VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 91-18
JEAN LOWELL	)	

MEMORANDUM AND ORDER

At issue is whether the Labor Relations Board should grant the Request For A Stay Pending Appeal filed in this matter by the State of Vermont, Department of Personnel ("State"), on September 18, 1992. By such request, the State is seeking to stay, pending appeal by the State, the Board Order of August 20, 1992, 15 VLRB 291. In the August 20 decision, the Board concluded that the State discriminated against Jean Lowell ("Grievant"), based on her gender, in the classification review of her position. The Board ordered that: 1) the State conduct a full and non-discriminatory review of the classification and assignment to pay grade of Grievant's position; 2) the State provide Grievant with a complete, written explanation of the results of that review and an opportunity to correct factual errors; and 3) in the event the review results in Grievant's position being rated at a higher pay grade, Grievant shall receive back pay from the date the initial classification decision in this matter was effective (i.e., May 27, 1990).

The State has filed memoranda in support of its request for a stay. Grievant has filed memoranda in opposition to such a request. The Board considers the State's request for a stay pursuant to 3 VSA §1003, which provides that a Board order "shall not automatically be stayed pending appeal" and that the Board "may stay the order or any part of it."

In determining whether to grant a stay, we apply the following three-part test: 1) whether the party seeking the stay will suffer irreparable harm if the stay is not granted, 2) whether issuance of the stay will substantially harm the other party, and 3) by what result will the interests of the public best be served. Grievance of VSEA (Re: Post Assignments, 12 VLRB 30 (1989). VSCFF, AFT Local 3180, AFL-CIO and Vermont State Colleges, 11 VLRB 1 (1988). Affirmed, Unpublished Decision, Supreme Court Docket No. 87-224 (April 5, 1988).

Both parties have requested that the Board add a fourth prong to this three-part test. The parties request that we adopt the standard used in state and federal courts, in deciding a stay motion, of whether there is an adequate basis in law for disagreement with the lower court's ruling. This standard applies when a higher court is deciding whether to stay an order of a lower court. Here, the Board is deciding whether the Board's own order should be stayed. The standard which is applied by higher reviewing courts does not extend to the decision-making body whose decision is being appealed. Thus, we decline to add this fourth prong to the three-part test.

In applying the three-part test, we first review the respective contentions of the parties. The State contends that, if a stay is not granted, the State will suffer irreparable harm because it will be required to spend extremely scarce time, money and resources on a potentially unnecessary classification review at a time when State resources and revenues are extremely limited. The State also contends that there is a risk of future

litigation at additional expense to the State arising from this Board-ordered review. The State further maintains that there is a substantial question whether the State could recoup payments to Grievant if a stay is not granted, and the new review results in an upgrade, only to have the Supreme Court reverse the Board's Order.

On the other hand, the State contends that no harm will come to Grievant if a stay is granted since there is no guarantee that a new review will rate the position at a higher pay grade and, if it does, Grievant will receive full back pay with interest. Finally, the State contends that the public interest will best be served by the granting of a stay since there is a public interest in preserving scarce public resources against possibly unnecessary expenditures.

Grievant contends that the State's claim that a new classification review would waste scarce State resources is patently false and is belied by what Grievant terms is the State's "gross waste of public funds in this matter" in litigating this matter before the Board. Grievant contends that, in contrast to the "vast sums" which the State spent to litigate the matter before the Board and the perhaps even greater amount which may be spent in appealing the Board decision, the State would pay a fraction of that amount to conduct a new classification review. Grievant also contends that any alleged overpayment to Grievant as a result of a new classification review is speculative, and there is no evidence it would, or could, cause the State irreparable harm.

Grievant further contends that the State's claim that Grievant would not be harmed by a stay is without merit. Grievant contends that she has suffered from discrimination for two years in a position which was classified at pay grade 20 as a result of a discriminatory classification review and, if a stay is granted, will have suffered from discrimination for an event longer period until the Supreme Court decides the appeal. Finally, Grievant contends that the swift and effective elimination of discriminatory conduct by the State is most certainly in the public interest and outweighs the modest expenditure required by the Board order.

In applying the applicable test for determining whether a stay will be granted, we first discuss whether the State will suffer irreparable harm if the stay is not granted. We do not believe that any harm suffered by the State will rise to the level of irreparable harm. We recognize that the State will have to expend additional time, effort and monies to conduct a new classification review, even though the Supreme Court might later rule that such review was not required.

However, the fact that additional State resources will need to be expended is insufficient to rise to the level of irreparable harm. In VSCFF, Local 3180, AFL-CIO and Vermont State Colleges, supra, the Board considered whether to stay an order certifying the addition of adjunct faculty employed by the Colleges to the bargaining unit of full-time faculty, and certifying the union as the exclusive bargaining representative of the adjunct faculty. In deciding whether irreparable harm would result to the Colleges if a stay was not granted, the Board

concluded that the additional time and effort which the Colleges would have to expend to negotiate with the union concerning adjunct faculty did not rise to the level of irreparable harm, even though the Supreme Court might later rule that such bargaining was not required. 11 VLRB at 5. The amount of resources necessary to negotiate a collective bargaining agreement for a group of employees spread across four campuses substantially exceeds those necessary to conduct a classification review of one position. Thus, we conclude that the State has not demonstrated irreparable harm in this regard.

We reach the same conclusion with respect to other claims of irreparable harm by the State. The specter of additional litigation, stemming from this new review, raised by the State is mere speculation which cannot serve as the basis for granting a stay.

The issue whether the State could recoup payments made to Grievant as a result of a classification review placing her position in a higher pay grade is insufficient to demonstrate irreparable harm. The State's contention that there is a "substantial question" whether it could recoup payments is just an assertion without any support in the materials provided to us by the State. To say something is a "substantial question" does not make it so. We suggest that the parties explore ways to resolve the recoupment problem should it arise.

Moreover, in VSCFF, AFT Local 3180, AFL-CIO v. Vermont State Colleges, supra, the possibility obviously existed that the union would negotiate pay increases and increased benefits for the

adjunct faculty. 11 VLRB 6. Yet, this was insufficient to result in granting the Colleges' request for a stay, even though the Supreme Court might later rule that bargaining was not required. Id. Thus, the fact that an employee ultimately may receive a wage increase stemming from a Board order, which possibly could be reversed, is insufficient to demonstrate irreparable harm to a public employer.

In sum, requiring the State, pending appeal, to conduct a classification review of Grievant's position, which may result in a wage increase for her, does not rise to the level of irreparable harm to the State.

On the other hand, we believe that issuance of the stay will substantially harm Grievant. The classification review of Grievant's position at issue on appeal occurred more than two years ago. Thus, since the Board concluded that the State discriminated against Grievant based on her gender in conducting the review, Grievant has suffered from discrimination for a lengthy period. She is entitled to a non-discriminatory classification review of her position without further delay. The fact that she can be made whole for any lost wages at the conclusion of the appeal and subsequent review does not overcome the substantial harm caused by the ongoing discrimination.

Finally, we determine by what result will the interests of the public best be served. We conclude that the public interest in effective enforcement of mandates against discrimination based on gender outweighs the general public interest in the chance that public monies unnecessarily may be spent by a new classification review.

Moreover, the public interest in prudent spending of scarce State resources should best be served by denying the State's request for a stay. An inordinate amount of resources already have been expended in the proceeding before the Board on a case which should have been informally resolved if reasonableness and common sense prevailed. The requirement to conduct a new classification review pending appeal provides the parties with another opportunity to resolve this matter and expend substantially less resources than inevitably will be expended if the appeals process runs its entire course. Surely, the public interest is better served by creating the potential for a satisfactory resolution of differences with a modest expenditure of public funds than by ensuring an expensive appeal on an issue which should have been informally resolved if reasonableness and common sense carried the day.

Now therefore, based on the foregoing reasons, it is hereby ORDERED that the State of Vermont, Department of Personnel's Request For A Stay Pending Appeal of the Order issued by the Labor Relations Board on August 20, 1992, in the Grievance of Jean Lowell is DENIED.

Dated this 29th day of October, 1992, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Louis Toepfer, Acting Chairman

Catherine L. Frank

Leslie G. Seaver