

State of New Hampshire



PERSONNEL APPEALS BOARD
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APPEAL OF DAN CLOUTIER
Docket #2004-T-011
Office of Information Technology

June 2, 2004

The New Hampshire Personnel Appeals Board (Wood, Johnson and Urban) met on Friday, May 21, 2004, under the authority of RSA 21-I:58 and Chapters Per-A 100-200 of the NH Code of Administrative Rules, to hear oral argument by the parties on the issue of an appropriate remedy in the above titled appeal. Mr. Cloutier appeared and was represented by Attorney Shawn Sullivan. Attorney John Martin and Peter Yao, a member of the Governor's staff, appeared on behalf of the State.

The underlying events are not in dispute:

1. Mr. Cloutier was notified by letter dated February 2, 2004 that he was to be laid-off from his position effective February 16, 2004.
2. Mr. Cloutier was separated from service effective February 16, 2004. Because he had fewer than ten years of service, he was unable to exercise the option to bump another employee within his division/agency.
3. Mr. Cloutier, through his attorney Shawn Sullivan, filed a timely appeal of his separation from service, asserting that the lay-off was effected in violation of the Rules of the Division of Personnel. Mr. Cloutier alleged that there was no actual reorganization within the Office of Information Technology, no reduction in workload, and no legitimate reason for a lay-off. He argued that laying him off was simply a means of dismissing him without due process. He argued that his separation appeared to be disciplinary in nature.
4. The appellant alleged that the decision to lay him off was an arbitrary, capricious and unlawful action taken in response to the resignation of Robert Anderson, former Chief

Information Officer, who had worked closely with the appellant during his tenure with the Office of Information Technology.

5. The Board convened a pre-hearing conference on March 17, 2004, which the Board and the parties agreed to continue until April 7, 2004 and scheduled a hearing on the merits of the appeal for April 21, 2004.
6. At the April 7, 2004, pre-hearing conference, the parties informed the Board that they had reached an agreement that the lay-off did not comply with the Rules and the appellant was entitled to reinstatement with back-pay. The parties disagreed, however, on the extent of the appropriate remedy. The Board directed the parties to file memoranda outlining their respective positions on the issue of an appropriate remedy and to appear before the Board on May 5, 2004 to offer oral argument and respond to questions from the Board on their proposed remedies.
7. By letter dated April 28, 2004, the appellant submitted his proposal. He outlined the State's responsibility to reinstate the appellant without loss of pay to the employee's former position or a position of like seniority, status and pay. A more appropriate remedy, he argued, would be for the Board to exercise its equitable powers as described by RSA 21-I:58 and make the following orders:
 - a. "Since his unlawful termination, the appellant has taken a lesser paying job with the Secretary of State's Office. Given that the decrease in income approximates Eight Thousand Dollars (\$8,000.00) per year, there would be a significant impact on the appellant's yearly income as well as his retirement benefits (RSA 100-A). Under the circumstances, either a salary upgrade or supplemental wages paid by the appointing authority would be necessary to make him whole."
 - b. "New Hampshire Supreme Court has recognized that an award of attorney's fees may be due, even in the absence of a statutory authorization where, 'an individual is forced to see judicial assistance to secure a clearly defined and established right.', Harkeem v. Adams, 117 NH 687 (1977); or 'for those who are forced to litigate against an opponent who's position is blatantly unreasonable,' Keenan v. Fearon, 132 NH 494 (1988)."
8. In its memorandum dated April 28, 2004, the State proposed two alternative remedies:
 - a. "The respondent has offered to reinstate the appellant to his former position as an Administrator IV with the Department of Administrative Services. Pursuant to this offer he would receive back pay, benefits and seniority from the date he was

laid off through the date of his reinstatement with his back pay offset by the amount he has earned in his position as Assistant Secretary of State..."

- b. "The appellant has indicated his desire to remain in his current position as an Assistant Secretary of State. However, he wishes to receive financial compensation to offset the difference in his current salary and the salary he received in his former positions. The respondent does not believe that this would be a fair and equitable outcome. If the appellant wishes to remain in his current position he has every right to do so. However, he cannot reasonably expect to remain in that position with additional financial compensation to supplement his income. Should he wish to remain in his current position the respondent would agree to compensate him for back pay, benefits and seniority from the date of his lay off until the date of his employment as an Assistant Secretary of State. The respondent cannot agree to compensate the appellant [sic] over and above that amount if he chooses to remain in his current position."

At the May 5, 2004 hearing on the appropriate remedy, a quorum of the Board was present to hear and decide the appeal. The appellant objected to going forward without the full three-member panel that had participated in the earlier pre-hearing conferences. The Board, with the consent of the parties, rescheduled the matter for hearing on Friday, May 21, 2004.

At the May 21, 2004 hearing, Mr. Sullivan argued that during settlement discussions, the State had conceded that Mr. Cloutier's rights were somewhat violated when he was laid off. He said he'd offered a written stipulation for the parties to sign in which the State would agree as follows: "The State of New Hampshire Office of Information Technology hereby stipulates and agrees that it violated the personnel rules as alleged in Mr. Cloutier's appeal of February 17, 2004 and that no hearing on the merits is necessary."

Mr. Martin argued that the State was willing to stipulate that Mr. Cloutier worked for the State for a number of years, that he transferred from the Department of Administrative Services to the Office of Information Technology, that his position in the Office of Information Technology was abolished, and that he was laid off. He said the State would further stipulate that although it was correct to abolish the position, the appellant was not the least senior employee in that classification within the agency and was not the person who should have been laid off. He said

that the State would not stipulate to the rest of the facts alleged in the appellant's letter of appeal.

Mr. Sullivan reiterated his argument that the lay-off was only a thinly veiled attempt to terminate the appellant without due process. He argued that if the agency refused to admit that it had blatantly violated the rules as the appellant had alleged, the appellant would need a hearing on the merits to prove that the agency's underlying motives were improper. He argued that under the provisions of RSA 21-I:58, the Board should take evidence concerning the agency's underlying motives for the termination and issue an order requiring the State to make an additional payment to the appellant to compensate for the loss of future earnings and retirement contributions.

The Board reviewed with the parties the language of RSA 21-I:58 concerning its jurisdiction, noting that even if it were to hold a further hearing and determine that the appellant was terminated for some reason other than those stated in the February 2, 2004 layoff letter, the remedy defined by RSA 21-I:58 would be the same: reinstatement to a position of like seniority, status and pay, as well as an award of back pay.

Mr. Sullivan argued that reinstatement should not be deemed the only option and he asked the Board to "stretch" the exercise of its equitable powers in crafting a remedy. He argued that the State had not offered to reinstate Mr. Cloutier to a position of like seniority, status and pay. Rather, he said, the offer was to appoint Mr. Cloutier to an Administrator IV position (salary grade 33) in the Department of Administrative Services Budget Office similar to that from which he had been promoted to the position of Information Technology Manager V (salary grade 34) in the Office of Information Technology. He argued that the State's offer would not result in Mr. Cloutier's reinstatement to a position of like seniority, status and pay. Moreover, he argued, reinstatement to a position in either the Department of Administrative Services or the Office of Information Technology would result in the appellant being placed in "a hostile environment." He argued that the only fair resolution would be to make the appellant whole, compensate the appellant prospectively for his loss of earnings, and pay attorney's fees that the appellant would not have incurred had the State not dismissed him in violation of the rules.

The Board stated that it was not in the business of issuing punitive orders, suggesting that the appellant had other opportunities if he chose to pursue the matter in court where he could argue

the issue of wrongful discharge and seek damages. In doing so, the Board cautioned, the appellant also ran the risk of a verdict in the State's favor, where the appellant would be entitled to none of the relief requested or offered by the State.

The parties then addressed the status of the position in the Office of Information Technology from which Mr. Cloutier was removed. Mr. Martin indicated that the position had been abolished. He and Mr. Yao explained that when the Office of Information Technology was created, the intent was to pull together all the information technology professionals from the various State agencies and have them report through a centralized Office of Information Technology that would service the IT needs of all the other agencies. Mr. Martin said that the Information Technology Manager V position occupied by Mr. Cloutier had been transferred to the Office of Information Technology from the Department of Safety and, following that transfer, was reassigned to perform largely financial functions.

Mr. Yao said that when Mr. Anderson, CIO, resigned from the Office of Information Technology in January 2004, Governor Benson asked Mr. Yao to step in and "take a look at the agency" while they were waiting for the CIO position to be filled. When he looked at the jobs, he said, he realized that this was supposed to be just an IT service function. He didn't feel that a finance function was required for the agency to function effectively. He said that if the Office of Information Technology needed financial services, it was clear that those functions could be performed by the Department of Administrative Services with the assistance of OIT staff. He said that Mr. Cloutier's position was then unnecessary and the function was eliminated. He said it was his understanding that there was no intention to fill the position in the future, although he had not discussed it specifically with Rick Bailey, the new CIO.

The Board asked for the status of other positions in the Office of Information Technology and if there were any vacancies. Mr. Yao said that on the IT side, there had been attrition and positions were not being filled. To the best of his knowledge, he said, there were still vacant positions but they would be subject to the hiring freeze.

Mr. Sullivan described Mr. Cloutier's former position as having been "abandoned," arguing that the agency did not abolish the position but simply got rid of Mr. Cloutier. He and Mr. Cloutier argued that Mr. Anderson's intention had been to have Mr. Cloutier manage the financial functions at the outset while the agency was being organized then transition into straight

information technology assignments if the financial function was eventually phased out. Mr. Cloutier said that former CIO Anderson believed the agency needed an IT Manager V with an understanding of the State's financial processes and the ability to perform financial analysis specific to the activities of the Office of Information Technology.

Before closing the hearing, the Board asked the State to provide information about the status of Mr. Cloutier's former position in the Office of Information Technology and whether that agency would be able to reinstate him to the same or a similar position. Mr. Martin agreed to provide that information to the Board by Wednesday, April 26, 2004.¹ During the course of deliberations, however, the Board concluded that it did not need that information in order to reach a fair and equitable solution in accordance with the requirements of RSA 21-I:58 and the Rules of the Division of Personnel (Chapters Per 100-1500, NH Code of Administrative Rules).

Based on the information provided by the parties and information obtained by the Board on the State's web page, the Board made the following findings of fact and rulings of law:

1. According to the Office of Information Technology's Strategic Plan (<http://www.nh.gov/technology/docs/lssitpfyO407.pdf>):
"RSA Chapter 4-D:3, Laws of 2003, established the Office of Information Technology (OIT) on July 1, 2003, within the Office of the Governor. The Office of Information Technology is led by the Chief Information Officer, a position appointed by the Governor. The Office of Information Technology is responsible for managing and coordinating all technology resources in the executive branch of government, developing and implementing strategies to enhance state customer service, and creating statewide efficiencies through the use of information and other technologies. These responsibilities include developing a formal information technology planning process for approving agency information technology plans, preparing and maintaining a statewide information technology plan based upon agency plans, and reviewing, assessing, and approving the feasibility of agency plans, including cost estimates and impacts on other agencies and political subdivisions of the state."

¹ The State submitted its response as requested, indicating that: (1) the appellant's previous position was neither filled, nor was it being abolished, but was being reclassified and downgraded to Database Administrator; (2) there is currently a vacant IT Manager V position (labor grade 34) in OIT's Web Development group for which the appellant could probably be certified; and (3) there is an available Administrator IV vacancy (labor grade 33) in the Embedded Agency Application Group that might require more software development experience than the appellant possesses.

2. RSA 4-D:1 states: "There is established the office of information technology within the office of the governor. The office of information technology shall be under the supervision of the chief information officer. The chief information officer shall be appointed by the governor, with the advice and consent of the council, and shall be a non-classified employee."
3. At the time of the appellant's promotion from Administrator IV in the Department of Administrative Services to the position of Information Technology Manager V in the Office of Information Technology, Robert Anderson was the Office of Information Technology's Chief Information Officer.
4. The supplemental job description for the specific Information Technology Manager V position occupied by Mr. Cloutier immediately prior to his lay-off from employment was intended to perform various IT and finance functions in support of the agency's overall strategy.
5. Mr. Anderson resigned from his position in late January 2004.
6. On or about February 2, 2004, Peter Yao, acting on behalf of the Governor's Office, decided that the various financial review and analysis functions performed by Mr. Cloutier did not need to be performed within the Office of Information Technology itself, but could be performed by staff from the Department of Administrative Services working in conjunction with OIT staff.
7. Mr. Yao issued a February 2, 2004 notice of lay-off to the appellant, informing him, "Due to change in organization within the information technology function and the resulting decline in agency workload, it has become necessary to lay you off from your position as a full-time Information Technology Manager V."
8. At the time of lay-off, Mr. Cloutier was not the least senior employee within the Office of Information Technology classified as an Information Technology Manager V.
9. In accordance with Per 1001.01, "An appointing authority may lay off an employee only when such layoff becomes necessary because of the following reasons: (a) Abolition of a position; (b) Change in organization; (c) Decline in agency work load; (d) Insufficient funding; (e) Change in state law; and (f) Change in federal requirements."
10. Per 1001.02 (a) through (l) describes the procedure for lay-off. Per 1001.02 (a) through (e) describes the order of lay-off as follows:
 - (a) An appointing authority shall first determine, by division, the class or classes to be affected within the agency.

(b) Each employee whose position is in an affected class shall be considered with other employees in the same class within a division of an agency in accordance with seniority, whether the employee is on duty or leave status, or receiving workers' compensation.

(c) Seniority for the purpose of layoff shall be the length of continuous full-time service with the state from the last date of hire to full-time service on the basis of years, months, and days of service including military leave pursuant to Per 701.02 except that any days, months, or years of leave without pay for educational or personal reasons shall not be counted.

(d) No permanent employee shall be laid off from any position while there are temporary fill-in, part time, original provisional or probationary employees serving in the same class of position within the same division of the agency.

(e) Except for very unusual instances of an individual possessing unique credentials that are necessary for the agency to carry out a legislated mandate, seniority shall govern the order of layoff..

11. Having determined that it no longer needed a position to support financial activities, the Office of Information Technology was authorized to determine that a change in organization and decline in agency workload justified a layoff from the classification of Information Technology Manager V.
12. Unless others within the Information Technology Manager V classification possessed unique credentials necessary for the agency to carry out a legislated mandate [Per 1101.02 (c)], the agency was obliged to layoff on the basis of seniority within the classification.
13. Mr. Cloutier, who was not the least senior person within his classification within the agency was laid off in violation of Per 1001.02(d) of the NH Code of Administrative Rules (Rules of the Division of Personnel).
14. In order to complete the layoff in accordance with the Rules, the least senior Information Technology Manager V incumbent should have been laid off, reassigned or demoted in lieu of layoff, with Mr. Cloutier reassigned to assume those responsibilities.
15. RSA 21-I:58 states, in part, "If the personnel appeals board finds that the action complained of was taken by the appointing authority for any reason related to politics, religion, age, sex, race, color, ethnic background, marital status, or disabling condition, or on account of the person's sexual orientation, or was taken in violation of a statute or of rules adopted by the director, the employee shall be reinstated to the employee's

former position or a position of like seniority, status, and pay. The employee shall be reinstated without loss of pay, provided that the sum shall be equal to the salary loss suffered during the period of denied compensation less any amount of compensation earned or benefits received from any other source during the period. "Any other source" shall not include compensation earned from continued casual employment during the period if the employee held the position of casual employment prior to the period, except to the extent that the number of hours worked in such casual employment increases during the period. In all cases, the personnel appeals board may reinstate an employee or otherwise change or modify any order of the appointing authority, or make such other order as it may deem just."

Apart from its authority to reinstate without loss of seniority, status or pay, the Board lacks the statutory authority to award compensatory or punitive damages, even if it were to find that the agency's violation of Per 1001.02 was deliberate.'

The rules governing layoff are clear and unequivocal. Except in unusual cases involving specific qualifications required to carry out a legislative mandate, seniority within a classification within an agency governs the order of layoff once a class or classes has been identified for a reduction in force. The Office of Information Technology admits that it erred in laying Mr. Cloutier off, as he was not the least senior employee within the classification identified for reduction in force. Under the provisions of RSA 21-1:58, the Board's obligation is to ensure that the agency corrects that error by reinstating the appellant to a position of like seniority, status and pay.

Unless it could prove that the entire classification of Information Technology Manager V was eliminated or abolished, the State's suggestion that it can correct its error by reinstating Mr. Cloutier to a position in another classification and/or another agency at a salary grade less than that he held at the time of his layoff from the Office of Information Technology merely compounds the error. Accordingly, the Board found that the State's proposal to return Mr. Cloutier to a position in the Department of Administrative Services Budget Office is not consistent with the requirement of RSA 21-1:58, I to reinstate the employee to a position of like seniority, status and pay.

² The Board makes no finding with respect to any motives the agency may or may not have had for layoff other than those described in its February 2, 2004 notice of layoff and the presentation made by the State's representatives throughout these proceedings.

The appellant said it was clear he was not going back to the Office of Information Technology. Moreover, he argued, in order to receive an appropriate amount of compensation for the agency's violation of the Rules, the Board should not require him to return to either the Office of Information Technology or the Department of Administrative Services. The appellant described both agencies as "hostile environments" where he believed he would continue to be targeted for removal.

The appellant argued that instead of reinstating him, the Board should allow him to remain in his current position and order the State to compensate him for his current and future earnings, as well as the difference those earnings would make upon retirement when the State calculates his average final compensation.³ The appellant argued that he currently works at the highest step of his unclassified position, and said it was unlikely that he would attain a salary equivalent to that he earned prior to layoff prior to retirement. Finally, the appellant argued that because the State violated his rights under the personnel rules and illegally terminated his employment, the State should be required to pay his attorney's fees.

As the Board indicated early in the hearing, it is neither inclined nor authorized to assess punitive damages, nor is it authorized to award attorney's fees. The Board is authorized to order the appellant reinstated to his former position or a position of like seniority, status and pay.

Based on the parties' agreement that: the layoff was effected in violation of the Rules of the Division of Personnel, the classification of Information Technology Manager V still exists in the Office of Information Technology, Mr. Cloutier was not the least senior employee in that classification, and Mr. Cloutier is certified as meeting the minimum qualifications for appointment to that classification, the Board orders the appellant reinstated, with an appropriate award of back pay, to a position of Information Technology Manager V within the Office of Information Technology.

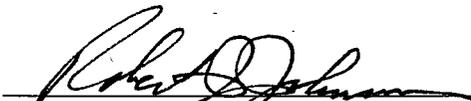
³ RSA 100-A:1, XVIII defines average final compensation as "...the average annual earnable compensation of a member during his highest 3 years of creditable service, or during all of the years in his creditable service if less than 3."

1. The appellant shall be reinstated without loss of seniority, status or pay to a position of Information Technology Manager V in the Office of Information Technology.
2. The appellant shall be entitled to reimbursement for lost wages between February 17, 2004 and the date of this order, provided that such award shall be reduced by interim earnings under the conditions set forth in RSA 21-I:58.
3. Should the appellant choose to remain in his current position with the Secretary of State's Office, he shall be entitled to no additional compensation beyond the date of this order.
4. The appellant's request for award of attorney's fees is denied.

THE PERSONNEL APPEALS BOARD



Patrick H. Wood, Chairman



Robert J. Johnson, Commissioner



Anthony B. Urban, Commissioner

cc: Director of Personnel
Attorney Shawn Sullivan
Attorney John Martin
OIT CIO Rick Bailey