

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	
VERMONT STATE COLLEGES)	DOCKET NO. 89-14
STAFF FEDERATION, AFT)	
LOCAL 4023, AFL-CIO)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On February 9, 1989, the Vermont State Colleges Staff Federation, AFT Local 4023, AFL-CIO ("Federation") filed a grievance with the Labor Relations Board. The grievance alleged that the Vermont State Colleges ("Colleges") violated Article 3, Section 2, and Article 27, Sections 1 and 7, of the collective bargaining agreement between the Federation and the Colleges, effective for the period July 1, 1987 to June 30, 1989 ("Contract"), by assigning to Maxine Merrick, Library Technician II at Johnson State College, work reserved for the Library Technician III classification without compensation, and by changing the job content of a Federation represented position without giving the Federation an opportunity to bargain.

On April 19, 1989, the Colleges filed a motion to dismiss the grievance on the ground that it was not timely filed. A hearing was held on April 20, 1989, before Board Members Charles McHugh, Chairman; William Kemsley, Sr. and Catherine Frank. The Colleges were represented by Attorney Nancy Quinn Dorey. The Federation was represented by Mark Majors, Federation Grievance Officer. At the hearing, the Board reserved judgment on the Colleges motion to dismiss.

The Federation and the Colleges filed briefs on May 1 and May 2, 1989, respectively.

FINDINGS OF FACT

1. The Contract provides in pertinent part as follows:

Article 3 Management Rights

... 2. ...Management rights also include, but only after first giving the Federation notice and the opportunity to bargain, the right:

- ...(b) ...to change job content and classify and reclassify...

Article 9 Grievance Procedure

... 4. A grievance must be presented at Step I within 30 calendar days following the time at which the grievant(s) could have reasonably been aware of the existence of the situation created by the Colleges which is the basis for the grievance...

Article 27 Classification System

1. The position classification system effective June 11, 1980 shall remain in full force and effect.

2. The position reclassification panel shall consist of four persons from within the Vermont State Colleges selected by the Chancellor and four employees selected by the President of the Staff Federation. Panel members shall normally serve from the date of their appointments to the expiration date of this Agreement. However, the Chancellor and the President of the Staff Federation may fill vacancies or replace their representatives to promote effective operations of the panel upon written notification to the other party.

... 4. Recommendations for the reclassification of a position shall be based on the following:

- a) demonstrated changes in duties, responsibilities, and/or qualifications which result in a change in position point value as determined by the AAIM evaluation system sufficient to justify a pay range change, and/or

- b) evidence that a position at a VSC college encompasses the same duties and responsibilities and requires the same qualifications yet is classified differently at another college.

5. If a position is reclassified to a higher level, the incumbent shall receive a salary increase if his/her current salary is below the minimum salary for the new classification...

6. Recommendations of the panel shall be forwarded to the Chancellor for final determination promptly after consideration. The Chancellor shall advise the Panel, the affected College(s), and the Staff Federation of his/her decision within two weeks after receiving the recommendations of the panel. This decision shall not be subject to the grievance and arbitration provisions of this Agreement.

7. If an employee covered by this Agreement should voluntarily assume the duties and responsibilities of a higher rated position in a classification in a higher pay range or not covered by the position her/she holds, then (a) that employee shall receive the rate of the higher classification or (b) either party may submit the position for possible reclassification, or (c) the Vermont State Colleges shall modify the duties and responsibilities of that employee to conform with the requirements of the position classification.

(Joint Exhibit 3, Federation Exhibits 5, 6)

2. Two of the positions covered within the bargaining unit of non-faculty employees of the Colleges represented by the Federation are Library Technical Assistant II ("LTA II") and Library Technical Assistant III ("LTA III"). The LTA II position is a Pay Grade 6, and has a salary range of \$12,608 - \$19,630. The LTA III position is a Pay Grade 7 position, and has a salary range of \$15,447 - \$24,050.

3. The job description for LTA II provides in pertinent part as follows:

Definition

Perform diversified duties of a technical and para-professional nature to assist with library function at assigned library, working under the direction of the librarian.

Examples of Work Performed

Teletype, mail, phone and person-to-person contact constitute the means of communication utilized. Provides reference service to students, administrators, faculty, trustees, and to the general public directly. Supervises the maintenance of the college holdings. May conduct special studies to determine ways to improve library services in area of primary responsibility. Develops and maintains collections of books and related materials to meet the special needs of the college. This may include consultation with the University of Vermont and other Vermont State Colleges. Screens book orders for correct bibliographic information, prepares purchase orders for supervisor's approval. Supervises and participates in the receiving and checking of book shipments for quantities, quality and price. Publicizes the availability of reference and interlibrary loan services throughout the Vermont State Colleges through personal contact, workshops, college publications, and other suitable means. Maintains awareness of current library loan work, and aids college professional staff and students in maintaining awareness of current library practices. Prepares annotated bibliographies and types reports when appropriate. Performs related work as required.

(Federation Exhibit 4)

4. The job description for LTA III provides in pertinent part as follows:

Definition

Perform diversified duties of a technical and para-professional nature involving delivery of library services of a specialized nature at assigned library. Works under the direction of the librarian.

Examples of Work Performed

Exhibits thorough knowledge of collection contents, strengths and weaknesses and recommends materials and/or equipment to improve the library collection through the addition or deletion of library materials. Consults with personnel at other Vermont libraries and may serve as the college representative at conferences. Plans and participates in the publicizing of available library services, including reference inter-library loan and media through personal contact, workshops, college publications and other suitable means. Assists the library by recommending administrative procedures in primary area of

responsibility. Conducts special studies to determine the need for library service improvements, and prepares manuals, reports and other statements of assessment of library needs. May be responsible for major area of operations of the library such as, 1) technical services, including: cataloguing, classification and processing of print and non-print materials, or; 2) audio visual selection, including: maintenance, distribution, and instruction, or; 3) government documents, including: selection, classification and dissemination of government publications, or; acquisitions, including: selection of vendors, ordering of materials, verifying accounts, utilization of standard bibliographies and union lists, maintaining liaison with the college community concerning acquisitions of material. Prepares annotated bibliographies or collects and prepares materials for monthly, quarterly, semi-annual and annual reports. Trains and directs support staff and student assistants. Related work as required.

(Federation Exhibit 2)

5. An LTA III generally performs duties in three of the following major areas of operations: 1) technical services, 2) audio visual selection, and 3) government documents. The major difference between the LTA II and LTA III positions is that the LTA III performs duties in these major areas of operation, while the LTA II position includes no such duties.

6. Maxine Merrick began employment as an LTA II, at the John Dewey Library at Johnson State College, on July 6, 1987. At some point near the time she began employment, Merrick received a copy of the LTA II job description and a copy of the Contract.

7. At the time Merrick began employment, Mark Majors also was employed at the Library as an LTA II. Majors performed many duties relating to the Library's audio/visual equipment and services. Based on these duties, Majors eventually prepared a request for reclassification of his position of LTA II to LTA III. Majors reviewed his request for reclassification with College personnel

officer John Lord. Lord told Majors that the position he was performing was not an LTA III but was an LTA II position. Majors did not pursue his reclassification request. Majors subsequently left employment with Johnson State College in November 1987.

8. In November 1987, Lois Beaty, the library coordinator at Johnson State College, in preparing to post an LTA II position notice to fill the vacancy left by Majors' resignation, orally contacted the Federation through Sally Searles, Federation chapter president, and Pat Barton. Beaty solicited the opinion of the Federation as to an LTA II job description modified to include some audio/visual duties.

9. On or about November 2, 1987, Beaty received a written response from Searles and Barton which provided in pertinent part as follows:

After reviewing the descriptions of Library Technician II and Library Technician III carefully, it is the Union's opinion that it is clear that any audio-visual related duties fall under the LTA III description. Specifically "...audio visual selection, including: maintenance, distribution and instruction..."

Therefore, we feel it would be unfair to require these duties of an LTA II when an LTA III is being recognized for it both by grade and salary.

(Federation Exhibit 3)

10. Beaty did not at any time respond to this letter from Searles and Barton. Beaty also did not inform the College administration that she had solicited the opinion of the Federation as to the modified LTA II job description. When she subsequently hired an LTA II, Beaty used the original description for an LTA II, rather than a modified job description, when posting the vacancy throughout the Colleges system.

11. After Majors left employment at Johnson State College, an issue arose as to who would assume the audio/visual duties previously performed by Majors. Merrick, because of her interest in the audio/visual equipment and services offered by the College, voluntarily in February 1988 assumed the audio/visual duties previously performed by Majors.

12. From February 1988 until November 14, 1988, the percentage of time spent by Merrick performing audio/visual duties ranged between 5 - 20 percent. Merrick was responsible for the distribution of the audio/visual equipment, demonstration of equipment usage and set-up, routine repair of equipment, routine replacement of parts and the duplication of video cassettes.

13. During this period, the remaining bulk of Merrick's work involved 1) supervision, scheduling, record-keeping and payroll of work-study students; 2) circulation responsibilities, and 3) acting as a reference assistant (Colleges Exhibits F, G).

14. Merrick did not perform the duties performed by an LTA III in the major areas of operation of technical services and government documents.

15. Beaty and Merrick decided to seek reclassification of Merrick's position from an LTA II to an LTA III. They submitted a reclassification request on July 14, 1988 (Colleges Exhibit F). The Federation was not aware of the reclassification request.

16. After reviewing the reclassification request, William Crangle, College Business Manager, informed Beaty, approximately in September 1988, that the duties performed by Merrick constituted an LTA II, rather than an LTA III, position.

17. The Federation first became aware that Merrick was performing audio/visual duties on October 6, 1988, when Merrick informed Majors, Federation Grievance Officer, that she was performing such duties.

18. The Federation filed a Step I grievance on October 28, 1988, raising the issues raised in the grievance before the Board.

19. On November 10, 1988, Searles informed Crangle of the memorandum she and Barton had sent Beaty on November 2, 1987.

20. On November 14, 1988, College personnel officer Robert Chamberlain sent a memorandum to Beaty instructing her that, effective immediately, Merrick was to be relieved of all audio/visual duties. Merrick was subsequently relieved of these duties (Colleges Exhibit J).

21. As of November 14, 1988, Merrick's annual salary was \$12,922 (Federation Exhibit 1).

MAJORITY OPINION

The Federation contends that the Colleges violated Article 3, Section 2, and Article 27, Sections 1 and 7, of the Contract, by assigning Maxine Merrick, an LTA II, LTA III work without compensation and changing the job content of a position without giving the Federation an opportunity to bargain. We first address a timeliness issue raised by the Colleges.

Timeliness

The Colleges contend that this grievance should be dismissed as untimely filed. The Colleges first contend that Merrick failed to file her grievance within 30 calendar days following the time at which she could have reasonably been aware that she was performing duties

outside of her job description, and thus did not adhere to the timeliness requirements of the grievance procedure article of the Contract. We reject the Colleges' assertion because Merrick is not the grievant in this matter. The correspondence filed by the Federation at the various steps of the grievance procedure clearly indicates that the Federation is the grievant.

Nonetheless, the Colleges contend that the Federation did not file the grievance in a timely manner because it failed to file its grievance within 30 days following the time at which it could have reasonably been aware that Merrick was performing duties outside of her job description. The Colleges maintain that the latest date the Federation could assert that it could reasonably have been aware that an LTA II was performing audio/visual duties at Johnson State College is November 2, 1987, the date the Federation chapter president, Sally Searles, and Federation member, Sally Barton, responded to the request of the library coordinator, Lois Beaty, concerning the Federation's opinion as to an LTA II job description modified to contain audio/visual duties.

We disagree. In their response, Searles and Barton indicated that it was the Federation's opinion that audio/visual duties fell outside the LTA II's job description. Subsequently, when Beaty had posted a job description advertising another LTA II vacancy, no audio/visual duties were listed on the job description. Thus, the Federation could not have been reasonably aware at this time that an LTA II was performing audio/visual duties.

We conclude that the Federation filed this grievance in a timely manner. The time at which the Federation "could have reasonably been aware" it had not received notice or an opportunity to bargain the

content of the LTA II position was when Merrick brought it to the Federation's attention on October 6, 1988, that she had been performing audio/visual duties. The grievance herein was filed within 30 days of that date. As the Board stated in Grievance of Marcotte and VSCSF, 9 VLRB 143, at 155 (1986):

The language of Article 3, Section 2, places the burden on the Colleges to notify the Federation when a job content change is contemplated. When the Colleges fail to meet their obligation, it is unreasonable to penalize the Federation... for not earlier grieving a violation of which they were not made aware.

Merits

We turn to addressing the merits of this grievance. The first issue on the merits is whether the Colleges violated the Contract by failure to notify the Federation and give the Federation an opportunity to bargain the job content of the position held by Merrick.

Where the job description for a position does not adequately reflect the duties performed by the employee in that position, then the "job content" of that position has been changed, and the colleges are required under Article 3, Section 2, to give the Federation notice and an opportunity to bargain concerning the change. Marcotte, supra, at 152. It is apparent that Merrick's job duties for the period February 1988 to November 1988, left her somewhere between an LTA II and an LTA III. While the audio/visual duties performed by Merrick 5-20 percent of her time were consistent with what an LTA III was required to do and were a significantly different and higher level of responsibility than called for in an LTA II job description, Merrick was not required to perform other LTA III duties. An LTA III

generally performs duties in two of the three major areas of technical services, audio/visual selection and government documents. Merrick performed duties in only one of the three major areas. Also, she performed no other significant duties of an LTA III. The bulk of her work continued to be LTA II duties.

The fact Merrick did not perform all of the duties of an LTA III and still performed the bulk of the duties of an LTA II does not excuse the Colleges from notifying the Federation and giving them an opportunity to bargain over the change. The "job content" of the LTA II position occupied by Merrick had changed such that she was performing duties above her job classification, sufficient by itself to trigger the obligation to notify the Federation and bargain. Marcotte, supra, at 153.

However, the Colleges contend that the bargaining obligation did not apply because Merrick voluntarily assumed, and was not assigned, audio/visual duties. We would agree with the Colleges' position, if as in the case of Marcotte, supra, the involved employee was told by a supervisor to stop performing such duties and voluntarily continued to do them. However, Merrick performed the audio/visual duties with the authorization of Beaty, her supervisor, from February 1988 to November 1988. Under such circumstances, the "job content" of the position had changed with supervisory authorization, and the Colleges were required to bargain.

Nonetheless, the Colleges contend that any violation of the Contract was caused by the Colleges' decision to withdraw the audio/visual duties from Merrick pursuant to Article 27, Section 7, of the Contract. The effect of the Colleges withdrawing such duties from

Merrick simply was to limit the potential backpay liability of the Colleges. However, this did not cure the failure of the Colleges to meet their bargaining obligation for the period Merrick was performing the audio/visual duties. To hold otherwise would be to allow the Colleges to benefit from failure to meet their contractual duty of notification.

In sum, we conclude the Colleges violated Article 3, Section 2 of the Contract by failing to notify the Federation and giving it an opportunity to bargain concerning job content changes in the LTA II position. The Colleges are liable for the period Merrick actually performed duties outside of her classification - February 1988 to November 14, 1988.

The Federation also contends that the Colleges violated Article 27, Sections 1 and 7 of the Contract by assigning Merrick LTA III work without compensation. We conclude that this article is not applicable to resolving this grievance.

We turn to determining what remedy to apply. In determining a remedy appropriate to the consequences of the Contract violation, there are two interests at issue: 1) "to enforce compliance with all provisions of a collective bargaining agreement upon complaint of either party" pursuant to 3 VSA §982(g); and 2) to make whole any individual damaged as a consequence of a party's non-compliance. Vermont State Colleges Faculty Federation and Peck v. Vermont State Colleges, 139 Vt 329 (1981). Grievance of Birchard and VSCSF, 10 VLRB 192, 200 (1987). Any remedy to be granted dates back to the time the violation began occurring. Marcotte, supra, at 155.

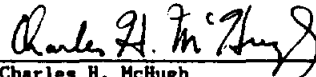
The Federation has been denied its right to negotiate concerning the job content changes of the position occupied by Merrick. An appropriate remedy to redress this violation is to order the Colleges to first give the Federation notice and the opportunity to bargain concerning any contemplated job content changes in the LTA II position at Johnson State College.

In addition, Merrick should be made whole for the Colleges' violation of Article 3, Section 2. We recognize that backpay is not awarded when a position is routinely reclassified upward pursuant to Article 27, and but for the Colleges' non-compliance, Merrick would not be entitled to a backpay award. However, Merrick was undeniably damaged by the Colleges non-compliance.

It is difficult to measure damages precisely. It is a matter of speculation what Merrick would have earned had the Contract been followed and the Colleges and Federation negotiated the matter of job content changes. The Federation requests that Merrick be awarded the difference between her salary and the minimum salary for an LTA III for the period in which she performed the audio/visual duties, February 1988 through November 14, 1988, plus 12 percent interest.

Given that this Contract violation subverted not only the job classification system, but the right to bargain at the expense of one worker by a process which undermined the Federation's authority, we believe the remedy requested by the Federation is appropriate. Marcotte, supra, at 157. To hold otherwise would be to allow the Colleges to benefit from their failure to meet their contractual duty to provide notice and to bargain. Marcotte, supra, at 155. It would encourage the employer to attempt pay savings in hopes the changes would not be discovered. Marcotte, supra, at 157.

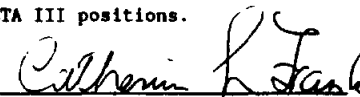
The annual difference between the two salaries during the relevant period is \$2,525. Merrick worked duties outside of her job description for 78 percent of the year. Seventy-eight percent of \$2,525 equals \$1,970. Merrick is entitled to that amount, plus 12 percent interest. It is equally difficult to specify a date where interest liability commences in this case. We conclude the date Merrick discontinued performing audio/visual duties, November 14, 1988, is an appropriate date.


Charles H. McHugh


William E. Kemsley

MINORITY OPINION

I concur with my colleagues in all aspects of this decision except the amount of money Maxine Merrick should be reimbursed to make her whole. The only duties of the LTA III position that Merrick performed were the audiovisual duties which accounted for only 5 to 20 percent of Merrick's time. Thus, to make her whole for the LTA III work that she did, she should only receive 20 percent of the salary difference between the LTA II and LTA III positions.


Catherine L. Frank

ORDER

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

1. The Grievance of the Vermont State Colleges Staff Federation, AFT Local 4023, AFL-CIO is SUSTAINED;

2. The Vermont State Colleges shall first give the Federation notice and an opportunity to bargain concerning any contemplated job content changes in the Library Technical Assistant II position at Johnson State College;

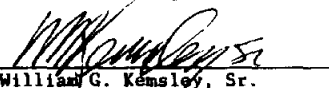
3. The Colleges shall pay Maxine Merrick \$1,970, plus interest;

4. The interest due Merrick shall be at a rate of 12 percent interest per annum, shall be based on the full \$1,970 backpay award, and shall run from November 14, 1988, to the date she receives the backpay award.

Dated this 7th day of September, 1989, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Charles H. McHugh, Chairman


William G. Kemsley, Sr.