VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF JAMES HARRISON, from decisions of the Vermont Department of Labor & Industry, pursuant to Personnel Rules and Regulations 1.01, 3.03, 6.073.	DOCKET NO. 79-6S

FINDINGS OF FACT, OPINION AND ORDER

Statement of the Case

On February 13, 1979 the Vermont State Employees Association (hereinafter "VSEA") filed a grievance on behalf of James Harrison from a Step Two Decision by the Department of Labor & Industry dated December 14, 1978 and a Step Three Decision by the Department of Personnel dated January 12, 1979. The State filed an answer to the grievance on March 5, 1979.

A hearing was held on the matter on April 26, 1979. Chairman Kimberly B. Cheney, Member William G. Kemsley, Sr., and Member Robert H. Brown were present for the Board. The grievant was represented by Alan S. Rome, Counsel for the VSEA, and the State was represented by Bennett E. Greene, Assistant Attorney General.

FINDINGS OF FACT

1. The VSEA is the exclusive bargaining representative for the non-management unit of State employees. James Harrison, the grievant is a member of the non-management unit.

2. The Board takes judicial notice of the Non-Management Unit Agreement between the VSEA and the State as well as the Rules and Regulations for Personnel Administration promulgated by the Department of Personnel.

3. James Harrison has been employed by the State for eight years. He is presently a child support enforcement specialist in the Agency of Human Services. His position is classified at Pay Scale 11. During the fall of 1978 Mr. Harrison's weekly salary was $273.00. His annual salary was $14,196.

4. In the fall of 1978 James Harrison applied for the position of wage investigator with the Department of Labor & Industry.

5. At the time James Harrison applied for the opening, the position of wage investigator was classified at Pay Scale 11 which pay scale has a salary range of $185.50 per week to $276.00 per week. At some time after the opening was filled, the position was reclassified to Pay Scale 12 which has a salary range of $197.00 to $294.00.

6. In September 1978 the Commissioner of the Department of Labor & Industry, Joel R. Cherington, asked his business manager, Jeff Fothergill, how much money the Department of Labor & Industry had available to pay a wage investigator. Mr Fothergill informed Commissioner Cherington that the total annualized salary available for the position of wage investigator was $12,456. On April 5, 1979 Mr. Fothergill submitted a memo to Mr. Cherington setting forth the manner in which he had arrived at this salary figure based on the funding appropriated to the agency by the 1977 Legislature, subsequent pay act increases and the salary that the department was already paying to another wage investigator. (State's F & G)

7. On August 31, 1976 the Department of Labor & Industry submitted a budgetary request for personal services for the department's administration for fiscal year 1978/79 to the Legislature. One of the line items on that request was for two wage investigator positions at Pay Scale 11. The total budget request for these two positions was $18,850. (State's G)

8. By Public Act 247, Section 37, the Adjourned Session of the 1977 Legislature appropriated $170,468.00 to the Department of Labor & Industry administration for personal services. (Grievant's 3, Page 3)

9. On October 19, 1978 Commissioner Cherington submitted a hiring certificate request for the position of a wage investigator to the Department of Personnel. He indicated on his request that he wished to fill the position by either an agency promotion or by an open competitive appointment.

10. The Department of Personnel returned the hiring certificate of candidates eligible for appointment to the Department of Labor & Industry with a list of names of eligible candidates including a list of 17 candidates under the heading of State Promotional and six candidates under the heading of Open Competitive (State's I)

11. The person ultimately hired, Judy Chapman, was not on the hiring certificate.

12. The hiring certificate represented a list of names of candidates who were minimally qualified for appointment to the position of wage investigator. It included the names of 10 candidates who were being restored (i.e. who have been separated without prejudice from State service within the past two years and were seeking re-employment by the State) and 10 candidates who had taken a competitive exam.

13. Candidates who are transfers are usually listed on the certificate in the order in which their requests are received by the Department of Personnel; candidates who have taken the open competitive exam are listed in the order of their exam scores.

14. None of the candidates listed under the heading of State Promotional on the certificate were interviewed. Three of the six candidates listed under Open Competitive were interviewed.

15. No candidates within the Department of Labor & Industry who were minimally qualified for the position of wage investigator appeared on the certificate as it was typed up by the Department of Personnel.

16. In the fall of 1978 Judy Chapman was employed by the Department of Labor & Industry. On August 29, 1977 while employed as a steno C for the Department of Labor & Industry, she submitted an application for the position of administrative assistant to the Department of Personnel indicating her desire for advancement. Her application was updated on September 1, 1978.

17. After the hiring certificate was received by the Department of Labor & Industry, a request to certify the eligibility of Judy Chapman for the position of wage investigator was submitted to the Department of Personnel. The Department of Personnel certified that Judy Chapman was eligible for the position and her name was hand written in at the bottom of the certificate.

18. On October 30, 1978 the Commissioner of Labor & Industry appointed Judy Chapman to the position of wage investigator.

19. James Harrison, the grievant, was never interviewed for the position of wage investigator. On November 13, 1978 he telephoned the Department of Labor & Industry and was informed by Jeannine Wood that he had not been selected for the position because his salary was too high.

20. Commissioner Cherington's reasons for not hiring James Harrison are set forth in Paragraph 7 of Commissioner Cherington's Findings of Fact which resulted from the Step Two hearing in the above-entitled grievance. His reasons are as follows:

> "James Harrison was considered for appointment to the position of wage investigator by the Commissioner of Labor & Industry. The Commissioner of Labor & Industry did not appoint James Harrison and others similarly situated because he and others would, under the employment contract, be required to be paid substantially above the minimal annual salary associated with the position of wage investigator. In addition, Mr. Harrison and others similarly situated were not appointed to the position of wage investigator because they would not, under the employment contract, be required to serve a probationary period upon their employment by the Department of Labor & Industry."

21. There are two positions for wage investigators within the Department of Labor & Industry. One position has been consistently filled for the past two years and the incumbent is presently paid a salary of $10,842 per year. The second position had been vacant for over a year prior to the appointment of Judy Chapman.

OPINION

I

Non-Merit Factor Discrimination

Grievant argues that the Commissioner of Labor & Industry discriminated against him by utilizing non-merit factors, the amount of the salary to be paid and the fact he would not be on probationary status, when he refused to consider him for appointment to the position of wage investigator.

Section 5.03 of the Personnel Rules and Regulations (hereinafter "Regulations"), implementing 3 V.S.A. §310 states in pertinent part:

> "Discrimination against any person in connection with recruitment, examination, appointment, training, promotion, retention, or any other personnel action because of race, national origin, or any other non-merit factors, or political or religious opinions or affiliations is prohibited."

We interpret this rule to mean that prohibited "discrimination" occurs if any proscribed fact bears on the appointing authority's decision, be it sex, race, religion or non-merit factors. Thus, there is no requirement in order to prove a violation, to establish that grievant has been treated differently than others. We are required, then, to determine in the first instance whether salary requirements or probationary status are "non-merit factors".

We do not find grievant's argument persuasive that discriminatory, non-merit factors violative of Regulations §3.03 were connected with the Commissioner's appointment decision. The Commissioner's stated reasons for not appointing or even interviewing a transfer (State Promotional candidate) were two-fold: First, under Section 6.073 of the Regulations, the Department of Labor & Industry would have been required to pay a transfer the same salary which the employee was receiving elsewhere in the classified service; and second, under Section 10.06 of the Regulations a transfer is exempt from serving a six month probationary period. Prior to requesting a hiring certificate from the Department of Personnel, the Commissioner determined the maximum salary limit the Department could afford to pay a wage investigator based on its budget and its appropriations for administrative personal services from the Legislature. The salary which grievant was receiving from the Social Welfare Department exceeded the Commissioner's maximum salary limit by approxi- $1,740 per year.

Grievant has raised certain factual issues with regard to the validity of the Commissioner's decision as to the maximum salary his department could afford to pay a wage investigator. We make no finding with regard to these issues since in our opinion the Commissioner was well within his authority under 3 V.S.A. §207(a) to fix the compensation of employees in his department based on the department's budget. This Board is not inclined to review

budgetary decisions which are matters of managerial discretion. Absent a showing that a decision was made for the sole purpose of discriminating against the grievant as an individual, we must assume that the decision was based on legitimate financial considerations relating to the soundness and efficiency of the Department's operations. We, therefore, do not find that the grievant was discriminated against under Section 3.03 of the Regulations when he and other transfers were eliminated from consideration for the position on the basis that their current salaries already exceeded the maximum salary available for the position. That being so, we need not consider the effect of the rule placing transfers in a non-probationary status and the Commissioner's refusal to consider the grievant for that reason. We note in passing, however, that the rule may prevent transfers from being appointed by a less candid person than Commissioner Cherington and may not be best for the merit system as a whole.

In short, we agree with the State that the salary factor is neither a merit factor - one related to the ability to perform, nor a non-merit factor - one related to considerations prescribed by rule. It is a crucial factor which is legitimate for management to consider and not one prohibited by 3 V.S.A. §310, or Regulations §3.03.

II

Discrimination Based on Application of Law or Rule

A finding that Section 3.03 was not violated does not, however, end our inquiry. Mr. Harrison filed a grievance which is statutorily defined as:

> "Grievance," means an employee's, group of employees', or the employee's collective bargaining representative's expressed dissatisfaction, presented in writing, with aspects of employment or working conditions under collective bargaining agreement or the discriminatory application of a rule or regulation, which has not been resolved to a satisfactory result through informal discussion with immediate supervisors. 3 V.S.A. §902(14) (emphasis added)

Because, as we explain below, we believe Mr. Harrison has been the subject of the "Discriminatory application of a rule" . . . we believe the Legislature intended that he be given some relief.

Our starting point is Section 9.01 of the Personnel Regulations which provides in pertinent part:

> Chapter 9 Certification of Names from a Register
>
> 9.01 Request for Certification: When a classified position becomes vacant or when a new position is established and such position is to be filled by competitive procedures, a request for certification shall be submitted to the Commissioner on a prescribed form. Upon receipt of such request, the Commissioner will certify from the appropriate register the names of available persons having the three highest qualifying scores, . . . Candidates eligible for re-employment, transfer, demotion or restoration will be certified without scores as appropriate.

And Section 11 provides in pertinent part:

> 11.01 Method of Making Promotions: As far as is practicable and feasible, a vacancy shall be filled by promotion of a qualified employee based upon individual performance, as evidenced by recorded performance evaluation reports, and capacity for the new position.
>
> 11.011 A candidate for promotion must be certified by the Director to possess the qualifications for the higher position set forth in the specifications for the class of position.
>
> 11.03 Promotion by Noncompetitive Examination: If it is determined by the agency to fill a vacancy by a noncompetitive examination, an employee proposed for promotion shall be examined by the Director in accordance with Section 11, subsection 11.02 of these rules and regulations and, if found to qualify for the class, shall be so certified by him. An inter-agency promotion shall not be made through noncompetitive examination.
>
> 11.04 Promotion by Administrative Action: If an appointing authority elects to fill a vacancy by the promotion of a qualified and eligible employee of the agency by administrative action, he shall certify to the Director that the employee has been selected for promotion on the basis of performance evaluation reports maintained over a substantial period of time. The Director shall then certify whether or not the employee designated for promotion meets the minimum requirements for the higher class of position.

Three main features of these Regulations, as applied in this case, are apparent:

(1) Under Section 9.01 to fill a vacant classified position (rather than a new position), the appointing authority must request, on a prescribed form, "certification" of candidates.

(2) On the prescribed form referred to in Section 9.01, the appointing authority can indicate whether he wishes to fill a vacancy by: State promotion, open competitive appointment, or agency promotion. The form apparently gives the appointing authority a choice as to which categories of candidates will appear on the certificate. In fact, he does not have a choice, since under the last sentence of Section 9.01, the Personnel Department is required to include on the list candidates who are eligible for transfer, demotion, restoration or re-employment. Thus, as in this case, even though Commissioner Cherington indicated on the form that he did not wish to fill the vacancy by State promotion, he received a certificate with the names of transfers the Personnel Department administrators considered eligible for State promotion, whom he had already determined he would not hire.

(3) Even if the appointing authority indicates on the prescribed form that he wishes to fill the vacancy through agency promotion, the Department of Personnel interprets its own rules in such a way that it is not required under Section 9.01 to list such candidates on the certificate. These promotions, the Department says, may be made under Section 11.01 or 11.04 by passing Section 9.01 altogether. Thus, although Commissioner Cherington indicated that he wished to fill the vacancy through agency promotion, and there was an eligible employee within his agency who had notified the Department of Personnel of her desire to be promoted, the Department of Personnel did not list her on the original hiring certificate.

When applied to the grievant, we believe that these rules, their interpretation and administration, placed him in a classification "wholly unrelated

to the objective of the [personnel] statute": In Re Barcomb 132 Vt. 225, 232 (1974). He was, therefore, discriminated against, or more accurately, denied the equal protection of the laws because there was no rational basis, given the purpose of the personnel rules, to place him in the class of persons he found himself in.

One of the purposes of the Regulations as set forth in Section 1.01(4) is: "To promote efficiency and high morale among State employees." We do not believe that the term high morale as it is used in this context should necessarily be interpreted colloquially to mean the promotion of "confident", "enthusiastic", "loyal" mental attitudes among individual employees. (cf. Webster's New Collegiate Dictionary, Eighth Edition) We do believe, however, that like the term "efficiency", "high morale" is related in this context to fostering the general goal of promoting employee "effectiveness" referred to in 3 V.S.A. §309(a)(4). This goal is to be obtained by, among other means, certifying to an appointing authority a list of "eligible" candidates. See Regulations, Section 9.01.

In an ultimate sense, however, the grievant was not "eligible" for appointment. The salary the Department of Labor & Industry would have had to pay him exceeded what the Department's budget could afford. Informing a candidate that he is eligible for an opening when there is no realistic possibility that he will be considered at all raises false expectations and subjects the candidate to potential embarrassment and loss of job efficiency in his present position due to the knowledge that he is seeking employment elsewhere. The Department of Personnel has a duty to certify candidates who are truly eligible. If transfers are to be considered, information concerning salary limits for the position is crucial.

In addition the broad rule of Section 9.01 that vacancies will be filled from the list is swallowed up by department use of the "administrative" promotion route of Section 11.01 or 11.04. Section 9.01 would appropriately lead grievant to believe that only candidates whose names appeared on the original hiring certificate were eligible. But the name of the candidate who was selected to fill the vacancy did not appear on the original certification list.

The grievant is thus placed in a position which discriminates against him. Unlike agency promotional and open competitive applicants, he is placed on a list certified as eligible, when in fact he is not and Section 9.01 would lead him to believe the appointment would be from among those on the list, when in fact it was not.

After carefully reviewing the Regulations relating to the hiring process, as applied to grievant, we find a hiring process contrary to the overriding purpose of departmental rules to promote "high morale". The process was also contrary to the Commissioner of Personnel's statutory duty under 3 V.S.A. §310(e) to prescribe rules governing appointments and promotions which are consistent with her duty under 3 V.S.A. §309(a)(5) to encourage "effective personnel administration".

The situation which was created in this case inevitably results in an employee whose name is on the original hiring certificate inferring that the rules governing the hiring procedure are a sham which can be manipulated at the whim of the appointing authority or the Department of Personnel in order to allow the promotion of an insider or preselected candidate. For all these reasons, we believe the grievant has been discriminated against and his grievance should be allowed.

REMEDY

Having come to the conclusion that Mr. Harrison has a valid grievance we must now turn our attention to the proper remedy. We do not believe that the remedy requested by the grievant, creating a vacancy in the position of wage inspector in the Department of Labor & Industry, is warranted. The initial appointment of Judy Chapman did not violate the principles of the merit system as set forth in 3 V.S.A. §312. Her appointment was consistent both with the statutory mandate to fill vacancies from within the classified service under 3 V.S.A. §327(8) and with the statutory definition of merit principles contained in 3 V.S.A. §312(a) which includes the concept of "promotion contingent on evaluated capacity in service". Her promotion is the preferred method of filling vacancies. See Regulations, Section 11.01. Furthermore, unlike the Arizona case of Finger v. Beamus 480 P.2d 41 (Ariz. App. 1971) cited by the grievant, there is no requirement either by law or regulation that her name be on the original hiring certificate. Finally, since in the state of the record now before us, grievant himself is not actually eligible since the salary which he had required to be paid prevents his employment, it would be fruitless to declare the position vacant and open to new hiring procedures. And we are aware of the realities that the appointing authority could validly, and probably would, reappoint Judy Chapman to the position if he is satisfied with her work. Thus declaring the position vacant would only recreate the sham and misleading inferences we here find constitute a grievance.

Nevertheless, we believe we have both the duty and the authority to fashion a remedial order to bring the employer's actions in conformity with the purposes of the statutes governing personnel administration.

We believe our authority to be analogous to that of an arbitrator selected under a collective bargaining agreement. Although it is true that the parties did not agree by collective bargaining to appoint this Board as a final and binding grievance arbitrator, the Legislature has done so in their stead; and because of equal access by the parties to Legislative process, we do not view this fact as crucial. In any event, the Legislature has established this Board and given it the authority to "hear and make final determination on the grievances of all State employees". 3 V.S.A. §926. We believe this statute, like §301(a) of the Labor Management Relations Act, 29 U.S.C. §185 authorizes this Board, and the Vermont Supreme Court through the appellate process, to fashion a body of law for the enforcement of collective bargaining agreements and administrative rules relating to personnel administration incident to the grievance procedure. See Textile Workers v. Lincoln Mills 353 U.S. 448, 1 L.Ed.2d 972 (1957).

The United States Supreme Court has recognized that arbitrators need flexibility in fashioning remedies but that an arbitrator does "not sit to dispense his own brand of industrial justice". Instead an award must "draw its essence" from the contract. See United Steel Workers of America v. Enterprise Wheel & Car Corp. 363 U.S. 597,4 L.Ed 2d 1424 (1960).We have accordingly looked for guidance to federal decisions under §301(a) which review the propriety of an arbitrator's award. We are inclined toward the view expressed in Local 369, Bakery & Confectionary Workers International Union of America v. Cotton Baking Company, Inc. 514 F.2d 1235 (1975).

> "The arbitrator must also be left free to decide more than which party is right or which party is wrong. Having found a contract violation, he must fashion a remedial order to bring the parties' actions in conformity with the contract and make reparation for past infringements."

We have considered an award for monetary damages to the grievant, but there is no evidence introduced to support such an award, and from the nature of the case we do not foresee that grievant could have suffered any actual monetary loss. Had we agreed fully with the grievant the most he would be entitled to is the transfer from one job to another with the same pay, tenure rights, and contract benefits.

Some courts have held that if there are no actual damages, only nominal damages may be awarded. See Brotherhood of Trainmen v. Denver & Rio Grande Western Railway Company 338 F.2d 407 (1964). Other courts hold that an arbitrator's award including "punitive" damages is sustainable if it is "reasonable in light of the findings of the arbitration board". See Sheet Metal Workers International Association v. Helgesteel Corp. 335 F.Supp. 812 (1971). We suggest, without deciding, that this is the sounder rule.

An award of punitive damages in this case would have as its primary purpose creating an incentive to the Personnel Commissioner not to discriminate in the future against persons in grievant's position. However, there is nothing in this record, or other cases before us, which leads us to believe such an incentive is necessary. Nor is such an award justified on this record to make "reparations" to the VSEA itself. Rather, we prefer to assume, unless shown otherwise, that the Commissioner will carry out her statutory responsibilities under 3 V.S.A. §309(a)(5), and (6) and remedy whatever defects exist consistent with this opinion.

ORDER

For the foregoing reasons it is hereby ORDERED:

1) The grievance of James Harrison be allowed; and

2) The Personnel Commissioner investigate the operation and effect of the Personnel Rules governing filling of vacant positions in the classified service and, after consultation with the Vermont State Employees Association, promulgate such amendments to Personnel Rules as may be necessary in light of this opinion no later than December 1, 1979.

Dated this 12 day of July, 1979, at Montpelier, Vermont

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney, Chairman

William G. Kemsley, Sr.

Robert H. Brown

FILED 7/12/79 mjf

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF JAMES HARRISON DOCKET NO. 79-6S

AMENDMENT TO BOARD ORDER

The Board pursuant to 3 V.S.A. §924(b) hereby amends the Order, dated July 12, 1979, by striking Paragraph 2 thereof, and substituting in its place the following:

2) The Personnel Commissioner shall not:

(a) Certify any "state promotion" candidates pursuant to Rule 9.01 unless she has previously determined that the appointing authority has sufficient funds to pay that individual's salary; or

(b) Advise, or lead appointing authorities to believe, by use of the form prescribed under Rule 9.01, or otherwise, that she/he may fill a vacancy by choosing either state promotion, open competitive appointment, or agency promotion; or

(c) Fail to list agency promotional candidates on the certification list.

Dated this 13th day of September, 1979 at Montpelier, Vermont.

Kimberly B. Cheney, Chairman

William G. Kemsley, Sr.

Robert H. Brown

Appealed to S.C.
Appeal dismissed by
Stip.
8/27/81