VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 88-76
SEDNEY ULRICH	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On December 22, 1988, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of Sedney Ulrich ("Grievant"). The grievance alleged that the State of Vermont, Department of Mental Health ("Employer"): 1) involuntarily demoted Grievant in violation of the Agreement between the State of Vermont and VSEA for the Non-Management Unit, effective for the period July 1, 1988 to June 30, 1990 ("Contract"), and 2) violated the Contract by failing to provide Grievant with reduction in force rights under Articles 2 and 71 of the Contract when the duties of her position were contracted out.

A hearing was held before Board Members Louis Toepfer, Acting Chairman; William Kemsley, Sr., and Catherine Frank on August 17, 1989. Michael Seibert, Assistant Attorney General, represented the Employer. Michael Zimmerman, VSEA Staff Attorney, represented Grievant.

The parties filed Proposed Findings of Fact and Memoranda of Law on August 24, 1989. The Employer filed a response brief on August 29, 1989, and Grievant filed a letter in response to the response brief on September 11, 1989, neither of which have been considered by the Board pursuant to Board policy.

FINDINGS OF FACT

1. In early 1985, Grievant was employed by the Employer as a Mental Retardation Protective Services Worker, which was then a Pay Scale 13 position (Grievant's Exhibit 3, pages 1-2; Grievant's Exhibit 7, page 1).

2. As a Protective Worker, Grievant essentially acted as a public guardian for mentally retarded adults living in the community. She helped make decisions, on behalf of those individuals, concerning areas such as where they would live, where they would work and the kinds of medical treatment they would receive (Grievant's Exhibit 3, pages 1-2).

3. In early 1985, 15 mentally retarded adults in the Lamoille County area were being served by a private contractor. There was, however, growing concern within the Division of Mental Retardation that the clients were in possible danger because of certain deficiencies in the contractor's operation. Due to that concern, the decision was made to terminate the contractor's contract. Further, inasmuch as the Division of Mental Retardation could not find another contractor willing or able to take over the services which the previous contractor had provided, it was decided that the Department of Mental Health would take over the function as provider of those services, at least until a new contractor could be found.

4. David Burrus, Assistant Director of the Division, recommended to Ronald Meltzer, Director, that Grievant take on those duties. Burrus' recommendation was followed. Once the decision was made, Meltzer discussed the plans with Grievant. He told her that she

would be working with the clients in Lamoille County for about six months, until a new contractor could be found. Grievant told Meltzer that she was not interested in taking an interim position. Meltzer responded to the effect that although her duties in that position would be of limited duration in Lamoille County, he had plans for her to later perform the same duties elsewhere in the State. Grievant accepted.

5. Grievant actually began to perform her new duties on May 31, 1985. In those duties, Grievant carried the caseload previously carried by the private contractor.

6. Due to the change in job duties, Grievant's Protective Services Worker position was temporarily reallocated, effective June 2, 1985, to the position of Brandon Training School Program Supervisor, a Pay Scale 17 position. Grievant received an increase in hourly pay from $7.71 to $9.24 due to this temporary reallocation. Grievant received notice that the action taken regarding her position was a temporary reallocation (State's Exhibit 1, Grievant's Exhibit 6, pages 1-2; Grievant's Exhibit 7, page 1).

7. From June 2, 1985, to January 23, 1988, Grievant remained in the position of Brandon Training School Program Supervisor and continued in the status of temporary reallocation while performing her duties with the Lamoille County clients (Grievant's Exhibits 8,9).

8. From time to time in 1986 or 1987, Burrus or Meltzer would mention to Grievant that a contractor would take over the Lamoille County operation which she was running, but that did not come to pass.

9. In January of 1987, with the implementation of the Willis classification study and new pay plan, Grievant received a notice from the Department of Personnel to the effect that she, as a Brandon

Training School Program Supervisor, would be assigned to Pay Grade 24, and, because that constituted an upgrade, would receive a salary increase. As a result, by the end of 1987, Grievant was earning $12.89 per hour as a Brandon Training School Program Supervisor, Pay Grade 24 (Grievant's Exhibit 12; Grievant's Exhibit 13).

10. At some time around January, 1988, Burrus inquired of Charly Dickerson, then the Personnel Administrator for the Employer, as to how Grievant's salary would be affected in the event that she took a transfer or was reassigned back to her old job. Dickerson, after having researched the relevant Personnel rules, and after having ascertained that the Department wished to preserve Grievant's salary in the event of such a job change, requested, by memorandum dated January 15, 1988, that Grievant's position be converted from a temporary reallocation to a permanent reallocation, which request was approved by the Department of Personnel, effective January 24, 1988. Grievant saw neither Dickerson's request nor the notice of approval (Grievant's Exhibit 14, Grievant's Exhibit 15).

11. In May, 1988, the Employer reached an agreement with another private mental health organization to provide, among other things, the services Grievant had been responsible for since June, 1985. Charles Moseley, Director of the Division of Mental Retardation, informed Grievant in May, 1988, that a private provider had been found, and would begin services in July, 1988. Mosely told Grievant that she would work with the new contractor for about six months.

12. Some time during the summer of 1988, Moseley informed Grievant that, because of the critical need for persons in the role of

Protective Services Worker, he planned to assign to her the duties she had performed before her temporary reallocation in June, 1985. Moseley informed Grievant that she would not have reduction in force rights.

13. At about the same time as this was occurring, Grievant applied for a position which was left vacant by Burrus accepting another position. That position was Chief of Community Services, a Pay Grade 24 position, and, had Grievant been given reduction in force rights, she would have had absolute hire rights to the position and other Pay Grade 24 and below positions for which she was qualified. However, she was not hired for the position, and was informed of that decision by letter dated August 9, 1988 (Grievant's Exhibit 3, pages 7-8; Grievant's Exhibit 18).

14. On September 9, 1988, Moseley wrote a letter to Grievant which provided in pertinent part as follows:

> As you know, your duties will be reassigned effective immediately. I will expect between *now* and the *end* of October to examine the full context of these duties in order to submit the request to have your job re-evaluated by the Department of Personnel's classification unit (Grievant's Exhibit 21).

15. By Notice of Action effective 10/30/88, the Department of Personnel reallocated Grievant's position to Mental Retardation Protective Services Worker, at Pay Grade 19. As a result of that action, Grievant's salary moved from pay Grade 24, Step 3, at $13.93 per hour, to Pay Grade 19, Step 14, at $14.19 per hour. As a result of her placement on Step 14 of Pay Grade 19, Grievant will not be entitled to another step increase for a longer period than if she had remained at Pay Grade 24 (Grievant's Exhibit 1, pages 13 and 19-22; Grievant's Exhibit 27, page 2).

16. Over a period of approximately the last five years, the Department of Personnel has issued approximately 100 downward reallocations of positions per year. The State has consistently interpreted the Contract to provide that an employee reallocated downward due to a reassignment of duties is not entitled to reduction in force rights. Also, these downward reallocations ordinarily have not been considered demotions which the State lacks the authority to impose on an employee.

17. At all times relevant herein, the Contract has contained the following relevant language:

> DEFINITIONS
>
> DEMOTION - the change of an employee from one pay grade to another pay grade 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 - the change of a position from one class to another class.
>
> REDUCTION IN FORCE - a reduction in the size of the work force due to a lack of work or otherwise pursuant to management rights.
>
> ARTICLE 2
>
> MANAGEMENT RIGHTS
>
> 2. Consistent with statutory authority the State may contract out work as provided in Paragraph 3 of this Article and may discontinue services or programs, in whole or in part. As a result of such discontinuance a permanent status employee who is laid off shall have reduction in force rights under Article 71.
>
> ... 3. A permanent status employee who, as a result of contracting out, loses his job will be deemed to have been reduced in force under Article 71, Reduction in Force...

4. The employer may determine that a reduction in force is necessary when a lack of work situation exists or in conformance with this Article.

5. ...With respect to any dispute under paragraphs 2, 3 and 4, the parties agree that... any disputes thereunder will be processed according to the grievance procedure.

ARTICLE 19
CLASSIFICATION REVIEW AND CLASSIFICATION GRIEVANCE

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 incorrectly classified and/or incorrectly assigned a 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...

ARTICLE 71

REDUCTION IN FORCE

... Section 6.

1. An employee with permanent status who would otherwise be laid off shall not be laid off provided:

a. There are within the employee's same agency or department positions at the same or lower pay grade which are vacant, which management intends to fill, and the employee about to be laid off meets the minimum qualifications and is able to perform the duties of these vacant positions.

... Section 7. REDUCTION IN FORCE RIGHTS (Recall Rights)

An employee with permanent status who has been officially notified he will be laid off shall have the following rights:

1. Beginning 30 days prior to the effective date of the reduction in force and continuing for two years from the effective date, the employee will have mandatory re-employment rights to any vacant classified bargaining unit position to be filled by State government, except positions in the State Police Unit, provided:

   a. such position is at the same or lower pay grade as the position from which the employee was laid off; and

   b. the employee meets the minimum qualifications for the position; and

   c. the employee has indicated a desire and willingness to accept a position having that location, pay grade and particular nature...

(Grievant's Exhibit 1)

18. The rules for personnel administration contain the following pertinent definitions:

2.038 SEPARATION is the termination of an employee from employment by the State through resignation, removal, dismissal, retirement or layoff.

2.0382 LAYOFF is an involuntary separation from a position of an employee whose service record has been adequate or better either by reason of a reduction of force due to lack of work or lack of funds, or by reason of discontinuance of the position as previously established

11.05 Demotion: An employee may be demoted at the discretion of the appointing authority for cause stated in writing to the employee or because of reduction in force (Joint Exhibit 1).

19. In the grievance filed in this matter at Step III, the step which is an appeal to the Department of Personnel and is the step prior to grieving to the Board, Grievant did not allege that the Employer had violated Article 2 of the Contract. At the Step III hearing, Grievant also did not allege that the Employer had violated Article 2 of the Contract (Grievant's Exhibit 22).

OPINION

Grievant first contends that she was entitled to reduction in force rights because a reduction in force occurred herein. We conclude that 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". Under the Contract, "lack of work" occurs "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".

Grievant contends that there was a reduction in force in that the work force was reduced by a lack of work since, by virtue of contracting out the work previously performed by Grievant, there was not enough work to allow staffing to continue with the additional program supervisor position which Grievant occupied. The work force was not reduced here due to lack of work or for any other reason. The downward reallocation of Grievant's position resulted in the size of the work force remaining constant, as Grievant continued working with the Employer, albeit at a lower pay scale. There was no "lack of work" here, just a redirecting of staffing to perform certain work (i.e. protective service work) rather than other work (i.e. direct supervision over the care of the mentally retarded adults).

Nonetheless, Grievant contends that even if the situation here was not a reduction in force, the language of Article 2 of the Contract makes it clear that Grievant was entitled to reduction in force rights. Article 2 provides that "(a) permanent status employee who, as a result of contracting out, loses his job will be deemed to

have been reduced in force under Article 71, Reduction in Force". Grievant contends that this makes clear that an employee such as Grievant, who is not actually laid off, will be treated as though laid off and, accordingly, will be granted reduction in force rights.

We conclude that this issue is untimely raised. Article 18 of the Contract, Grievance Procedure, provides that a grievance shall contain "specific references to the pertinent section(s) of the contract... alleged to be violated". It further provides that if a grievance is not raised in a timely manner at Step III of the grievance procedure, "the matter shall be considered closed". This language mandates specific raising of issues when the grievance is first submitted or the right to raise the issue is waived. Grievance of Colleran and Britt, 6 VLRB 235, 259 (1983). At Step III, an earlier step of the grievance procedure, Grievant did not allege that Article 2 of the Contract was violated. Thus, the right to raise that issue has been waived.

Even if Grievant was not entitled to reduction in force rights, Grievant contends that she was improperly demoted. Grievant relies on the Board decision in Grievance of Hood and Mahar, 11 VLRB 64 (1988), to support this contention.

Grievant's reliance on Hood and Mahar is misplaced. Therein, the Board concluded that once the Governor issued an executive order transferring the grievants from one department to another department, the State was limited by the Personnel Rules to transferring the grievants to positions of the same pay grade. Id, at 73. The Board faulted the States in such circumstances for changing the grievants from positions of one pay scale to another pay scale for which a lower maximum rate of pay was provided. Id.

The holding by the Board in Hood and Mahar was limited to prohibiting the State from reducing employees' pay scales when they were transferred under circumstances similar to the grievants in that case. It was not intended to limit the State's right to downwardly reallocate a position under circumstances like this case where no transfer of an employee was involved.

The downward reallocation which occurred here technically was a demotion within the meaning of the Contract definition of "demotion" since Grievant was changed from one pay scale to another pay scale for which a lower maximum rate of pay was provided. However, unlike the situation in Hood and Mahar, supra, what occurred here was not an improper demotion in violation of the Contract and the Personnel Rules. Article 19 of the Contract clearly provides the State with the unilateral authority to reallocate positions downward, subject to challenge through a classification grievance. Experience under this Contract provision indicates that approximately 100 positions per year are reallocated downward and are not considered improper demotions. Ordinarily, including the circumstances of this case, a downward reallocation is not an improper demotion in violation of the Contract or the Personnel Rules. It is a demotion for "cause" pursuant to Section 11.05 of the Personnel Rules subject, of course, to challenge through a classification grievance. It is only in extraordinary circumstances such as existing in Hood and Mahar, supra, that a downward reallocation of a position results in the incumbent of the position being improperly demoted under the Contract and the Personnel Rules.

We need to correct one statement made in Hood and Mahar, supra. Therein the Board stated:

> Reading the provisions of Article 17 together with Section 11.05 of the Personnel Rules, an employee may be demoted involuntarily only due to a reduction in force. Id, at 73.

In so stating, the Board was mindful that Article 17 of the Contract, relating to disciplinary actions, had removed demotion as one of the steps in the progressive discipline ladder for disciplining employees for "just cause". Accordingly, the Board concluded that the provision in Section 11.05 of the Personnel Rules allowing for demotion for "cause" was not to be given effect since it had been superceded by the Contract. We hold to our view that disciplinary demotions are clearly prohibited. However, the demotion for "cause" provision still applies to downward reallocations. We note that this has no effect on the result in Hood and Mahar, supra, since the demotion of the grievants therein clearly was not for cause due to the requirement that their transfer must be to a position of the same pay grade. Id, at 73.

ORDER

Now therefore, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED that the Grievance of Sedney Ulrich is DISMISSED.

Dated this 2nd day of November, 1989, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Louis A. Toepfer, Acting Chairman

William G. Kemsley, Sr.

Catherine L. Frank