

State of New Hampshire

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PERSONNEL APPEALS BOARD

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

APPEAL OF LANG MANN

Response to Appellant's Motion for Reconsideration
Docket #90-T-12

June 6, 1991

The New Hampshire Personnel Appeals Board (McNicholas, Johnson and Bennett) met Wednesday, May 22, 1991, consider the appellant's May 21, 1991 Motion for Reconsideration of the Board's May 2, 1991 decision in the above-captioned matter.

In support of his request for reconsideration, the appellant argued:

"Although the Board at no time in its decision actually uses the word 'resign', it appears that the Board may have found that Mr. Mann resigned from his DRED supervisor's position. Such a finding would be against the weight of all the evidence. The witness for the appointing authority testified that DRED had taken affirmative steps and had terminated Mr. Mann in November of 1989. An employer cannot and would not terminate an employee who has already resigned." (SEA Motion, 5/21/91, page 1)

In its order, the Board actually found that:

"...the appellant was not discharged. When confronted with the issue of his health and his ability to do his work, the appellant told his supervisor that he'd be "getting done" when he transferred to the Department of Transportation, and simply informed his supervisor that he would finish out the season on paid sick leave. The Board found it reasonable to conclude that if either the appellant or the agency believed the appellant had any intention of returning to work, both would have addressed the issue of Mr. Mann's health and fitness for duty. The Board also found it unlikely that the agency would simply have allowed the appellant to run out his sick leave without the benefit of some professional assessment of his physical condition if it believed the appellant was interested in returning to work in the spring."

The Board neither concluded, nor did it need to conclude, that the appellant resigned. The appellant alleged that DRED's refusal to reemploy him constituted a de facto termination. The Board found that the record did not support such a finding. Accordingly, his appeal was dismissed.

The appellant attempts to further support his claim that he was discharged, had offered no resignation, and still considered himself to be an employee of DRED, stating:

"His seeking information on disability retirement only supports his contention that he never resigned since an employee must be 'in-service' to even apply for disability benefits under the New Hampshire Retirement System."

"There was uncontroverted testimony that the parties all had an understanding that Mr. Mann would simply call DRED near the end of his DOT assignment to get a start-date for his upcoming DRED assignment."

"The Board asserted that DRED would have addressed Mr. Mann's health had DRED contemplated Mr. Mann's return, but the record is clear that DRED did exactly that. The Board further thought it was reasonable to conclude that DRED would have sought physician certification of Mr. Mann's physical ability to do his job, but again, DRED did so."

Taken collectively, and removed from the context of the actual chronology of events, one could conclude that the appellant intended to return to work. That conclusion, however, is not borne out by the record, particularly in light of the reversal of the order in which the above events occurred.

The appellant's last assignment for DRED began on May 5, 1989. He was absent from work because of an angina attack on May 10, 1989, five days after the start of work. He was out on sick leave and only returned to work on June 8, 9, and 10, after which he again went out on sick leave. On or about June 20, 1989, DRED requested that he produce certification of his ability to return to full duty. No such certification was produced.

The appellant, in his Motion, appears to ask the Board to believe that the certification was requested either at the conclusion of the season in anticipation of his return in the spring, or after his contact with the DRED in the spring when he requested a letter to support his claim of disability. None of the evidence will bear out that conclusion.

DRED did not request information regarding the appellant's ability to return to work in the spring of 1990, or at the conclusion of the 1989 season because

the appellant told them he "was getting done" and would finish out the season on sick leave. Had there been any reasonable expectation of the appellant's return to work in the spring, given the department's earlier request for a physician's release for duty, and given the appellant's absences during and at the conclusion of the season, the Board continues to believe that the department would have conditioned the appellant's return upon such certification.

The only other discussion between the appellant and DRED concerning the state of his health was initiated by the appellant. Mann asked Boucher to provide him with a letter stating that he could not perform his work, so that it could be used as proof of incapacitation in his attempt to secure disability or Workers' Compensation benefits. He informed Mr. Boucher that he needed a statement indicating that he could not perform his work.

The appellant pointed to "uncontroverted testimony that the parties all had an understanding that Mr. Mann would simply call DRED near the end of his DOT assignment to get a start-date for his upcoming DRED season." In fact, on review of the appellant's exhibit #3, his last day of work at DOT was Friday, April 13, 1990. His call to Boucher for a letter describing his alleged "disability" occurred on Friday, April 13, 1990. His Notice of Accidental Injury or Occupational Disease was dated May 5, 1990 (SEA Exhibit #4, pg. 1). The letter from Seacoast Cardiology Associates (SEAExhibit #4, page 3) was dated May 15, 1990.

The appellant's position required strenuous physical labor, which he claimed to have been unable to perform during his previous seasonal employment with DRED. His physician's advice a full month after the alleged request by him for a start-date, plainly stated that he should avoid all those tasks which form the basis of his duties and responsibilities as a Maintenance Mechanic II. Were the Board to believe that the appellant intended to return to work, the record should reflect some discussion between Mr. Boucher and Mr. Mann regarding not only a start date, but the availability of light duty assignments.

With regard to the appellant's claim that his seeking information on disability retirement only supports his contention that he never resigned, the Board finds this to provide little more than support for a finding that the appellant had no intention of actually returning to full duty. Rather, it suggests an awareness on the part of the appellant that unless he could prove he was currently employed by some agency of the State, he would be unable to pursue a claim for disability retirement under the provisions of RSA 100-A:6.

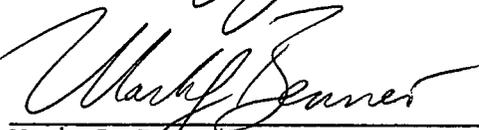
APPEAL OF LANG MANN (Docket #90-T-2)
Response to Request for Reconsideration
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The Board in consideration of the record before it, voted unanimously to deny Mr. Mann's request for reconsideration. In so doing, the Board voted to affirm its decision of May 2, 1991.

THE PERSONNEL APPEALS BOARD


Patrick J. _____, Chairman


Robert J. Johnson _____


Mark J. Bennett _____

cc: Kenneth Plourde, Business Administrator, DRED
Michael C. Reynolds, SEA General Counsel
Virginia A. Vogel, Director of Personnel

McNicholas

State of New Hampshire

WPPID737



PERSONNEL APPEALS BOARD
State House Annex
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APPEAL OF LANG T. MANN Docket #90-T-12

Department of Resources and Economic Development

May 2, 1991

The New Hampshire Personnel Appeals Board (McNicholas, Johnson and Bennett) met Wednesday, April 10, 1991, to hear the appeal of Lang T. Mann. The appellant, a former employee of the Department of Resources and Economic Development, was represented at the hearing by Lesley Warren, SEA Legal Intern. Kenneth Plourde, Business Administrator, appeared on behalf of the Department of Resources and Economic Development (DRED). Also appearing on behalf of the Department of Resources and Economic Development was Jeffrey Boucher, Manager, Pawtuckaway State Park...

The appellant argued that he was a permanent seasonal or permanent temporary employee of DRED under the provisions of RSA 98-A:3 and that as a "temporary permanent" or "permanent seasonal" employee, he was entitled to return to his position at Pawtuckaway State Park at the opening of the season.

"Position Made Permanent. Any person appointed under a temporary appointment or any person appointed 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 or a permanent seasonal employee and entitled to all the rights and benefits of a permanent employee in the classified service of the state."
[RSA 98-A:3]

The appellant claimed he was illegally discharged from his seasonal Maintenance Mechanic II position when DRED refused to rehire him in the spring of 1990. Jeff Boucher, the Manager at Pawtuckaway State Park, argued that Mann was not terminated. He testified that Mann had had an angina attack on May 10, 1989. He was out of work on sick leave for ten days. Mann worked again on June 8 and 9, 1989 and on June 10, he had another attack and was out again on sick leave. Mr. Boucher testified that on or about June 20, 1989, on the advice of the DRED business office, he telephoned Mann and asked him to request a letter of his physician detailing what work he might or might not perform safely. Boucher testified that the appellant's duties included running a chain saw, raking, and heavy lifting. No letter was ever produced.

Boucher testified that the Department had an obligation to assure itself that

"the man wouldn't drop dead" on the job, noting that he'd had no knowledge of Mann's health problems until the angina attack he suffered in May, 1989. Mann confirmed that following the angina attack, Boucher "was more than sympathetic".

Boucher testified that he and Mann got into a heated verbal exchange during the first week in September about Mann having failed to complete a job assignment. Boucher stated that the restrooms at the Park had not been cleaned, which was one of the appellant's responsibilities. Boucher called ahead to the shop and left instructions for Mann not to leave for the day until he'd met for a discussion with Boucher. It was during that conversation that Mann informed Boucher he would be transferring to the Department of Transportation on September 27. Until that time, he said he would use his accrued sick leave. Neither party mentioned Mann returning to work at Pawtuckaway in the spring of 1990, Boucher did not hear from the appellant again for seven months.

On April 13, 1990, Mann called Boucher at home and said he was planning to apply for "disability". He asked Boucher for a letter explaining his earlier request for verification from Mann's physician about his physical condition, and his ability to perform his duties. Boucher called the DRED business office to see what kind of letter he might be able to give Mann. A letter was prepared on April 16th. (That letter was not entered as evidence by either party to this appeal.) Mann then called the Boucher home again and spoke with Mrs. Boucher, who reported to her husband that the appellant had asked several general questions about the park, but made no mention of a "start-up date" or any reference to Mann returning to work. According to Boucher, his wife told Mann the park had filled the available positions for the season, and that the park was suffering the same fiscal problems as other agencies in State government.

Boucher testified that Mann never called him to inquire about working at the park that season. He only called concerning the letter they had discussed on April 13, 1990, regarding Mann's alleged disability. As late as April, 1990, DRED still had no information from Mann or his physician about Mann's health.

The appellant testified that he had suffered a heart attack in 1986, but he'd not suffered angina attacks until the first in May, 1989. He said that when he came back from sick leave after the first attack, Jeff Boucher had told him he'd have to consider "getting done" or going on disability. He insisted that he did not consider himself disabled. Mann did state that Boucher had been "more than sympathetic" after his first angina attack.

Mann testified that he had called Jeff Boucher in March 1990, to ask if DRED had established a "start-up date" for Pawtuckaway, and that he had called again in April when he talked to Mrs. Boucher. He argued that he'd called specifically to find out why he wasn't being allowed to return to work. Boucher, however, insisted that the conversation had only involved getting a letter for Mann which would allow him to pursue his claim for disability.

The appellant argued that in order to be discharged, he should have been given a letter of discharge, and that minimally he must have received three warnings for the same "offense" before his discharge could be legally accomplished. While receipt of a third letter of warning for the same offense is one means by which an employee may receive notice of discharge, the Rules of the Division of Personnel include a number of means whereby an appointing authority may discharge an employee (i.e., fifth warning for a variety of offenses, notice of mandatory discharge, and notice of immediate discharge under the optional discharge provisions). The appellant had received no written warnings, and was not presented with a letter of termination.

The Board found that the appellant was not discharged. When confronted with the issue of his health and his ability to do his work, the appellant told his supervisor that he'd be "getting done" when he transferred to the Department of Transportation, and simply informed his supervisor that he would finish out the season on paid sick leave. The Board found it reasonable to conclude that if either the appellant or the agency believed the appellant had any intention of returning to work, both would have addressed the issue of Mr. Mann's health and fitness for duty. The Board also found it unlikely that the agency would simply have allowed the appellant to run out his sick leave without the benefit of some professional assessment of his physical condition if it believed the appellant was interested in returning to work in the spring.

It is equally reasonable to conclude that the agency, if it believed Mr. Mann intended to return to work, would have predicated such return upon his producing a certification from his physician or other licensed health care practitioner attesting to his ability to perform the duties of a Maintenance Mechanic. Mr. Mann testified that at the time of his transfer he was of such physical condition as to require a "light duty" assignment.

The appellant argued that he would not be able to come back to work and perform strenuous physical tasks, and that he should be considered a handicapped person subject to the provisions of the Rehabilitation Act of 1973. He therefore argued that the Department was responsible for making a reasonable accommodation for his handicap. The Board does not agree. The mere fact that the appellant is unable to perform heavy lifting or heavy manual labor does not necessarily qualify him for consideration as a "handicapped" person for whom any "reasonable accommodation" is warranted or required. Appellant's Exhibit #4 (May 15, 1990 letter from Lawrence J. Petrovich, M.D.) states specifically that Mr. Mann "can drive, do repetitive tasks, walking and light physical work is reasonable. He cannot be expected to do heavy manual labor, recurrent heavy lifting or other similar forms of heavy manual labor".

The appellant failed to respond to the Department's request that he provide information from his physician prior to the end of the 1989 season concerning his ability to perform heavy labor. The appellant never claimed to be "handicapped", nor did he ever provide information from his physician or a licensed health care practitioner to support such claim if implied. The parties agree that the appellant did indeed suggest using "leaf blowers"

rather than rakes in clearing away leaves. He did so, however, claiming that everyone's work would be easier. This, in the Board's opinion, does not constitute a request for accommodation, even if the appellant were legally entitled to such.

The appellant also argued that the Department of Resources and Economic Development's decision refusing to reemploy him in the spring of 1990 was "arbitrary, capricious, and made in bad faith". He asked that the Department of Resources and Economic Development be required to reinstate him with full back pay and benefits. Again, the Board does not agree.

First, the standard which the appellant has applied to his appeal is generally reserved for appeals involving the discharge of a probationary employee. Inasmuch as the employee alleges he was a "permanent" employee, the Board would not normally apply that standard to review of his appeal. Were the Board to apply that standard, the Board could not find that the actions of the Department of Resources and Economic Development were either arbitrary, capricious or made in bad faith.

In September of 1989, Mann informed his employer, the Department of Resources and Economic Development, that he would be finishing out his season with that Department on sick leave. Further, he informed the supervisor that he was "getting done" and transferring to the Department of Transportation. The appellant admitted that the last conversation he had with his supervisor in the fall of 1989 included discussion of whether or not the appellant's physical condition would allow him to perform the hard physical labor inherent in the position of Maintenance Mechanic II. At that time, he had not provided the Department with the requested release from his physician, despite the fact that the Department had requested that information several months earlier at the conclusion of one of the sick leaves occasioned by the appellant's recurring angina attacks.

When the Department next heard from the appellant, it was in the form of a telephone call during which he requested a letter which he might use to support his claim for disability and/or Workmen's Compensation. The appellant offered no evidence to persuade the Board that he expected to return to DRED in the spring of 1990, or that he had given DRED any reason to expect him to return or to seek reemployment in any of the seasonal maintenance positions. The Board does not consider the appellant's telephone call to Mrs. Boucher to constitute a request for establishment of a "start-update", or notice that the appellant had any intention of returning to the park.

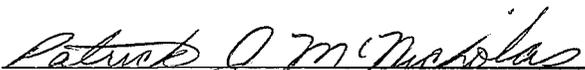
The appellant believes that he is automatically entitled to return to the Department of Resources and Economic Development by virtue of his having been employed by that Department for six or more months, not necessarily consecutively, in the prior twelve month period. The Board does not agree. The Board believes that RSA 98-A:3 confers upon "permanent seasonal" employees certain rights and benefits, including accrual of certain amounts of leave, health and dental benefits comparable to other classified employees during the period of employment, accumulation of seniority for the purposes of longevity

payment, and the right to appeal an action of the Director or the appointing authority during the period of employment. The Board does not believe that such "permanent seasonal" status confers upon the employee the automatic right to reemployment. The appellant has offered no persuasive argument or evidence to lead the Board to conclude that the Department of Resources and Economic Development was under any obligation to rehire him for the following season. Further, the appellant offered no persuasive argument or evidence which might lead the Board to believe that he had indicated any interest in returning to Pawtuckaway State Park in the spring of 1990, even if the Department were under such obligation to reemploy him the following season.

"Seasonal" positions by their very nature are those likely to occur on a yearly basis. There is no guarantee, however, that such position will be funded or available. Given the seniority which permanent seasonal employees may accumulate, there is no reasonable standard by which employees might be "recalled". Therefore, the Board determined that the language of RSA 98-A:3, in conferring "permanent seasonal" status, does so only for the purpose of determining those benefits for which an employee might be eligible during periods of qualifying employment.

The Board in consideration of the record before it, voted unanimously to deny **Mr.** Mann's appeal.

THE PERSONNEL APPEALS BOARD


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