

**Appeal of Kristen Wege**

**Docket #2015-T-006**

**Department of Administrative Services, Risk Management Unit**

November 9, 2015

The New Hampshire Personnel Appeals Board met in public session on Wednesday, October 14, 2015, under the authority of RSA 21-I:58 and Chapters Per-A 100-200 of the NH Code of Administrative Rules, to hear the appeal of Kristen Wege, the Appellant. The following commissioners sat for this hearing: Vice-Chair Norman Patenaude, Esq., Commissioner Christopher Nicolopoulos, Esq., and Commissioner David Goldstein. The Chair of the Board, Charla Stevens, Esq. was not present and neither party objected to her absence. Mrs. Wege, who was represented at the hearing by John G. Vanacore, Esq., was appealing her termination as a Benefits Manager in the Risk Management Unit (hereinafter RMU) at the Department of Administrative Services. Assistant Attorney General Christen Lavers appeared on behalf of the Department of Administrative Services.

The record of the hearing in this matter consists of pleadings filed by the parties prior to the date of the hearing, notices and orders issued by the Board, the audio recording of the hearing on the merits of the appeal, and documents admitted into evidence.

**THE FOLLOWING PERSONS GAVE SWORN TESTIMONY:**

Kristen Wege, Appellant

Grant Wege, Appellant's Husband

Joyce Pitman, Appellant's Immediate Supervisor

Catherine Keane, Director of Risks and Benefits, RMU

**ISSUES OF LAW:**

RSA 21-G:21 Definitions (Code of Ethics)

RSA 21-G:22 Conflict of Interest (Code of Ethics)

Per 1002.02 Dismissal During Probationary Period

## **BACKGROUND**

The Appellant was hired by the Department of Administrative Services, RMU as a Benefits Manager. It was discovered after her hire that her husband, Grant Wege, was employed by Anthem Blue Cross and Blue Shield of New Hampshire (hereinafter Anthem). It was determined that given the extent of Anthem's involvement in the State's benefits programs, that a conflict of interest existed. As a result, the Appellant was dismissed on March 19, 2015 and filed her Appeal on April 3, 2015.

A pre-hearing conference was held on April 29, 2015 and the Appellant argued that whether there was a conflict of interest was an issue for the Board to determine. The State disagreed. As a result, the Board requested that each party submit memorandums of law on the issue. The Board held a second pre-hearing conference on June 24, 2015 to allow the parties to argue their positions regarding the scope of the Final Hearing. After careful consideration, the Board held that it would allow testimony and evidence regarding the alleged conflict of interest and would give the issue proper weight when making a final decision.

## **FINDINGS OF FACT**

In May 2014, then Commissioner of the Department of Administrative Services, Linda Hodgdon, reclassified an existing position to an Administrator III, Benefits Manager due to the extremely heavy workload in the RMU. The Appellant applied for this position and her employment was confirmed by way of correspondence dated January 12, 2015. The Administrator III, Benefits Manager is a full-time position with an annual salary of \$61,484.00.

The Supplemental Job Description (hereinafter SJD) for an Administrator III, Benefits Manager reads, in relevant part, "Scope of Work: Responsible for the procurement, contract management and general oversight of assigned third party administrators (TPA) of the State employee and retiree benefits program, including pharmacy benefits manager, dental benefits administrator, life insurance vendor, and administration of flexible spending accounts, health reimbursement arrangements and voluntary benefit offerings". The SJD also reads, in relevant part, "Special

Requirements: This position requires excellent administration and managerial skills to oversee and perform a broad range of health benefit program activities. Requires good working knowledge and understanding of health care, benefits administration and human resource and government systems”.

The Appellant’s responsibilities would also have included developing Requests for Proposals (hereinafter RFP’s) for various benefits of the State, reviewing the proposals submitted by vendors, negotiating contracts, and making recommendations as to which vendor’s proposal most closely matched what the State was seeking. Once the vendor was selected, the Appellant would maintain a relationship with the vendor to supervise the administration of the contract. In addition, prior to the contract’s expiration, the Appellant would assist in determining whether to extend the contract or send it back out to bid.

Anthem is currently under contract to provide TPA services for New Hampshire’s health benefit program, which includes approximately forty thousand (40,000) members, including employees, dependents of employees, and retirees. The value of this contract is twenty million, one hundred nineteen thousand, nine hundred dollars (\$20,119,900.00). Anthem Life is also currently under contract with New Hampshire to provide life insurance for full-time state employees who are eligible for benefits, as well as voluntary life insurance for employees who elect such benefits. The value of this contract is seven hundred three thousand, five hundred dollars (\$703,500.00). In addition, in the last two (2) years, Anthem has submitted bids for the State’s pharmacy benefits management and dental TPA services. Anthem also plays a direct role with New Hampshire’s Flexible Spending and Health Reimbursement Arrangement provider, ASI-Flex.

The Appellant’s first day of employment was January 21, 2015. During the morning hours on January 21, 2015 the Appellant met with the Human Resources director, Carol Jerry. While Ms. Wege was away from her desk meeting with Ms. Jerry, the Sales Account Management Executive from Anthem, Andrew Deselle, visited the RMU. Joyce Pitman, the Appellant’s immediate supervisor, informed Mr. Deselle that a new Benefits Manager was hired, that her name was Kristen Wege, and that she wanted him to meet Ms. Wege. Mr. Deselle told Ms. Pitman that he knew the Appellant had been hired because her husband, Grant Wege, was

employed by Anthem. Mr. Deselle informed Ms. Pitman that the Appellant's husband held the same position at Anthem as he did, but in the small business sector. Ms. Pitman testified that Mr. Deselle told her that the Appellant's husband was a "shining star" and he was going to climb the ladder at Anthem. Ms. Pitman became concerned about the Appellant working on any accounts that involved Anthem because of her husband's employment. Ms. Pitman brought her concerns to the Director of Risks and Benefits, Catherine Keane, and Ms. Keane was shocked that this had not been disclosed prior to the Appellant's first day of employment.

There was testimony from each party as to why the issue of the Appellant's husband's employment was not discovered until Mr. Deselle made the disclosure on the Appellant's first day of employment. The Appellant testified that she did not think her husband's employment with Anthem was a conflict of interest or would even create the potential for a conflict of interest. She testified that she did not believe that she could have done anything in her position to enhance her husband's position with Anthem because his responsibilities at Anthem were so far removed from Anthem's contracts and its bidding for contracts with the State of New Hampshire. Mr. Wege also testified that he could not benefit from the Appellant's employment as he worked in the small business sector and had nothing to do with the State's contracts with Anthem.

Ms. Pitman testified that she did not ask the Appellant if she was married during the interview and, if so, how her spouse was employed. Ms. Pitman testified that she did not ask these questions as she knew it was inappropriate due to her knowledge of human resources. She also referred to the United States Equal Employment Opportunity Commission, Pre-Employment Inquiries and Marital Status or Number of Children (Exhibit 1 Tab H ), which states, in relevant part, "The following pre-employment inquiries may be regarded as evidence of intent to discriminate when asked in the pre-employment context:

- Marital status of applicant or whether applicant plans to marry
- Employment status of spouse
- Name of spouse

In the weeks after discovering where the Appellant's husband was employed, Ms. Pitman, Ms. Keane, and then Commissioner Hodgdon discussed possible solutions that would allow the Appellant to retain her employment as a Benefits Manager while not allowing her to work on anything that Anthem was involved in or could be potentially involved with in the future. One of the options discussed was having the Appellant sign a confidentiality agreement. Another option was to attempt to "wall off" the Appellant from anything involving Anthem.

It was determined that it was logistically impossible to "wall off" the Appellant because of the limited office space available to the eight (8) employees in the RMU office and also due to the "cubicle environment". Ms. Keane testified that the walls in the RMU are "paper thin" and "everyone hears everything all the time" and that even as Director, she has no privacy. Ms. Keane also discussed the heavy workload and the desire to spread the work out evenly amongst staff. She also discussed that she wished to have a team atmosphere and have the employees learn from one another. Furthermore, Ms. Keane testified that the Appellant would not only be privy to conversations within the office regarding Anthem but would also have computer access, which would include Anthem's dealings with the State. She concluded that for the above reasons, "walling off" the Appellant was just not feasible.

Prior to revisiting the idea of having the Appellant sign a confidentiality agreement, Ms. Keane learned of NH RSA 21-G:21 and RSA 21-G:22 (Code of Ethics). Ms. Keane determined that the Appellant's position and her husband's employment constituted a conflict of interest. She testified that a Benefits Manager could develop an RFP that would favor one vendor over another and could also provide confidential information as to what the State was seeking in a proposal which would provide an unfair advantage. Ms. Keane was concerned that the Appellant would share confidential information, including but not limited to RFP's, with her husband and that this would provide, again, an unfair advantage to Anthem in the bidding process for contracts. The State also expressed concern regarding the appearance of impropriety due to the Appellant's position as a Benefits Manager and her husband's employment at a business that would be submitting bids in the future for contracts that involved millions of dollars.

Ms. Keane testified that, due to the extent of Anthem's involvement in New Hampshire's benefits program, it was impossible to exclude the Appellant from all matters involving Anthem or potentially involving Anthem and have enough work to keep the Appellant employed full-time. Ms. Keane testified that after reading the aforementioned statutes, it was determined that a conflict of interest existed which prevented the Appellant from meeting the work standard as outlined in her SJD and, as a result, the Appellant was dismissed on March 19, 2015.

### **CONCLUSIONS OF LAW**

The State argued that there was a conflict of interest as a result of the Appellant's work as a Benefits Manager and her husband's employment with Anthem, which interfered with her ability to meet the work standard. The Appellant disagreed and argued that no conflict of interest existed as the Appellant's husband's employment with Anthem did not involve any work on the State's accounts with Anthem.

RSA 21-G:21 defines a conflict of interest as "a situation, circumstance, or financial interest which has the potential to cause a private interest to interfere with the proper exercise of a public duty". RSA 21-G:22 states "Executive branch officials shall avoid conflicts of interest. Executive branch officials shall not participate in any matter in which they, or their spouse or dependents, have a private interest which may directly or indirectly affect or influence the performance of their duties".

The State argued that the Board need only determine if there was a reasonable basis for the employer to conclude that a conflict of interest existed and to determine if the Appellant could meet the work standard. On the other hand, the Appellant argued that the Board not only has the authority to determine whether a conflict of interest actually existed but must also make that determination whether the Appellant's dismissal was arbitrary, illegal, capricious or made in bad faith.

The Appellant argued that in order for a conflict of interest to exist there must be a private interest that is "immediate, definite, and capable of demonstration; not remote, uncertain,

contingent and speculative, that is, such that men of ordinary capacity and intelligence would not be influenced by it.” Marsh v. Town of Hanover, 113 N.H. 667 (N.H. 1973).

The Marsh case was decided in 1973 and RSA 21-G:21 and RSA 21-G:22 were enacted in 2004 and subsequently amended in in 2006, which expanded a private interest to include a situation or circumstance. New Hampshire RSA 21-G:21 includes the word “potential”. The word “potential” is defined by the Merriam-Webster dictionary as “existing in possibility, capable of development into actuality”. The State argued that the Benefits Manager is a high level management position responsible for every aspect of the relationship with a vendor of a health plan from the drafting of an RFP, through bidding and contract negotiations, and continuing on through the contractual relationship ensuring compliance with contractual terms. The State was concerned that the Appellant would obtain confidential information about what the State was seeking in proposals for multi-million dollar contracts and then share them with her husband so Anthem would have an unfair advantage in the bidding process. The State expressed concern over the appearance of impropriety due to the Appellant’s position and her husband’s employment if Anthem were to continue to be awarded such large contracts as it has now. Any reasonable person could question whether the Appellant’s husband’s employment at Anthem could potentially cause a conflict of interest resulting in Anthem having an unfair advantage in the bidding process.

In the Executive Branch Ethics Committee Advisory Opinion, 2008-001 the question presented was, “May a department head or other supervisor within a prospective employee’s chain of command participate, directly or indirectly, in the hiring of a family member?”. The Committee held that an executive branch official who serves as a department head or supervisor must recuse himself or herself from a hiring process when either a spouse or a dependent family member is a candidate for employment within the official’s department. The Committee cited RSA 21-G:22, requiring executive branch officials to avoid conflicts of interest. The Committee also relied on RSA 21-G:21, II and states, in relevant part, “Although the legislature has not defined this further as it relates to non-dependent family members or spouses, the Committee recognizes there may be a private interest other than pecuniary ones that could well come into consideration and violate the Ethics Code. For instance, if the family member hires their brother or aunt out of

loyalty or affection, they are allowing their private interest, their relationship with that individual, to interfere with their proper exercise of a public duty”. The Committee goes on to further hold that “A spouse or dependent family member has a personal financial interest in employment. Therefore, a decision to fill a vacancy where the decision maker’s spouse or dependent family member is a candidate for the position is a situation which has the potential to cause the private interest to interfere with the proper exercise of the public duty to make supervisory decisions in the best interest of the people of the State.”

Even if the Board was to completely agree with the Appellant’s argument that Anthem’s contracts with the State would not directly affect her husband in any way, it is clear that the State’s contracts would affect her husband’s employer. There is reasonable potential that the Appellant could attempt to manipulate the RFP’s or provide her husband with confidential information regarding what the State was seeking in response to its RFP’s out of loyalty or affection to him, which would interfere with her proper exercise or her public duty to make decisions that are in the best interest of the State. Moreover, Mr. Deselle told Ms. Pitman that the Appellant’s husband is a “shining star” and was going to climb the ladder at Anthem. There is a real potential for the Appellant to share confidential information, as a Benefits Manager, with her husband to assist him in “climbing the ladder”. Any promotion of the Appellant’s husband at Anthem would presumably not only financially benefit him but the Appellant as well.

In the Executive Branch Ethics Committee Advisory Opinion 2008-002, the Committee questioned whether members of the Comprehensive Cancer Plan Oversight Board may vote on targeting of funds if their employer organization has submitted a response to an RFP. The Committee held that members should not participate in RFP development teams that are preparing RFP’s if their employer organization is likely to be submitting proposals within that program category. In addition, the Committee held that members should not participate in RFP Review Teams if the team is reviewing responses from the member’s employer organization. This decision prevents a board member from participation in issues where their employer is involved as it is a conflict of interest.

This case is analogous with the Appellant's case. The Appellant would be developing RFP's and then reviewing the proposals once submitted. Although the Committee held that executive branch board members are prevented from participating in matters where their employer is involved, RSA 21-G:22 states, "Executive branch officials shall avoid conflicts of interest. Executive branch officials shall not participate in any matter in which they, **or their spouse** or dependents, have a private interest which may directly or indirectly affect or influence the performance of their duties". Consequently, it is reasonable to conclude that, after reading the above Advisory Opinion 2008-002, the Appellant would need to be precluded from working on Anthem's dealings with the State due to her husband's employment with Anthem.

In the Executive Branch Ethics Committee Advisory Opinion 2007-013, the question presented was, "Do the ethics laws prohibit an executive branch official from participating in regulatory activities relative to a non-profit or charity when a spouse or dependent serves as a board member or is a paid employee of the non-profit or charity". The Committee answered yes and held that when a spouse or dependent serves as a board member for a non-profit or charity they have governing authority over and a fiduciary duty to the organization, which constitutes a private interest. The Committee further explained that a spouse or dependent who is a paid employee of a non-profit or charity has a financial interest in the non-profit or charity as a result of that employment, which is a private interest. "Such interests, generally, are significant enough that they have the potential to at least indirectly influence the performance of the executive branch official's duties. The Committee concluded that "an executive branch official who regulates non-profits or charities must recuse himself or herself from participating in any manner in the regulation of a non-profit or charity when a spouse or dependent serves as a board member or is a paid employee of the non-profit or charity.

This case is analogous to the present case as the Appellant was hired as a Benefits Manager who would have been responsible for developing RFP's for various benefits of the State. The Appellant would have also been responsible for reviewing proposals submitted by vendors such as the Appellant's husband's employer, Anthem, and would have also negotiated the terms and conditions of the contract of the selected bid. Furthermore, the Appellant would have made recommendations as to which vendor's proposal most closely matched what the State was

seeking and whether to extend the contract or send it back out to bid. In this case, there is the potential that her husband's employment would have at least indirectly affected or influenced the performance of her duties. According to the above opinion, the Appellant must be precluded from working on any proposals offered by Anthem.

The Board believes that the Appellant's husband, as an Anthem employee, does have a financial interest in the overall financial status of Anthem. If Anthem is not awarded contracts such as described above and it fails financially, it is likely that this would directly or indirectly affect the Appellant's employment. The Board also believes that the Appellant, as spouse of an Anthem employee, has a financial interest in whether Anthem succeeds. As discussed above, if the Appellant's husband benefits from his employment at Anthem then one can presume the Appellant does as well. There is obviously the possibility that she may provide confidential information with respect to RFP's and otherwise out of loyalty and affection towards her husband.

Due to the above facts, and after review of New Hampshire Statutes, and Executive Branch Ethics Opinions, the Board agrees with the State that a conflict of interest exists in this matter, as a result of the Appellant's position as a Benefits Manager and her husband's employment with Anthem. Due to this conflict of interest and the need to preclude the Appellant from working on anything that Anthem is involved in and due to the extent of Anthem's involvement with State benefits, the Appellant failed to meet the work standard as there was not enough work for her, outside of the Anthem contracts, to keep her employed full-time.

The Board must now determine if the Appellant proved by a preponderance of the evidence that her termination was "arbitrary, illegal, capricious or made in bad faith". Per-A 207.12 (a).

In the Appellant's closing argument, she stated, through counsel, that she did not believe the decision to dismiss her was made in bad faith. The issue is now limited to whether her dismissal was illegal, arbitrary or capricious. The Board does not find that her dismissal was illegal as it did not violate any laws.

The common meaning of “arbitrary” is a decision “based on random or convenient selection or choice rather than on reason” or one made “[w]ithout adequate determining principles...non-rational...capriciously”. Appeal of Board of Trustees of University System of New Hampshire for Keene State College, 129 N.H. 632 (N.H. 1987). The word “capricious” is defined by the Merriam-Webster dictionary as “determined by chance or impulse or whim rather than by necessity or reason” or “not planned or chosen for a particular reason”.

There was testimony from the State that no one wanted the Appellant dismissed from her employment. The State was relieved when the Appellant was hired due to the already heavy workload in the RMU. After learning of the conflict of interest, the State spent several weeks trying to find a solution so that the Appellant could retain her position within the State but not be involved in any of the State’s contracts with Anthem. It was determined that there was simply not enough work for the Appellant if she could not work on State contracts involving or potentially involving Anthem. The Appellant’s dismissal was a last resort when no other reasonable solution could be determined.

The Board agrees with the State that this is a most unfortunate situation. The RMU is still painfully understaffed and the Appellant was unemployed for a period of time. There was discussion about how this situation could have been prevented and the Board believes that, taking into account the Appellant’s education, work history and volunteer work, she should have broached the subject of her husband’s employer to the RMU during her interview. She was interviewing to be a Benefits Manager and her husband worked for the State’s largest benefits administrator. The State was prohibited, by law, from asking any questions regarding her marital status or employment status of her husband. The Board finds that the Appellant failed to meet the work standard as she was precluded, by New Hampshire law, from working on any issue related or potentially related to Anthem.

Absent evidence and argument to demonstrate by a preponderance of the evidence that the Appellant’s dismissal was arbitrary, illegal, capricious or made in bad faith, the Board voted unanimously to DENY ~~Ms.~~ the Appellant’s appeal.

THE PERSONNEL APPEALS BOARD

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Chair, Charla Stevens, Esq.

cc: Sara Willingham, Director of Personnel, 25 Capital Street, Concord, NH 03301  
John Vanacore, Esq., Vanacore Law Office, 19 Washington Street, Concord, NH 03301  
Christen Lavers, Esq., New Hampshire Department of Justice, 33 Capitol Street, Concord,  
NH 03301