

State of New Hampshire



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

APPEAL OF ROBERT JOYCE

Docket No. 92-T-15

Department of Resources and Economic Development

The Board (Bennett, Rule and **McGinley**) met on October 14, 1992, to hear and consider the appeal of Robert Joyce, a former employee of the Department of Resources and Economic Development (DRED). DRED contends that Mr. Joyce was laid off as part of its reorganization in order to effect legislatively mandated cost cutting. Mr. Joyce contends that he was terminated in retaliation for having filed grievances and complaints regarding **DRED's** operations. Mr. Joyce had been employed seasonally by DRED for approximately 18 years.

In this matter, Mr. Joyce is represented by Michael C. Reynolds, SEA General Counsel. The Agency is represented by Kenneth C. Plourde, its Business Administrator.

The Agency presented a Motion to Dismiss this appeal on grounds that Mr. Joyce received proper notice that his seasonal position as a Maintenance Mechanic II at **Crawford** Notch State Park had been identified for elimination in order to reduce costs and fulfill legislative mandates, that DRED has been engaged in the

process of streamlining itself and that includes the elimination of Maintenance Mechanic II positions like Mr. **Joyce's**, and that his appeal is based upon the definition of "**permanent** seasonal employee" as it is set forth in RSA **98-A:3**. On this point, DRED contends that Mr. Joyce is not entitled to automatic recall to a seasonal position in accordance with our decision in the Appeal of Lang Mann (No. 90-T-12). This motion was taken under advisement at the hearing.

The record and evidence in this appeal consists of the **parties'** pleadings, the testimony of witnesses, and four exhibits offered by the appellant without objection. On the record and evidence we grant Mr. Joyce's appeal in part and deny DRED's Motion to Dismiss.

Three issues present themselves in this appeal:

1. Was Mr. Joyce "fired" or "laid off"?
2. Does RSA 98-A apply to him, particularly insofar as RSA 98-A:3 appears to confer certain rights upon temporary or seasonal employees whose positions become "**permanent**" by virtue of that statute?
3. If so, what are the protections afforded by that statute?

On the first issue, the Board concludes that Mr. Joyce was not "fired," but "laid off."

Harry Reid, Supervisor of Parks Operations, testified that he had previously recommended the elimination of Mr. Joyce's position and did so again in the budget prepared in the spring of 1989, in order to save money. He says he had lost two other Maintenance Mechanic II positions in this way, with the Park Manager I

positions assuming the responsibilities thereof. Subsequently (testifying on cross examination), a full time Maintenance Mechanic II was hired for the "Northern Region," to replace the various Maintenance Mechanics II for each park in that region, one of such positions having been Mr. Joyce's. This job was not offered to Mr. Joyce. Nothing was done to put Mr. Joyce in another position for which he was qualified, and indeed, he may have been qualified for several positions, including the full time Maintenance Mechanic II position. Nothing was done to see if the part time employees, like Mr. Joyce, could fill this new full time job. DRED did not believe that Mr. Joyce had any bumping rights and acted accordingly.

It is undisputed on the record as a whole that Mr. Joyce's performance has been at least satisfactory in his position as a Maintenance Mechanic II. DRED does not dispute that Mr. Joyce worked six consecutive months in at least one work season, and this is in accord with Mr. Joyce's testimony that he did so at least four times and perhaps six or seven times. RSA 98-A:3.

A review of the record and evidence as a whole does not lead us to conclude that Mr. Joyce was "fired" or "terminated" as a factual matter. We do not conclude that a "retaliatory" termination occurred here. The evidence suggests that Mr. Joyce, though a "problem employee" for his supervisors, was encouraged to seek promotion, other jobs at DRED, was given good performance reviews generally (we discount page 2 of Appellant's 1 as any kind of performance review having the weight of a formal evaluation),

and was generally treated and considered to be a valued employee, although perhaps a difficult one.

DRED contends that Mr. **Joyce's** appeal is based upon the definition of "permanent seasonal employee" as contained in RSA 98-A:3. DRED contends that Mr. Joyce is not entitled to automatic recall to a seasonal position due to our decision in the Appeal of Lang Mann, No. 90-T-12. We find that decision to be distinguishable from the instant appeal, and inapposite hereto. In that decision we determined that the appellant was not guaranteed a position with DRED in an upcoming work season by virtue of being "permanent" as defined by RSA 98-A:3. As the Board determined in the Appeal of Lang Mann, that:

"...(t)he appellant has offered no persuasive argument or evidence to lead the Board to conclude that DRED was under any obligation to rehire him for the following **season.**"

Nothing in the instant case has changed our view. However, this case does not revolve around that proposition. Instead, this case ultimately is resolved on the issue of what rights a "permanent seasonal employee" has in the event of layoff. We conclude that he enjoys some rights, that it is unclear whether they were furnished to him by the department, and accordingly, that they must be.

RSA 98-A:1 defines a "**seasonal** appointment" as one "**...full time...for** the period of appointment...reasonably likely to recur each year for a varying number of months." These appointments become "permanent" pursuant to RSA 98-A:3, and **therefore** enjoy

"...all the rights and benefits of a permanent employee in the classified service of the state" if the incumbent "...works the equivalent of 6 months or more, not necessarily consecutively, in any 12 month period...." On the evidence and record, this is exactly what Mr. Joyce did. Accordingly, we find him to be a "permanent seasonal employee."

Let us turn for a moment to RSA 98-A:4, which provides:

"98-A:4 Retroactive Accumulation. If such permanent temporary employee or such permanent seasonal employee is employed beyond the 6 months period he shall be eligible for retroactive accumulation of payment of accrued annual leave upon being laid off for the season or separation from service. Such employee shall be eligible to accumulate sick leave and shall be allowed to carry over any prior sick leave at the same rate for time actually worked. No payment for sick leave, however, shall be made for accrued sick leave upon lay-off or separation."

In pertinent part, the leave is available "...upon being laid off ~~for the~~ season or separation from service..." Reading this chapter as a whole, and this section as a part of it, it contemplates that seasonal employees are "laid off" each season for purposes of its protections. (See, RSA 98-A:1,II, :5, :7, and note former Per. 308:05, stipulated to be the effective rule at the pertinent times to this appeal).

When Mr. Joyce was not offered employment for the 1992 season (see February 6, 1992, memo attached to DRED's Motion to Dismiss) he was, in effect, "laid off" as contemplated by RSA 98-A:4, and that chapter generally (Note, RSA 98-A:7, recognizing the rules of the Division of Personnel). Thus, Mr. Joyce was a "permanent

seasonal **employee**" who was "laid off," as contemplated by the rules of the Division of Personnel. RSA 98-A:1, 3, 4, 7. Accordingly, he was entitled to the protections of that statute and those rules. We may thus answer issue two in the affirmative.

We turn now to issue three. Pursuant to RSA 98-A:3, Mr. Joyce enjoyed "...all the rights and benefits of a permanent employee in the classified service..." In light of RSA 98-A:7, and our finding that he was not terminated, but laid off, he was entitled to the protections of Per. 308.05, Layoff, at the time of his most recent separation from state service. The layoff is clearly authorized by that rule, and the procedure therefore is clearly established.

Thus, Per. 308.05, (a)-(c), regarding the procedure for layoff apply here. Those require that the appointing authority determine the class or classes affected and consider each employee therein in accordance with his seniority, etc. This occurred, in part, via the memo to Mr. Joyce of February 6, 1992, from Michael **Pelchat**, appended to the **agency's** Motion to Dismiss. However, the referenced memo fails to deal with seniority or some of the other requirements of Per. 308.05 (a), such as Per. 308.05 (a)(1):

"No permanent employee shall be laid off from any position while there are emergency, temporary fill-ins, part-time, original provisional or probationary employees serving in the same class of position in the agency, and the order of layoff shall be as stated herein."

Nor is the issue of "bumping" addressed as provided by Per. 308.05 (b).

"Order of layoff. Except for very infrequent instances of outstanding ability, seniority will govern the order of layoff for employees having 5 or

more years of state service. Employees having less than 5 years of service shall be laid off generally on the basis of ability."

Per. 308.05 (c), Notice, has not been complied with. The Director of Personnel was not notified, according to the evidence, although the 14 day notice period appears to have been satisfied as the memo was issued in February and the "season" begins, it appears, in May.

Turning briefly to Per. 308.05, (b), Order of Layoff, this can be expected to be of greatest significance to the appellant (See also, Per. 308.05 (a)). This section affords him "bumping" rights in some instances. The testimony suggested that he asked about, inter alia, certain "**laborer**" positions, to which he might have been able to "bump" pursuant to this section.

Quite simply, the **appellant's** only cognizable complaint is that he did not get the procedural protections that he was entitled to get as an 18 year veteran employee in connection with this layoff decision, which is otherwise non-reviewable by this Board.

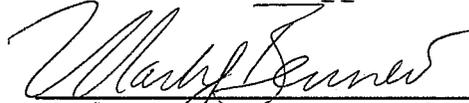
A remedy is in order to address the portion of this appeal that we grant. Robert Joyce, having been laid off, is entitled to the protections of former Per. 308.05. Accordingly, DRED is ordered to review the extant seasonal positions junior to his Maintenance Mechanic II position as of May, 1992, for which Mr. Joyce was qualified in light of his seniority, and the seniority of the incumbents therein, in order to determine which, if any, positions he could have "bumped" into. As the 1992 season is now

concluded, he is awarded back pay in accordance with the results of said review, as his interests may appear, less replacement earnings he had during the pertinent seasonal period. Similarly, **Mr. Joyce** is to be offered a seasonal position for calendar year 1993, and if one is not available, afforded the procedural rights to which he is entitled as set forth herein.

So ordered.

February 16, 1993

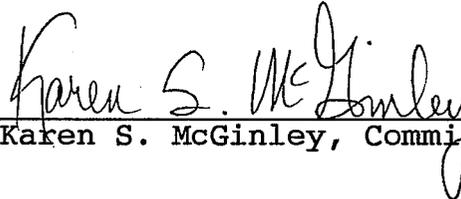
The Personnel Appeals Board



Mark J. Bennett, Acting Chairman



Lisa A. Rule, Commissioner



Karen S. McGinley, Commissioner

cc: Kenneth Plourde, Administrator
Department of Resources and Economic Development

Michael C. Reynolds, General Counsel
State Employees' Association of N.H., Inc.

Virginia A. Lamberton, Director
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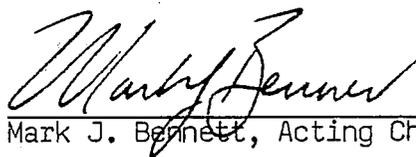
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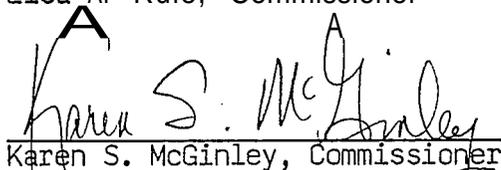
On March 8, 1993, the Department of Resources and Economic Development submitted a Motion for Reconsideration of the Board's February 16, 1993 decision in the above captioned appeal. The State Employees¹ Association, on behalf of the appellant, filed its Objection on March 15, 1993.

Having reviewed the Motion and Objection in conjunction with the Board's decision in this matter, the Board voted unanimously to deny the requested reconsideration. The appellant failed to persuade the Board that on the facts, the decision was either unlawful or unreasonable.

THE PERSONNEL APPEALS BOARD


Mark J. Bennett, Acting Chairman


Lisa A. Rule, Commissioner


Karen S. McGinley, Commissioner

cc: Virginia A. Lambertson, Director of Personnel
Kenneth Plourde, Administrator, Resources and Economic Development
Michael C. Reynolds, SEA General Counsel