

State of New Hampshire



PERSONNEL APPEALS BOARD
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APPEALS OF ROBERT THYNG

Docket #00-P-1 and #00-P-2

New Hampshire Department of Corrections

December 16, 1999

(3)

The New Hampshire Personnel Appeals Board (Wood, Johnson and Barry) met on Wednesday, December 8, 1999 under the authority of RSA 21-I:58, to hear the appeals of Robert Thyng, an employee of the Department of Corrections. Mr. Thyng, who was represented at the hearing by SEA Field Representative Stephen J. McCormack, was appealing decisions by the Department of Corrections dated March 3, 1999 and September 21, 1999 denying him promotion to Corrections Lieutenant. Attorney John Vinson appeared on behalf of the Department of Corrections. Although the Board consolidated the cases for the purposes of hearing, the Board agreed to decide each appeal on its individual merits.

Without objection by either party, the hearing in this matter was conducted on oral argument and offers of proof by the representatives of the parties. The record of the hearing in this matter consists of the audio tape recording of the hearing on the merits, pleadings submitted by the parties, orders and notices issued by the Board, and documents admitted into evidence as follows:

State's Exhibits

Docket #00-P-1 and #00-P-2

- A. PPD 2.1
- B. Performance Evaluation for Robert Thyng signed and dated by the appellant on 7/22/99
- C. Performance Evaluation for Robert Thyng signed and dated by the appellant on 9/29/98
- D. Performance Evaluation for Robert Thyng signed and dated by the appellant on 10/10/97
- E. Performance Evaluation for Robert Thyng signed and dated by the appellant on 8/13/96
- F. Performance Evaluation for Robert Thyng signed and dated by the appellant on 11/8/95
- G. Performance Evaluation for Robert Thyng signed and dated by the appellant on 9/7/94
- H. Performance Evaluation for Robert Thyng signed and dated by the appellant on 8/19/93
- I. Performance Evaluation for Robert Thyng signed and dated by the appellant on 7/21/92
- J. Performance Evaluation for Robert Thyng signed and dated by the appellant on 2/21/92
- K. Performance Evaluation for Robert Thyng signed and dated by the appellant on 7/9/91
- L. Performance Evaluation for Robert Thyng signed and dated by the appellant on 12/3/90

Appellant's Exhibits

Docket #00-P-1

- 1. March 3, 1999 letter of non-selection sent to Sgt. Robert Thyng by Sid Bird, Warden, Berlin Prison
- 2. March 12, 1999 appeal letter from Wayne Brock, SEA Steward to Warden Sid Bird, Re: Sgt. Robert Thyng: Non-Selection for Promotion
- 3. March 31, 1999 letter from Warden Sid Bird to Sgt. Robert Thyng
- 4. April 16, 1999 appeal letter from Wayne Brock, SEA Steward, to Henry Risley, Commissioner, NH Department of Corrections, Re: Sgt. Robert Thyng: Non-Selection for Promotion
- 5. May 3, 1999 letter from Commissioner Hank Risley to Wayne Brock
- 6. May 11, 1999 letter from Wayne Brock to Commissioner Risley
- 7. June 8, 1999 letter from Commissioner Risley to Wayne Brock, Re: Denial of Appeal

8. June 16, 1999 letter from Stephen J. McCormack, SEA Field Representative to Virginia Lamberton, Director of Personnel, Re: Appeal of Robert Thyng, Non-Selection for Promotion
9. July 6, 1999 letter from Director Virginia Lamberton to Stephen McCormack, Re: Appeal of Robert Thyng
10. Policy and Procedure Directive (PPD) 2.1., NH Department of Corrections: Personnel Selection, Promotion and Retention
11. Employee Performance Evaluation - Sergeant Robert Thyng, dated July 12, 1998
12. November 17, 1999 memorandum from Sergeant Robert Thyng, Re: Appeal of Non-Selection for Promotion
13. November 17, 1999 memorandum from Lt. Anthony Dragon, Re: Appeal of Robert Thyng, Non-Selection for Promotion

Docket #00-P-2

1. September 21, 1999 letter of non-selection sent to Sergeant Robert Thyng from Sid Bird, Warden, Northern NH Correctional Facility, NH Department of corrections
2. Letter from Sergeant Robert Thyng to Commissioner Risley, NH Department of Corrections -- RE: Integrity, September 23, 1999
3. Policy and Procedure Directive (PPD) 2.1., NH Department of Corrections Personnel Selection, Promotion and Retention
4. Employee Performance Evaluation - Sergeant Robert Thyng, dated August 1, 1999
5. November 17, 1999 memorandum from Sergeant Robert Thyng, Re: Non-Selection for Promotion
6. November 17, 1999 memorandum from Lt. Anthony Dragon Re: Appeal of Robert Thyng, Non-Selection for Promotion

The following facts are not in dispute:

1. Sergeant Thyng was denied selection for promotion to one of three vacant Corrections Lieutenant openings at the Northern NH Correctional Facility in Berlin, NH.
2. Under the selection process described by Department of Corrections PPD 2.1., using a three-step assessment procedure that rates employee performance evaluations, work history (including length of service, time in grade, letters of commendation, education, training and discipline), and an oral board, Sergeant Thyng ranked third among the candidates for the vacancy.
3. In a letter to Sgt. Thyng dated March 3, 1999, Warden Bird notified the appellant of his non-selection for promotion to Lieutenant, citing: 1) "problems with sexual harassment in the work place," 2) a restraining order issued against the appellant at the request of a former employee who was married to another Department employee at the time, and 3) "a history of alcohol abuse" as the reasons the Warden believed the appellant lacked the personal and professional qualifications for promotion.
4. Sgt. Thyng appealed the Warden's decision, alleging violations of Per 602.02 (a) and (c) of the Rules of the Division of Personnel.
5. In this appeal, SEA Steward Brock argued on the appellant's behalf that: 1) the "chemical use issue" occurred off-duty and "was addressed through the appropriate treatment modality" so that the appellant was cleared for return to duty in a supervisory capacity, 2) the Department relied upon a "medical issue concerning [the] clinical use [that] would seem to violate the basic tenets of the American Disabilities Act.," 3) the Department's investigation into issues surrounding the restraining order did not result in any discipline and should not have affected the appellant's application for promotion, 4) the Department never disciplined the appellant for sexual harassment, and 5) the appellant's current performance evaluations contradict the Warden's assertion that the appellant lacked personal or professional qualifications for promotion.
6. Warden Bird affirmed his decision not to select Sgt. Thyng for promotion by letter dated March 31, 1999. In that letter he wrote, "...I will be glad to revisit the opportunity for you to

lateral up and prove yourself, provided your pattern of using sick time regularly is eliminated, and you show a continued behavioral improvement."

7. After unsuccessful attempts to resolve the promotion dispute through the informal settlement process, Sgt. Thyng appealed his non-selection to the Personnel Appeals Board by letter dated July 19, 1999.
8. With his appeal of non-selection pending, Sgt. Thyng made a subsequent application for promotion to Lieutenant at the Northern NH Correctional Facility.
9. Sgt. Thyng was ranked first among the candidates for the vacancy.
10. The appellant received notice of his non-selection in a letter from Warden Bird dated September 21, 1999.
11. In that letter, Warden Bird informed the appellant that although he was pleased at the appellant's "personal progress," the Warden felt that Sgt. Thyng needed, "...to continue what you have started for longer than one or two months before taking on the responsibilities of Lieutenant at the Berlin facility."
12. The Warden's comment referred to a statement made by the appellant during the selection process in which Sgt. Thyng indicated that he had not consumed any alcoholic beverages for a month.
13. Sgt. Thyng has never received formal discipline by the department for his on-duty or off-duty conduct.

Mr. McCormack argued that the Department of Corrections failed to follow its own policies and procedures when it refused to promote Sgt. Thyng to Lieutenant. He argued that although Major Guimond had referred to the appellant's performance having suffered from problems that had occurred off-duty, there was no other reference to those problems in the appellant's file. He argued that in the June 2, 1999 evaluation completed by Unit Manager Daniel Walsh, with which Dick Gerry, head of Security for the prison concurred, Sgt. Thyng was described as, "an outstanding performer..." who was, "...more than capable of performing in the lieutenant role if given the chance."

Mr. McCormack argued that the Department of Corrections Policy and Procedure Directive 2.1 provides that, "Selection will generally be made, if all things are equal, in numerical order as they appear on the final score sheet." He argued that in the absence of any formal discipline taken by the department or documents detailing deficiencies in the appellant's personal or professional qualifications, "all things" were equal. He argued that Sgt. Thyng's own supervisors considered him a good candidate for promotion, and that in both instances, Sgt. Thyng's ranking on the final score sheet entitled him to selection for promotion to one of the vacancies.

Mr. McCormack argued that the Rules require an employee to know the reasons for non-selection and to receive those reasons in writing. He argued that the Board's previous orders in promotional appeals specify that the reasons must be valid and sufficient, and without valid or sufficient reasons, a qualified candidate may not be denied selection. He argued that the reasons given in the first denial of promotion involve off-duty conduct that was not documented in the appellant's personnel records, while the second denial questions the appellant's progress and motivation in dealing with those issues. He argued that the Department never really gave the appellant valid or sufficient reasons that they could verify. He argued that after the first denial of selection, the appellant had been assured that if he kept working on improvement, he'd be promoted to the next vacancy. He argued that the Department can't cite performance as a basis for denying selection, and then ignore good evaluations. He argued that the Board should find that if there are shortcomings in an employee's performance, or in his personal or professional qualifications for promotion, the agency has to document what those shortcomings are.

Mr. Vinson argued that the Rules of the Division of Personnel and the Department's policy on selection and promotion impose no requirement for the agency to select a candidate simply because that candidate receives the highest numerical score in the rating process. Specifically, he argued that PPD 2.1, IV g., reserves for the hiring authority "the final say as to who is selected." He argued that while it was true in 70% of the cases that the highest ranked candidates were selected, it was not true in the remaining 30%. He also argued that in this instance, "all other

things" were not equal. He noted that the policy quotes Per 602.02 of the Rules of the Division of Personnel that requires the agency to select, the most qualified candidate, "in the opinion of the appointing authority," and that the warden did not consider Sgt. Thyng qualified for promotion at that time.

Mr. Vinson also argued that the rules impose no obligation on an appointing authority to select a candidate simply because there weren't "documented performance issues." He argued that the appellant's performance evaluations did reveal performance deficiencies that the warden could reasonably consider in making his selection for promotion.

Mr. Vinson argued that Warden Bird did not abuse his discretion by not promoting Thyng. He argued that according to Per 602.02 candidates may be denied promotion if, in the opinion of the appointing authority, the candidate is deemed to lack the personal or professional qualifications for promotion. He argued that in 1998, the Department became aware of a claim by a former employee who was married to another departmental employee that Sgt. Thyng had been stalking her, and that she had obtained a restraining order against him. He offered to prove through the testimony of Warden Bird that the warden had read the transcript from the district court hearing at which various people from the department had testified as to what they had observed in the work place, that he had seen the restraining order, and that he had concerns that if Sgt. Thyng were promoted to Lieutenant, he would be the person receiving and handling harassment complaints from staff and the staff could be intimidated by that. He argued that although the appellant referred to the stalking charge as "mere allegations," the testimony that the warden read persuaded him that Sgt. Thyng lacked the personal and professional qualifications for promotion at that time. Mr. Vinson argued that the warden offered the appellant a lateral transfer as a Sergeant to the prison in Berlin so that the warden could observe him directly and determine his qualifications for promotion.

Mr. Vinson argued that the discretion vested in the appointing authority is substantial, and that the warden's decision in both cases was a proper exercise of that discretion. He argued that

Warden Bird is experienced, has substantial experience in corrections and knows what qualities he wants in his staff. Mr. Vinson said that the Department has a hard time standing up and criticizing Sgt. Thyng because he is a valued employee, but he is not, in the warden's opinion, the person best qualified to fill the position.

Having considered the evidence, arguments and offers of proof, the Board made additional findings of fact and rulings of law as follows:

14. Sgt. Thyng's 1997 performance evaluation reveals significant deficiencies in the areas of "Dependability and Attendance" and "Feedback," and notes that he, "Was out of work for 3 months, 'stress related,' most of which was brought on by off-duty situations."
15. In the 1997 evaluation, Sgt. Thyng's performance ratings dropped from an above average rating (88 total points) to an average rating (66 total points).
16. In the 1998 evaluation, Sgt. Thyng's over-all rating increased to a total of 76 points, although "Dependability and Attendance" remained seriously below standards, the general supervisory comments indicated that while his attendance had been a significant problem, it had improved with counseling.
17. In 1998, the Department became aware of complaints against Sgt. Thyng made by a former fellow employee who was married to another Corrections Officer, and learned a restraining order had been issued against the appellant.
18. Sgt. Thyng currently occupies a "line supervisor" position at the prison in Concord. Warden Bird offered the appellant an opportunity for a lateral transfer to the prison in Berlin so that the Warden could observe him personally in the workplace interacting with other staff.
19. The positions of lieutenant for which Sgt. Thyng had applied are considered part of the senior management staff within the Department of Corrections.

20. Warden Bird is required by the Rules of the Division of Personnel to select for promotion those candidates he deems "best qualified" for the position(s) to be filled.
21. Although it is the Department's practice to promote those candidate who receive the highest ranking during the promotion/selection process, neither the Personnel Rules nor the Department's own PPD impose a strict requirement to select on the basis of ranking within the promotional process.
22. Warden Bird had articulable reasons for non-selection in both cases under appeal and he transmitted those reasons to the appellant in writing as required by the Rules of the Division of Personnel.

Rulings of Law

- A. "Whenever possible, selection by the appointing authority to fill a vacancy shall be made from within an agency and shall be based upon the employee's: (1) Possession of the knowledge, skills, abilities and personal characteristics listed on the class specification for the vacant position; and (2) Capacity for the vacant position as evidenced by documented past performance appraisals." [Per 602.02 (a)]
- B. "The most qualified candidate for the position, 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) Fonger full-time agency employees who have been laid off within the past 3 years; (3) Probationary employees; and (4) Part-time employees." [Per 602.02 (c)]
- 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." [Per 602.02 (d)]
- 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 reason(s) why the employee was not selected." [Per 602.02 (e)]

- E. "Applications from fully qualified applicants will then be evaluated and a point score assigned to each applicant..." [Department of Corrections PPD 2.1, IV, 3. c.]
- F. "The hiring authority has the final say as to who is selected." [Department of Corrections PPD 2.1, IV, 3. g.]
- G. "Selection will generally be made, if all things are equal, in the numerical order as they appear on the final score sheet." [Department of Corrections PPD 2.1, IV, 3. g.(3)]

Decision and Order

Sgt. Thyng's disappointment at not being selected is evident in his September 23, 1999 letter to former Commissioner Risley. In that letter he relates a conversation that he had with Captain Ross Cunningham in July, 1999, in which Capt. Cunningham reportedly told the appellant, "...there are two Lieutenants positions available, if you place number one or two on the board." While the Appeals Board understands the appellant's frustration at being denied promotion after having been given such assurances, the appellant's letter provides perhaps some of the most compelling arguments in favor of the hiring authority retaining discretion in the selection process to select that person he or she considers "best qualified."

First, there was no evidence that Captain Cunningham was privy to the appellant's performance records or any of the information that Warden Bird considered when denying the appellant promotion to Lieutenant. Further, the Rules and the Department's own policy clearly reserve for the hiring authority the right to select a candidate or deny selection. The evidence reflects that Warden Bird exercised his professional judgment in assessing Sgt. Thyng's abilities to assume a management team position within the Department. He had articulable concerns about the manner

in which Sgt. Thyng's admitted off-duty conduct had affected his performance on the job, and on that basis, refused him promotion. The Board believes that his decision reflects an appropriate exercise of discretion that the Rules contemplate.

Sgt. Thyng's evaluations bear out Mr. Vinson's assertion that the appellant is a valuable and a valued member of the department. However, those same evaluations describe a period of diminished performance in the few years preceding the opportunities for promotion. There is sufficient evidence to persuade the Board that at the time of selection, the appellant lacked personal and professional qualifications for promotion.

Therefore, on the evidence, argument and offers of proof, the Board voted unanimously to DENY Sgt. Thyng's appeals.

THE PERSONNEL APPEALS BOARD


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Robert J. Johnson, Commissioner


James J. Barry, Commissioner

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