

State of New Hampshire



PERSONNEL APPEALS BOARD
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APPEAL OF ROSEMARY LYONS

DOCKET #99-P-3

DEPARTMENT OF SAFETY - DIVISION OF STATE POLICE

December 16, 1999

A quorum of the New Hampshire Personnel Appeals Board (Wood and Barry) met on Wednesday, November 3, 1999, under the authority of RSA 21-I:58, to hear the appeal of Rosemary Lyons, an employee of the Department of Safety. The appellant, who was represented at the hearing by SEA Field Representative Jean Chellis, was appealing the Department of Safety's March 8, 1999, decision to not select her for promotion to the position of Supervisor I. Major Kevin O'Brien appeared on behalf of the agency.

Without objection, 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 submitted by the parties, 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. February 8, 1999 job posting for Department of Safety Employees only, with attached class specification revised 11/23/92 and supplemental job description revised 3/12/99 for Supervisor I
2. Copy of a newspaper clipping advertising a Communications Supervisor I vacancy
3. Supplemental job description for Supervisor I, amended 3/12/99
4. Letter to Virginia Lamberton dated April 6, 1999 with attachments

State's Exhibits

The State offered no exhibits for admission into the record of the hearing.

The material facts are not in dispute:

1. On February 8, 1999 the Department of Safety posted a Supervisor I vacancy at the State Police Communications Center. The posting included copies of the class specification for Supervisor I and a supplemental job description.
2. The class specification for Supervisor I includes the following statement of Minimum Qualifications:

"Education: Bachelor's degree from a recognized college or university with major study in a field relevant to program area in which position is assigned. Each additional year of approved formal education may be substituted for one year of required work experience. Experience: Two years' experience in a field or occupation relevant to program area in which position is assigned. Each additional year of approved work experience may be substituted for one year of required formal education."

Under Special Requirements, the class specification states, in part, "Specific degree and experience requirements must be tailored to meet documented recruitment needs of the agency or department. All specific minimum qualifications must be stated on the supplemental job description and approved by the Division of Personnel prior to posting at the agency level."

3. The supplemental job description posted with the class specification listed the minimum qualifications for the position as follows:

"Education: Graduation from high school or GED equivalent. Each additional year of approved formal education may be substituted for one year of required work experience."

Experience: Six years experience in communications work requiring the use of a two-way radio system, typewriter and computer terminal, three years of which must have been a NH State Police Communications Center."

4. The supplemental job description attached to Appellant's Exhibit 1 does not include a statement or signature indicating approval by the Director of Personnel.
5. Ms. Lyons applied for the posted vacancy, was interviewed for the Supervisor I vacancy on the morning of March 8, 1999, and received verbal notification the same day that she had not been selected for promotion.
6. On March 17, 1999, the Department of Safety advertised in the Concord Monitor and the Manchester Union Leader the Supervisor I vacancy. The qualifications listed in the advertisement were as follows: Education: "HS/GED AND six years experience in communications work requiring use of two-way radio, typewriter and computer terminal, three years of which must have been in full time police communications center. Additional education may substitute for experience."
7. On April 6, 1999, the State Employees' Association wrote to Personnel Director Lamberton on behalf of Ms. Lyons' co-worker, Norman Hobbs, requesting on Mr. Hobbs' behalf that the Director: "1) notify the Department of Safety about the error in the newspaper advertisements and 2) remind the department to select a candidate who has the required three years experience at a NH State Police Communications Center."
8. In her letter to Director Lamberton, the appellant made no claim that she should have been selected for the vacant position when it was posted, or that the Department of Safety abused its discretion in denying her selection to the vacancy.
9. There is no evidence that the April 6, 1999 letter from the SEA to the Director of Personnel about the Supervisor I vacancy was forwarded to the Division of State Police or to the Department of Safety to make them aware of discrepancies in the statements of minimum qualifications.
10. The April 6, 1999 letter to Director Lamberton requests as a remedy that the Director of Personnel, "1) notify the Department of Safety about the error in the newspaper

advertisements and 2) remind the department to select a candidate who has the required three years experience at a NH State Police Communications Center."

11. Maj. O'Brien sent written notification dated April 21, 1999 to Ms. Lyons inviting her to meet with him at any time to discuss her non-selection for promotion to the vacancy. Ms. Lyons did not ask to meet with Major O'Brien.
12. The Division of State Police had "articulable" reasons for its decision not to select Ms. Lyons for the Supervisor I vacancy but did not list specific deficiencies in performance or qualification in the text of the memo denying her selection.
13. On April 26, 1999 Ms. Lyons obtained a Supervisor I supplemental job description that differed from the one that accompanied the February 8, 1999 in-house posting, and contained a statement of minimum qualifications that differed from original posting and the newspaper advertisements for the vacancy.
14. By letter dated April 27, 1999, the State Employees' Association filed an appeal with the Board, asking the Board to order the Department of Safety to discontinue its recruitment efforts, and re-post the vacancy in-house using the approved supplemental job description.
15. The appellant did not assert that she was improperly denied selection for promotion to the vacancy or that she was the candidate best qualified for promotion.

Ms. Chellis argued that the Department of Safety, Division of State Police, violated Per 402.01 (a)(2) and Per 404.02 (k) of the Rules of the Division of Personnel by posting the position vacancy with a supplemental job description and a statement of minimum qualifications that had not been approved by the Director of Personnel. She argued that the Division also violated Per 602.02 (e) of the Rules by failing to provide Ms. Lyons with timely written notification of her non-selection for promotion.

Ms. Chellis stated that the Supervisor I position was filled by someone from outside the agency in May, 1998. She argued that although the selected candidate did not appear to meet the posted

minimum qualifications, it would be unfair to ask the Board to order his removal from the position some six months after the date of hire when it had taken the Board more than six months to schedule the matter for hearing. Ms. Chellis argued that although the current incumbent should not be penalized, the Department of Safety should suffer some consequence for having violated the Rules. She informed the Board that the appellant would be willing to accept a cash settlement, which Ms. Chellis suggested would be the most appropriate remedy.

Major O'Brien argued that the Division of State Police neither intended nor attempted to circumvent the Rules of the Division of Personnel when it posted and later advertised the Supervisor I position vacancy. He stated that the agency acted in good faith throughout the process of filling the position, relying on staff from the Department's human resources office to ensure that the process was completed in accordance with the Rules. Major O'Brien admitted that written notice to the internal candidates was delayed by approximately seven weeks following a death in his secretary's family, but indicated that the internal applicants were aware in March that they had not been selected for promotion.

Major O'Brien said that he was more than willing to meet with Ms. Lyons to discuss the reasons why she had not been selected, but that she never responded to his April 21" memo inviting her to do so. He said that while he was not aware that different qualifications were listed when the position was advertised outside the agency, the advertisement would have had no effect on his decision since Ms. Lyons was considered a certified candidate who met the minimum qualifications who simply was not selected for the vacancy for articulable reasons. Maj. O'Brien also argued that when the successful candidate was selected, he had been certified by human resources personnel as meeting the minimum qualifications for the vacancy based upon his possession of an associate's degree, a certificate in management, and four years of experience in telecommunications for the Bureau of Emergency Communications.

At the conclusion of the hearing, the parties were given an opportunity to discuss off the record any possibilities for a settlement, and were asked to advise the Board if an agreement had been reached. On November 4, 1999, the Board received a memo from Major O'Brien indicating that he and his superiors had chosen to reject the appellant's request for a \$2,500 cash lump sum payment. By way of explanation for that decision, Major O'Brien wrote:

1. "Only the New Hampshire Department of Justice is authorized to financially settle any case.
2. Ms. Lyons was not selected for the position for specific, articulable reasons and those have never been disputed by Ms. Lyons.
3. Per 301.03(b) allows for Supplement[al] Job Descriptions to be modified by the appointing authority or its representative.
4. Per 301.03(d)(9) allows for a Supplemental Job Description to only repeat the Minimum Qualifications indicated by the actual Job Specification. The contested Supplemental Job Description is not in compliance with this rule because the qualifications outlined actually exceed those specified for a Supervisor I.
5. If any violation of the rules did occur, involving the postings or publication for the position, they were technical violations at best and done with the approval of the Division of Personnel. Further, any violations were beyond the control of the State Police and would not have changed the decision to select Ms. Lyons.
6. To enter such a settlement would be giving a financial reward to Ms. Lyons for a technical violation that was beyond the Division's control."

On November 8, 1999, the Board received the appellant's response. In that letter Ms. Chellis wrote:

"Nothing in Major O'Brien's letter explains why the Department of Safety used three different sets of minimum qualifications during the selection process for the Supervisor I position for which Ms. Lyons applied.

"The violation of personnel rules is not mitigated by the fact that the Department of Safety relied on guidance from the Division of Personnel. In fact the rules violation appears more egregious if it occurred with the Division of Personnel's knowledge and/or approval.

"We do not believe the candidate who was selected to fill the Supervisor I position should be penalized for the Department's failure to follow the personnel rules when advertising for the position. However, we do believe the Department should be penalized for its failure to follow personnel rules. We believe a clear message from the Board is necessary to prevent the Department of Safety from committing (with or without the approval of the Division of Personnel) future violations (technical or otherwise) of the personnel rules."

Having considered the parties' documentary evidence, oral argument, offers of proof, original pleadings and the post-hearing submissions, the Board made additional findings of fact and rulings of law as follows:

- 1-a. The action giving rise to the appeal occurred on March 8, 1999 when the appellant was interviewed and advised of her non-selection for promotion to the position of Supervisor I.
- 2-a. The Department considered the appellant to have met the minimum qualifications for promotion to Supervisor I, but did not believe that her particular qualifications would meet the Division's needs for the Supervisor I vacancy.
- 3-a. There was no evidence that the Department of Safety intentionally posted or published the wrong statement of minimum qualifications, or that the error in posting the statement of qualifications had any effect upon the assessment of Ms. Lyons' capacity or suitability for the vacancy.

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), Rules of the Division of Personnel]
- B. "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 (d), Rules of the Division of Personnel]
- C. "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 (e), Rules of the Division of Personnel]

- D. "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...." [RSA 21-I:58, I]
- E. "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. The employee shall be reinstated without loss of pay, provided that the sum shall be equal to the salary loss suffered during the period of denied compensation less any amount of compensation earned or benefits received from any other source during the period.." [RSA 21-I:58, I]
- F. "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."" [RSA 21-I:58, I]

Decision and Order

On all the evidence, argument and offers of proof, and for the reasons set forth below, the Board voted unanimously to DENY Ms. Lyons' appeal.

RSA 21-I:58 provides a right of appeal to " Any permanent employee who is affected by any application of the personnel rules." The only application of the rules that actually affected Ms. Lyons was the Department's decision not to select her for promotion, and the appellant offered neither evidence nor argument to suggest that she was the best qualified candidate for promotion and would have been promoted had there been no errors during the recruitment process.

Ms. Lyons was certified as meeting the minimum qualifications for the vacant position. However, the Rules impose no requirement upon an appointing authority to select a candidate simply because that candidate meets the minimum qualifications for the vacancy. Rather, the Rules require an appointing authority to select "the most qualified candidate for the position." [Per 602.02 (c)] As Major O'Brien stated both orally and in writing, and without contradiction, the Department of Safety did not consider the appellant the most qualified candidate and had articulable reasons for not selecting her for promotion.

RSA 21-158 authorizes the Board to order an employee "reinstated" without loss of pay or seniority when there is evidence that the employee was affected by an action taken in violation of the statutes or of rules adopted by the Director of Personnel. The only decision or action that affected the appellant occurred when the agency denied her selection for promotion. The appellant made no assertion that Department of Safety violated the Rules or abused its discretion when it denied her selection for promotion. Ms. Lyons did not argue that she was the most qualified candidate for promotion, that she should have been promoted, or that she would have been promoted under other circumstances. Accordingly, the Board found that the Department's decision was not taken in violation of the statutes or of rules adopted by the Director of Personnel.

In her November 8, 1999 letter, Ms. Chellis wrote that, "...the Department should be penalized for its failure to follow personnel rules." Ms. Chellis argued that a \$2,500 payment to the appellant would be an appropriate remedy. The Board does not agree.

The Board certainly expects agencies to conduct their business in accordance with the Rules of the Division of Personnel. However, mistakes do occur. Absent any evidence that the mistakes in this case had any effect whatsoever upon the appellant, no remedy is required. Furthermore, there is no evidence that the Department conducted itself in a malicious or reckless fashion. Therefore, even if the Board had the statutory authority to award punitive damages, there is no

justification for assessment of a penalty against the department, or award of a windfall to the appellant.

The appellant's concerns about the Board's delay in hearing the appeal are shared by the Board. However, a more timely hearing would not have had any effect on the decision.¹

On the evidence, argument and offers of proof by the representatives of the parties, the Board voted unanimously to DENY the appeal.

THE PERSONNEL APPEALS BOARD


Patrick H. Wood, Chairman


James J. Barry, Commissioner

cc: Thomas F. Manning, Director of Personnel, 25 Capitol Street, Concord, NH 03301
Jean Chellis, SEA Field Representative, PO Box 3303, Concord, NH 03302-3303
Maj. Kevin O'Brien, Division of State Police, 10 Hazen Dr., Concord, NH 03305

¹ In those instances where an appellant believes that he or she will be affected adversely by a delay in hearing, the Board suggests that the appellant advise the Board of those circumstances and make a specific request for special scheduling, or a request for a preliminary order so that the rights of the parties will not be prejudiced.