

# State of New Hampshire



**PERSONNEL APPEALS BOARD**  
25 Capitol Street  
Concord, New Hampshire 03301  
Telephone (603) 271-3261

## **APPEAL OF CHARLES SKIDMORE**

**. Docket #93 -P-6**

### **Response to Appellant's Motion for Reconsideration on Motion for Discovery and Request for Full Evidentiary Hearing**

**October 24, 1994**

By letter dated September 8, 1994, SEA Field Representative Stephen J. McCormack requested reconsideration of the decisions reached by the Board at its meeting of August 24, 1994, denying Mr. Skidmore access to "all documents, ratings and recommendations related to the selection process" in which Mr. Skidmore was denied promotion to Firefighter II, Pease ANG, Adjutant General's Office. In that same letter, Mr. McCormack objected to the Board's decision to hear the appeal on offers of proof and requested that the Board schedule a full evidentiary hearing.

#### **Response to Appellant's Motion for Reconsideration on Motion for Discovery**

The Personnel Rules provide that selection for a vacancy shall be based the employee's possession of the knowledge, skills, abilities and personal characteristics listed on the class specification for the vacant position, and capacity for the vacant position as evidenced by documented past performance appraisals. Even when a candidate has satisfied the minimum qualifications for selection, the Rules allow appointing authorities broad discretion in determining which candidates are best suited for appointment.

The State's burden in this matter is to produce evidence sufficient to persuade the Board that it had articulable reasons sufficient to form the basis of its opinion that Mr. Skidmore was not the most qualified candidate for promotion under the selection criteria utilized by the agency. The appellant's burden is to demonstrate that he was the best qualified candidate, and that the agency abused its discretion by not selecting him for promotion.

On August 4, 1994, the State Employees' Association submitted a "Motion for Discovery/Motion to Compel". The appellant asked the Board to order the Adjutant General's Office to give the appellant copies of all documents related to the selection process including, but not limited to, the questions asked, rating/scoring sheets, and the specific recommendations relating to the selection process that were utilized to fill the position of State Firefighter II. By letter dated August 11, 1994, Lt. Col. Dennis O'Connell filed the Adjutant General's objection to that

Motion. The Board allowed the parties to offer oral argument on the Motion and Objection at its August 24, 1994 meeting.

Following oral argument, the Board ruled that Mr. Skidmore was entitled to information regarding his own score on the selection interview, the range of scores achieved by the fifteen candidates who had applied for promotion, and the appellant's own ranking among the fifteen candidates. Mr. Skidmore was informed that he ranked fourth out of the fifteen candidates, that he had scored a 92% on the structured oral interview, that two candidates scored 94%, that the successful candidate scored 99%, and that the lowest score was 36%.

There appears to be no dispute that Mr. Skidmore was advised by letter dated March 15, 1993, signed by Major General Price, that the appellant's test information could be reviewed by making an appointment with Dennis McCabe of the New Hampshire Division of Personnel, as specified in Per 501.09 (b) and (c) of the Rules of the Division of Personnel:

"(b) An eligible candidate shall be entitled to information concerning relative position on the register, upon request and presentation of proper identification, but the register shall not be open to public inspection."

"(c) A candidate shall be allowed to review the results of a graded examination, provided:

- (1) The candidate makes an appointment with authorized examination section personnel within 30 days of the date of the examination administration; and
- (2) No notes or excerpts of examination material are taken by the candidate."

Chapter III (Examinations), page D-9 of the Technical Assistance Manual published by the Division of Personnel, explains further the kinds of information available to a candidate following a structured oral examination. "A candidate who has taken a structured interview is allowed to review the Master Rating Form within 30 days of the interview date. At the time of the review, the candidate will be able to read the questions which were asked of him or her, and the ratings received...".

In his request for reconsideration of the Board's decision denying him additional discovery, Mr. McCormack again asked the Board to order the Adjutant General's Office to provide all documents related to the selection process, including questions asked, rating/scoring sheets and the specific recommendations. He argued that under the provisions of the Collective Bargaining Agreement, any file kept by any supervisor which relates in any way to an employee's status must be considered part of the employee's personnel file. He argued that documents related in any fashion to Mr. Skidmore's non-selection for promotion, including information about the remaining candidates, must be viewed as part of the appellant's personnel file under the provisions of the Collective Bargaining Agreement.

The Board does not agree. The Board does not believe that the Collective Bargaining Agreement requires the production of individual work papers, or that those work papers should be considered part of an employee's personnel file under the circumstances described by the appellant. It appears that the appellant has been afforded reasonable access to information

concerning his own candidacy for promotion.

Per-A 204.02 of the Rules of the Personnel Appeals Board provides:

(b) In exceptional cases, either party may request that the Board order formal discovery, including requests for admissions, requests for production, interrogatories and depositions. The requesting party shall set forth those factors which it believes support its request for additional discovery.

To date, the appellant has failed to persuade the Board that his is an exceptional case warranting the production of documents listed in his Motion for Discovery or his Request for Reconsideration. Accordingly, the Request for Reconsideration is denied.

#### Request for Full Evidentiary Hearing

In support of the appellant's objection to this appeal being heard on offers of proof, Mr McCormack cited the Supreme Court's decision in the matter of Attitash Mountain Service Company v. Christopher Schuck, 135 NH 427 (1992). Mr. McCormack argued that the Court's decision confirmed the appellant's rights under the provisions of RSA 541-A to cross-examine witnesses "for a full and true disclosure of facts". He further argued that Appellant's only means of securing information about "how the selection process worked, to include the final scoring and ranking, will be through cross-examination of all applicable parties involved in this matter." (See Appellant's September 8, 1994 letter, page 2).

The Board has reviewed the Court's decision in *Attitash v. Schuck* and finds that there are several factors which differentiate it from the instant appeal. In *Attitash v. Schuck*, the Department of Labor unilaterally decided to hold a "telephonic hearing" and scheduled the matter for hearing in that format without the prior agreement of the parties. The Labor Department's rules provide for telephonic hearings "...if the parties agree and the hearings officer approves". Thus, the Court found that the Labor Department's notice violated the agency's own rules by setting the matter for hearing by conference call without the prior agreement of the parties.

The Personnel Appeals Board has no similar rule limiting the steps which it may take to expedite the hearing of an appeal. In fact, Per-A 201.03 of the Board's procedural rules allows the Board, on its own motion, to suspend any rule in the interest of expediting a hearing or for other good cause, unless otherwise precluded by law. The parties are well aware of the Board's lengthy docket, and the resulting delay in scheduling many matters for hearing. The Board believes that speedier disposition of pending appeals benefits both parties. Therefore, upon its own motion, for good cause and in the interest of expediting hearing, the Board scheduled this appeal for hearing on offers of proof by the parties, or representatives of the parties.

RSA 21-I:58, under which the Board would hear an appeal of an application of the Personnel Rules, states in pertinent part:

"Any permanent employee who is affected by any application of the personnel rules,

except for those rules enumerated in RSA 21-I:46, I and the application of rules in classification decisions appealable under RSA 21-I:57, may appeal to the personnel appeals board within 15 calendar days of the action giving rise to the appeal. The appeal shall be heard in accordance with the procedures provided for adjudicative proceedings in RSA 541-A...."

The Board does not believe that the provisions of RSA 541-A prohibit, the Board from limiting testimony of witnesses, if full and true disclosure of relevant facts can be accomplished in a more efficient manner. RSA 541-A:18, IV, states:

"A party may conduct cross-examinations required for full and true disclosure of the facts."

Per-A 203.03 (d) states:

"The Board shall permit such cross-examination as is necessary for a full and true disclosure of the facts. Re-direct examination and re-cross examination shall be allowed as to matters previously raised by the opposing party with that witness only upon the approval of the Board."

Per-A 203.06 (a) also allows the Board to limit the number of witnesses a party may be allowed to call:

"To avoid unnecessary cumulative evidence, the Board may limit the number of witnesses or the time for testimony upon a particular issue in the course of any hearing."

There is no requirement that the parties concur with the Board's decision in this instance to limit the number of witnesses or the amount of time the witnesses may be allowed to testify, or to restrict testimony to those instances where it can be demonstrated that there is a substantial issue of credibility. The parties were advised at the first scheduled hearing that the Board would consider requests to examine and cross-examine witnesses on a case by case basis. Absent evidence or argument to the contrary, the Board remains convinced that neither party is prejudiced by limiting examination and cross-examination to proper matters of inquiry concerning credibility.

The Board continues to believe that the parties can submit this case on documentary evidence, offers of proof and legal argument, and that this decision is consistent with the Court's ruling in Attitash v. Schuck:

"These statutory provisions allowing for cross-examination ensure, even within the informal setting of a departmental hearing, that the parties are afforded a fair and meaningful opportunity to present their case."

"[I]n this case, the divergent positions taken by the parties concerning the terms of Schuck's employment raise questions of credibility."

While there are clearly divergent positions in this case, they appear to arise from an interpretation of the appointing authority's discretion in selection, not from any question of credibility. Chief LeBlanc advised Mr. Skidmore by letter dated January 26, 1993:

"Your performance in the structured interview was satisfactory; however, the interview panel concurred on the basis of responses to standardized questions, that at least three other participants exhibited greater expertise and background in the skill areas identified as required for effective job performance."

Mr. Skidmore took issue with that assessment. In his letter to Chief LeBlanc dated February 23, 1993, Mr. Skidmore maintained that he was the best qualified candidate:

"...To date, I have not received any rationale that explains how an individual with no professional, crash, or supervisory experience other than their current position, is more qualified than an individual with almost 15 years of experience."

The Board remains of the opinion that these issues can be submitted through documentary evidence, oral argument and offers of proof, without prejudice to either party. In the event that additional evidence is necessary to understand and decide the appeal, the Board may compel the production of additional evidence, upon its own motion or if it agrees with the motion of any party, under the authority of Per-A 203.09.

Mr. Skidmore's appeal shall be heard at 9:00 a.m. on October 26, 1994, in Room 411, State House Annex, Concord, New Hampshire. The appeal shall be made on offers of proof by the parties or representatives of the parties. Insofar as the parties have had more than 60 days notice of the scheduling, and agreed that they would be available to appear on October 26, 1994, motions for postponement or additional special scheduling will only be considered for the most exceptional circumstances.

FOR THE PERSONNEL APPEALS BOARD



Patrick J. McNicholas, Chairman

cc: Virginia A. Lamberton, Director, Division of Personnel  
Dennis O'Connell, Esq., Legal Counsel, Adjutant General's Office  
Stephen J. McCormack, Field Representative, State Employees' Association

# State of New Hampshire



## PERSONNEL APPEALS BOARD

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### Appeal of Charles Skidmore Docket #93 - P-6 Office of the Adjutant General

November 17, 1994

The New Hampshire Personnel Appeals Board (McNicholas, Johnson and Rule) met Wednesday, October 26, 1994, to hear the promotional appeal of Charles Skidmore, an employee of the Office of the Adjutant General, concerning his non-selection for promotion to the position of Firefighter II at the Pease Air National Guard Base. Mr. Skidmore was represented at the hearing by Stephen McCormack, SEA Field Representative. Attorney Dennis O'Connell appeared on behalf of the Office of the Adjutant General.

The record in this matter consists of the audio tape recording of the hearing, exhibits' submitted by the appellant prior to the hearing, and the pleadings filed by both parties prior to the hearing on the merits. The appeal was made on offers of proof, over the objection of the appellant.

The underlying basis of Mr. Skidmore's appeal is his contention that the selection decision was based solely on the results of a structured oral interview for the position of Firefighter II, and that the interview panel was not satisfied with his answer to one of the nine questions asked. He further argued that he had substantially more experience than the selected candidate and should have been deemed the best qualified candidate for selection.

Mr. McCormack asserted that the appellant was the best qualified candidate for promotion, based on a combination of experience, knowledge, skills, abilities, and documented past performance. He argued that the appellant was never apprised of any personal or professional qualifications he was deemed to be lacking for promotion. He further asserted that the Office of the Adjutant General violated the Rules of the Division of Personnel in selecting another candidate for promotion, because it failed to give adequate weight to Mr. Skidmore's past work experience and performance appraisals, relying instead on the results of a structured oral interview. Mr. McCormack argued that the Board was empowered by the provisions of RSA 21-I:58 to make an independent review of the qualifications of both the selected candidate and the appellant, to determine that the appellant was better qualified for promotion, and to order him promoted retroactively to the date the position was filled.

Mr. O'Connell argued that RSA 21-I:58 does not allow the Board to substitute its judgement for that of management, or to usurp management's prerogative in determining which candidate is best suited for selection to fill a vacancy within an agency. Mr. O'Connell argued that the Rules give management broad discretion in selecting candidates for promotion, particularly with regard to deciding what weight to give to past performance when selecting candidates for promotion, and that the Supreme Court has repeatedly affirmed that right.

Preliminary Arguments, Motions and Objections

On Mr. Skidmore's behalf, Mr. McCormack argued that without access to additional information about the qualification of the other candidates, as well as information about precisely how the panel arrived at its decision to select another candidate, the appellant would be unable to present his case. Mr. McCormack contended that the Board's October 24, 1994 decision on pending motions misstated the facts about Mr. Skidmore's attempt to gather information about the selection process. Specifically, Mr. McCormack argued that the appellant had not been given access to the master rating form, had not been apprised of his ranking, nor was he allowed to review the questions asked or answers he had given in the structured oral interview. Mr. McCormack asserted that Dennis McCabe of the New Hampshire Division of Personnel had refused to allow Mr. McCormack and Mr. Skidmore access to information about the structured interview without a direct order to release that information.

Mr. O'Connell took exception to the appellant's representations about his access to information about his structured oral interview. Mr. O'Connell pointed to Appellant's Exhibit 8, noting that two separate meetings had been scheduled by the Office of the Adjutant General with Mr. Skidmore to review the results of his own structured oral interview, and that the appellant had been apprised of his ranking among the candidates. He offered to prove that Mr. Skidmore had been given access to all examination information to which he was entitled under the Rules of the Division of Personnel, as well as being afforded the opportunity to meet personally with Assistant Chief Trindall and Chief LeBlanc to review and discuss the appellant's performance on the structured oral interview.

Mr. O'Connell reiterated his objection to allowing the appellant access to information about the other candidates for the position of Firefighter II. He referred the Board to his written Objection to Motion to Compel, dated August 11, 1994, in which he asserted that the records sought by the appellant were specifically protected by the provisions of RSA 95-A:5, IV. Mr. O'Connell noted that the Board had already denied the appellant's Motion for Discovery/Motion to Compel, as well as the appellant's Motion for Reconsideration of that decision, and suggested that no further discussion of the matter was necessary.

Mr. McCormack argued that RSA 91-A:5, IV does not protect information about the other candidates. He contended that because Mr. Skidmore believed he was more qualified for promotion, he was entitled to information about the other candidates which could help him prove his case. He reiterated the appellant's position that there were no legitimate privacy interests which would warrant withholding information Mr. Skidmore sought to obtain about his co-workers' qualifications, work experience or examination results if he believed himself to be better qualified than they were for promotion.

Upon review of the evidence, the Board found that the appellant's allegations about being denied access to his own examination data, both by the Office of the Adjutant General and by the Division of Personnel, were unsupported by the record. Mr. McCormack's letter to the Director of Personnel dated March 18, 1993 (Appellant's Exhibit #3) did not request access to the appellant's own records, but to that of other candidates:

"...In the letter of appeal it was requested that Chief LeBlanc:

1. Identify all parties involved in the selection process;
2. Provide the appellant, through the Association, all documents, ratings and recommendations related to the selection process."

"...Mr. Skidmore also requested that Chief LeBlanc provide information to myself, as his chosen representative, regarding the selected candidates' qualifications and rationale for promotion."

"Therefore, the appellant, Mr. Charles Skidmore, and the State Employees' Association respectfully requests that the appellant be provided through the State Employees' Association the previously requested material."

"Therefore, in accordance with the Personnel Rules of the State of New Hampshire, PART Per 202.03, a meeting is requested. Prior to this meeting, it is requested that the State Division of Personnel schedule a meeting with Mr. Dennis McCabe so that Mr. Skidmore may see the previously requested documentation." (Emphasis added.)

Neither that letter nor the other exhibits submitted by the appellant support his claim that the Division of Personnel and the Office of the Adjutant General denied him access to his own records, including his performance on the structured oral interview. Mr. McCormack's February 1, 1993 letter to Chief LeBlanc asks for "all documents, ratings and recommendations related to the selection process." (Appellant's Exhibit 9) Chief LeBlanc's February 9, 1993 response (Appellant's Exhibit 8) specifically denied the appellant access to other employee records, but clearly set forth the manner in which Mr. Skidmore's own results could be reviewed:

"Finally, section Per 501.09 specifies which portions of examination documentation candidates shall or shall not be allowed to review. On 21 January 1993, Asst. Chief Trindall and I met with you. You were notified of your non-selection and ranking. You were also, at this time, afforded the opportunity to set up a meeting with Asst. Chief Trindall to discuss your interview. This was accomplished on 27 January 1993 between you and Asst. Chief Trindall -- one of the board members. If you wish, I will meet with you and again allow you to review your results of the structured interview, however, you shall not be allowed to review the register or the test results and documentation of other candidates."

On March 8, 1993, Mr. McCormack again requested information about the other candidates. In his letter to General Lloyd M. Price (Appellant's Exhibit #5), Mr. McCormack wrote:

"Chief LeBlanc also stated that Mr. Skidmore would not be allowed to review the register or the test results and documentation of other candidates. ...Also, Chief LeBlanc once again refused to provide any information regarding the selection process concerning qualifications, test results, and/or documents of other candidates." (Emphasis added.)

General Price's response dated March 15, 1993, advised Mr. McCormack that, "Mr. Skidmore and/or you, as his representative, may review his test results pursuant to Per 501.09(c) by making an appointment with Dennis McCabe of the State Division of Personnel." There is no evidence that Mr. Skidmore or Mr. McCormack ever requested a meeting with Mr. McCabe to review the appellant's own test results, although there is ample evidence that a request was made of the Director of Personnel to see information about the other candidates.

Mr. O'Connell offered to prove through the evidence submitted by the appellant and the testimony of Chief LeBlanc that the appellant repeatedly was offered access to his own records in accordance with Per 501.09; There was neither evidence nor a contradictory offer of proof

to support a finding that the appellant was denied access to his own structured oral interview information.

Inasmuch as the original Motion for Discovery/Motion to Compel had been denied at the Board's meeting of August 24, 1994, and the Motion for Reconsideration of that Decision denied by Order dated October 24, 1994, the Board advised the appellant that its written order would stand, and that it would note his objection for the record.

Mr. McCormack argued that the Board's decision to hear Mr. Skidmore's appeal on offers of proof denied the appellant his rights to a hearing under the provisions for adjudicative proceedings contained in RSA 541-A. Specifically, Mr. McCormack asserted that RSA 21-I:58 says any employee who is "affected" by any application of the personnel rules has the right to request a hearing as set forth in RSA 541-A:16 IV, 8 and 18.

RSA 541-A:16, IV states:

"Opportunity shall be afforded all parties to respond and present evidence and argument on all issues involved."

The parties have been allowed to respond and present evidence and argument on all issues involved. The Board does not believe that RSA 541-A:16, IV imposes any requirement for the Board to hear live testimony, if such testimony is deemed unnecessary to decide the issues presented for the Board's consideration.

RSA 541-A:16, VIII states:

"Findings of fact shall be based exclusively on the evidence and on matters officially noticed in accordance with RSA 541-A:18, V."

Again, the statute does not impose any requirement that the Board take the testimony of witnesses in order to make findings of fact. The statute only requires the Board to rely upon the evidence and matters officially noticed in accordance with RSA 541-A:18, V, in reaching its decision.

Finally, RSA 541-A:18, I states:

"All testimony of parties and witnesses shall be made under oath or affirmation."

Contrary to the position taken by the appellant, the Board does not believe that RSA 541-A:18, I requires the Board to take testimony in all cases. The Board believes that the statute is intended to establish the manner in which testimony may be used. When testimony is to become part of the record in a contested case, that testimony must be given under oath or affirmation. Similarly, the Board does not believe that RSA 541-A:18, IV guarantees that testimonial evidence may be offered in all cases, only that when examination of a witness is allowed, the other party may cross-examine that witness, for a full and true disclosure of the facts.

In its October 24, 1994 order, the Board indicated that it would review requests to examine witnesses on a case by case basis when there was reason to believe that the testimony of a witness or witnesses was necessary for full and true disclosure of the facts. Absent any specific requests, and a basis upon which to find that such testimony was necessary under the

conditions described, the Board affirmed its decision denying the appellant's request for a full evidentiary hearing.

### Offers of Proof

The Office of the Adjutant General offered to prove through the testimony of Chief Leonard LeBlanc that in response to a posting for the position of Firefighter II, there were fifteen candidates who were ultimately interviewed for promotion. Pre-qualification of the candidates involved an assessment of each candidate's education, experience and past performance. The final competition consisted of structured interviews which were held on or about January 15, 1993, before a panel of three Assistant Fire Chiefs. Each candidate was given a two-page guide to explain the goals of the structured interview, as well as suggestions about how to prepare for the interview and how to deliver a favorable performance. Each candidate was asked a total of 9 questions relevant to the classification of the position as outlined in Per 501.06. Each member of the 3-member interview panel independently rated the candidates' answers to the questions asked. Their scores were recorded on a matrix designed to compare their performance. The candidate with the highest over-all score was selected for the position. The appellant finished in fourth place behind the candidate who was ranked highest, and two other candidates whose scores were tied for second place. He offered to prove that the candidate who received the highest score on the structured oral interview was selected for promotion, and that the selection of that candidate was both permissible and proper under the applicable Rules of the Division of Personnel.

Mr. McCormack offered to prove through the testimony of Mr. Skidmore that the appellant was more qualified for promotion to Firefighter II than the selected candidate. He offered to prove that Mr. Skidmore had approximately 17 years of airport crash and firefighting experience in other government positions, compared to only 2 years of similar experience for the selected candidate. He offered to prove that the successful candidate's only airport crash experience had been acquired during his employment at Pease Air National Guard Base. He also offered to prove through the testimony of the appellant that the nine structured oral interview questions were too generalized, and that they failed to address the specific types of responsibilities of a Firefighter II.

Mr. McCormack said that the appellant would testify that he had 7 years experience as a captain, that he had 10 years of experience supervising up to 20 people, and that 4 years of his supervisory experience included total authority for hiring and firing. He said Mr. Skidmore would testify that to the best of his knowledge, the selected candidate's only experience before being hired at Pease was gained through work as a volunteer firefighter. Mr. Skidmore would testify that all of his performance evaluations showed him meeting expectations, and that the supervisory comments contained in those evaluations consistently praised him for performing above the standards. Mr. Skidmore would also testify that when testing for promotion to Captain, he had scored better than 3 of the 4 lieutenants.

Mr. Skidmore would testify that the successful candidate could not compete for earlier postings until 1992 because he lacked the required experience. He would argue that because he had so much more actual experience than the selected candidate, he had to believe the selection was based solely on the structured oral interview. He would also testify that the panel was unhappy with his response to 1 of the 9 questions, therefore resulting in his interview score being lower than that of 3 other candidates. He offered no proof with respect to the question asked which Mr. Skidmore believed to be the basis for his scoring lower than three other candidates.

Mr. McCormack argued that selection based solely on the results of a structured oral interview constituted a violation of the Personnel Rules. He further argued that the Director of Personnel had interpreted her own rules to mean that when selecting a candidate for promotion, all factors, including knowledge, skill, ability, education, experience and past performance had to be considered.

After the parties finished presenting their offers of proof, the Board asked Mr. McCormack if his appellant also needed to prove that he was better qualified than the top three candidates. Mr. McCormack said Mr. Skidmore only had the burden of proving that he was better qualified than the selected candidate, because the remaining 14 candidates, including the 2 who tied for second place, failed to take a timely appeal.

#### Findings of Fact

On the evidence, argument and offers of proof made by the parties, the Board found the following:

1. Mr. Skidmore was one of fifteen candidates seeking promotion to a vacant position of Firefighter II at Pease Air National Guard Base.
2. Mr. Skidmore and the remaining 14 candidates met the minimum qualifications for promotion, and participated in a structured oral interview before a 3-member panel comprised of the three Assistant Fire Chiefs.
3. Three of the fifteen candidates scored higher than Mr. Skidmore in the structured oral interview. Mr. Skidmore was notified of his non-selection by memo dated January 26, 1991, signed by Chief LeBlanc.
4. In the notice of non-selection, Chief LeBlanc advised the appellant that his performance in the structured oral interview had been satisfactory, but that three candidates had demonstrated greater expertise and background in the skill areas identified as required for effective job performance.
5. In Mr. Skidmore's opinion, the questions themselves were too general in nature. In Mr. Skidmore's opinion, more task specific problems should have been posed to better test the candidates' knowledge of practices and procedures. He believed his failure to obtain the highest score was attributable to the panel's dissatisfaction with his answer to one of the questions.
6. Following his notice of non-selection for promotion, Mr. Skidmore pursued the procedures for informal settlement outlined in PART Per 202 of the Rules of the Division of Personnel, seeking to have the recommendation of the panel and decision of the appointing authority reversed. Throughout the informal settlement procedure, Mr. Skidmore insisted that he was the most qualified candidate because he had substantially more relevant experience than the selected candidate.
7. Mr. Skidmore believed that insufficient weight had been given to his past performance appraisals.
8. Mr. Skidmore's past performance was acceptable and his performance on the structured oral interview was better than the majority of the candidates for promotion.

## Standard of Review

### Per 602.02 Filling Vacancies Within An Agency

(a) Whenever possible, selection by the appointing authority to fill a vacancy shall be made from within an agency and shall be based upon the employee's:

- (1) Possession of the knowledge, skills, abilities and personal characteristics listed on the class specification for the vacant position; and
- (2) Capacity for the vacant position as evidenced by documented past performance appraisals.

(b) The most qualified candidate, in the opinion of the appointing authority, shall be selected from designated groups of employees considered in the following order:

- (1) Full-time employees;
- (2) Former full-time employees who have been laid off within the past three years;
- (3) Probationary employees; and
- (4) Part-time employees.

(c) Candidates may be denied selection if, in the opinion of the appointing authority, they are deemed to lack personal or professional qualifications for promotion.

(d) If an employee is not selected after applying for a posted position, the appointing authority shall notify the employee in writing and shall state the reasons why the employee was not selected.

## Discussion of the Relevant Facts

Per 602.02 of the Rules of the Division of Personnel authorizes an appointing authority to select candidates for promotion based on their possession of the knowledge, skills, abilities and personal characteristics listed on the class specification for the vacant position being filled. In making such a determination, several factors must be considered, including but not limited to capacity for the vacant position as evidenced by documented past performance appraisals.

Per 602.02 (b) further provides for selection of the candidate who, in the opinion of the appointing authority, is deemed most qualified. Candidates are to be considered for promotion in order of employee status: full-time, former full-time employees who have been laid off within the past three years, probationary employees, and part-time employees. In the instant appeal, the order of consideration was not in dispute.

Per 602.02 (c) provides that candidates may be denied selection if, in the opinion of the appointing authority, they are deemed to lack personal or professional qualifications for promotion. Mr. Skidmore complained that he had never received such notice of deficiency in personal or professional qualifications for promotion, constituting a violation of Per 602.02(c) by the Office of the Adjutant General. The Board does not agree. Not being selected is not synonymous with lack of qualification. While the record reflects that Mr. Skidmore was considered qualified for promotion, in the opinion of the appointing authority, he was not the most qualified candidate.

Mr. Skidmore has maintained throughout his appeal that he was the candidate best qualified for promotion. His representative has asserted that in order to prevail in his appeal and be promoted retroactively, Mr. Skidmore need only demonstrate that his qualifications are superior to those of the selected candidate. The Board does not agree.

Mr. Skidmore's appeal arises from his belief that because of his past experience, job performance, and ranking on other promotional examinations, he should have been considered the best qualified candidate. Although the appellant disapproved of the interview questions themselves, he did not dispute that he received a score of 92% on the interview and that three candidates received scores higher than his.

On the criteria established by the appointing authority, three candidates were considered more qualified or better suited for promotion than was the appellant. Without altering the selection criteria, or the relative weight assigned to those criteria, the appellant's ranking would not change. If the selection criteria or weighting were altered sufficiently to change Mr. Skidmore's ranking, it is only reasonable to assume that the ranking of the remaining candidates could be altered as well. Under those circumstances, reposting the position would be the only appropriate remedy.

The statutes clearly authorize the Board to determine if a rule was properly applied, and to make a corrective order if an agency has exceeded or abused its discretion in hiring and selecting for promotion. However, the Board does not believe the legislature ever intended to usurp the authority of State agencies by dictating to them which criteria to utilize when determining which candidates are most qualified for selection, or what weight those criteria must be given in considering and comparing candidates.

"The personnel commission regulations expressly allow an appointing authority to refuse to promote a candidate ... and this court has held that agencies are not obligated to promote under this regulation when there are other more qualified candidates. Appeal of Golding, 121 N.H. 1055, 1059, 438 A.2d 292, 295 (1981). Further, mere proof that the job performance of a candidate is adequate does not provide a basis for requiring an agency to promote that candidate to a higher level position." [Petition of the Division of State Police, 120 NH 72 (1985)]

Even if the Board were to adopt the appellant's argument (which it does not) that greater experience automatically means better qualification or capacity for a vacancy, the Board still does not believe that RSA 21-I:58 authorizes it to reverse a decision of the appointing on that basis.

"The rules further provide that '[i]t 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.'" [Petition of the Division of State Police, 120 NH 72 (1985)]

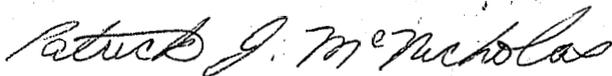
The Rules of the Division of Personnel recognize management's prerogative in selection, as well as its authority to determine which candidate is best qualified for promotion. RSA 21-I:58 does not permit the Board to substitute its own judgement for that of management except in cases where a decision is made in violation of a rule or a state law, or there is no set of facts upon which the appointing authority could reasonably have made the decision which it made. In this instance, the appellant has not offered to prove any set of facts to which those criteria would apply.

## Rulings of Law

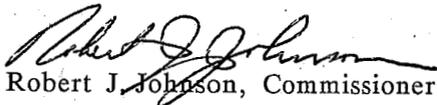
- A. Per 501.09 (a) through (c) describes the extent of the examination information available to candidates, including their final earned rating, their relative position on the register, and the actual results of the examination, including what questions the candidate was asked and how the candidate's answers were rated. However, Per 501.09(b) restricts information about other candidates. The Adjutant General's decision denying Mr. Skidmore information about the other candidates was consistent with the provisions of Per 501.09(b) of the Rules of the Division of Personnel.
- B. Application of Per 501.09 of the Rules of the Division of Personnel by both the Office of the Adjutant General and the Division of Personnel was consistent with the provisions of RSA 91-A:5 IV, which, in part, permits agencies to restrict access to test questions, scoring keys, and other examination data used to administer a licensing examination, application for employment or academic examinations. RSA 91-A:5 IV also restricts access to personnel records, where such disclosure would constitute an invasion of privacy.
- C. The law is well-settled on the issue of managerial prerogative in selection. The New Hampshire Supreme Court's decision in the Petition of the Division of State Police, 120 NH 72 (1985) affirms the fact that an appointing authority's opinion of a candidate's relative qualifications must be given great weight.
- D. Under certain circumstances (i.e., a well-founded complaint that the selected candidate did not meet the minimum qualifications for appointment to a vacancy) it might be appropriate to order an agency to disclose additional information about another candidate's education, experience, or examination results. However, Mr. Skidmore's appeal arises from a difference of opinion between himself and the appointing authority about the relative value of his experience versus that of the other promotional candidates and the degree to which the appointing authority relied upon the structured oral interview in assessing and selecting a candidate. In the absence of compelling evidence or argument to the contrary, the Board found that the appellant has failed to demonstrate that the privacy interests of one or more of the candidates is outweighed by his own interest in reviewing their employment applications, personnel records, or examination records. The records of the remaining fourteen candidates are protected by the provisions of RSA 91-A:5.
- C. Per 602.02 (a) through (d) sets forth the manner in which appointing authorities shall consider candidates for selection to fill vacant positions, the circumstances under which candidates may be denied selection, and the extent of the appointing authority's obligation to apprise employees of the reasons for non-selection. The record reflects that the Office of the Adjutant General considered candidates and notified applicants of their non-selection in accordance with the applicable standards established by Per 602.02 of the Rules of the Division of Personnel.
- D. Under the provisions of Per 602.02 (b) and (c) of the Rules of the Division of Personnel, an appointing authority's opinion in matters of selection must be given great weight.

- E. Neither the statutes nor the administrative rules require an appointing authority to give greater weight to an employee's past performance or length of service than to a candidate's demonstration of skills and abilities as may be ascertained through examination, including but not limited to structured oral interviews.
- F. Per 602.02 (c) permits appointing authorities to deny an employee selection to a vacancy if, in the opinion of the appointing authority, that employee lacks certain personal and professional qualifications. However, Per 602.02 (c) may not be read as mandating the selection of any and all qualified candidates. When there is more than one candidate qualified for selection, the appointing authority must determine which candidate is most qualified. In the opinion of the appointing authority, there were three candidates more qualified than the appellant under the selection criteria established by the appointing authority. The Office of the Adjutant General acted within its discretion in denying the appellant selection for promotion to Firefighter II if, in its opinion, he was not the best qualified of the candidates eligible for promotion.
- G. The appointing authority determined that Mr. Skidmore was not the most qualified candidate for promotion to Firefighter II. the evidence, argument and offers of proof, the Board voted unanimously to deny Mr. Skidmore's appeal.

THE-PERSONNEL APPEALS BOARD



Patrick J. McNicholas, Chairman



Robert J. Johnson, Commissioner



Lisa A. Rule, Commissioner

cc: Virginia A. Lamberton, Director of Personnel  
Dennis O'Connell, Esq., Office of the Adjutant General  
Stephen J. McCormack, SEA Field Representative