, Human Resources Administrator, Department of Health and Human Services, 129 Pleasant St., Concord, NH 03301.
Stephen Foster, 824 Alton Woods Ave, Concord, NH 03401.

This page contains some corrections.
Please see previous page for original signatures.

THE PERSONNEL APPEALS BOARD



Patrick H. Wood, Chairman



Robert J. Johnson, Commissioner

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