

State of New Hampshire

PERSONNEL APPEALS BOARD
Edward J. Haseltine, Chairman
Gerald Allard
Loretta Platt



EXECUTIVE SECRETARY
Mary Ann Steele

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

1988-0-101

APPEAL OF ELAINE FUGERE

March 29, 1988

At its meeting on Tuesday, March 29, 1988, the Personnel Appeals Board, Commissioners Cushman and Platt sitting, reviewed the appeal of Elaine Fugere filed on her behalf by the State Employees' Association by letter dated March 21, 1988.

The State Employees' Association contends that an appeal to the Director of Personnel was filed by letter to the Director dated December 3, 1987, and that the Director did not respond to the appeal request.

The Board will allow the Director fifteen days from the date of this notice to provide the Board with information relative to this appeal prior to scheduling the matter for hearing.

FOR THE PERSONNEL APPEALS BOARD

A handwritten signature in cursive script that reads "Mary Ann Steele".

MARY ANN STEELE
Executive Secretary

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cc: Virginia A. Vogel, Director of Personnel

Jean Chellis, SEA Field Representative

Dr. David Larrabee, President
New Hampshire Vocational Technical Institute

Mary Pillsbury Brown, Commissioner
Department of Postsecondary Education

State of New Hampshire

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APPEAL OF ELAINE FUGERE July 29, 1988

On July 19, 1988, a prehearing conference was held in the above-captioned matter. The appellant was represented by Shaun Sullivan of the State Employees' Association. Assistant Attorney General Robert Dunn appeared on behalf of the New Hampshire Technical Institute.

At the hearing, the parties stipulated that the March 31, 1988 letter from Arthur Harris to Elaine Fugere was one of both increment denial and termination. The issues to be presented at the evidentiary hearing will be limited to those incidents giving rise to that March 31, 1988 letter. The parties agreed that the depositions of the appellant and Dr. David Larrabee would be taken prior to the hearing. The appellant's representative indicated that a meeting with the Director of Personnel was scheduled for July 21, 1988 on the appeal of the first denial of an annual increment. The Board hereby orders that all "step" appeals relative to that increment shall be completed on or before August 19, 1988.

The State indicated that it expected to present three witnesses and the appellant stated that it expected to present five to ten witnesses. Both parties requested that the Board allow longer than one hour for the presentation of evidence.

The Board has scheduled this matter for 1:00 p.m. on Wednesday, September 14, 1988 in Room 401 of the State House Annex, Concord, New Hampshire. The Board will schedule no other hearings for that afternoon. No further continuances shall be granted. The parties should make every effort to determine whether stipulations of fact can be submitted. If there are any other legal issues to be resolved, motions shall be filed no later than September 1, 1988 setting forth the issues and relief requested. In the event a settlement is reached prior to the hearing, the parties shall notify the Board immediately.

FOR THE PERSONNEL APPEALS BOARD

A handwritten signature in cursive script that reads "Mary Ann Steele".

MARY ANN STEELE, Executive Secretary

cc: Michael Reynold, General Counsel
State Employees' Association

Robert E. Dunn, Jr.
Assistant Attorney General

Virginia A. Vogel, Director of Personnel

State of New Hampshire

PERSONNEL APPEALS BOARD

Patrick J. McNicholas, Chairman
George R. Cushman, Member
Robert J. Johnson, Member
Peter C. Scott, Alternate
Mark J. Bennett, Alternate



EXECUTIVE SECRETARY
Mary Ann Steele

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APPEAL OF ELAINE FUGERE Order on Pending Motions

A. Motion for Contempt

Following the Board's recent decision, Appellant was reinstated to her position as an Associate Professor in the Dental Auxiliaries Program. The Dental Auxiliaries Program consists of a Dental Assisting Program and a Dental Hygiene Program. These latter programs were apparently separate when Appellant was hired, but have since been combined into the Dental Auxiliaries Program.

When Appellant was wrongfully discharged, her assignments fell primarily within the Dental Assisting Program. Following reinstatement, however, her assignments cover both areas with greater emphasis in the Dental Hygiene Program. See Summer Schedule 1989, Exhibit B.

Appellant claims she was reassigned to duties within the Dental Hygiene Program in order to force her resignation, in violation of NHTI's transfer requirements, and in violation of the Board's order. She also claims that NHTI refuses to discuss this reassignment with her.

The Board's order provides that Appellant be reinstated to her former position. Since NHTI apparently did this, it has not directly violated the order. Accordingly, the Motion for Contempt is denied. Further action on Appellant's claims will be deferred, as discussed below.

Appellant has not alleged that the reassignment constitutes a transfer within the meaning of Per 101.38. Such transfers can only be made for the best interests of the agency. Per 302.05(b). The Board can see no reason to hold the agency to a higher standard when dealing with the reassignment of a schedule.

The Appellant has, however, alleged what amounts to bad faith on the part of NHTI. While the allegations, standing alone, do not necessarily support the claim, the Board does not look favorably on NHTI's alleged refusal to discuss the matter with Appellant. Accordingly, the Board orders NHTI to make the appropriate supervisory and administrative staff available to Appellant for good faith discussions.

The Board directs Appellant to follow the usual adjustment and appeal procedure with NHTI before bringing the matter to the Board for further consideration. If Appellant remains convinced of NHTI's bad faith, she may file an appeal with the Board alleging specific facts to support her claim.

Finally, the Board urges NHTI to take reasonable steps to make Appellant personally and professionally comfortable with her new assignments. Neither NHTI nor its students will benefit from an instructor cast adrift in an unfamiliar and hostile area.

B. Motion for Re-hearing.

Appellant's Motion for rehearing is granted. The hearing will be scheduled for Wednesday, July 19, 1989 at 1:30 p.m. in Room 401 of the State House Annex, School Street, Concord, New Hampshire. The Board will receive whatever testimony and other evidence or argument the parties desire to submit on the issues raised by the Motion.

One hour will be allowed for the hearing. The parties should also be prepared at the hearing to present a written summary of their actions to comply with the Board's directives since the date of this Board's original order, and subsequent to this notice of scheduling. Both Appellant, if her teaching schedule will permit, and a representative of the agency should make every effort to appear personally at the scheduled hearing. If the parties require more time, they should so notify the Board within ten days of this order.

FOR THE PERSONNEL APPEALS BOARD


Peter C. Scott, Esq.

Dated: June 26, 1989

cc: Sarah Hopley, Human Resource Coordinator
New Hampshire Technical Institute

Robert Dunn, Assistant Attorney General
Office of the Attorney General

Jon Meyer
Backus, Meyer and Solomon

State of New Hampshire

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88-D-101

PERSONNEL APPEALS BOARD

State House Annex
Concord, New Hampshire 03301
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APPEAL OF ELAINE FUGERE

The Personnel Appeals Board, Commissioners McNicholas, Cushman and Scott, sitting, met on March 8, 1989 to consider the Appeal of Elaine Fugere, a former employee of the New Hampshire Technical Institute.

Chris Henchey, Director of Operations, State Employees¹ Association and Attorney Jon Meyer appeared on behalf of the appellant. Assistant Attorney General Robert E. Dunn, Jr. appeared on behalf of the agency.

The undisputed facts, as they appear from the record, bear repeating. During the time of the events in question, Appellant was an Associate Professor in the Dental Auxiliaries Program, a part of the New Hampshire Technical Institute ("NHTI").

A. First denial of increment and letter of warning.

On July 13, 1987, Dr. David Larrabee, President of NHTI, gave Appellant a written letter of warning and notified Appellant that she would not receive her annual salary increase scheduled for August, 1987. On July 17, 1987, Appellant, through Attorney Carol Ann Conboy, appealed the letter of warning to Mary P. Brown, Commissioner of Postsecondary Vocational-Technical Education.

On November 6, Commissioner Brown held a hearing for Appellant. Commissioner Brown upheld the action of Dr. Larrabee in a memorandum dated November 24, 1987. On December 3, 1987, Appellant, through SEA Field Representative Jean Chellis, appealed the adverse decision to the Director of Personnel.

On March 21, 1988, Field Representative Chellis notified the Board that the Director had not taken any action on the appeal. Accordingly, on March 29, the Board ordered the Director to provide the Board with pertinent information relative to the appeal. The Director responded on April 18, indicating that she had investigated the matter, and that although she had not held a hearing, she believed that the letter of warning was appropriate based on the information available.

This matter apparently lay in limbo for a long time thereafter. The Board issued an order on July 29, 1988, which stated that the Director had scheduled a hearing on this first denial of increment for July 21, and ordered all "step" appeals relative to that increment completed by August 19. On August 8, however, the Director notified the Board that in fact no hearing was scheduled.

On August 15, 1988, Appellant requested the Board to default the appointing authority based upon the delay in responding to the appeal. The record before the Board suggests that no further action has been taken by the Director relative to the appeal of the first letter of warning and increment denial.

B. Second denial of increment and termination.

On March 31, 1988, Arthur Harris, Dean of Academic Affairs for NHTI, gave Appellant "notification of an intent not to award an increment increase." He also informed Appellant that, "according to the requirements of this section [Per 304.04(a)], I shall recommend that you be discharged as of August 21, 1988." On April 11, Appellant appealed the action taken in the March 31 letter, to the extent that the letter "would be considered by the Personnel Appeals Board to be a termination or a de facto termination."

In that appeal, and in subsequent correspondence to the Board dated May 4, 1988, Appellant sought clarification of both the procedural effect of the March 31 letter and specification of the reasons for the action taken. This was apparently supplied by Dr. Larrabee in his letter of July 19 (which mistakenly bears the date of June 19).

On August 22, 1988, Dr. Larrabee informed appellant that:

your employment is terminated due to a second increment denial because of unsatisfactory work performance. This is effective August 21, 1988.

On August 26, Appellant filed an appeal of the termination.

On August 31, 1988, Attorney Jon Meyer filed his appearance on behalf of Appellant, and on September 7, the SEA withdrew their appearance. On September 13, Attorney Meyer filed a Motion for Reinstatement.

C. Motion for Reinstatement.

In her Motion for Reinstatement Appellant argues that the termination is improper because it fails to comply with the requirements of the Rules of the Division of Personnel. For the reasons stated below, the Board agrees.

Per 304.04(a) provides in pertinent part as follows:

[A]n appointing authority may withhold an increase for unsatisfactory work performance, but in no event shall an annual increase be withheld for more than one year. If, at the end of the second year, the employee is sufficiently borderline as to not warrant an increase, he must be transferred, demoted or discharged.

NHTI argues that this section gives **it** the right to discharge the employee at the end of the second year **if** the employee's work remains unsatisfactory. Appellant argues that NHTI may not rely solely on this section to discharge an employee, but instead must conform to the ordinary rules regarding discharge.

The Board agrees with Appellant. The Board initially notes that neither party is aware of any other instance when Per 304.04(a) has been used as the sole reason for discharging an employee. The Board is similarly unaware of any such use.

Per 304.04(a) appears in Part Per 304 entitled "Compensation Plan." That Part deals with compensation. The sections surrounding Per 304.04(a) do not provide guidance in disciplinary matters. Part Per 308, on the other hand, deals with Separation and Demotion. This placement of Per 304.04(a) among rules dealing with compensation, with no specific cross-reference to the section in the disciplinary rules, suggests to the Board that Per 304.04(a) does not provide a way to bypass the provisions of Part Per 308.

Per 308.03(3)(e) lists "unsatisfactory work" as one of the "other offenses". Other offenses are handled as provided in Per 308.03(4). Under Per 308.03(4)(3), an employee may be discharged only after the third written warning for the same offense such as unsatisfactory work. **If** Per 304.04(a) were intended to provide an alternative method of discharge for unsatisfactory work, the Board would have expected some reference to that fact in Per 308.03.

Ironically, Per 304.04(b) provides the employee with some assurance that, although the "work is not of the quality and quantity expected," his performance is "not immediately of a level to warrant discharge." This is quite different from the disciplinary section's requirement that letters of warning contain the notice that "unless corrective action is taken the employee will be subject to discharge." Per 308.03(4)(b). This further supports the Board's conclusion that Per 304.04(a) limits the appointing authority's ability to withhold salary increases, rather than adding to the appointing authority's options in disciplinary matters.

It is also ironic that Commissioner Brown stated in her November 24, 1987 decision that Appellant's "job is not in jeopardy at this time." While Dr. Larrabee's July 19, 1988 letter suggests that many of the alleged deficiencies arose after Commissioner Brown's decision, the record shows no written letter or memorandum advising Appellant that her job was in jeopardy prior to the March 31, 1988 letter of intent to terminate.

Finally, the Board notes that the Director, in her November 3, 1987 letter to Commissioner Brown, advised the appointing authority to proceed in the way the Board and the Appellant interpret the Rules. In that letter the Director concludes with the following paragraph:

In closing, I would comment that the letter is one written warning, or one disciplinary action, which is notifying ms Fugere that her work is unsatisfactory and as such her increment will not be authorized. If her work performance continues to be unsatisfactory, then you would be required to have two written warnings on file and then a third which would be her letter of termination.
(Emphasis aaaa.)

D. Request for Default.

The Board denies the request for default. First, the appointing authority cannot be held liable for any delay caused by the Division of Personnel. The Board can see no purpose in penalizing NHTI for the Division's delay.

NHTI's delay, on the other hand, seems to be the result, at least in part, of confusion over the proper way of handling an appeal taken directly to Commissioner Brown, rather than taken up first within NHTI. Additionally, Appellant has not alleged any prejudice due to the delay.

Furthermore, appeals to the Board had been taken up as early as March 21, 1988, a full five months before the eventual action terminating Appellant's employment with NHTI was to become effective. In its order of July 17, 1988, the Board notified the parties of scheduling of a pre-hearing conference on July 12, 1988, intended to narrow the factual issues of the case. On June 27, 1988, the State Employees' Association, then representing Appellant, requested a continuance. Were it not for Appellant's Motion, the matter might have been settled prior to Appellant's last scheduled day of work.

E. Order.

Appellant is hereby ordered reinstated.

Since the appointing authority may withhold only one increment, at least one of the two increments will have to be granted. The Board hopes that the parties can work out among themselves which one will be withheld in order to most quickly put their differences behind them.

If the parties cannot agree, however, they should notify the Board to schedule a hearing. At that hearing, the Board will receive evidence on the first increment denial. If the first denial is upheld, then the second will be rendered moot. If the first denial is overturned, the Board will schedule a hearing to consider the second denial.

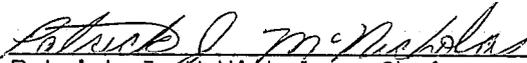
The question of back pay rests solely upon resolution reached by the parties, or in further hearings before the Board, concerning the first or second denial of increment. The Board will not order back pay for the period following August 21, 1988.

Appellant had ample opportunity for hearing prior to the effective date of termination. The Board, by order of notice dated June 17, 1988, scheduled a pre-hearing conference on July 12, 1988. On June 27, 1988, the State Employees' Association filed a Motion to Continue. The Board again ordered a pre-hearing conference for July 26, 1988.

On July 7, 1988 the State Employees' Association filed a Motion for Special Scheduling, requesting a full two days for hearing, and a Motion to Continue and Consolidate on July 18, 1988. The Board, in its order of July 29, 1988, scheduled a hearing for September 14, 1988. On August 26, 1988 the SEA filed another Motion to Continue. Finally, on August 31, 1988, Attorney Jon Meyer filed his appearance on Appellant's behalf, filing simultaneously a Motion to Decide Motion to Continue.

Had the parties proceeded with hearing on the first denial of increment, and had the appellant prevailed in that appeal, the second denial of increment would not have had the effect of a de facto termination. Initial delays in pursuing that appeal before the Board, as the above chronology will attest, occurred at the specific request of the appellant. Therefore, the Board has decided to treat the period of August 21, 1988 through March 8, 1989 as a leave of absence without pay.

THE PERSONNEL APPEALS BOARD


Patrick J. McNicholas, Chairman


George R. Gushman, Jr., Member


Peter C. Scott, Alternate

DATED: May 22, 1989

cc: Robert E. Dunn, Jr.
Assistant Attorney General

Jon Meyer, Esq.
Backus, Meyer and Solomon

Virginia A. Vogel
Director of Personnel

State of New Hampshire



PERSONNEL APPEALS BOARD

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

Appeal of Elaine Fugere Order on Pending Motions

August 18, 1989

On Wednesday, July 19, 1989, the Personnel Appeals Board (McNicholas, Cushman and Scott) met to further consider the appeal of Elaine Fugere, an employee of the Department of Postsecondary Technical Education (NH Technical Institute) who had been terminated by notice of a second denial of annual increment and who was subsequently reinstated by order of the Board.

At its July 19th meeting, the Board considered several motions, which will be discussed in turn below:

A. Motion for Reconsideration - Back pay.

In its May 22, 1989 decision, the Board reinstated Appellant, but essentially denied her any back pay for the period from August 21, 1988 (the effective date of the termination) until March 8, 1989 (the date of the hearing before the Board). The reason for treating Appellant as having been on an unpaid leave status for that period, as stated in that decision, rested primarily on the number of continuances requested by Appellant.

During 1988, the Board scheduled a prehearing conference for July 12, and hearings on the merits for July 26 and September 14. Appellant asked to have each of these continued. The Board felt, and continues to feel, that had one or more of these scheduled meetings been held, the entire process might have been concluded more promptly. A prehearing conference was finally held on February 14, 1989, with a hearing on the dispositive issues on March 8.

This case presents an unusual situation for the Board. Often, an appellant will challenge the appointing authority's disciplinary action on the basis that it was too severe under the circumstances. In such a case, the Board believes it has the power to substitute a different sanction, under the Board's authority to "change or modify any order of the appointing authority". See RSA 21-I:58, I. For example, a termination could be converted to a suspension, even though this would have the effect of denying back pay for the period of the suspension.

In this case, however, the parties never got a change to establish the truth or falseness of the underlying behavior of Appellant which led to the disciplinary action of NHTI. Accordingly, the record cannot provide the Board with any authority to order a lesser disciplinary action.

The Board's decision must therefore rest entirely on the fact of Appellant's Motions. The Board first notes that the appointing authority never opposed these Motions, and indeed suggested the continuance of both the July 26 and September 14 hearings. See NHTI's Response to Appellant's Motion for Special Scheduling (7/15/88) and Motion to Continue (9/1/88). Moreover, part of the responsibility for the delay could be said to rest with the Board, which for administrative reasons was not able to reschedule a hearing until nearly six months after the September 14th hearing date.

Accordingly, upon reconsideration, the Board has determined to order the Appellant "reinstated without loss of pay". See RSA 21-I:58, I. Appellant shall promptly provide NHTI with a statement of compensation earned or benefits received from any other source during the period of termination. Id.

B. Motion for Reconsideration - Default.

Upon reconsideration, the Board has determined to uphold its original decision. In addition to the reasons stated in that decision, the Board notes that the adjustment and appeal procedure (per 306.04) does not set up inviolable deadlines. The adjudicator need only notify the appellant of the reasons for the delay.

In extreme cases, such as those where an appellant is severely prejudiced by the arbitrary, capricious or bad-faith delay of an appointing authority, the Board would consider taking the drastic step of default. In most cases, however, delay can best be dealt with by judicious application to the next level of appeal for help in moving the process along. For example, if an appellant were having trouble getting a decision out of an agency head (Step III), the appellant should petition the Director (Step IV) for assistance. Indeed, the record suggests that Appellant received the Board's assistance in moving the case along when it was before the Director. See Order of March 29, 1988.

C. Motion to Seal Records and Close Hearing.

Appellant filed a motion at the time of the hearing to seal records of this matter because of her desire to submit certain medical records in conjunction with her appeal of her termination and Motion for Contempt. The appointing authority has assented to the Motion; and the Board at its July 19 hearing granted the Motion.

D. Motion for Rehearing on Motion for Contempt.

Appellant's Motion for Rehearing is granted. The hearing will be scheduled for September 13, 1989 at 10:00 a.m. The Board will receive whatever testimony and other evidence or argument the parties desire to submit on the issues raised by the Motion for Contempt.

The hearing on the Motion for Reconsideration will be consolidated with a hearing on the merits of the recent termination of Appellant (Docket #89-T-17). Any hearing relative to the denials of increment will be deferred until a later date. The Board understands that the propriety or impropriety of the denials of increment are not directly related to the most recent termination or the Motion for Contempt.

Two hours will be allowed for the hearing. If the parties require more time, they should so notify the Board, within ten days of this order.

CUSHMAN, DISSENTING:

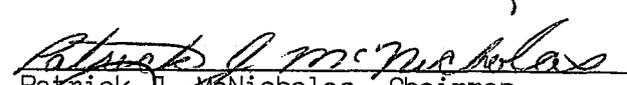
■ respectfully dissent from the majority's ruling on Appellant's Motion for Reconsideration. While ■ agree with that part of the ruling upholding our decision to deny the default, ■ disagree with the majority with respect to the issue of back pay.

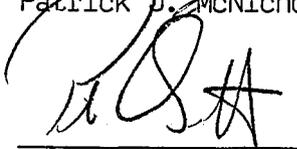
The Tech has made serious allegations against Appellant concerning her actions over a two-year period. The Tech may well have had legitimate grounds for strong disciplinary action against Appellant, even though they clearly proceeded improperly under the rules.

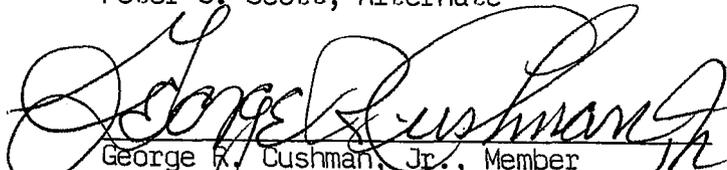
In addition, as stated in our earlier decision, Appellant contributed to the delay involved in reaching a final resolution, once the matter reached the Board.

By awarding Appellant back pay, Appellant may be getting, or may appear to be getting, a windfall. At a minimum, I would have preferred to hear evidence on the underlying issues involved in the withholding of increases before the Board makes a ruling on back pay. Without knowing all the facts, ■ do not see how we can properly make an order granting back pay.

THE PERSONNEL APPEALS BOARD


Patrick J. McNicholas, Chairman


Peter C. Scott, Alternate


George R. Cushman, Jr., Member
(Dissenting)

cc: Jon Meyer, Esq.
Robert Dunn, Jr., Assistant Attorney General
Virginia A. Vogel, Director of Personnel