

State of New Hampshire



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

Appeal of Lillian Emerson – Docket #2011-T-002
Department of Education
May 13, 2011

A quorum of the New Hampshire Personnel Appeals Board (Wood and Johnson) met in public session on Wednesday, May 4, 2011, under the authority of RSA 21-I:58 and Chapters Per-A 100-200 of the NH Code of Administrative Rules (Rules of the Personnel Appeals Board) to consider the State's February 18, 2011, Motion for Summary Dismissal, the Appellant's February 25, 2011, Objection to Department of Education's Motion for Summary Dismissal, and the State's March 10, 2011, Response to Ms. Emerson's Objection to the Department's Motion for Summary Dismissal.

In accordance with the provisions of Per-A 206.05 (e) – (g):

- (e) All motions for summary disposition shall state specifically the grounds upon which the movant asserts the right to have an order for summary disposition entered, and shall specify the disposition requested.
- (f) If at any time, with or without a motion by a party, the board determines that there are no material facts in dispute, the board shall decide the appeal on the undisputed facts as presented by the parties.
- (g) The board shall enter an order summarily dismissing a matter if, at any time, with or without a motion of a party, it concludes that:
 - (1) The appeal was not filed timely; or
 - (2) The board does not have jurisdiction over the appeal or the matters addressed therein.

Having reviewed the pleadings submitted by the parties, the Board found that the material facts regarding Ms. Emerson's separation from service, and her application for employment prior to the effective date of her separation, are not in dispute. Those facts are summarized below:

1. On July 9, 2010, Ms. Emerson submitted a letter of resignation to Kathleen Murphy, Director of the Division of Instruction in the Department of Education. In pertinent part, Ms. Emerson's letter stated, "As a follow-up to our conversation of this afternoon, this letter is my notice of resignation from the Department. My last day will be August 5, 2010."
2. On or about July 21, 2010, nearly two weeks after her written resignation was submitted, Ms. Emerson participated in an exit interview with Director Murphy.
3. By letter dated July 22, 2010, Director Murphy accepted Ms. Emerson's resignation and confirmed that Ms. Emerson's last day of employment would be August 5, 2010. Ms. Murphy encouraged Ms. Emerson to meet with Human Resources to discuss

any matters relative to her employment at the Department. She also thanked Ms. Emerson for meeting with her the previous day for her exit interview.

4. By letter dated July 26, 2010, addressed to Ms. Murphy, Ms. Emerson requested that her resignation notice of August 5, 2010, be withdrawn.
5. By letter dated July 27, 2010, Director Murphy acknowledged receipt of Ms. Emerson's request to rescind her resignation. Director Murphy wrote, in pertinent part, "Your resignation letter was accepted by the Department and that decision stands."
6. The position from which Ms. Emerson had resigned was posted for internal recruitment, with a closing date of July 28, 2010. Ms. Emerson submitted her application for that position on July 29, 2010, the day after the filing deadline for internal Department of Education applicants.

In the Department's February 18, 2011, Motion for Summary Dismissal, Attorney English asked the Board to dismiss Ms. Emerson's appeal of her separation from service as a matter outside the Board's subject matter jurisdiction, arguing that Ms. Emerson was not dismissed, but instead resigned from her position at the Department of Education. In his Objection to the State's Motion, Attorney Reynolds argued that Ms. Emerson "...did not resign. She gave notice, but such a notice is not a resignation until after the effective date. It is probably an unanswered question in NH whether a state employee has the right to rescind a resignation before its effective date; but especially under the state classified system, the most appropriate interpretation is that such employees do have that right." The Board does not agree.

As noted in Attorney English's Motion for Summary Dismissal, the Board addressed the issue of its subject matter jurisdiction to hear and decide appeals involving an employee's resignation from employment when it issued its decision in the Appeal of Roslyn Beaudet (#89-T-4, March 15, 1990):

"The Rules do not provide employees with any implicit or explicit right to unilaterally withdraw a resignation once given; nor do the Rules provide for appeal of an appointing authority's acceptance of such resignation if given. Once an employee has tendered his resignation, unless he can support an allegation that such resignation was given under duress, any rights to appeal within the meaning of RSA 21-I:58 have been forfeited."

In his February 25, 2011, Objection, Attorney Reynolds wrote:

"The Beaudet case cited by the DOE does not apply here. The Board in that case found that Ms. Beaudet gave an immediate resignation, which was immediately accepted, even though she may have stayed at work the rest of the day. It is believed the NH Supreme Court declined¹ that appeal, so it is not mandatory or even authority to be cited."

Although the facts in the Beaudet appeal are very different from those presented in the instant appeal, the Board believes that its decision in that case is both applicable and instructive.² In the Beaudet case, the Appellant gave her resignation verbally in the heat of

¹ The Court did not decline the appeal; on September 13, 1991, the Court affirmed the Board's decision based on the briefs and oral arguments.

² http://admin.state.nh.us/hr/pab/decisions/Termination/beaudet_roslyn_1989-t-008.pdf

the moment during a meeting with her Commissioner. Ms. Beaudet later insisted that she had not actually resigned, and she attempted to return to work the following day. The Department refused her entrance to her office, indicating that it had accepted her resignation. The Department did not provide written confirmation of its acceptance of Ms. Beaudet's resignation until after Ms. Beaudet had attempted to return to work. On appeal to this Board, the Board found that:

"...Ms. Beaudet did, in fact, resign from her position...The Board further found that the Department of Corrections was under no obligation to question Ms. Beaudet's "subjective intent" when her resignation was given, to provide Ms. Beaudet the opportunity to withdraw her resignation, or to consider her resignation invalid because it was given at a time when she may have been angry or frustrated."

Unlike the facts in the Beaudet case, Ms. Emerson's resignation was not immediate, and was not given in the heat of the moment. By letter dated July 9, 2010, Ms. Emerson informed Director Kathleen Murphy that she was resigning from her position effective August 5, 2010. She wrote, "As a follow-up to our conversation of this afternoon, this letter is my notice of resignation from the Department. My last day will be August 5, 2010. I appreciate the opportunity to have worked with you and to have been able to provide services to the hundreds of grant recipients as they serve the children of New Hampshire." There is no suggestion that the Department of Education was seeking Ms. Emerson's resignation, or that the resignation was in any way coerced. Ms. Emerson participated in an exit interview with Director Murphy on or about July 21, 2010. Director Murphy gave Ms. Emerson written notice dated July 22, 2010, that Ms. Emerson's resignation had been accepted. The Department of Education then posted Ms. Emerson's position for recruitment within the agency. By letter dated July 26, 2010, Ms. Emerson indicated that she wished to rescind her resignation. Between July 9, 2010 and July 26, 2010, Ms. Emerson made no effort to withdraw her resignation. By letter dated August 2, 2010, Education Commissioner Virginia Barry confirmed that the department had accepted Ms. Emerson's resignation.

The Personnel Appeals Board's jurisdiction is described by RSA 21-I:46, I, which states, in pertinent part, "The personnel appeals board shall hear and decide appeals as provided by RSA 21-I:57 and 21-I:58 and [with specified exceptions] appeals of decisions arising out of application of the rules adopted by the director of personnel..."

The following Rules of the Division of Personnel refer to the resignation of an employee from the State classified service.

- ❖ Per 205.08 lists invalid appeals and matters not subject to informal settlement, including Per 205.08(1), "Resignation, unless the employee can demonstrate by a preponderance of evidence that the resignation was made under extreme duress."
- ❖ Per 1002.08 (g) states that, "Nothing in this rule shall prohibit an appointing authority from allowing an employee to request that he or she be allowed to resign in lieu of discharge," provided that the employee meets certain conditions, including acknowledgement that the employee has forfeited any right to appeal.
- ❖ Per 1203.05 (a)(1) allows for the payment of unused annual leave to an employee who resigns.
- ❖ Per 1204.08 (a) states, "Upon resignation or dismissal, the amount of sick leave remaining to the employee's credit shall lapse."


Absent an allegation that Ms. Emerson's resignation was made under extreme duress, the Board found that her resignation is a matter outside the Board's subject matter jurisdiction.


The Department of Education has also asked the Board to dismiss Ms. Emerson's appeal involving the agency's refusal to accept her application for employment as an in-house candidate. Attorney English argued that Ms. Emerson was ineligible to apply as an internal candidate because she had tendered her resignation for the posted position, and because the application that she did file was submitted after the deadline for receipt of applications from in-house candidates. Attorney Reynolds argued that, "...Ms. Emerson clearly was terminated; she had the right to have her application accepted as an in-house candidate; and the appointing authority has abused her discretion in the separation of Ms. Emerson from her DOE position and refusal to keep her employed."

The question of Ms. Emerson's eligibility as an in-house candidate is not as simple or straightforward as either party would suggest. Per 402.01 (a)(1) provides that whenever a vacancy is to be filled within an agency, the appointing is required to post the position in-house for a period of not less than 5 days. The posting must include, among other things, the date by which applications will be received. The parties agree that the position was posted for 5 days as required, and that Ms. Emerson's application was submitted one day after the position posting had closed. Even assuming that Ms. Emerson still qualified as an "in-house candidate" after her resignation had been submitted, her application was not submitted before the posted deadline. Ms. Emerson, as set forth in her notice of appeal, indicated she voluntarily chose to delay the submission of her application. The decision of the Department of Education not to accept Ms. Emerson's application was not an abuse of discretion nor a violation of the Personnel Rules. Per 405.02 (a) (4).

For all the reasons set forth above, the Board voted to GRANT the Department's Motion to Dismiss Ms. Emerson's appeal as matters outside the Board's subject matter jurisdiction.

THE PERSONNEL APPEALS BOARD


Patrick Wood, Chair


Robert Johnson, Commissioner

cc: Karen Hutchins, Director of Personnel
Lisa English, Assistant Attorney General, Department of Justice
Michael Reynolds, SEA General Counsel