

# State of New Hampshire



## PERSONNEL APPEALS BOARD

25 Capitol Street

Concord, New Hampshire 03301

Telephone (603) 271-3261

**Appeal of Theodore Mottola - Docket # 2009-P-004**

**Department of Corrections**

**January 5, 2011**

The New Hampshire Personnel Appeals Board (Wood, Bonafide, and Johnson) met in public session on Wednesday, November 10, 2010, under the authority of RSA 21-I:58 and Chapters Per-A 100-200 of the NH Code of Administrative Rules, to hear the appeal of Theodore Mottola, an employee of the NH Department of Corrections. Mr. Mottola, who was represented at the hearing by SEA Field Representative Marc Abear, was appealing the Corrections Department's December 22, 2008, decision denying his request for promotion in his own position from the classification of Technical Institute/College Assistant Professor to Technical Institute/College Associate Professor. Michael Brown, Senior Assistant Attorney General and Lisa Carrier, Human Resources Administrator for the Department of Corrections, appeared on behalf of the agency.

The appeal was originally scheduled for hearing on November 3, 2010. At that meeting, the State submitted a 124-page exhibit and a Motion to Dismiss. The Board also received the Appellant's Motion to Exclude Witnesses and Exhibits based upon the State's failure to make timely disclosure of its proposed exhibit and list of possible witnesses. The Board voted to continue the hearing for one week in order to allow the Appellant sufficient time to review the State's proposed exhibit, then voted to deny Appellant's Motion to Exclude. The Board also advised the parties that the State's Motion to Dismiss would be taken under advisement. Mr. Abear filed the Appellant's Response to the Motion to Dismiss on November 9, 2010.

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

### State's Exhibit 1 (page 1-124)

- Class Specification for Technical Institute Associate Professor
- NH Department of Corrections PPD 2.19, Promotion Procedures and Guidelines for Instructors in Career and Technical Education

- June 20, 2008, memorandum from Jay Nagy, Career and Technical Education Director to All Career and Technical Education Instructors
- Theodore P. Mottola, Application for Promotion, August 1, 2008
- November 26, 2008, Promotion Board – Lisa Currier
- November 26, 2008, Promotion Board – Jay Nagy
- November 26, 2008, Promotion Board – Daniel Tanguay
- November 26, 2008, Promotion Board – Lori Seog
- December 11, 2008, Memorandum to Warden Fortier from Jay Nagy, Director- Career and Technical Education Center
- December 2, 2008, letter to Theodore Mottola from William G. McGonagle, Assistant Commissioner
- Theodore P. Mottola, Application for Promotion, February 17, 2009
- March 17, 2009, Promotion Board Questions
- March 17, 2009, Promotion Board – Lori Seog
- March 17, 2009, Promotion Board – Daniel Tanguay
- March 17, 2009, Promotion Board – Lisa Currier
- March 16, 2009, Promotion Board Notes
- June 12, 2009, Letter to Theodore Mottola from William G. McGonagle, Assistant Commissioner

#### Appellant's Exhibits

(Exhibits 1 and 2 are noted in the Appellant's October 26, 2010, letter to the Board, but no actual exhibits so numbered were offered or admitted into evidence)

3. May 16, 2008, Letter from Lisa Currier, Human Resources Administrator
4. The Appeal of Theodor Mottola dated January 6, 2009 January 6, 2009, with Attachments:
  - December 22, 2008, letter from William G. McGonagle to Theodore Mottola
  - Class Specification for Technical Institute/College Associate Professor
  - Promotion Procedures and Guidelines for Instructors in Career and Technical Education, Statement 2.19, including:
    - Supplemental Job Description for T/I College Assistant Professor
    - Supplemental Job Description for T/I College Associate Professor
    - Supplemental Job Description for T/I College Professor
    - Criteria for Establishment of Professional Credits
    - Professional Credit Summary form (blank)
    - Application for Promotion form (blank)

## Evaluation Criteria

June 20, 2008 memo from Jay Nagy to All Career and Technical Education Instructors

5. December 22, 2008, Letter from William McGonagle
6. Class Specification for Technical Institute/College Association Professor
7. NHDOC PPD 2.19, Promotional Procedures and Guidelines
8. Supplemental Job Description for T/I College Assistant Professor
9. Supplemental Job Description for T/I College Associate Professor
10. Supplemental Job Description for T/I College Professor
11. Criteria for Establishment of Professional Credits
12. Professional Credit Summary
13. Application for Promotion
14. Evaluation Criteria
15. June 20, 2008, Memorandum from Jay Nagy
16. June 18, 2008, emails from Jay Nagy re: Theodore Mottola
17. June 18, 2008, emails from Randy Choiniere re: Theodore Mottola
18. June 19, 2008, email from Jay Nagy
19. June 9, 2008, email from Jay Nagy
20. July 2, 2008, email from Lisa Currier
21. June 6, 2008, email from Randy Choiniere
22. June 6, 2008, email from Jay Nagy
23. June 23, 2008, email from Jay Nagy
24. Step I Personnel Appeal dated May 30, 2008
25. Class Specification for Technical Institute/College Assistant Professor
26. June 20, 2008, email from Theodore Mottola
27. June 20, 2008, email from Jay Nagy

The Appellant also offered an eleven-page document titled "Appellant's Statement of Proof," which Mr. Abear read into the record.

## Board's Decision on State's Motion to Dismiss and Appellant's Response to Motion to Dismiss

The State moved for dismissal of the instant appeal, arguing that:

1. The Appellant could not meet his burden of proof, as the promotion decision under appeal was purely discretionary and the Department's decision to deny the requested promotion was done fairly and consistent with existing policies and procedures.

2. The process used to deny Mr. Mottola promotion occurred in accordance with the applicable policy and was the same process applied to all similarly situated candidates.
3. The provisions of Per 603.02 of the NH Code of Administrative Rules set the standard for promotional decisions, and applying a different standard as the Appellant suggested would violate the Equal Protection provisions of both the New Hampshire and United State's Constitutions.
4. The Appellant waived his right to a hearing as well as his access to any remedy that he had or might have had, as he failed to appeal a subsequent denial of promotion and is now no longer employed by the Department of Corrections, having resigned from his position.
5. The Appellant is estopped from asserting that the promotional process was inadequate and improper as he made a second application for promotion after the initial denial of promotion, and in doing so, availed himself of the same promotional process in 2009, which he now challenges in his appeal of his 2008, denial of promotion.

The Appellant objected to the State's Motion to Dismiss, arguing that:

1. Neither the Motion nor the State's exhibits were timely filed.
2. Factual assertions contained in the State's Motion were inaccurate.
3. The Department violated its own policies and procedures during the promotional process including the notice of promotional opportunities, composition of the board reviewing applications for promotion, and establishment of 66 points as the threshold score for promotional consideration.
4. The Appellant never waived his right to a hearing when he left State services, as his separation from service was the result of the Department's decision to remove him for non-disciplinary reasons and his subsequent decision to retire on a disability retirement.
5. The Appellant never waived his right to a hearing or to a remedy by participating in a second promotional review, and the Appellant would not be estopped from asserting that the promotional process was inadequate or improper if the promotional process, promotion standards, and basis for appeal remained unchanged.

In the majority of cases, issues under appeal such as written warnings and denials of promotion will have no effect on an Appellant's prospective status as an employee once an employee has left State service, particularly if the separation from service was voluntary. As a result, those appeals generally will be dismissed as moot. In this instance, however, the Appellant asserted, without contradiction, that his separation from service was not entirely voluntary, and that he took disability retirement only after the agency undertook steps to remove him for non-disciplinary reasons. The Board then voted to DENY the State's Motion to Dismiss.

Position of the parties on the merits of the appeal:

Senior Assistant Attorney General Brown argued that candidates in Career and Technical Education are considered eligible for promotion when they meet the minimum qualifications for the academic rank being sought. Mr. Brown argued that although the Appellant met the minimum qualifications for promotion to Associate Professor, promotions are not automatic. Mr. Brown argued that the actual decision to grant or deny requests for promotion rests solely with the Department of Corrections. Mr. Brown argued that the Department of Corrections' promotion board evaluated the Appellant's application for promotion using the same process and criteria used to evaluate all other applications for promotion and determined that the Appellant did not possess the personal or professional qualifications for promotion, and did not obtain the minimum score of 66 for his application to receive further consideration. Mr. Brown argued that although promotion in this case would not have been to a vacant position, the same principles applied as those set forth in Per 602 of the Rules whereby an employee meeting the minimum qualification for selection to a vacancy can be denied promotion if, in the opinion of the appointing authority, that employee lacks the personal or professional qualifications for promotion.

Mr. Abear argued that the promotional process utilized by the Department of Corrections was incorrectly interpreted and applied. Mr. Abear argued that once the Appellant met the minimum qualifications for promotion by attaining 45 professional credits, he was entitled to promotion within his own position from the rank of Assistant Professor to Associate Professor. Mr. Abear argued that the Department of Corrections imposed additional requirements for promotion that were not articulated in the department's promotional guidelines or in the job description for TI/C Associate Professor. He also argued that the agency did not comply with its own guidelines, and that the guidelines themselves did not conform to the requirements of the Rules of the Division of Personnel or for promotion through attainment of professional credits established by the Community College System of New Hampshire.

The parties agreed that the decision under appeal did not involve promotion from one position number to another or to selection to a vacancy as defined by Per 602 of the Director's Rules, but to the Appellant's request for assignment to a different academic rank and salary grade in his own position number. The Appellant argued that because no vacant position was involved, Per 602 of the Personnel Director's rules is inapplicable, and the department could not lawfully deny the Appellant's request for an increase in position title and compensation once the Appellant demonstrated that he met the minimum education and experience requirements for the rank and salary grade he was seeking. The State argued that the decision to grant or deny the Appellant's request for promotion was solely at the discretion of the department, and that meeting the qualifications for promotion did not guarantee a promotion, only that the employee would be considered for the rank and title requested. Senior Assistant Attorney General Brown

asserted that the decision in this instance was consistent with the agency's normal practice and procedures, and that the Appellant received the same consideration as all other similarly situated employees.

Facts:

1. Mr. Mottola was employed by the Department of Corrections as a Technical Institute/College Assistant Professor when he made application for promotion to the rank of Technical Institute/College Associate Professor.
2. Department of Corrections PPD 2.19 provides a process whereby instructional personnel assigned to Career and Technical Education may apply for promotion within their own positions once they have sufficient time in grade, and they meet the criteria for assignment to a different position title and salary grade. (State's Exhibit 1, page 6)
3. According to the Department of Corrections PPD 2.19, IV, B (State's Exhibit 1, page 6), "The Promotion Board will meet annually, if necessary, to consider all requests for promotion. The recommendations of the Board will be based on standard professional position descriptions (Attachment 1) and Evaluation Criteria (Attachment 5)."
4. Mr. Mottola's original request to participate in the promotional process was denied based upon a finding by the Department that he late-filed the request. That decision was reconsidered, however, and the Department provided a written invitation to all instructors in the Career/Technical Education section to apply for promotion, explaining that a new promotional board would be established to evaluate applications for promotion. (SEA Exhibit 16)
5. Candidates who demonstrate that they have met the minimum qualifications for promotion, who have sufficient time in service as set forth in the policy, and who have earned a minimum of 55 professional credits may apply for promotion to Associate Professor. (State's Exhibit 1, page 4)
6. The minimum qualifications for the generic class of Technical Institute/College Associate Professor include a Master's degree from a recognized college or university with major study in a subject are related to the teaching assignment, and five years' experience in teaching, business or industry in the field in which the teaching vacancy exists. In the alternative, an applicant may meet the minimum educational requirement by completing forty-five professional credits as evaluated by the Technical Institute. (State's Exhibit 1, page 2)
7. Applicants for promotion under the provisions of PPD 2.19 must earn the opportunity for an interview with the promotion board by demonstrating that they meet the minimum qualifications for the title and salary grade sought.
8. A handwritten note dated August 20, 2008, signed by Sara Sawyer, Director of Human Resources for the Community College System of New Hampshire, on page 1 of Mr. Mottola's application for promotion

indicated that Ms. Sawyer had reviewed Mr. Mottola's application for promotion and certified the Appellant as satisfying the minimum qualifications of 45 professional credits for appointment at the level of Technical Institute/College Associate Professor based on the "standard professional position descriptions referred to in PPD 2.19, IV, B, Attachment 1. Standard professional position descriptions for the various academic ranks provided in Attachment 1 to PPD 2.19 include special requirements for, "Successful completion of the Corrections Academy and continuing Certificate as correctional line personnel as established by the certifying authority." Otherwise, the job descriptions refer back to the class specifications for the remaining minimum qualifications.

9. Having proven that he met the minimum qualifications for promotion, the Appellant earned the opportunity to be interviewed by the promotion board so that they might evaluate his promotional application against the evaluation criteria for instructional personnel as listed in PPD 2.19, Attachment 5.
10. PPD 2.19 states, "For each competency area, the applicant must clearly describe the reasons they feel a promotion is deserved." The policy does not guarantee promotion solely on the basis of satisfying the minimum qualifications for the rank and salary grade sought. (State's Exhibit 1, page 4)
11. Mr. Mottola's application for promotion was evaluated by a four-member Department of Corrections promotion board that included Lisa Currier, HR Administrator, Lori Seog, Director of the Bureau of Programs, Daniel Tanguay, Educational Director, and Jay Nagy, Career and Technical Education Center Director. (SEA Exhibit 16)
12. In order to receive a recommendation for promotion, candidates must score a minimum of 66 points in areas defined as follows: Teaching, which includes Assignment/Expectations; Effectiveness of Instruction; Academic Contributions; Concern for Students; and Professional Growth and Development.
13. Based on the interviewers' collective assessment, the Appellant did not reach the 66 point threshold required for him to advance to the next stage of the promotional process.
14. Although the promotion board can recommend a promotion, the Commissioner of the Department of Corrections retains full authority to approve or deny promotion to an otherwise qualified candidate who has obtained the promotion board's recommendation.

Discussion of the evidence, arguments and offers of proof in light of the Board's authority as set forth in RSA 21-I:46

RSA 21-I:46, I, describes the Board's jurisdiction as follows:

- I. The personnel appeals board shall hear and decide appeals as provided by RSA 21-I:57 and 21-I:58 and appeals of decisions arising out of application of the rules adopted by the director of personnel except those related to:

(a) Performance evaluations of classified employees; provided, however, that an employee who is disciplined or has other adverse action taken against him as the result of an evaluation may appeal that action.

(b) The refusal of an appointing authority to grant a leave of absence without pay.

(c) Classification decisions of the director of personnel when the reasons for appeal are based on any of the following:

(1) The personal qualifications of an employee exceed the minimum requirements for the position in question.

(2) The employee has held the position for a long period of time.

(3) Any positions previously held by the employee or any examinations passed by the employee which are not required for the position in question.

(4) The employee has reached the maximum of the assigned salary grade.

(5) The cost of living or related economic factors. authority to hear and decide appeals as based on its opinion that he lacked the personal or professional qualifications for promotion.

RSA 21-1:58 allows the Board to hear and decide appeals brought by "[a]ny permanent employee who is affected by any application of the personnel rules, except for those rules enumerated in RSA 21-1:46, I and the application of rules in classification decisions appealable under RSA 21-1:57...." The parties agree that there was no change in the duties and responsibilities assigned to the position, and no request by the Department or the Appellant for the Division of Personnel to review, reclassify or reallocate the position. As a result, although the dispute involves the Appellant's position classification and rate of pay, the decision under appeal is not a classification decision of the Director of Personnel subject to appeal under the provisions of RSA 21-1:57.

Similarly, the Board can not treat the appeal as a dispute arising out of the proper interpretation or application of a rule adopted by the Director of Personnel that would be appealable under the provisions of RSA 21-1:58, as neither party provided evidence that a personnel rule exists that would require an employer to adjust an employee's position title or salary grade simply because that employee met the minimum qualifications for a position at a higher rank or salary grade. If, as the Appellant argues, the decision under appeal should not be considered a promotional decision subject to the provisions of Per 602 of the personnel rules, it raises the question of which standards the Board should apply in evaluating the evidence and rendering a decision on the merits of the appeal, since the decision depends upon an interpretation of a policy and procedure adopted by the agency.

The only policy or procedure offered by either party to explain the "promotion" process was the Department of Corrections PPD 2.19 regarding promotion within an employee's own position for personnel assigned to academic

positions in career and technical education at the Department of Corrections. Although the issue does not involve selection to a vacancy, it appears that the only reasonable way to evaluate the evidence and reach a decision is to apply the standards set forth in Per-A 207.12 (c) of the Board's rules, which states:

"In appeals involving denial of promotion or selection to a vacancy, the board shall determine if the appellant proves by a preponderance of the evidence that the decision was unreasonable or unlawful because: (1) The appellant met the minimum educational and work experience requirements for selection to the vacancy; (2) The appellant possessed the personal and professional qualifications for selection to the vacancy; and (3) The appointing authority abused its discretion by denying selection to the person best qualified for selection to the vacancy, or that the non-selection decision was unlawful."

#### Decision and Order

The Board found that there is no requirement in either the administrative rules of the Division of Personnel or the Department of Corrections policies and procedures for an individual to be promoted within his or her own position simply because that individual meets the minimum qualifications for the position title and salary grade sought. The Department of Corrections promotional process for instructional personnel in career and technical education involves more than just a review of the applicant's background in terms of education and experience, but an assessment of his or her proficiency in a number of areas including teaching, assignments, expectations, effectiveness of instruction, academic contributions, concern for students and professional growth and development.

In the Appellant's case, and as set forth in William McGonagle's letter of December 22, 2008, the members of the promotion board found that the Appellant, "...did not demonstrate levels of teaching competencies required or did not articulate them during the interview board." Assistant Commissioner McGonagle wrote, "The Appellant] fell short in the areas of program development, new courses and teaching strategies. While the breadth of [the Appellant's] activities are diverse, there is a lack of depth within Business and Computer Education. In addition, [the Appellant's] participation in professional development activities is minimal. {The Appellant's] professional development should be broadened beyond day long workshops and [the Appellant needs] to develop as a High School educator." (State's Exhibit 1, page 64)

The Board also found that the Department of Corrections applied the standards outlined in PPD 2.19 in evaluating the Appellant's application for promotion, and that the Department acted within its authority in denying the Appellant's

application for promotion. Therefore, for all the reasons set forth above, the Board voted unanimously to DENY Theodore Mottola's appeal.

THE PERSONNEL APPEALS BOARD

  
\_\_\_\_\_  
Patrick Wood, Chair

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Philip Bonafide, Vice-Chair

  
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Robert Johnson, Commissioner

cc: Karen Hutchins, Director of Personnel, 25 Capitol St., Concord, NH 03301  
Michael Brown, Senior Assistant Attorney General, Department of Justice, 33 Capitol St., Concord, NH  
03301  
Lisa Currier, Human Resources Administrator, Department of Corrections, 105 Pleasant St., Concord, NH  
03301  
Marc Abear, SEA Grievance Representative, State Employees Association of NH, 107 N. Main St.,  
Concord, NH 03302-3303