

State of New Hampshire

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PERSONNEL APPEALS BOARD

State House Annex
Concord, New Hampshire 03301
Telephone (603) 271-3261

APPEAL OF PIERRE A. PLANCHET
Docket #90-P-15 and #91-P-6
N.H. Department of Corrections

February 13, 1992

The New Hampshire Personnel Appeals Board (Bennett, Rule and McGinley) met Wednesday, January 8, 1992 to hear Pierre Planchet's appeal of non-selection for promotion from Corrections Officer to Corrections Lieutenant. The Board (McNicholas, Bennett and Rule) also met on Monday, January 20, 1992 to hear a second appeal of non-selection to the rank of Lieutenant. At each hearing the appellant was represented by SEA Field Representative Stephen J. McCormack and the Department of Corrections was represented by Harden Michael Cunningham.

Although the appeals are not consolidated, the issues presented in the two appeals are similar. Therefore, a single Order will be issued covering both matters.

On all the evidence, the Board found that Officer Planchet lacked the personal and professional qualifications for promotion. Lieutenants at the State Prison serve as shift commanders. Because of their responsibility for establishing work schedules, monitoring employee attendance and leave, recommending disciplinary action and enforcing departmental policies, the Department understandably would seek out candidates with proven supervisory skills and experience. Reasonably the Department would reject candidates who did not possess such experience. The same standard would be expected for promotion to the rank of Sergeant where a typical duty assignment would involve supervision, training and evaluation of subordinate officers.

Officer Planchet testified that he had served as a Corrections Officer II, which he considered equivalent to the rank of Corporal and that he had on "several" occasions been named the OIC (Officer in Charge). The Department of Corrections argued that Officer Planchet had insufficient supervisory experience to be deemed a viable candidate for promotion to Lieutenant.

Officer Planchet testified that because of family problems he had been unable to accept promotion to either Corporal or Sergeant when such promotions were offered. However, the Board found that the Department of Corrections was under no obligation to take such mitigating circumstances into consideration when selecting an officer for promotion to Lieutenant. The appellant did not persuade the Board that his supervisory experience was sufficient to warrant his promotion to the rank of lieutenant. The Board found that the Department of Corrections reasonably concluded that the appellant was "an ostensibly qualified candidate" who lacked the personal and professional qualifications for promotion to Lieutenant. Accordingly, the Board voted to deny both appeals.

Although the Board voted to deny Officer Planchet's appeals, he raised a number of issues which the Board will address below:

I. Department of Corrections Promotional Registers

The appellant alleged that the Department of Corrections violated its own promotional policy by re-prioritizing the promotional "register" for the rank of lieutenant. He contended that the Rules of the Division of Personnel require registers of eligibles to remain active for a period of two years. He argued that promotions to Lieutenant should have occurred in the order in which the candidates' names first appeared on the roster.

The Board does not agree. Per 101.38 defines "Register" as "...a list of persons who are eligible for a specific classification." Further, Per 101.23 defines "Eligible candidate" as meaning "...any applicant who receives a passing earned rating." PART Per 302 of the Rules of the Division of Personnel describes the manner in which registers of eligible candidates are established and maintained by the Director of Personnel.

The promotional list used by the Department of Corrections is not a "register" within the meaning of the Rules. Authority for establishment and maintenance of a register of eligible candidates for a specific classification is vested solely in the Director of Personnel. Therefore, the appellant is incorrect in asserting that the Department of Corrections violated the Personnel Rules by rearranging the ranking of the candidates, or selecting someone other than the first candidate on that list.

The Board also does not accept Warden Cunningham's repeated assertions that the Department of Corrections' promotional policy and the use of promotional "registers" has been "blessed" by the Division of Personnel. No evidence has been offered in this or any prior Department of Corrections promotional appeal to support such a finding. Given the number of appeals which have arisen over the application of this policy and repeated allegations that the Department of Corrections policy violates the Rules of the Division of Personnel, the Board found it improbable that the Warden would not offer the sworn testimony of the

Director to support his claim. The Board found it equally implausible that the Director of Personnel would have approved the policy as it is described to this Board.

Warden Cunningham testified that as promotional vacancies occur, the candidate on the top of the promotional list is offered the vacant position. The Board does not find this practice to be in compliance with the Rules of the Division of Personnel which require that all qualified candidates be afforded the opportunity to apply for promotions as vacancies occur and are filled.

By holding promotional boards at six month intervals and failing to post each and every position which is to be filled by promotion, the Department of Corrections has violated and continues to violate the Rules of the Division of Personnel. The Board finds the Department's current promotional policy as set forth in its Policy and Procedure Directive to be in clear violation of the Personnel Rules. Accordingly, the Board strongly recommends that the Director of Personnel refuse to approve or authorize the promotion of any Department of Corrections candidate unless the Department can demonstrate conclusively that it has posted such vacancy prior to selection, and that the promotion was available to all qualified candidates for promotion.

II. Interpretation of the promotion Appeals Tribunal Order in the Appeal of Michael Beadle.

While the particulars of the Tribunal's Order in the Appeal of Michael Beadle have been quoted extensively in this case, they also appear to have been almost completely misunderstood. Therefore, the Board has reproduced and will expand on portions of the Tribunal's Order of April 3, 1991, Appeal of Michael Beadle, Docket #90-P-11.

"The Tribunal does not object to consideration for promotion on the basis of a roster of eligibles, provided however, that any candidate who meets the minimum qualifications for promotion may be added to the roster, in a ranking consistent with his 'factor rating' and oral board scores. ... Given management's prerogative in selection, however, the Tribunal does not consider the addition of candidates to the roster, or the possible re-ranking of the candidates already on the roster, to be inconsistent with the Rules of the Division of Personnel." (Emphasis added)

"...[O]nly holding qualifying boards every six months may deny certain qualified candidates the opportunity for promotion, in violation of Per 302.02(c)."

The parties would be well-served by carefully reading Per 302.03(b) of the Rules of the Division of Personnel pertaining to promotion of "qualified" candidates for promotion.

"(b) Selection for such promotion shall be based upon capacity for the vacant position, ability as evidenced by past performance, and length of service with the department.

"(1) It is the prerogative of the appointing authority to give such weight to an employee's job performance as he deems appropriate when considering the employee for appointment' to a vacancy.

"(2) If the appointing authority finds certain professional and personal qualifications lacking in even ostensibly qualified candidates for promotion, employees may be denied promotion.

"(3) While probationary and part-time employees not having six months service within a one-year period can respond to a departmental posting, preference in selection must be given to permanent employees."

The Department of Corrections Policy and Procedure Directive addressing promotions is not entirely without merit. Certainly the Department may use any number of reasonable evaluation tools in rating candidates for promotion. The Department of Corrections appears to have addressed "ability as evidenced by past performance" and "length of service with the department" in its factor ratings and oral board scores. The appellant appears to have no objection. Similarly, the scores derived after oral interviews provide some indication of capacity for the vacancy.

The ongoing dispute presented by this appellant and many of his co-workers who have previously appealed to this Board and/or the Promotion Appeals Tribunal arises from management's exercise of its discretion in deciding when "ostensibly qualified candidates" may be denied promotion. That dispute is fueled by management's abject failure to articulate the basis for its promotional decisions, its reliance upon the order of names on the promotional roster, and its continued hesitation to provide the reasons for non-selection.

On July 13, 1990, the Department responded as follows to Officer Planchet's request for the reasons for non-selection (Exhibit #4, Appeal of Pierre Planchet, Docket #90-P-15):

"As has been often and repeatedly expressed, you were not selected because a man ahead of you on the promotion list was selected. That is the reason for having a promotion list. You were ranked seventh after a review of many salient features. The primary one was your suitability to be a Lieutenant and a supervisor. Since you are a Corrections Officer and have little experience in a supervisory role either as a Corporal or as a Sergeant, it would be difficult for you to make a convincing case that you are ready to be a supervisor as a Lieutenant. As you will note, the six officers who preceded you on the list all had supervisory experience at the varying ranks." (Emphasis added)

The appellant received a similar letter on October 11, 1990 (Exhibit 2, Appeal of Pierre Planchet, Docket #91-P-6):

"Upon completion of the oral board you placed tenth on the promotion list. A review was then conducted as specified in Policy and Procedure Directive 2.2.1 and after consideration of all factors involved you remained in that position on the list.

"Since promotions are competitive and a number of qualified candidates apply for such promotion there exists a need for comparative selection in order to prioritize the list. I can only recommend that you continue to perform your duties to the best of your ability and develop and improve upon those positive qualities which are the mark of an effective supervisor.

"Because of the variables involved I can not answer your question concerning your expectations for promotion."

The Board finds the Department of Corrections' reliance upon "the list" to be an irritatingly convenient method of exercising managerial discretion without having to take any responsibility for it. The Board does not necessarily find anything inherently wrong with the decision not to promote Officer Planchet, provided that the Department is able to demonstrate that promoting him is not possible or reasonable, and that he lacks certain personal and professional qualifications for promotion. During the course of Officer Planchet's hearing, the Department offered testimony supportive of a finding that Officer Planchet lacked the appropriate level of supervisory experience. The Department of Corrections referred to Officer Planchet's "attitude" as making him a less desirable candidate for promotion to Corporal. However, rather than addressing these performance or work trait issues, the Department simply informed the appellant he was not promoted because there were other candidates "ahead of him" on the promotional list. When the appellant then got to the top of the list, the "register" either expired or was re-ranked.

III. Compliance with the Rules of the Division of Personnel in Selecting Candidates for Promotion.

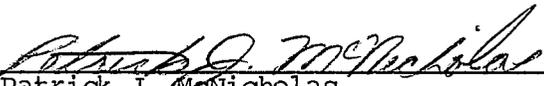
The current Rules of the Division of Personnel are clear and unequivocal in addressing promotion. Vacancies shall be filled "whenever possible and reasonable" by the promotion of qualified permanent employees of the department or agency. If, at the time of selection, the agency has fifteen permanent employees who meet the minimum qualifications for promotion, each should be considered. The Rules neither suggest nor provide for the establishment of a "prioritized" or "reprioritized" list of candidates for in-house promotion. Retaining a ranking of candidates for any period of time

beyond that required to select a candidate for the vacancy in question violates the merit principles of employment in State service.

IV. Managerial Discretion in Selection for Promotion

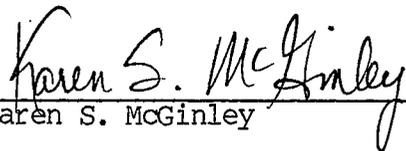
The agency is responsible for selecting the most suitable candidate for promotion. Although the candidates may have been ranked by an interview panel, the ultimate decision in selecting a candidate rests with the appointing authority or his designee. If the appointing authority exercises discretion in selection, the appointing authority should be prepared to take responsibility for that decision. The Department's practice of responding to an employee's request for the reasons for non-selection by reciting bits and pieces of the policy and informing the candidate that his name was not "at the top of the list" as prioritized or re-prioritized does not comport with the Rules of the Division of Personnel which requires that the reasons (i.e., poor attendance, lack of job knowledge, inadequate communication skills, etc.) be provided to the employee in writing.

THE PERSONNEL APPEALS BOARD


Patrick J. McNicholas


Mark J. Bennett


Lisa A. Rule


Karen S. McGinley

cc: Virginia A. Vogel, Director of Personnel
Warden Michael Cunningham, New Hampshire State Prison
Viola Lunderville, Administrator of Security, New Hampshire State Prison
Lisa A. Currier, Human Resource Coordinator, Department of Corrections
Stephen J. McCormack, SEA Field Representative

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THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 91-183 Appeal of Pierre Planchet

the court upon August 22, 1991 made the following order:

Appeal from administrative agency is declined. See Rule 10(1).

Distribution:
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Attorney General's Office
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Personnel Appeals Board
File

Ralph H. Wood,

Clerk

State of New Hampshire



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Response to Appellant's Motion for Reconsideration

PIERRE A. PLANCHET

Docket #91-P-9, 90-P-5, 90-P-10 and
Undocketed Appeals Dated May 3, 1990 and May 4, 1990

New Hampshire Department of Corrections

April 3, 1991

At its meeting of April 3, 1991, the Personnel Appeals Board (McNicholas, Bennett and Johnson) considered the Motion for Reconsideration filed by SEA Field Representative Stephen J. McCormack on behalf of Pierre Planchet, an employee of the Department of Corrections. The appellant argued that the Board's February 28, 1991 decision in the above captioned appeals erroneously dismissed *Mr.* Planchet's appeals, and asked that the Board order the Department of Corrections to immediately promote Officer Planchet.

Upon review of the record before it, and in consideration of the grounds offered by the appellant in support of his Motion for Reconsideration, the Board voted unanimously to deny his request.

The appellant argued that transfer of Sgt. Allen Northcott to fill a vacant Corrections Sergeant position on February 8, 1990, violated Per 302.02 (c) and Per 302.03 (a). The Board does not agree. The appellant also argued that the Department of Corrections, in posting for a Corrections Sergeant on April 18, 1990, but limiting consideration to only those who then held the rank of Sergeant violated Per 302.02 (c). Again, the Board does not agree. Per 302.05 of the Rules of the Division of Personnel addresses Transfer Within a Department or Agency.

"(a) A vacancy may be filled by the appointing authority by the transfer of a departmental employee from any position within the same labor grade to the vacant position upon written notice to the director and approval by him as to minimum qualifications.

"(b) It is the prerogative of management to determine who [sic] and when employees are to be transferred, keeping in mind that they can be made

PIERRE A. FLANCHET

Docket #91-P-9, 90-P-5, 90-P-10 and
Undocketed Appeals Dated May 3, 1990 and May 4, 1990

Response to Appellant's Motion for Reconsideration

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only for the best interests of the agency. Such transfers are subject to appeal to the [personnel appeals board] by the employee affected if he feels that the transfer was made for some other reason."

Inasmuch as the appointing authority may elect to fill a vacancy through transfer, with or without the agreement of the employee to be transferred, provided that the Director of Personnel has certified that employee as meeting the minimum requirements of the position into which the employee will be transferred, the Board does not find posting for "laterals only" to be a violation of the promotional rules. In fact, the Board finds the initial postings for "laterals" to be a prudent approach both for the purposes of cross-training and career advancement within the ranks of uniformed personnel. Once all the applications for lateral transfer have been implemented or rejected, however, the Board remains of the opinion that the resulting position vacancy, if such vacancy is to be filled, must be posted for promotional opportunities.

Mr. Planchet's appeals of May 3, 1990 and May 4, 1990 alleged that the Department of Corrections had violated Per 302.03(a) and Per 302.01(c) by failing to post positions for promotion, and further that the Department had violated its own promotional policies. The Department's promotional policy, which appeared as an attachment to the appellant's May 3, 1990 and May 4, 1990 appeals, states in pertinent part,

"Individuals presently holding the same position title who are interested in the position may file a request for a lateral transfer. These requests will be reviewed and acted upon before holding a promotion board. If a lateral transfer is accepted for that position, the new vacancy will be posted. This process will continue until no further lateral transfer requests are received." [Department of Corrections P.P.D. 1.2.1 effective 11/20/89, IV., 1. c.]

"Promotion Boards for the positions of Corporal, Sergeant, and Lieutenant will be held twice a year to build up an internal register of candidates qualified for the respective position. Inherent in this system is the belief that Lieutenants, Sergeants and Corporals can do the work of Lieutenants, Sergeants and Corporals no matter where the position is assigned. There are no permanent posts or assignments designated as Lieutenant, Seryeant or Corporal.. [Department of Corrections P.P.D.1.2.1 effective 11/20/89, IV., 6, a.]

"Vacancies will be posted and filled by lateral transfer when appropriate, then by rank order on the internal register." [Department of Corrections P.P.D.1.2.1 effective 11/20/89, IV., 6, c.]

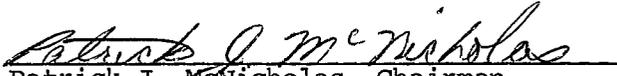
PIERRE A. PLANCHET

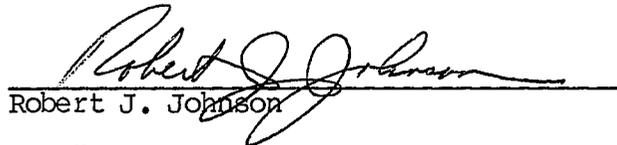
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Response to Appellant's Motion for Reconsideration

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In his appeals dated May 3 and 4, 1990, the appellant asked that the Board issue a decision without evidentiary hearing. The information presented by the appellant at that time and in his subsequent Motion for Reconsideration failed to persuade the Board that the Department of Corrections violated its own policy of promoting from the "internal register" described in P.P.D.1.2.1, which appeared as attachments to each of the appeals.

THE PERSONNEL APPEALS BOARD


Patrick J. McNicholas, Chairman


Robert J. Johnson


Mark J. Bennett

cc: Virginia A. Vogel, Director of Personnel
Ronald Powell, Commissioner, Department of Corrections
Lisa A. Currier, Human Resource Coordinator, Department of Corrections
Michael K. Brown, Staff Attorney, Department of Corrections
Stephen J. McCormack, SEA Field Representative

State of New Hampshire

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APPEAL(S) OF PIERRE A. PLANCHET

Docket #91-O-1 (February 9, 1990) ✓
- Docket #90-P-5 (April 9, 1990) ✓
- Docket #90-P-10 (April 23, 1990) ✓
- Undocketed (May 3, 1990)
- Undocketed (May 4, 1990)
- Docket #90-P-15 (June 26, 1990) ✓
- Docket #91-P-6 (October 17, 1990) ✓

Dated: February 28, 1991

On January 17, 1991, the Personnel Appeals Board issued a pre-hearing order in the above-captioned appeals of Pierre Planchet, directing the appellant to file a response within twenty days of that order, providing for the Board's consideration "a written explanation of why a hearing should be held to receive additional evidence and/or legal argument, and why the Board should not find for the Department of Corrections on the facts presented to date." By letter dated February 1, 1991, received by the Board on February 4, the appellant submitted additional written arguments and evidence, as well as a request that the Board schedule each matter for hearing should the Board decline to order *Mr.* Planchet's immediate promotion. The Department of Corrections responded to the appellant's submissions by letter dated February 12, 1991, asking that the Board dispose of the matter without evidentiary hearing, and issue an order upholding the Department of Corrections position in this matter.

Appellant points to the affidavit of Walter Davies (Appellant's Exhibit #1) which he claims to verify "...the absolute violations of requirements for posting and filling vacant positions. (Exhibit #9)". *Mr.* Davies' affidavit addresses transfers, whether voluntary or involuntary, into positions of his same rank (Sergeant). Additionally, all of the position transfers to which *Mr.* Davies referred in his affidavit would have occurred prior to February 12, 1990, the effective date of Department of Corrections Policy and Procedure Directive, Chapter: Personnel, Statement Number: 1.2.1, appearing as Appellant's Exhibit #9. The Board also noted that Appellant's Exhibit #4 (Mills memo of February 5, 1990) also predates the effective date of policy 1.2.1 (Exhibit #9)

On all the evidence and argument received to date, the Board voted at its

APPEAL(S) OF PIERRE A. PLANCHET:

Docket #91-O-1 (February 9, 1990), Docket #90-P-5 (April 9, 1990)
Docket #90-P-10 (April 23, 1990), Undocketed (May 3, 1990),
Undocketed (May 4, 1990), Docket #90-P-15 (June 26, 1990),
Docket #91-P-6 (October 17, 1990)

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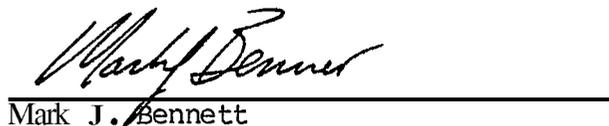
meeting of February 13, 1991, to schedule two of the promotional appeals for hearing at the next available date (Docket #90-P-15 and Docket #91-P-6). With regard to the remainder of the above-listed appeals, the Board found that the evidence is not supportive of appellant's claim that the Department of Corrections acted in violation of its own policies or in violation of Per 302.03 of the Rules of the Division of Personnel. On the contrary, it would appear that when positions were improperly posted, an immediate correction was made. Following selections under the "laterals only" postings and transfers (voluntary or involuntary), any remaining promotional vacancy was posted, consistent with the promotional provisions of Per 302.03 of the Rules of the Division of Personnel.

Based upon the foregoing, the Board affirms its order of January 17, 1991, dismissing the following appeals: Docket #91-O-1 (February 9, 1990), Docket #90-P-5 (April 9, 1990), Docket #90-P-10 (April 23, 1990, Undocketed (May 3, 1990) and Undocketed (May 4, 1990)

THE PERSONNEL APPEALS BOARD


Patrick J. McNicholas, Chairman


Robert J. Johnson


Mark J. Bennett

cc: Virginia A. Vogel, Director of Personnel
Stephen J. McCormack, SEA Field Representative
Michael K. Brown, Staff Attorney, N.H. Department of Corrections

State of New Hampshire



PERSONNEL APPEALS BOARD

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Appeals of Pierre A. Planchet

(Department of Corrections)

90-O-1, 90-P-5, 90-P-10, etc.

Pre-Hearing Order

Pursuant to its order of June 1, 1990 (containing pertinent background information), the Personnel Appeals Board conducted a pre-hearing conference relative to the instant appeals on June 20, 1990. Stephen **McCormack**, SEA Field Representative, appeared for the appellant (who was present) and Attorney Michael Brown appeared for the Department of Corrections (Deputy Commissioner Nicholas Pishon and Ms. Viola Lunderville were also present on behalf of the agency.)

The purpose of the conference was to narrow the factual issues under consideration and to limit any potential cumulative testimony in anticipation of any evidentiary hearing which may become necessary. The parties were asked to provide information, offers of proof or argument as to whether or not the various appeals instituted by Mr. Planchet should be consolidated, and lastly, whether or not the matter is susceptible of disposition without

evidentiary hearing, as the appellant contends (although not necessarily as he contends).

The gist of Mr. **Planchet's** factual contentions appears to be that the Department of Corrections has posted various Lieutenant and Sergeant positions to be filled by lateral transfer only of a Lieutenant or Sergeant (as may be appropriate) from another position of like rank into the posted position for purposes of performing different job duties. These positions and postings are not intended to offer promotional opportunities, but only a career and duty change and a chance to gain experience in another subject matter area for the selected officer. It is contemplated that the ultimately vacant Lieutenant or Sergeant position would then be posted as a position to which any candidate, including Correctional Officers such as the appellant, to the extent that he is qualified, could apply, and to which those of lesser rank could be promoted. (See memo of Richard A. Greenwood of April **18**, 1990 to the appellant; attached thereto, **the posting** of April 6, 1990; and the Department of Corrections Policy and Procedure Directive, Chapter: Personnel, Statement **Number:** 1.2.1, dated November 15, 1989, effective November 20, 1989).

The gist of the **appellant's** argument is set forth in his letter of appeal of February **9**, 1990 (and essentially identically in his other appeals dated April 9, April 20, May 3, and May 4, received by the Board on the dates indicated in our order of June **1**, **1990**), and is that the Department of Corrections violated Per

302.02(c) by failing to post the vacant positions as therein required, and thereby deprived the appellant of a promotional opportunity in accordance with Per **302.03(a)**, for which he is entitled to a remedy. He contends that the appropriate remedy is promotion to one of the positions concerned in one of his appeals, and he proposed an order of preference.¹

Per 302.02, entitled "Methods of Filling Vacancies," provides, **in** pertinent part:

(a) All vacancies in the state classified service shall be filled by transfer, promotion ..., but not necessarily in that order...

(c) All vacancies shall be posted on departmental bulletin boards so that employees may have the opportunity to apply for promotion...

Note that Per 302.05, entitled "Transfer Within a Department or Agency," is a separate rule dealing with that subject; however, it is oriented to the circumstance of involuntary transfers and certain appeals to this Board as a result. That section is not claimed to apply in the instant appeal by either party.

The Department of **Corrections'** personnel policy (provided by the appellant and referenced above), provides in Section **IV, (c)**, dealing with Recruitment and Hiring Procedures, that:

¹ The other procedural contentions and citations appearing in the appeal documents are not particularly relevant to the discussion herein and are not reviewed as this is a preliminary order. A discussion of the applicability of Per-A 202.04 appears below.

(c) Individuals presently holding the same position title who are interested in the position may file a request for lateral transfer. These requests will be reviewed and acted upon before holding a promotion board. If a lateral transfer is accepted for that position, the new vacancy will be posted. This procedure will continue until no further lateral transfer requests are received.

It appears to this Board that the procedure set forth in Section IV,(c), of the personnel policy must be read in conjunction with the other provisions of that section, particularly general procedural subsections **IV(a)** and (b). If so done, it would seem that the Department of Corrections permits internal posting of lateral transfer opportunities, and this is indeed consistent with the foregoing discussion and the posting of April 6, 1990, referenced above. If so, it would appear that the Department of Corrections has a posting procedure consistent with Per **302.02(c)** pertinent to the filling of vacancies by voluntary lateral transfer. While subsection **IV,(c)**, cited above, could make this more clear, that is not an unreasonable reading of the policy, and it appears from the one example provided to us that that is what the Department endeavored to do.

In turning briefly to Per 302.02, we note that subsection (a) provides that **all** vacancies may be filled by certain procedures, including "**transfer**," and that section (c) requires all vacancies, presumably including voluntary transfers, to be subject to a

posting requirement such as the Department of Corrections appears to have followed in the one example discussed above.²

If this is indeed so, and if this is indeed what the Department has done in the case of all of the positions at issue in Mr. **Planchet's** appeals, we do not find that practice offensive to our rules, or unlawful or unreasonable. If the factual situation is indeed this, Mr. Planchet's appeals should be dismissed. Naturally, as this is a pre-hearing order and we are inferring facts from a limited presentation to us, we do not so rule on the basis of the current record.³

Accordingly, on the basis of the record as it now stands, we return to Per-A 202.04. This time we focus on subsection **(a)(2)**. In light of the foregoing, it appears to the Board that there are currently no material facts known to be in dispute, so that the Board may reach a decision without taking the testimony of witnesses. Pursuant to Per-A **202.04, (a), (2)**, the Board hereby orders either party wishing to do so to explain in writing, within twenty days of the date hereof, why the Board should hold a hearing

² Involuntary transfers are dealt with under Per 302.05. We do not here rule whether or not the notice provisions of Per 302.05 are pertinent in the same way to voluntary transfers as they are to involuntary transfers, nor do we rule whether or not involuntary transfers pursuant to Per 302.05 must be preceded by posting in accordance with Per **302.02(c)**.

³ Nor do we rule or imply that the Department's Personnel Procedures comport in **toto** with the rules of the Division of Personnel, or other pertinent law, or that they do not.

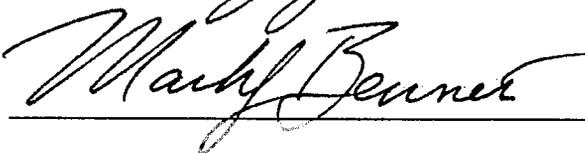
to receive additional evidence and/or legal argument, and why the Board should not find for the Department of Corrections on the facts presented to date, and summarized above. The opposing party shall then have ten days in which to respond to the other parties' submission.⁴

Of particular importance to the Board would be any offers of proof or evidence that the facts are not as we have supposed them to be above, **i.e.** positions were filled voluntarily without "Lateral Transfer **Only**" postings having been made, etc. The purpose of our order (pursuant to Per-A 202.04) is to provide the parties an opportunity to demonstrate that an evidentiary hearing is required in this matter because the actual provable facts differ from those we have adduced from the representations of the parties at the pre-hearing conference, which are set out in this **pre-hearing** order. Failing that, a final order in these appeals will issue as aforesaid at the close of the 30-day response period described above.

17 January 1991

The Personnel Appeals Board





⁴ We do not anticipate an initial submission from the Department of Corrections, although it is free to file one pursuant to this order.

cc: Stephen McCormack
SEA Field Representative

Michael K. Brown, Staff Attorney
N.H. Department of Corrections

Virginia A. Vogel, Director
Division of Personnel

