

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	DOCKET NO. 87-37
	)	
ROBERT HOOD, JR. AND	)	
THOMAS MAHAR, JR.	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On July 16, 1987, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of Robert Hood, Jr. and Thomas Mahar, Jr., ("Grievants"). Grievants alleged that actions taken by the State of Vermont ("State") against them constituted either involuntary demotion without just cause, or reductions-in-force, in violation of Articles 17 and 71 of the collective bargaining agreement between the State and VSEA for the Non-Management Unit; effective for the period July 1, 1986, to June 30, 1988 ("Contract") and the Personnel Rules.

A hearing was held on December 10, 1987, in the Labor Relations Board hearing room before Board members Dinah Yessne, Acting Chair, William Kemsley, Sr., and Louis Toepfer. Michael Seibert, Assistant Attorney General, represented the State. Michael Zimmerman, VSEA Staff Attorney, represented Grievants. Testimony was taken at the hearing and, in addition, the parties stipulated to various facts and to the admission of evidence. The parties further agreed to take and file the depositions of Claude Magnant and Jeanne Van Vlandren in lieu of testimony.

The parties filed briefs on December 17, 1987. On December 23, 1987, the parties filed the depositions of Claude Magnant, Robert

Hynes and Thomas Ball for the Board's consideration. The deposition of Jeanne Van Vlandren was not taken.

#### FINDINGS OF FACT

1. Since about 1960, Hood has been continuously employed by the State as a classified employee. From 1960 to the end of March 1971, Hood was employed by the State Department of Health. In March 1971, Hood took a position as Environmental Protection Technician with the State Department of Water Resources. He held that position until April of 1984, at which time he took the position of Environmental Protection Plumbing Review Chief in the Department of Water Resources. As Environmental Protection Plumbing Review Chief, Hood was a member of the Supervisory bargaining unit (Grievants' Exhibit 24).

2. Since March of 1972, Mahar has been continuously employed by the State as a classified employee. In March of 1972, Mahar was hired as an Environmental Protection Technician by the Department of Water Resources. In 1978, that class was reallocated to the class Environmental Technician C (Grievants' Exhibit 23).

3. While they occupied their positions of Environmental Protection Plumbing Review Chief and Environmental Technician C, respectively, Hood was Mahar's immediate supervisor (Grievants' Exhibit 25, page 14; Grievants' Exhibit 26, pages 6 and 7).

4. At the time of the events here at issue, Hood was a pay grade 20, and Mahar was a pay grade 19 (Grievant's Exhibit 15 & 16).

5. At the time of the events here at issue, there existed in the State Department of Labor and Industry a Plumbing Inspector position, Pay Grade 17.

6. At all times relevant, the Rules and Regulations for Personnel Administration provided in pertinent part as follows:

... 2.041 Transfer is a change of an employee (1) from one position to another position of the same class or (2) from a position of one class to a position of another class within the same pay grade, in any organizational unit.

... 6.073 Transfer: A transferred employee shall be paid the salary in effect in previous position occupied.

... 11.05 Demotion: An employee may be demoted ... for cause ... or because of reduction in force (Grievants' Exhibit 6).

7. Section 11.05 of the Personnel Rules relating to demotion has been superseded by the Contract insofar as section 11.05 provides that an employee may be demoted for cause. Under Article 17 of the Contract, demotion is no longer a form of disciplinary action available to the State.

8. At all times relevant, the Contract contained the following ~~pertinent~~ definitions:

DEMOTION - the change of an employee from one pay scale to another pay scale for which a lower maximum rate of pay is provided.

LACK OF WORK - when (1) there is insufficient funds to permit the continuation of current staffing; or (2) there is not enough work to justify the continuation of current staffing.

LAY OFF - the separation of a classified employee due to lack of work or otherwise pursuant to management rights.

REALLOCATION - change of a position from one class to another class.

REASSIGNMENT - the change of a class from one pay scale to another pay scale.

REDUCTION IN FORCE - a reduction in the size of the work force due to a lack of work or otherwise pursuant to management rights. (Grievants' Exhibit 7, pages 1-3).

9. Article 19 of the Contract, entitled Classification Review and Classification Grievance, provides in pertinent part as follows:

Section 1. Definitions

a. Classification Review is defined as the process whereby either employees or management may initiate a review by the Personnel Department to determine whether an individual position, or any group of positions, is correctly classified and/or incorrectly assigned to pay grade.

b. Classification Grievance is defined as a dispute over whether the position of an individual employee, or the positions of a group of employees, is incorrectly classified and/or assigned to pay grade...

Section 2. Management Rights

Nothing herein shall be construed in a manner which prevents or interferes with management's unilateral authority to reallocate a position into a new or existing class; to assign a class into a different pay grade ...

Section 3. Procedure for Review of Classification

...d. (A)ny employees who believe that they are incorrectly classified and/or assigned to pay grade may initiate a request for classification review in accordance with this article...

Section 4. Classification Grievance

a. Classification grievances may be filed after January 1, 1987, in accordance with this article.

b. No classification grievance may be filed by an employee until the employee has first complied with the provisions of this article regarding classification review and has received a determination from the Personnel Department.

...Section 8. Exclusive Remedy

The grievance and appeal procedures provided herein for classification disputes shall be the exclusive procedures for seeking review of the classification status of a position or group of positions.

10. 3 VSA §2001, enacted in 1970, provides as follows:

"The governor may make such changes in the organization of the executive branch or in the assignment of functions among its units as he considers necessary for efficient administration." (Grievants' Exhibit 3, page 3).

11. Since enacted in 1970, 3 VSA §2002 has provided, in pertinent part, as follows:

"(a) The governor may propose by executive order changes in the organization of the executive branch of government which are not consistent with or will supersede existing organization provided for by law. The executive order shall be submitted to both houses of the general assembly.

(b) An executive order issued under this chapter shall be presented to the general assembly not later than January 15th of the year in which the general assembly sits. The executive order shall become effective unless disapproved by resolution of either house of the general assembly within ninety days, or before final adjournment of that annual session, whichever comes first." (Grievants Exhibit 3, pages 3 and 4).

12. 3 VSA §209 provides, in pertinent part, as follows:

"The governor shall provide for and require a practical working system to insure efficiency and mutual helpfulness among the departments ... He may transfer, temporarily or permanently, subordinates of anyone of such departments to another department as the needs of the state may seem to him to require. He shall make, promulgate and have power to enforce such rules and regulations as he may see fit for the conduct of such departments and alter or add to the same in his discretion." (Grievants Exhibit 2).

13. On January, 14, 1987, Governor Madeleine Kunin, citing 3 VSA §209 and §2001, signed an executive order which provided, in part, as follows:

"(I) do hereby transfer the following positions and incumbents from the Agency of Environmental Conservation, Department of Water Resources, to the Department of Labor & Industry, with position duties to be defined by the Department of Labor & Industry and the appropriate classification action to be taken by the Department of Personnel, both to be completed by the effective date of the transfer:

WA 0130, Plumbing Review Chief  
WA 0139, Environmental Technician C

... Responsibility for the public plumbing program authorized by 3 VSA, Section 2873 and 18 VSA, Section 1305 shall be transferred from the Agency of Environmental Conservation, Department of Water Resources to the Department of Labor & Industry. All the promulgated rules and program policies of the Department of Water Resources Public Plumbing Program shall remain in effect and properly amended or modified by the Department of Labor & Industry."

The positions mentioned in the Executive Order were those occupied by Grievants (Grievant's Exhibit 12).

14. In accordance with 3 VSA §2002, the Executive Order was submitted to the General Assembly. Neither house passed a disapproving resolution.

15. By memorandum dated April 16, 1987, and addressed to Claude Magnant, Department of Personnel Director of Personnel Operations, Jeanne Van Vlandren, Commissioner of the Department of Labor & Industry, wrote in pertinent part, as follows:

"SUBJECT: Proposed Reclassification of Plumbing Inspector

I am submitting this action in conjunction with the attached Executive Order #36 dated January 14, 1987. The Executive Order transfers two positions and incumbants (sic) from the Agency of Environmental Conservation to the Department of Labor and Industry. This action combines the public and private sector plumbing program.

This will increase the responsibilities of the existing Labor and Industry Plumbing Inspector, Pay Grade 17. I plan to appoint two AEC incumbants (sic) to this position as well. As you can see from the Executive Order this will result in an involuntary demotion for the two AEC employees. I understand that reduction in force procedures are not necessary to do and that the incumbants (sic) salaries will not be reduced"

Van Vlandren attached to her memorandum a position description for the revised Plumbing Inspector class, a proposed class specification, and a recommendation that the pay grade for the class be increased to pay grade 18 (from pay grade 17) (Grievants' Exhibit 14).

16. By Report of Personnel Action dated April 22, 1987, Magnant informed Van Vlandren in pertinent part, as follows:

"In accordance with Executive Order #36 signed by Governor Kunin on 1/14/87, the following positions and incumbents are transferred from the Department of Water Resources to the Department of Labor and Industry, with classification action as subsequently indicated:

WA-130,	Environmental Protection Plumbing Review Chief, PG-20, Robert Hood, incumbent.
WA-139,	Environmental Technician C, associated class: Plumbing PG-19, Thomas Mahar, incumbent.

Those two positions are concurrently reallocated to the class Plumbing Inspector. The class Plumbing Inspector, PG-17, is concurrently reassigned to PG-18 ... The reassignment of the class also includes existing Plumbing Inspector position 1R-30.

... The class Environmental Protection Plumbing Review Chief, and the associated class Plumbing attached to the class Environmental Technician C are concurrently abolished.

Effective date for all of the above is 5/3/87 (Grievants' Exhibit 15).

17. Magnant considered the personnel action he took as a downward reallocation through no fault of Grievants.

18. By letter dated May 1, 1987, Van Vlandren wrote to Mahar, in pertinent part, as follows:

"I am writing to inform you that effective May 17, 1987 you will be transferred to the Department of Labor & Industry ... as part of Executive Order #36 dated January 14, 1987. This Executive Order transfers the authority and responsibility for the State's Public Building Plumbing Program to Labor and Industry.

Your class title will be Plumbing Inspector at pay grade 18. Because this represents an involuntary demotion from pay grade 19, your current salary will not be reduced. You will receive an hourly rate of \$11.49, placing you on step 11 under pay grade 18 (Grievants' Exhibit 16, page 1).

19. By letter dated May 1, 1987, Van Vlandren wrote to Hood, in pertinent part, as follows:

"I am writing to inform you that effective May 17, 1987 you will be transferred to the Department of Labor and Industry ... as part of Executive Order #36 dated January 14, 1987. This Executive Order transfers the authority and responsibility for the State's Public Building Plumbing Program to Labor and Industry.

Your class title will be Plumbing Inspector at pay grade 18. Because this represents an involuntary demotion from pay grade 20, your current salary will not be reduced. You will receive an hourly rate of \$14.09, placing you above the maximum pay grade 18 (Grievants' Exhibit 16, page 2).

20. On May 17, 1987, Grievants reported to the Department of Labor and Industry. They became Plumbing Inspectors (pay grade 18), and their old position classes [Environmental Protection Plumbing

Review Chief (pay grade 20), and Environmental Protection Engineer C - Plumbing (pay grade 19)] were abolished.

21. The adverse economic consequences to the Grievants resulting from the actions here complained of are as follows:

(1). Hood:

Had he remained in a pay grade 20 position (at step 14), he would have been eligible for a July 1987 salary increase for pay grade 20, step 14 (i.e., from \$14.09 to \$14.38 per hour). He would also have been eligible to move to the next step (15) on December 27, 1987, at which time his hourly salary would have increased from \$14.38 to \$14.80. By virtue of the actions complained of, Hood's hourly salary (\$14.09) was above the maximum for pay grade 18 (\$12.93). He cannot move to a higher step, for there is none.

(2). Mahar:

Just prior to the events complained of, Mahar was at step 9 of pay grade 19, earning \$11.47 per hour, and would have been eligible for a July 1987 increase for that step and pay grade, from \$11.47 per hour to \$11.76 per hour. By virtue of the events complained of, Mahar went from an hourly rate of \$11.47 to \$11.49 (step 11 of pay grade 18) immediately. In July of 1987, Mahar's hourly rate went from \$11.49 to \$11.78 (step 11 of pay grade 18). Had he remained in pay grade 19, Mahar would have been eligible to move to the next step (i.e., step 10 of pay grade 19), or \$12.10 per hour, on September 6, 1987. By virtue of the events complained of, Mahar now is not



eligible to move to the next step of pay grade 18 until May 17, 1990 (Grievants' Exhibit 10, pages 7-8; Grievants' Exhibit 16; Grievants' Exhibit 17; Grievants' Exhibit 19).

22. There is no allegation that the transfers of Grievants were effected for any improper or illegal motive.

#### OPINION

Grievants first contend that the Executive Order at issue here is unconstitutional and therefore void, insofar as it attempts to amend statutes assigning the responsibility for the public building plumbing program to the Department of Labor and Industry. The State contends this issue is untimely raised.

We conclude this issue is untimely raised since it was neither raised at earlier steps of the grievance procedure nor in the grievance filed with the Board. Grievance of Hetzel, 8 VLRB 325, 330 (1985). Grievance of Regan, 8 VLRB 340, 364 (1985).

Grievants next contend that the State lacked the authority to reduce Grievants' pay grades under section 2.041 of the Personnel Rules, which provides that the positions of transferred employees shall be assigned to the same pay grade, and that the Contract definition of "demotion" precisely fits what happened to Grievants here and is not an authorized personnel action under the Personnel Rules.

The State counters that this is no more than a classification grievance in disguise; that the Department of Personnel conducted a

classification review after Grievants were transferred, and their revised duties established. The result of the classification review, the State contends, was a downward reallocation through no fault of the employees, not a demotion. The State contends such downward reallocation is properly subject to challenge through a classification grievance, not a grievance such as the one filed in this matter.

We conclude that once the Governor issues an Executive Order transferring positions and employees from one department to another department, the State is limited by Section 2.041 of the Personnel Rules to transferring employees to a position of the same pay grade. Grievance of Allen, 5 VLRB 511, 417 (1982) (Personnel Rules are an established past practice which attain the status of contractual rights and duties unless explicitly altered by contract provisions).

Here, however, Grievants were not transferred. Their new positions were not assigned to the same pay grades as their old ones. Instead, Grievants were demoted within the meaning of the Contract definition of "demotion" since they were changed from positions of one pay scale to another pay scale for which a lower maximum rate of pay was provided.

Reading the provisions of Article 17 of the Contract together with Section 11.05 of the Personnel Rules, an employee may be demoted involuntarily only due to a reduction in force. We conclude no reduction in force occurred here within the meaning of the Contract, which defines reduction in force as "a reduction in the size of the work force due to a lack of work or otherwise pursuant to management

rights." The work force was not reduced here due to a lack of work or any other reason. Two employees in the work force were simply transferred due to transfer of their position functions to another department. Accordingly, Grievants were demoted in violation of Article 17 of the Contract and Section 11.05 of the Personnel Rules.

We reject the State's contention that what occurred here was simply a proper classification review under Article 19 of the Contract and an appropriate downward reallocation through no fault of Grievants. While positions may be "reallocated", employees in Grievants' positions are "transferred". While the Executive Order required the Department of Personnel to take "appropriate classification action," that action cannot prejudice an incumbent employee beyond what is permitted by the Contract and the Personnel Rules.

Grievants request as a remedy that their present positions be upgraded to their former pay grades, with back pay. We conclude that this is an appropriate remedy to redress the State's violations of the Contract and the Personnel Rules.

In closing, we express our dismay at the state of the deposition transcripts filed subsequent to the Board hearing in this matter. The extent of inaudibles in the deposition made it impossible for the Board to ascertain the entire testimony being given and indicates a sloppiness in the way the parties presented their case to the Board. We place the parties on notice that we will not condone such sloppiness in the future and will more closely review requests to submit depositions in lieu of live testimony.

ORDER

Now therefore, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED:

1. The Grievance of Robert Hood, Jr. and Thomas Mahar, Jr., is GRANTED;

2. The State of Vermont forthwith shall restore the position occupied by Hood to pay grade 20 and the position occupied by Mahar to pay grade 19 and shall award them such back pay as they are entitled had their positions been properly placed in pay grade 20 and pay grade 19, respectively, effective May 3, 1987;

3. The interest due Grievants on back pay shall be at the rate of 12 percent per annum and shall run from the date each paycheck was due during the period commencing with the date Grievants should have received wage increases pursuant to paragraph 2 of this order and ending on the date they receive the back pay pursuant to paragraph 2; and

4. The parties shall submit to the Board by April 21, 1988, a proposed order indicating the specific amount of back pay due Grievants, and if they are unable to agree on such proposed order, shall notify the Board in writing that date of specific facts agreed to by the parties, specific areas of factual disagreement and a statement of issues which need to be decided by the Board. Any evidentiary hearing necessary on these issues shall be held on April 28, 1988, at 9:30 a.m. in the Labor Relations Board hearing room.

Dated the 8<sup>th</sup> day of April, 1988, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Dinah Yessne  
Dinah Yessne, Acting Chair

William G. Kemsley, Sr.  
William G. Kemsley, Sr.

Louis A. Toepfer  
Louis A. Toepfer