State of New Hampshire

PERSONNEL APPEALS BOARD
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APPEALS OF ROBERT SILVER
New Hampshire Banking Department
Docket #92-P-19,#93-P-3,
Undocketed Appeal Dated 3/17/93,
Undocketed Appeal Dated 9/28/93

June 1, 1994

The New Hampshire Personnel Appeals Board (McNicholas, Johnson and Rule) met Wednesday, March 16, 1994, and Wednesday, March 23, 1994, to hear the appeals of Robert Silver relative to his non-selection for promotion for four separate postings for the position of Banking Examiner IV. Mr. Silver was represented at the hearing by SEA Field Representative Stephen J. McCormack. Kathleen Belanger, Legal Coordinator, appeared on behalf of the Banking Department.

The Banking Department had moved to consolidate the appeals, arguing that each of the non-selection decisions arose from the same set of facts and circumstances and involved Mr. Silver's qualifications for promotion. The appellant originally objected to consolidation of the cases, arguing that there were four separate causes of action and that he was entitled to a hearing and a decision on each matter. For the purpose of judicial economy, the Board allowed relevant testimony and evidence in each case to be considered in the others, but agreed it would consider each case separately.

Appeals Filed

Mr. Silver had first applied for promotion to one of two Bank Examiner IV positions in May, 1991. At that time, because he had failed to attend FDIC (Federal Deposit Insurance Corporation) training offered by the Banking Department in conjunction with the FDIC, the Banking Department notified him that he failed to meet the minimum qualifications for promotion and that his application would not be considered. A timely appeal of that decision was filed by the appellant, alleging that he was being denied promotion solely on the basis of his failure to complete the FDIC's AES IV (Assistant Examiner School IV) training, a minimum qualification which did not appear on the job specification for Bank Examiner IV at that time.

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A hearing on the merits of this appeal (Docket #91-P-37) was scheduled on October 7, 1992.

Prior to the hearing on Mr. Silver's first denial of promotion, two more positions of Bank Examiner IV were posted. Mr. Silver applied, but was denied selection. He timely filed an appeal (Docket #92-P-19), again arguing that he had been denied promotion solely on the basis of his having failed to attend FDIC AES IV training. In this instance, however, the appellant's application was considered, and he was denied promotion ostensibly for failing to possess certain personal and professional qualifications for promotion. Mr. Silver contended that one of the positions posted remained vacant, and that the employee selected to fill the second vacancy, Nancy Daigle, did not meet the minimum qualifications for promotion, although his February 14, 1992 notice of non-selection stated that the candidate who was selected was "best suited for the position and overall department needs." On November 2, 1992, the Personnel Appeals Board issued a decision on Mr. Silver's first appeal of non-selection for promotion, finding that he did meet the minimum qualifications for consideration, and that he should be interviewed and considered for the vacancy. Mr. Silver was interviewed and was again denied selection, giving rise to his third appeal (Docket #93-P-3). In the notice of non-selection dated January 4, 1993, the Banking Department cited a variety of reasons for non-selection including an inability to effectively supervise subordinates, lack of management and training skills, refusal and failure to attend FDIC AES IV training, and demonstrated poor communication and interpersonal skills based on his past performance.

Mr. Silver was again denied promotion to one of two vacant Bank Examiner IV positions on March 5, 1993 (undocketed appeal dated 3/17/93), with the same rationale given as in the prior notice of non-selection. His final appeal (undocketed appeal dated 9/28/93) arose from denial of promotion on September 17, 1993, based on the same rationale appearing in the January 4, 1993 notice of non-selection.

Discussion of Testimony and Exhibits Relevant to All Pending Appeals

The Board declined to accept any exhibits or testimony on matters occurring subsequent to September 1993, the date of the last denial of promotion. According to exhibits submitted by the appellant in support of his appeal (Docket #92-P-19, Exhibits 4 - 6), the minimum qualification/special requirements statement on the Bank Examiner IV specification did not include the requirement for completion of the "FDIC Examination Management School" until August 20, 1993. When Mr. Silver had first applied for promotion to Bank Examiner IV, the position required the following minimum qualifications:

1. Possession of a Bachelor's degree from a recognized college or university with a major in accounting, finance, business administration or economics with a minimum of 15 credit hours in accounting.
2. Seven years' experience in accounting, auditing or business administration, four years of which must have been involved in the examination of banking institutions.

3. Thorough knowledge of applicable laws, practices and procedures relating to financial institutions. Thorough knowledge of and skill in applying examination techniques, procedures and accounting applicable to banking examinations. Thorough knowledge of credit and ability to understand involved business transactions. Ability to critically analyze the asset and liability structure of a bank and discuss all problems with bank management. Ability to organize and prepare concise reports covering all phases of each examination. Ability to establish and maintain harmonious working relationships with other employees, senior banking executives and the public.

On August 20, 1993, the specification was amended, decreasing the experience requirement from seven years' experience to five, although all of the experience had to be in the examination of financial institutions. The third listed qualification from the previous specification appeared on the new specification as "Recommended Work Traits", and included an additional statement, "Must be willing to maintain appearance appropriate to assigned duties and responsibilities as determined by the agency appointing authority." An additional qualification was added under a section entitled "Special Requirements" which read as follows:

> Must be willing to expand knowledge of examing [sic] techniques through continuous education. In particular, must have successfully completed the FDIC Examination Management School or a comparable course approved by the Bank Commissioner. Must be willing to attend specialized bank examination schools as required by the department and offered by the FDIC or other comparable agencies as determined by the Bank Commissioner.

Those persons who were already employed in the capacity of Bank Examiner IV were not required to attend FDIC AES IV training. However, since the inception of the training, no person has been promoted to the position of Bank Examiner IV without first attending and successfully completing the FDIC AES IV training.

Commissioner Roberge testified that the position of Bank Examiner IV (salary grade 31) is a senior management position in the Banking Department, and that in order to function effectively, a Bank Examiner IV needs the respect and cooperation of the manager and board of directors of institutions being examined by the Department. He testified that in order to secure the cooperation of bank personnel, examiners need good communications skills. Commissioner Roberge testified that in considering the qualifications of an employee for promotion to Bank Examiner IV, more than technical skills had to be appraised. A selection review, therefore, would consist of a review of past performance, education and training, and assessment by senior staff to determine a candidate's technical competence, communications skills and ability to work cooperatively with bank and Banking Department employees.

Commissioner Roberge testified that while Mr. Silver's technical skills are excellent, he lacks the interpersonal skills, diplomacy and ability to handle stressful situations carefully and

effectively. In general, he described Mr. Silver's behavior as "very difficult", stating he had been an embarrassment to the department on a number of occasions. He also testified that the complaint he received about Mr. Silver's conduct during the FDIC AES III training was the only complaint of its type that he had ever received. He related a conversation with the appellant following the promotion of a woman on staff who was pregnant and would be out on leave and unavailable as a result. He chided the Commissioner, telling him that it was "what he got for promoting a woman". The Commissioner testified that this exchange was indicative of Mr. Silver's lack of tact and diplomacy.

Commissioner Roberge admitted that annual performance evaluations required by the statutes and the Rules of the Division of Personnel were not conducted in the Banking Department, stating that the department was small enough that performance "appraisal" could take place in casual meetings or in more formal settings through meetings with the employees. He said whenever there was a problem, an employee could be called in to discuss the issue.

Commissioner Roberge testified that at the time other Senior Supervising Field Examiners were promoted, there was no training through the FDIC. He felt it would be improper to require additional training of incumbents with thirteen to fifteen years of experience. However, he testified that after the FDIC training became available, no other employees were promoted who had not completed the training. Commissioner Roberge testified that in Mr. Silver's case, the training was available and he refused to take advantage of it. He said that the FDIC AES IV training is geared toward developing senior management skills, and that he had been hopeful it wold have been effective in correcting some of the deficiencies in Mr. Silver's performance, particularly with regard to professional demeanor, leadership and interpersonal skills.

When asked if he could have promoted the appellant, Commissioner Roberge said it was possible to promote him, but that such promotion would not have made much sense. He said it was the position of the department to promote people who take steps to take full advantage of all available training, and who take steps to correct deficiencies in their performance, thus promoting those persons who are most qualified for promotion. He testified that prior to deciding not to promote Mr. Silver, he had consulted with the Assistant Commissioner, the Chief Examiner and all five senior examiners who had supervised the appellant. He testified that on the whole, Mr. Silver met the minimum qualifications for selection prior to amendment of the position specification, but that he was not the best qualified candidate for promotion based on his past performance and his failure to seek out training to correct the deficiencies in his performance.

The Banking Department also offered testimony and exhibits in support of their contention that Mr. Silver lacked the personal and professional qualifications for promotion. They are detailed below:

On January 29, 1985, Mr. Silver was arrested in Seabrook, New Hampshire for his actions arising out of an incident in a parking lot while he was on a coffee break. Mr. Silver engaged

in a confrontation with the driver of a vehicle which he believed to have nearly struck him as he was attempting to cross the lot. Mr. Silver was arrested and charged with "knowingly engaging in a course of violent, tumultuous behavior, in that he did shut one [name omitted] in between the door and door jamb of his pickup truck and did further hit the said [name omitted] over the left eye with his fist" Mr. Silver pleaded *nolo contendere* and was found guilty on February 11, 1985, for which he was fined $50. While it is unclear when this incident was brought to the attention of the Banking Department, he was never formally disciplined as a result of the incident.

On August 14, 1987, following the appellant's examination of the New Hampshire Food Industry Credit Union, its Treasurer, Wendy Garr, submitted a formal complaint to Banking Commissioner Roberge about the appellant's conduct during the course of his visit. Ms. Garr's letter, began by saying that the NH Food Industry Credit Union felt that his review had been very thorough and had pointed out several areas needing correction, which she said the office would begin to correct immediately. She continued, "Having stated this, we wish to register a formal complaint against Mr. Silver for his lack of professional courtesy, his work habits, and perhaps, most important, his lack of respect and consideration for the orderly operation of our office building by professional men and women." Included in her complaint were the following specific examples of the appellant's conduct:

Shouting across the room to her, whether or not she was with a customer
Huffing, sighing loudly and slamming large work file notebooks onto the floor
Placing calls to his personal broker on the C.U.'s only phone line
Calling from the C.U. office to arrange his week-end plans
Meeting with his own broker on work time at the C.U. offices
Accusing her of lying
Taking extended breaks, leaving early

She concluded her letter by stating, "In considering his very loud arrogant voice, very poor work habits, insinuations of preferential treatment of employee loans and personal business being conducted in our office, plus his disturbance of others in the work place, we would not appreciate having him in our office in the future."
Attached was a statement from John B. Dixon, Member and Former Treasurer of the NH Food Industry Credit Union, complaining that over a period of two days, when Mr. Silver had left the credit union office for the day, he had left the materials with which he was working on chairs, the table and floor. He said that some of the materials in full-view were two passbooks and a number of other credit union documents. He also said that when he visited the credit union the following day, August 7th, he found the credit union manager, Ms. Garr, upset because the appellant had allegedly accused her of a deliberate, fraudulent action in her capacity of treasurer for the credit union. He stated, "...while he may be a very good accountant, his work habits are poor at best and his treatment of women is very, very poor at best."

Before sending her complaint to Banking Commissioner Roberge, Ms. Garr had received a complaint dated August 10, 1987, from John M. Dumais, President of the New Hampshire Retail Grocers Association. In his letter, Mr. Dumais complained that the credit union office which was located adjacent to his tele-marketer's office, was so loud and noisy that his sales representative and other staff members had complained to him. When he brought the matter to Ms. Garr's attention, she advised him that an examiner from the Banking Commission was working in the office. He said he was "shocked to see and hear his personal broker who was visiting him on company time." The following were the observations of the tele-marketer as reported by Mr. Dumais:

> "The auditor was loud and unprofessional in his manner. He spoke in a loud, demanding (and demeaning) tone toward Wendy Garr, whether or not she was waiting on a customer. His boisterousness interfered with my telephone calls. On several occasions, people on the phone thought someone was shouting to me, because the auditor was shouting to Wendy.
>
> "When Mr. Dixon or Mr. Bill Feil came into the Credit Union the auditor's manner and tone changed dramatically. When these others were present, he spoke politely, in a professional tone to Wendy. His attitude with the businessmen was composed and more polite. However, when these men were not present, he resumed his rude manner.
>
> "It appeared that he treated the women in this office (he called us 'girls') with a different attitude and in particular, Wendy Garr.
>
> "There was a lot of tension when he was in the office. He slammed things, made heavy sighing noises, and was generally loud, lacking in concern for the normal flow of business. It was a great relief to me when he was gone."

Mr. Dumais concluded by saying, "For whatever reasons, let me just state that this examination period has seriously jeopardized the relationship of our staff and several key customers. ...[A]s a landlord, we must again object to the unprofessional behavior which took place last week. We hope you can take steps to insure that this situation does not take place again. If these actions were to continue, we may, ourselves, have to take further action on your lease."

In a memo prepared by Mr. Silver and received by the Banking Department on September 14, 1987, in response to the complaints from the NH Food Industry Credit Union, Mr. Silver said that there had been no complaints about his conduct by the credit union staff during his examination, and he suggested that these "unsolicited comments and criticisms" were nothing more than a "...SMOKE SCREEN to move the accent of this examination from the very serious problems of this CU to the EXAMINER" (emphasis his). He argued that because of the salary paid to credit union staff, he should not have found any areas needing correction. He said that although he had complained that the office was warm and uncomfortable, he had never remarked that he would be unable to work in the heat. In regard to Ms. Garr's complaint about

the appellant shouting across the room, he said it was because he had been put in a small work space which made it impossible to move around, requiring him to "call to Wendy to get her attention". With regard to the "sighing noises, etc.", Mr. silver stated, "I cannot deny that I made those noises several times. SORRY! When I saw that this CU which is [redacted] and doing EVERYTHING wrong, it's hard to control oneself... [M]y sighs and groans were from utter disbelief that all the above, and more, was happening with all the high priced help that was being paid. Several times after using hard-copy computer runs I wold lower the files to within a foot of the floor and drop them from there. That was the nature of my workspace. I did not, EVER, throw or slam books as Wendy suggests."

Mr. Silver stated that he made one call to his IRA broker and placed a buy order, using the broker's 800 number. He said he called J.F. Associates C.U. and inquired about the status of the CU and gave the new manager directions to his home for a Saturday night cocktail party. He said that when it appeared this individual wanted to talk, he suggested that they end the conversation because of the few incoming phone lines. He stated, "I am not aware of any calls made by me that cost this CU additional money."

Mr. Silver stated that when he was working in North Conway he made a contact with Copeland Company, making an appointment to meet with a representative Thursday during his examination at the NHFICU. He stated, "I am under the impression that meeting with COPELAND is permissible during working hours."

With regard to the request that Mr. Silver not be sent to perform another examination at NHFICU, the appellant stated, "This is a plea on the part of the CU to the NHBC to send, next exam, an examiner that will be less critical."

In response to Mr. Dixon's complaints, Mr. Silver said that considering the cramped quarters and the number of large, EDP files with which he was working as well as loose-leaf binders, he had asked for and received permission to leave out any materials on which he was working. He said that any passbooks would have been left in a file marked "Investments", but that they would not have been visible. Further, he sated, "Besides, they are not negotiable, and if the CU was so concerned, it could have taken the initiative." He concluded by stating, "Mr. Dixon said that he was the founder and past Treasurer, etc. of the CU and an executive with the NHRGA. At our meeting on Wednesday he had every opportunity to voice complaints from the CU and the NHRGA. HE DIDN'T because there were none, as Wendy had not yet thought of this smoke screen."

In what appears to be Mr. Silver's own memo to the file, he characterized all of the complaints as a smoke screen intended to shift the focus from problems discovered in the examination of the credit union to the examiner. He insisted that because of the tight quarters in which he was working, he may have accidentally dropped things, but that he had never "slammed" anything. He noted that when lowering binders to the floor, dropping them less than a foot, "IT MADE A LITTLE THUD. Come on, give me a break, I have a difficult job (AT THIS CU) and I

cannot do it in silence without breathing. HOWEVER, I NEVER, EVER, NOT ONCE, EVEN IN THE FRUSTRATED CONDITION THAT I EXAMINED THIS CREDIT UNION, NEVER, NEVER, DID I, what one would call throw; throw ANYTHING."

In response to the complaint that he had treated women in the office in a demanding, demeaning manner, Mr. Silver commented, "Women - 'Girls' - Obviously sexist comments. One morning when I went into the NHRGA side to get coffee (I was invited) I saw more than the 'one' woman that I usually said 'Good morning' to. There were three or four, that day. I went to the coffee pot and uttered the unforgivable, 'Good morning, Girls'. More SMOKE."

On September 25, 1987, after reviewing the complaints associated with the NHFICU examination, Bank Commissioner Roberge wrote to Mr. Silver advising him to "tighten your presence at the institution to conform with the prescribed work hours". He also advised Mr. Silver, "The conduct of your personal business, including phone calls, should be eliminated except for emergency situations." The Commissioner's letter stated:

> Perhaps the most alarming issue raised through this complaint is your acknowledged frustration and apparent inability to contain your disgust in adverse conditions. It is critical that frustration with certain conditions not openly reflect in the examiner's relationship with the institution's management and personnel. You are reminded that your report is to the commissioner on the conditions as you found them, therefore the severity of the final report is left to him. The importance of a meaningful dialogue and relationship with the supervised institution cannot be over-emphasized, particularly with an institution that has a multitude of problems in need of correction.
>
> The department is appreciative of your work because it is factual and objective, however, the department's relationship with the institution cannot be injured by field examiners.

In spite of issuing a letter of counselling to the appellant, the Banking Department did not impose any formal discipline.

The appellant attended FDIC AES III training June 10 - 30, 1989. In an undated written evaluation forwarded to the Banking Department, Mr. Silver's performance and conduct at the seminar was described as follows:

> "Clearly, Bob's loan write ups were excellent, both in the first exercise and the final project. In class, he participated in excess often to the detriment of the class as a whole. While some of his contributions were relevant, Bob seemed unable to allow anything to be said without adding his own comments or criticisms, antagonizing instructors and students who complained privately about his conduct. Mr. Silver was overqualified for the class, but recognizing this, did not use the opportunity well and was insensitive to the development needs for his less qualified classmates."

The complaint represented the only complaint ever received by the Banking Department about the conduct of one of its employees attending an FDIC course.

In spite of having received the above complaints, in November, 1987, Mr. Silver was informed that he could have future assignments in certain "bank jobs" in a selected "examiner in charge" capacity. He was also advised by that letter that such assignments did not necessarily indicate a permanent assignment or promotion to the next level of examiner. Mr. Silver did perform as the "examiner in charge" at the Saint Mary's Bank (the State's largest credit union) in 1988. At the time of the examination, in spite of Saint Mary's status as a credit union, it was the eighteenth largest of eighty-three chartered financial institutions in the state. Mr. Silver conducted the examination without incident or complaint.

In June 1989, Mr. Silver was informed by memo dated June 19, 1989, signed by Leon S. Merrill, Jr., Chief Bank Examiner, that he would be scheduled to attend FDIC AES IV training during calendar year 1990. Mr. Silver had not requested enrollment in the course, and objected to being scheduled to attend because he believed the course would be too strenuous. A meeting was held between the Commissioner and the appellant on November 30, 1989 to discuss his decision not to attend the training. The appellant explained that based on reports from FDIC field examiners who had been through the school, he did not believe the course would be of sufficient benefit to him to outweigh the physical strain which he believed it would cause. He believed the course itself would be too physically demanding, as well as requiring him to use electronic typewriters and computers with which he was not familiar. The Commissioner informed the appellant that he needed to confirm his attendance at the course prior to December 11, 1989.

By memo dated December 17, 1989, Mr. Silver responded to the Commissioner regarding the FDIC Examiner IV School and offered some "technical corrections" to the substance of the memo which the Commissioner prepared and forwarded to the appellant as a follow-up to their November 30, 1989 meeting. In his response, Mr. Silver said he had never refused to attend the training, but had said that there was no way he <u>could</u>. He said he believed the AES IV training schedule was too rigorous and that he lacked the stamina to complete it. He stated:

> "As regards paragraph 2, Silver <u>declines</u> to attend based upon the physical demands, the typing demands, and the fact that <u>I too</u> have OJT substitutes for this course, OJT that you claim your current Examiners IV have acquired to the exclusion of any other examiners. In your last paragraph you said I was made keenly aware of the school requirements for promotion. This awareness was not present when I was hired nor was it present when I was last promoted. I hope that the above will serve to correct any misunderstandings that either of us may have in this matter. If I have failed to remember fully any important portion of the conversation of November 30th please feel free to correct me, as I feel that the files should contain a transcript of the meeting of our minds."

On June 6, 1990, Chief Bank Examiner Merrill wrote to Robert J. Ruff, Chief of Training and Development for the FDIC, requesting information about the FDIC Examiner IV school, advising him that some of his examiners had expressed concern with regard to the extensive use of FDIC automated reporting and its application to the course. In his letter, Mr. Merrill stated, "We obviously do not wish to inhibit our state examiners and their training efforts because of an unfamiliarity with your automated examination report, therefore we would appreciate your comments with respect to the suitability of this course for state examiners, particularly in this area. The objectives of the AES IV as described in the course catalog appear to be very well suited for our needs particularly in the area of judgmental and communication skills. We would, however, appreciate your thoughtful comments with respect to the potential impact the automated reporting may have on the AES IV training efforts of our examiners.

Prior to receiving a response from the FDIC, Mr. Silver wrote to Chief Bank Examiner Merrill about his May 21, 1990 training notification. He stated specifically that it was not his desire to attend the training so that less experienced examiners in the department could attend the course and take advantage of the training. He said that the younger examiners "will never have the opportunity of many years of OJT as I have, as well as my many years in the 'outside world' as a professional accountant.... I am now far better able to prepare and analyze an examination report than any fledgling examiner that will attend this school. Also, public speaking has never been a big problem for me, while some of our current senior examiners with 30 or so years experience cannot contribute to a board meeting. Mr. Silver went on to say that he would suffer a particular disadvantage if he were to attend the training because he was not proficient in typing and the use of the FDIC's automated examination report. He said that considering his age and the fact that he takes blood pressure medication, he did not believe he should voluntarily expose himself to "an obviously stressful situation" and believed his superiors should share that concern. Finally, he said that he did not believe the specifications for Examiner III or IV that were in effect when he was hired by former Banking Commissioner Nelson "may be arbitrarily altered by a succeeding Commissioner" nor did he think that Commissioner Roberge would allow such an alteration to occur. Mr. Silver elected not to attend the scheduled training.

On June 14, 1990, the Banking Department received a response from the FDIC in the form of a letter dated June 11, 1990, signed by Robert J. Ruff, Chief of Training and Development for the FDIC. Mr. Ruff said that the AES IV training was highly regarded by state and foreign students "including those without similar report formats or automated reports." He also said that all the students were given hard-copy report schedules and that they could use those copies for performing the work. He said that word processing and FDIC "look-alike" software made it easier for some students to make a neat and orderly presentation, but that only the conclusions reached by the students were utilized to grade them on the course.

On January 14, 1991, Robert W. Flanders, President of the New Hampshire Federal Credit Union, wrote to the appellant regarding service the appellant had received from the teller

department of the credit union the preceding Friday. According to Mr. Flanders letter, Mr. Silver had a personal check in the amount of $275 drawn on another institution, $75 of which he wanted deposited, with the remaining $200 requested in cash. Mr. Flanders explained that under the Credit Union's funds availability policy, the funds would not be available on the same day. According to the letter, Mr. Silver had told the teller that he was a State Bank Examiner and could just show his credentials and cash checks at any bank without having an account. Mr. Flanders stated:

> "While your title may impress you, to me it does not make you any more important than any of our other members. You informed my employee that you do not think I know how to administer our funds availability policy. You are more than entitled to your opinion. I am thankful that we are a Federally Chartered Credit Union, because our examiners are more professional and would be unhappy with us if we made exceptions to our rules for members who consider themselves 'special individuals'."

A copy of the letter was forwarded to Banking Commissioner Roberge.

The appellant was called to a meeting on January 16, 1991, with Commissioner Roberge, Deputy Commissioner MacKnight, and Chief Examiner Merrill, to explain the incident. Chief Examiner Merrill recounted in a file memo that Mr. Silver had acknowledged that he had "responded in anger to a credit union representative and alluded to the fact that he was a bank examiner and was allowed check cashing privileges in other financial institutions. He further acknowledged that he related to the employee that Robert Flanders did not know how to 'administer a funds availability policy'." Commissioner Roberge directed the appellant to provide a written explanation of the incident.

Mr. Silver responded by memorandum dated January 21, 1991, apologizing that "such an innocent happening could have an effect on our reputation as professional examiners" but said that the matter was beyond his control. He said that he was shocked to learn that the credit union intended to put a hold on his funds since he was accustomed to being able to cash personal checks at banks throughout the State, a professional courtesy enjoyed by bank examiners. He said the imposition of the "funds availability" policy was even more disturbing because he was a member of the credit union and had a performing loan out with that institution at the time. He said he never produced his examiner credentials or asked for special favors because he was an examiner, and that his occupation had merely come up in the course of conversation while he was attempting to discuss both "funds availability" versus Federal Regulation C.C. His memo stated, "At NO TIME did I use my position as an examiner to gain favors. I merely mentioned examinations in the context of the professional courtesies that we are extended by institutions where we have no account relationship."

Commissioner Roberge wrote a letter of apology to Mr. Flanders, President of the NHFCU on January 22, 1991, advising him that the Banking Department had found his summation of the incident to be materially correct. He assured Mr. Flanders that the Banking Department policy

neither sanctioned nor condoned the use of bank examiner positions for special treatment, and characterized Mr. Silver's discussion of the credit union's administration of NHFCU's funds availability as "unprofessional".

On July 21, 1991, after having been denied promotion to the position of Bank Examiner IV, Mr. Silver wrote to Commissioner Roberge requesting a performance review by senior examination staff. He stated that in the past, whenever an examiner who had met the published minimum requirements for promotion and an opening existed. He said he had not been afforded the courtesy of such a review and requested that one be conducted in order to bring his file up to date. He suggested that such a review could be accomplished in a week or so. The record does not indicate that a formal review was conducted.

On cross-examination, Commissioner Roberge was asked why he had only filled one of the two vacant Bank Examiner IV positions. The Commissioner responded that he preferred to leave the position vacant rather than fill it with a person who was not fully qualified for the job. When asked why he had failed to discipline Mr. Silver for his past performance if the concerns were so great, he responded that the performance issues were viewed as a very serious matter, but that the Banking Department tries to "work with people, not punish them".

Mr. Silver testified that when he was first passed over for promotion, he requested a formal evaluation by senior staff, but was completely ignored. He said he had been waiting for years for an Examiner IV position to open up, since employee's usually had to wait until someone died or retired. He said the denial of promotion had been costly to him, since it denied him an opportunity to improve his responsibilities, his salary and his retirement account. He testified that every time the Banking Department posted new vacancies of Bank Examiner IV, they would fill one position and leave one position vacant. He said that none of the Bank Examiners IV appointed prior to 1987 had been required to complete the AES IV training, and he believed it was more appropriate to see him as "more of a peer to the people who had retired". He said that in spite of his many years' experience as a C.P.A., he was treated "like a new kid on the block".

Mr. Silver testified that when the Personnel Appeals Board had ordered the Banking Department to consider him for promotion and to interview him for a vacancy of Bank Examiner IV, he assumed the interview would focus on his qualifications. He said that he was led into the room where the interview was to take place and set up his own tape recorder. He said that Commissioner Roberge left and returned with the Assistant commissioner and Chief Examiner, then told him the interview would take approximately 2 hours. He testified that the first question by the Commissioner was, "Well, Robert, why do you think you're qualified to be a Bank Examiner IV." He said his short answer was that he had been demonstrating why he was qualified. He said that when he noticed there were no files, documents or papers on the table, he realized the interview would really be "kind of a Bobby Bash". However, since he believed they were all speaking frankly as peers, he told the Commissioner that he thought he had failed to properly manage the personnel in his department. He also said he expressed his

disapproval of the Commissioner's practice of sending junior examiners just a few years out of college into the banks to function as "in-charge" when they were only pretending to be in charge of the examination. He testified that it seemed strange that he was sitting there in an interview and telling the Banking Commissioner what he'd done wrong, but that it was the same advice he would have given him if the commissioner had hired him as a consulting CPA.

Mr. Silver testified that what had been characterized as unprofessional or disruptive behavior on his part during his FDIC AES III training, was actually meant to be constructive questioning for the benefit of the rest of the class. He was certain he knew at least as much about loans (the subject of the training) as the instructor, and would ask questions so the rest of the class could hear the answers. He offered the example of asking, "For the benefit of the class, would you describe a hypothecation?" Mr. Silver testified that the instructor had never criticized him for his behavior during the class, and had only written a negative evaluation when he saw the appellant's critique of the instructor.

Mr. Silver testified that he had never "refused" to attend the FDIC AES IV training, but had "respectfully declined". He said that it was commonly understood that the training was extremely strenuous, and that at his age and while taking medication for high blood pressure, he did not believe he should expose himself to the risk of such a tiring, stressful three weeks. He testified that he would have been glad to provide documentation of his medical condition, but had never been asked to do so.

Mr. Silver testified that conversations with the Commissioner during his interview for Bank Examiner IV were later held against him. He said that he had referred to one of the newer examiners as a "wood chopper" and that the Commissioner had chuckled about it at the time, then used the remark as proof of Silver's alleged insensitivity. He also argued that the discussion of how his arrest in 1985 for disorderly conduct was being blown out of proportion and was merely being used as a ploy to deny him promotion. He said his reaction was that of "a normal American male". He said that none of his performance over the years had warranted any formal action on the part of the Banking Commission, and that discussing it now was merely a way of justifying the denial of promotion. He said that he had irritated and embarrassed the Banking Commissioner when he wouldn't fill one of the slots at the AES IV training which had been made available to the State of New Hampshire, and that . He saw the denial of promotion as the only way that the Banking Department could get back at him for having put them in that awkward position.

Board's Decision and Order

On the evidence, the Board voted unanimously to deny all four of Mr. Silver's appeals. While there is little doubt about Mr. Silver's technical proficiency as a Bank Examiner III, the Board found that Mr. Silver lacked the discretion, diplomacy, tact and professional judgment to qualify for promotion to Bank Examiner IV. Although the appellant argued that he had been denied promotion solely on the basis of his failure to attend FDIC AES IV training, and that

he was denied promotion for non-merit reasons, the Board found that the Commissioner properly exercised his discretion in declining to select Mr. Silver. In fact, had Mr. Silver successfully completed the FDIC training, the Commissioner still would have been entitled to deny Mr. Silver promotion if he lacked the personal and professional qualifications for promotion. Mr. Silver failed to demonstrate that the Banking Department abused its discretion in failing to promote him to Bank Examiner IV. However, the appellant also brought to light some unacceptable personnel practices which the Banking Department needs to address.

According to Commissioner Roberge, the Banking Department has never implemented the State's system of performance evaluation, choosing instead to address employee performance issues through personal discussions and meetings. Commissioner Roberge also suggested that the Director of Personnel had tacitly approved his department's practice of substituting one-on-one discussions between managers and employees for standardized, written performance evaluation. While RSA 21-I:42 XIII allows the Director of the Division of Personnel to approve the use of supplemental evaluation systems for specific groups of employees, the statute makes no provision for a departmental exemption from the requirement that each classified employee receive an annual, written performance appraisal.

In the instant case, because there was documentary and testimonial evidence supporting the Banking Department's decision, the absence of standardized written performance evaluations did not form a sufficient basis upon which to grant Mr. Silver's appeals. Nonetheless, Mr. Silver and the other employees of the Banking Department have the right to expect annual, written performance evaluations as prescribed by law and administrative rule.

Findings of Fact and Rulings of Law

Before the close of the hearing, the Banking Department submitted proposed findings of fact and rulings of law, to which the Board responded as follows:

Docket #93-P-3

Proposed Findings of Fact
1 - 8 are granted
9 is granted, after deleting the word "refused" and replacing it with the word "declined"
10 is granted in part. There is insufficient evidence to find that FDIC AES IV training would have addressed remediation of Mr. Silver's personal and professional deficiencies.
11 - 15 are granted
(Note: There is no proposed finding #14)

Proposed Rulings of Law
A is granted
B is granted, after deleting the word "refusal" and replacing it with the word "declining"
C - D are granted

E is neither granted nor denied. The Rules of the Division of Personnel allow the Commissioner discretion in selecting the candidate best suited for promotion. However, since the Board did not review the qualifications of the third candidate, there is insufficient evidence to support the proposed ruling.
F is granted after deleting the word "refusal" and replacing it with the word "declining"
G - H are granted
I is granted in part. The FDIC AES IV training was not included in the minimum certification standards for the classification of Bank Examiner IV. The Commissioner could consider the training, however, in assessing the relative merit of the several candidates for promotion.
J - M are granted.

Docket #92-P-19

Proposed Findings of Fact
1 - 8 are granted
9 is granted, after deleting the word "refused" and replacing it with the word "declined"
10 is granted in part. There is insufficient evidence to find that FDIC AES IV training would have addressed remediation of Mr. Silver's personal and professional deficiencies.
11 - 15 are granted
(Note: There is no proposed finding #14)

Proposed Rulings of Law
A is granted
B is granted, after deleting the word "refusal" and replacing it with the word "declining"
C - D are granted
E is neither granted nor denied. The Rules of the Division of Personnel allow the Commissioner discretion in selecting the candidate best suited for promotion. However, since the Board did not review the qualifications of the third candidate, there is insufficient evidence to support the proposed ruling.
F is granted after deleting the word "refusal" and replacing it with the word "declining"
G - H are granted
I is granted in part. The FDIC AES IV training was not included in the minimum certification standards for the classification of Bank Examiner IV. The Commissioner could consider the training, however, in assessing the relative merit of the several candidates for promotion.
J - M are granted.

Undocketed Appeal Dated March 17, 1993

Proposed Findings of Fact
1 - 8 are granted
9 is granted, after deleting the word "refused" and replacing it with the word "declined"
10 is granted in part. There is insufficient evidence to find that FDIC AES IV training would have addressed remediation of Mr. Silver's personal and professional deficiencies.

11 - 15 are granted
(Note: There is no proposed finding #14)

Proposed Rulings of Law
A is granted
B is granted, after deleting the word "refusal" and replacing it with the word "declining"
C - D are granted
E is neither granted nor denied. The Rules of the Division of Personnel allow the Commissioner discretion in selecting the candidate best suited for promotion. However, since the Board did not review the qualifications of the third candidate, there is insufficient evidence to support the proposed ruling.
F is granted after deleting the word "refusal" and replacing it with the word "declining"
G - H are granted
I is granted in part. The FDIC AES IV training was not included in the minimum certification standards for the classification of Bank Examiner IV. The Commissioner could consider the training, however, in assessing the relative merit of the several candidates for promotion.
J - M are granted.

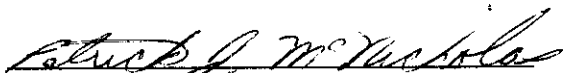
Undocketed Appeal Dated September 28, 1993

Proposed Findings of Fact
1 - 8 are granted
9 is granted, after deleting the word "refused" and replacing it with the word "declined"
10 is granted in part. There is insufficient evidence to find that FDIC AES IV training would have addressed remediation of Mr. Silver's personal and professional deficiencies.
11 - 15 are granted
(Note: There is no proposed finding #14)

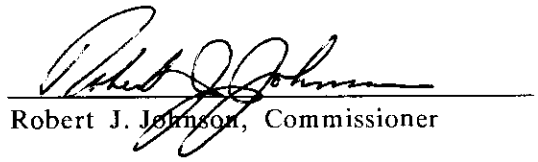
Proposed Rulings of Law
A is granted
B is granted, after deleting the word "refusal" and replacing it with the word "declining"
C - D are granted
E is neither granted nor denied. The Rules of the Division of Personnel allow the Commissioner discretion in selecting the candidate best suited for promotion. However, since the Board did not review the qualifications of the third candidate, there is insufficient evidence to support the proposed ruling.
F is granted after deleting the word "refusal" and replacing it with the word "declining"
G - H are granted
I is granted in part. The FDIC AES IV training was not included in the minimum certification standards for the classification of Bank Examiner IV. The Commissioner could consider the training, however, in assessing the relative merit of the several candidates for promotion.
J - M are granted.

Accordingly, Mr. Silver's appeals are denied.

THE PERSONNEL APPEALS BOARD



Patrick J. McNicholas, Chairman



Robert J. Johnson, Commissioner

Lisa A. Rule, Commissioner

cc: Virginia A. Lamberton, Director of Personnel
Kathleen Belanger, Legal Coordinator, Banking Department
Stephen J. McCormack, SEA Field Representative