

State of New Hampshire

WPPID839



PERSONNEL APPEALS BOARD

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

APPEAL OF JOHN HEATHCOTE Docket #92-T-6 Bureau of Court Facilities Division of Plant and Property Maintenance

November 12, 1991

The New Hampshire Personnel Appeals Board (Bennett, Johnson and Rule) met Wednesday, October 9, 1991, to consider the Motion to Dismiss filed by the Bureau of Court Facilities, relative to the termination appeal filed by John Heathcote, a former employee of the Department of Administrative Services, Division of Plant and Property Maintenance, Bureau of Court Facilities.

Inasmuch as the Motion is grounded on facts, the Board will treat it as a Motion for Summary Judgment which is presented to the Board unsupported by competent evidence or affidavit, and which therefore does not comport in any reasonable fashion to the provisions of RSA 491:8-a, Motions for Summary Judgment.

RSA 491:8-a II., provides in pertinent part:

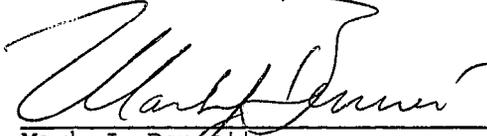
"Any party seeking summary judgment shall accompany his motion with an affidavit based upon personal knowledge of admissible facts as to which it appears affirmatively that the affiants will be competent to testify. The facts stated in the accompanying affidavits shall be taken as admitted for the purpose of the motion, unless within 30 days contradictory affidavits based on personal knowledge are filed or if the opposing party files an affidavit showing specifically and clearly reasonable grounds for believing that contradictory evidence can be presented at a trial but cannot be furnished by affidavits. ..."

In his appeal to the Board, the appellant denied all charges, including willful insubordination, verbal abuse to superiors, absenteeism without approved leave and lack of cooperation.

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Accordingly, the Board voted to deny the State's Motion, and to schedule the matter for hearing on Wednesday, April 1, 1992, at 9:00 a.m. The Board will allow one hour for this hearing. Prior to hearing the matter, the Board will allow the State to renew its motion, if properly submitted with supporting evidence and affidavit. Otherwise, the State may renew its motion at the scheduled hearing.

THE PERSONNEL APPEALS BOARD



Mark J. Bennett



Robert J. Johnson



Lisa A. Rule

cc: Virginia A. Vogel, Director of Personnel
Frank Monahan, Administrator, Bureau of Court Facilities
Michael C. Reynolds, SEA General Counsel

State of New Hampshire

WPPID926



PERSONNEL APPEALS BOARD

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

APPEAL OF JOHN HEATHCOTE Docket #92-T-6 Bureau of Court Facilities

August 20, 1992

The New Hampshire Personnel Appeals Board (McNicholas and Johnson) met Wednesday, April 1, 1992, to hear the appeal of John Heathcote, a former part-time employee of the Bureau of Court Facilities. Mr. Heathcote was represented at the hearing by SEA General Counsel Michael Reynolds. Frank Monahan, Administrator of the Bureau of Court Facilities (hereinafter Bureau) appeared on behalf of the State.

By letter dated September 19, 1991, Mr. Heathcote requested a hearing before the Board, arguing that he had often worked 40 or more hours per week and that the position he occupied would have been a regular 40 hour per week position once the Courthouse opened in Nashua. He argued he had not received any prior warnings, nor had he been given the specifics of the charges cited in his letter of termination.

On September 24, 1991, the Bureau filed a Motion to Dismiss, arguing that the appellant was a part-time, temporary employee throughout his length of service and therefore should not have standing to appeal his dismissal. The Board denied the State's Motion by Order dated November 12, 1991. In so doing, the Board stated in pertinent part:

"Inasmuch as the Motion is grounded on facts, the Board will treat it as a Motion for Summary Judgment which is presented to the Board unsupported by competent evidence or affidavit, and which therefore does not comport in any reasonable fashion to the provisions of RSA 491-8:a, Motions for Summary Judgment. . . .

"Prior to hearing the matter, the Board will allow the State to renew its motion, if properly submitted with supporting evidence and affidavit. Otherwise, the State may renew its motion at the scheduled hearing."
[See: P.A.B. Order, Docket #92-T-6, November 12, 1991]

Although the Chairman offered the Bureau an opportunity to renew its Motion to Dismiss at the outset of the hearing, the Bureau declined.

The appellant argued that he had worked the equivalent of 6 months in a 12 month period and was therefore entitled to the same rights and benefits as a permanent full-time employee under the provisions of RSA 98. He also argued that the Board should consider his appeal in light of the New Hampshire Supreme Court's ruling in the Appeal of Higgins-Brodersen and McCann. Having reviewed the payroll records provided by the appellant, the Board does not agree.

RSA 98-A:3 states the following:

"Any person appointed under a temporary appointment or under a seasonal appointment who works the equivalent of 6 months or more, not necessarily consecutively, in any 12-month period shall be deemed to be respectively a permanent temporary employee or a permanent seasonal employee and entitled to all the rights and benefits of a permanent employee in the classified service."

The appellant was originally hired as a Laborer, Salary Grade 4, on August 22, 1990, for maintenance work in the Hillsborough Courthouse. His regular hours of work were from 5:00 p.m. to 9:00 p.m., Monday through Friday, and throughout most of the length of his employment he worked an average of 20 hours per week. At the time he was hired, he was informed that the Bureau would anticipate placing him in a full-time position when the Courthouse in Nashua opened. In May, 1991, he was assigned additional hours in Nashua, and for several bi-weekly pay periods worked the equivalent of a full-time schedule. However, he was never made a permanent employee and was not assigned to a full-time position. He did not work full-time hours for the equivalent of 6 months within a 12 month period. Therefore, Mr. Heathcote's assignment can not be considered either "permanent temporary" or "permanent seasonal", and he would not be entitled to appeal under the provisions of RSA 21-I:58 as a permanent employee.¹

1/ "...[W]e conclude the Board did not act unreasonably or unlawfully in ruling that, for an employee to have a right of appeal under RSA 21-I:58, the personnel rule in question must have been applied to the employee while permanently employed. We hold that the Board did not err in ruling that it lacked jurisdiction, under RSA 21-I:58, over claims arising from the petitioners' part-time employment." Appeal of Higgins-Brodersen (1990) 132 NH 293, 564 A2d 449.

In its decision in the Appeal of Higgins-Brodersen, the Court found that part-time employees may appeal to the Board in matters involving an application of the Personnel Rules. Specifically, the Court stated:

'RSA 21-I:46 grants to the Board general authority to hear and decide 'appeals arising out of the rules adopted by the director of personnel...' RSA 21-I:46. The statute makes no distinction as to employment status; thus part-time employees appear subject to this provision." [See: Appeal of Higgins-Brodersen, (1990) 133 NH 576, 578 Asd 868.1

Inasmuch as Mr. Heathcote could not be considered a permanent employee, a permanent temporary employee or a permanent seasonal employee, his argument that he must have received three warnings for the same offense prior to termination is without merit. The Board believes the standard of review in this case is substantially more limited than even that standard applied to appeals by full-time probationary employees, where the employee must prove that the agency's action was arbitrary, illegal, capricious or made in bad faith. An agency should not be held to a higher standard in defending the discharge of a part-time employee.

In describing his employment with the Bureau of Court Facilities, the appellant said, "It got to the point where I was saying, no way I'm going to stay here". When questioned on the issue of alleged absenteeism without approved leave, Mr. Heathcote testified "...they'd let us float on the days we worked as long as we put in 40 hours". However, Mr. Heathcote admitted he and a co-worker routinely quit working approximately 20 minutes prior to the end of their shift, and that they would "just sit and yack" until 9:00 pm. He admitted to shouting at one of his supervisors, telling him "I hate your guts" and accusing supervisory staff of "running the place like Nazi Germany".

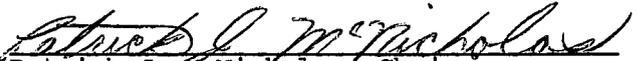
On the evidence, the Board found the appellant failed to meet his burden of proving that his discharge was arbitrary, illegal, capricious or made in bad faith. The appellant clearly was not meeting the work standard and justified his performance throughout the hearing by complaining of poor treatment by supervisory staff.

Although the Board found the termination to have been badly handled, and the State's attitude toward the appeals process rather cavalier, it found that the

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appellant failed to demonstrate that he was meeting the work standard. The Board did not find his termination to have been effected in violation of rules adopted by the director. Accordingly, the Board voted to deny the appeal.

THE PERSONNEL APPEALS BOARD


Patrick J. McNicholas, Chairman


Robert J. Johnson

cc: Virginia A. Vogel, Director of Personnel
Frank Monahan, Administrator, Bureau of Court Facilities
Michael Reynolds, SEA General Counsel

State of New Hampshire

WPPID988



PERSONNEL APPEALS BOARD

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APPEAL OF JOHN HEATHCOTE
Docket #92-T-6

Response to Appellant's Motion for Reconsideration

September 14, 1992

By letter dated August 26, 1992, SEA General Counsel Michael Reynolds filed a motion for reconsideration of the Board's August 20, 1992 decision in the above-captioned appeal. In support of that Motion, Attorney Reynolds argued the Board had "misinterpreted RSA 98-A:3 and has therefore applied the wrong standard of review" in determining the appellant's rights to appeal his termination were founded in RSA 21-I:46 rather than RSA 21-I:58. He also argued the Board had erroneously determined the appellant could be discharged without three letter of warning for the same offense. He stated:

"Nothing in that statute [98-A:3] requires 'full-time hours' at any time in the 12 month period. This statute has always been interpreted to mean that if an employee in a 40 hour week position works 1040 hours in any 12 month period, he achieves permanent status.' (Appellant's Motion for Reconsideration, pp. 1, 2)

This very loose interpretation is not borne out by a plain reading of the law. The statute makes no reference to working 1040 hours in any 12 month period to determine "permanent" status. RSA 98-A:1 plainly defines "permanent temporary" and "permanent seasonal", in terms requiring that the employee work in a full-time capacity to qualify for the rights and benefits of a "permanent" employee.

RSA 98-A:1 I. "Temporary appointment" shall mean an appointment made to fill a temporary position on a full-time basis for the period of appointment.

RSA 98-A:1 II. "Seasonal appointment" shall mean an appointment made to fill a seasonal position on a full-time basis for the period of appointment. A seasonal appointment is one which may reasonably be anticipated as likely to recur each year for a varying number of months.

RSA 98-A:1 IV. "Full-time basis" shall refer to employment calling for not less than 37-1/2 hours work in a normal calendar week or calling for not less than 40 hours work in a normal calendar week with respect to positions for which 40 hours are customarily required.

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Response to Appellant's Motion for Reconsideration

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"RSA 98-A:1V. "Part-time basis" shall refer to employment calling for less than 37-1/2 hours work in a normal calendar week or calling for less than 40 hours work in a normal calendar week with respect to positions for which 40 hours are customarily required.

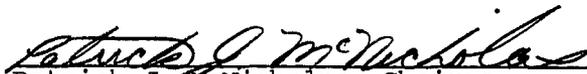
Clearly, the evidence supports a finding that Mr. Heathcote was a part-time employee whose appeal rights are limited to those defined by RSA 21-I:46 which describes the powers and duties of the Personnel Appeals Board as follows:

"The personnel appeals board shall hear and decide appeals as provided by RSA 21-I:57 and RSA 21-I:58 and appeals of decisions arising out of application of the rules adopted by the director of personnel..."

The Board voted to affirm its finding that Mr. Heathcote, a part-time employee of the Bureau of Court Facilities, was not entitled to greater protection from termination than full-time probationary employees who can be discharged at any time prior to the conclusion of the probationary period for failing to meet the work standard. The evidence supported a finding the appellant had failed to meet the work standard and was dismissed for that reason.

The appellant did not offer additional evidence or argument which was not already raised and considered by the Board in reaching its decision to uphold his termination from employment. The appellant has not demonstrated that the Board's decision was unlawful or unreasonable. Accordingly, the Board voted unanimously to deny the Motion for Reconsideration and to affirm its decision of August 20, 1992, denying Mr. Heathcote's appeal.

THE PERSONNEL APPEALS BOARD


Patrick J. McNicholas, Chairman


Robert J. Johnson

cc: Virginia A. Vogel, Director of Personnel
Michael C. Reynolds, SEA General Counsel
Frank Monahan, Administrator, Bureau of Court Facilities