

State of New Hampshire



PERSONNEL APPEALS BOARD

25 Capitol Street
Concord, New Hampshire 03301
Telephone (603) 271-3261

Appeal of Terri Gazaway-Barnard Docket #96-T-1

Department of Safety

Decision on Appellant's Motion to Seal Record Without Objection

May 13, 1996

The New Hampshire Personnel Appeals Board (Bennett, McGinley and Rule) met Wednesday, March 27, 1996, to hear the termination appeal of Terri Gazaway-Barnard, a former employee of the Department of Safety, Division of Motor Vehicles. At the outset of the hearing, the Appellant requested a continuance, asserting that the parties were actively engaged in settlement negotiations. The State argued that it had made its last, best offer, and that if the Appellant was unwilling to accept that offer, the State was ready to proceed with the presentation of its case. The Board permitted the parties additional time in which to privately discuss a possible settlement, and the parties advised the Board later that morning that a settlement had been reached. The parties agreed to file Stipulations for Docket Markings by April 3, 1996.

On April 9, 1996, the New Hampshire Personnel Appeals Board received from Attorney Andru Volinsky a Stipulation for Docket Markings signed by the State's Attorney, Ms. Kelloway-Martin on April 1, 1996, and by Mr. Volinsky on April 8, 1996. Attached was a Motion to Seal Record Without Objection signed by Attorney Volinsky on April 8, 1996.

In support of his Motion, Mr. Volinsky argued that the parties had settled the matter, and that it would be appropriate to seal the file in this case, with the exception of the docket markings, to prevent Ms. Barnard from suffering embarrassment or unnecessary disclosure of private facts. The Board does not agree.

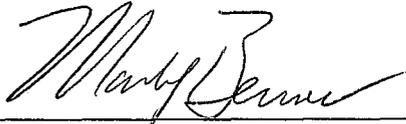
Per-A 205.03 of the Rules of the Personnel Appeals Board states:

"Presumption. In the absence of [an] order to close a hearing by the Board, all hearings shall be open to the public; and all tapes, transcripts, exhibits, decisions, motions or other portions of the record of any hearing shall be available to the public."

Any employee or agency appearing before the Board risks the possibility that embarrassing

information may become part of a public record. The Board does not believe that potential embarrassment to a party outweighs the Board's statutory obligation to maintain a public record of its proceedings.

THE NEW HAMPSHIRE PERSONNEL APPEALS BOARD



Mark J. Bennett, Acting Chairman



Lisa A. Rule, Commissioner

Karen S. McGinley, Commissioner

cc: Virginia A. Lamberton, Director of Personnel
Sheri J. Kelloway-Martin, Esq., Department of Safety
Andru H. Volinsky, Esq.

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Appeal of Terri Gazaway-Barnard
Department of Safety
Docket #96-T-1

March 22, 1996

The New Hampshire Personnel Appeals Board (McNicholas, Bennett and Rule) met Wednesday, March 20, 1996, under the authority of RSA 21-I:58 and the Rules of the Personnel Appeals Board to consider Appellee's Motion to Continue March 27, 1996 Hearing in the above-captioned appeal. In support of that Motion, Ms. Kelloway-Martin argued on behalf of the Department of Safety that there have been ongoing discussions between the Attorney General's Office and Appellant pertaining to a potential negotiated settlement, which may obviate the necessity for a hearing on the merits.

In a brief oral presentation to the Board, Ms. Kelloway-Martin indicated that she had been unable to reach counsel for Appellant for his assent to the Motion. She advised the Board that she had forwarded a copy of the Motion that morning by facsimile transmission to Mr. Volinsky, Appellant's representative. She informed the Board that she had suggested to Mr. Volinsky that he may wish to contact the Board if he concurred with the request to continue the hearing.

Absent an assent from the Appellant by the end of the day, and in consideration of the fact that the matter is scheduled for hearing on March 27, 1996, the Board voted unanimously to deny the Motion to Continue. However, the Board will consider a late-filed Motion to Continue from the Appellant, provided that the Department of Safety concurs with any such request which may be forthcoming.

FOR THE PERSONNEL APPEALS BOARD


Mary Ann Steele, Executive Secretary
N. H. Personnel Appeals Board

cc: Virginia A. Lamberton, Director of Personnel
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APPEAL OF TERRI GAZAWAY BARNARD

DOCKET #96-T-1

DEPARTMENT OF SAFETY/DIVISION OF MOTOR VEHICLES

January 17, 1996

The New Hampshire Personnel Appeals Board (Bennett, Johnson and Rule) met Wednesday, November 22, 1995, under the authority of RSA 21-I:58 and RSA 541, to hear oral argument on the Appellant's Motion to Allow Late Service, and the State's Objection to that Motion, in Ms. Gazaway Barnard's appeal of her termination from employment as a Title Examiner in the Division of Motor Vehicles. Attorney Andru Volinsky appeared on behalf of the Appellant. Attorney Sheri Kelloway-Martin appeared on behalf of the Department of Safety.

In the Motion to Allow Late Service which Mr. Volinsky filed on the appellant's behalf, he argued that the appeal letter was timely filed with the Board on July 5, 1995, but that due to a clerical error, a copy of the appeal letter was not forwarded simultaneously to the Department of Safety. He asserted that upon discovery of the error, a copy of the filing was forwarded immediately to the Department's Human Resources Administrator. Mr. Volinsky argued that the appellant's error in failing to forward copies of the appeal to the agency had not prejudiced the State, and that the Board should therefore permit the appellant to make late service of the appeal on the agency.

In her Objection, filed on behalf of the Department of Safety, Ms. Kelloway-Martin argued that the procedure for filing an appeal includes service of a copy of the appeal on the agency. She argued that the appellant is required by the provisions of Per-A 202.01 (c) and Per-A 206 to make service of the appeal at or before the time that the appeal is filed with the Board. She argued that because Ms. Gazaway-Barnard failed to make such service on the agency, she did not complete the procedure for filing an appeal, and that as a result, no appeal was actually filed. She argued that, "...any attempt to correct the error and file at this time would clearly violate the 15 day statute of limitations imposed by RSA 21-I:58 and Per-A 202.01 (a)."

During oral argument at the November 22, 1995, prehearing conference, the following issues were raised:

1. Are the Board's rules for "filing and service" of an appeal jurisdictional or procedural in nature?

The Board's rules are procedural in nature. RSA 21-I:46, V, which authorizes the Board to engage in rulemaking, states:

"The Board shall adopt rules under RSA 541-A regarding procedures for the conduct of its business." (Emphasis added.)

The Board's jurisdiction to hear and decide appeals is defined by RSA 21-I:58, I, which 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...."¹

2. Do the Rules of the Personnel Appeals Board differentiate between "filing" and "service" of an appeal, and can the Board consider an appeal to have been timely filed if a copy is not served on the other party to the appeal?

The Rules do differentiate between "filing" and "service" of an appeal, although that distinction may not be as clear as the appellant has suggested. Per-A 206.02 (a) states, in part, that "...filing shall not be timely unless the papers are received by the clerk within the time fixed by rule or law." The Rules do not specify that an appeal shall not be timely unless a copy of that appeal is served on the other party to the appeal at or before the time the appeal is filed with the Board. Therefore, the Board may consider an appeal to have been timely filed, even when a copy has not been served on the other party to the appeal.

3. Are the sanctions defined by Per-A 206.03 mandatory or optional?

Per-A 206.03 states, "Violations of Per-A 206 may provide grounds for any one of the following actions by the Board." It does not say that violations shall result in sanctions. Clearly, the language is intended to provide the Board discretion in determining the circumstances under which a violation is sufficiently egregious to warrant sanctions, up to and including dismissal, or refusal to hear an appeal.

4. Under what circumstances may the Board waive its own rules?

Unless otherwise precluded by law, Per-A 201.03 permits the Board to suspend any provision or requirement of the Board's rules in the interest of expediting a hearing, or for other good cause.

5. Has the Board improperly shifted the burden of proof from the employee to the employer if it requires the employer to prove that it has suffered some prejudice as the result of a procedural violation by the employee?

The State argued that the Board's rules are mandatory and jurisdictional, and that regardless of the reason for late service, the Board has an affirmative obligation to construe its rules very strictly, dismissing or refusing to hear the appeal, regardless of the appellant's reason for the violation of Per-A 206. The State argued that requiring it to demonstrate prejudice as a

¹ "An agency shall commence an adjudicative proceeding if a matter has reached a state at which it is considered a contested case or, if the matter is one for which a provision of law requires a hearing only upon the request of a party, upon the request of a party." (RSA 541-A:31, I)

prerequisite to dismissing or refusing to hear the appeal constituted an improper shift in the burden of proof. The State also argued that if prejudice needed to be demonstrated, the late service of Ms. Gazaway-Barnard's appeal had deprived the agency of a reasonable opportunity to evaluate the appeal in order to make a determination whether to fill the position vacancy created by Ms. Gazaway-Barnard's termination.

The appellant offered to prove that although the agency had not received a copy of the notice of appeal, there had been discussion of the pending termination appeal during the September 27, 1995, hearing on a letter of warning which had been issued to Ms. Gazaway-Barnard. The appellant also offered to prove that within three weeks of issuing its notice of termination the Department of Safety also had received notice that Ms. Gazaway-Barnard had filed an ADA claim with the Human Rights Commission. He said that the State knew that the Commission could order the Department to reinstate the appellant, and thus could not have reasonably relied upon the finality of its termination decision, whether or not it had notice of an appeal to this Board. Therefore, he asserted that the State could not support its claim of prejudice as a result of late service.

Per-A 206.03 allows the Board to determine what action, if any, to take as a result of a procedural violation. On the facts in this case, dismissal of the appeal, or refusal to hear the appeal, solely on the basis of a clerical error, is not warranted.

Accordingly, the Board voted unanimously to grant the Appellant's Motion to Allow Late Service. Within ten days of the date of this order, the appellant shall provide to the State a copy of the notice of appeal, as well as copies of any supporting documents which may have been provided to the Board with the original notice of appeal. Upon receipt of the appeal and supporting documents, the State shall be permitted twenty days in which to submit to the Board its response to the allegations contained therein.

THE PERSONNEL APPEALS BOARD



Mark J. Bennett, Acting Chairman



Robert J. Johnson, Commissioner



Lisa A. Rule, Commissioner

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