

**VERMONT LABOR RELATIONS BOARD**

GRIEVANCE OF: )  
 ) DOCKET NO. 97-41  
ARLENE CERUTTI )

## FINDINGS OF FACT, OPINION AND ORDER

### **Statement of Case**

On July 7, 1997, the Vermont State Employees' Association, Inc. ("VSEA") filed a grievance on behalf of Arlene Cerutti ("Grievant") against the State of Vermont Department of Agriculture ("Employer"), alleging that the Employer had violated Sections 11.01 and 11.02 of the State of Vermont Rules and Regulations for Personnel Administration ("Personnel Rules and Regulations"), the "Promotions" policy contained in the Employer's Employee Handbook, the Employer's Non-Discrimination and Affirmative Action Policy, and Article 5 of the collective bargaining agreement between the Employer and the VSEA for the Non-Management Bargaining Unit ("Contract"). Specifically, Grievant alleged that the Employer violated these provisions when it failed to promote her to the position of Account Clerk B.

Hearings were held on December 4 and 11, 1997, in the Labor Relations Board hearing room in Montpelier before Board Members Catherine L. Frank, Chairperson; Carroll P. Comstock and John J. Zampieri. Assistant Attorney General David Herlihy represented the Employer. VSEA Legal Counsel Samuel Palmisano represented Grievant. Grievant and the Employer filed post hearing briefs on December 30 and 31, 1997, respectively.

## FINDINGS OF FACT

1. Section 11.01 of the Personnel Rules and Regulations provides in pertinent part as follows:

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 Commissioner to possess the qualifications for the higher position set forth in the specifications for the class of positions.

...

2. The Employer's "Promotions" policy contained in its Employee Handbook states in pertinent part:

### Promotions

It is the department's policy that, when practical and feasible, a vacancy will 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. (Grievant's Exhibit 2)

3. Article 5 of the Contract states in pertinent part:

### 1. **NO DISCRIMINATION . . .**

In order to achieve work relationships among employees, supervisors and managers at every level which are free of any form of discrimination, neither party shall discriminate against . . . any employee because of . . . sex . . .

### 2. **AFFIRMATIVE ACTION PROGRAMS**

It shall be a goal and an objective of the State to develop and implement positive and aggressive affirmative action programs to redress the effects of any discrimination and to prevent future discrimination in personnel actions which affect bargaining unit personnel . . .

4. The Employer has posted a "Policy Statement on Non-Discrimination

and Affirmative Action" since at least November 20, 1995, signed by Department Commissioner Leon Graves, which states in pertinent part:

The Vermont Department of Agriculture, Food and Markets is committed to non-discrimination in employment and I personally, and as it's Commissioner, am committed to an affirmative action program to overcome imbalances in the department workforce for any under-represented group of people, within an equal employment opportunity (EEO) category . . .

With this in mind, the following Policy is established:

. . .

The Vermont Department of Agriculture, Food and Markets will include, as appropriate affirmative action, efforts to recruit, select, train, and promote, any person from an under-represented group within an EEO category

. . .

(Grievant's Exhibit 3).

5. Grievant graduated from Johnson State College in 1989 with a Bachelor of Arts degree in Business Management. She took accounting courses as an undergraduate. In 1988, Grievant started working for the State of Vermont Department of Labor and Industry. In 1990, she transferred to a position with the Employer as a Secretary B in its Dairy Division. Grievant has remained in that position until the present.

6. As a Secretary B, Grievant's job duties include data entry of various reports, answering the telephone, and using a computer database, spreadsheets and word processing programs.

7. Grievant passed her probationary period as a Secretary B in September 1990 and received an overall rating of "consistently meets job

requirements/standards". She also received overall "satisfactory" performance evaluations for the performance years September 1990 - September 1991, and September 1992 - September 1993 (Grievant Exhibits 7, 8, 9).

8. Grievant received an overall "excellent" performance rating for the performance year September 1994 - September 1995. The following year, September 1995 - September 1996, Grievant's supervisor, Ina Lamphear, wanted to give Grievant another "excellent" performance evaluation, but was told by her superiors that excellent performance evaluations should not be given. Lamphear opted not to give Grievant a written performance evaluation at all for that year. This resulted in Grievant receiving a presumptive overall performance rating of "excellent" under Article 12 of the Contract. Lamphear noted the following under "Reviewer's Comments" in Grievant's 1994 - 1995 performance evaluation:

Arlene is doing an excellent over-all job and she is an excellent employee. Arlene deals well with the public, is very pleasant to work with, and always has a smile. Arlene is a hard worker and needs very little supervision. Arlene is a an asset to the Dairy Division. The majority of Arlene's work is data entry. Arlene should try for an upgrade to Data Entry Clerk (Grievant's Exhibit 6).

9. Deputy Commissioner Ken Becker also noted the following under "Appointing Authority Comments" in Grievant's 1994 - 1995 performance evaluation:

Arlene quietly goes about her duties without complaint. The dairy division was given added responsibilities without any additional resources this summer to carry out the rBST labeling law. All members pitched in to answer phone calls, order labels and print notices. Arlene's contributions to this effort are greatly appreciated (Grievant's Exhibit 6).

10. Grievant never received comments in any of her written performance

evaluations regarding problems or complaints with respect to her taking telephone messages accurately (Grievant Exhibits 6, 7, 8, 9)

11. In September 1996, Rudolph Polli became the Employer's Business Manger/Personnel Officer. Polli has a degree in chemistry and has worked in various positions for the Employer for approximately 27 years.

12. Shortly after Polli became the Business Manger/Personnel Officer, the Administrative Assistant reporting to Polli accepted a promotion to another department in State government. There were two account clerk positions in the business office, an Account Clerk A and an Account Clerk B. Dennis Parker was the Account Clerk B. Parker was promoted to the Administrative Assistant position. As part of a state-wide reduction in force, the Account Clerk A position was eliminated. After Parker became the Administrative Assistant, Polli recruited internally for the Account Clerk B position, a Pay Grade 13. Polli did not have an accounting background and was anxious to fill the position as soon as possible.

13. The class specification for the Account Clerk B position defines the position as: "(e)lementary accounting work at a sub-professional level of responsibility in maintaining bookkeeping and accounting records through the application of accounting theory and practice." The minimum qualifications include an "Associate degree with a major in accounting or business administration" with no work experience, or a high school diploma and three years of appropriate clerical work experience (Grievant's Exhibit 10).

14. Grievant applied for the Account Clerk B position. She was the only "in-house" candidate (Grievant's Exhibit 13).

15. Polli told Grievant that, if the Department of Personnel determined that she was eligible to compete for the position, he would interview her for the position. Polli requested that the Department of Personnel advertise the job outside the Department as an open-competitive position so that he would have the maximum number of candidates from whom to choose. The Department of Personnel advertised the Account Clerk B position outside the Department (Grievant's Exhibit 11; State's Exhibit 1).

16. After a position is advertised outside a department, the Department of Personnel reviews candidates' applications and determines which candidates are eligible to compete for the position by comparing their experience and education to the class specifications of the advertised job. It places eligible candidates' names on a Hiring Certificate. If candidates are required to take a skills exam, the individual's score is noted on the Hiring Certificate. The Hiring Certificate is sent to the hiring department or agency (State's Exhibit 1).

17. On or about April 2, 1997, the Department of Personnel sent Polli the Hiring Certificate accompanied by the eligible candidates' employment applications and resumes. It also notified Polli and Grievant that it had determined that Grievant was eligible to compete for the Account Clerk B position provided that she pass an accounting skills examination. There were 21 eligible candidates for the Account Clerk B position. Candidates on the Hiring Certificate had attained exam scores ranging from 75 to 99 (Grievant's Exhibit 11; State's Exhibit 1).

18. Deputy Commissioner Becker selected a hiring panel to interview candidates. The panel included himself, Polli, and the former Account Clerk B,

Parker. Polli reviewed all 21 applications and selected five candidates to interview. Becker and Parker reviewed the applications and agreed with Polli's decision. Polli selected Grievant, and applicants Kathryn Vanone, Tara Putnam, Jerry Richardson and Michael Holmes (State's Exhibit 1).

19. Grievant contacted the Department of Personnel to arrange to take the accounting skills examination and informed Polli that she had done so. Interviews were scheduled for all candidates, except Grievant.

20. Grievant took the written examination on the morning of April 9, 1997, and was notified immediately that she had passed the exam with a score of 96, the third highest score of eligible candidates. Grievant immediately informed Polli of her test results, and he scheduled her interview for later that day. Except for Grievant, all interviewed candidates had at least a day's notice to prepare for the interview (Grievant's Exhibit 12).

21. Applicant Kathryn Vanone did not have a college degree. At the time of the interview she was a Pay Grade 15, Financial Technician/Account Clerk B at the Department of Education. The Department of Personnel had not required her to take the accounting skills exam (Grievant's Exhibit 16).

22. Tara Putnam had attended college but did not have a college degree. She had taken college computer software and programming courses. At the time of the interview, Putnam was an Account Clerk B at the Department of Employment and Training. She also had not been required to take the accounting skills exam (Grievant's Exhibit 17).

23. Jerry Richardson did not have a college degree. He had taken various

bookkeeping, typing and data processing courses. At the time of the interview, Richardson was an Account Clerk A at the Agency of Transportation. He had been required to take the accounting skills examination, and had received a score of 90 (Grievant's Exhibit 18).

24. Michael Holmes had graduated from the University of Vermont in May 1996 with a B.S. in Business Administration with a concentration in accounting. He had held two temporary accounting positions since his graduation from college. At the time of the interview, he was employed as a Temporary Accountant A with the Department of Public Safety. He had been required to take the accounting skills examination and had received the highest score, 99 (Grievant's Exhibits 14, 15).

25. The interview panel generally asked all candidates the same questions. Candidates were asked why they wanted the job, what their strengths and weaknesses were, if they had computer skills and if they had accounting experience. Parker explained the duties of the Account Clerk B position. The panel did not ask candidates about specific accounting methods and procedures.

26. Grievant did not have a good interview. She was hesitant and Becker occasionally had to encourage her to answer questions posed to her. Grievant appeared to be unprepared to explain why she wanted the job. She hesitated and finally said "partly because of the money" or words to that effect. She did not hesitate when asked what her strengths were; she immediately stated "speed and accuracy." Grievant hesitated in stating her weaknesses when asked; this was because she was uncomfortable in pointing out her weaknesses to a hiring panel. Because of her discomfort, Grievant initially stated that she did not have any weaknesses. This was



in an effort to make a joke and to break the tension. She finally stated that filing was a weak point and, if there was something else she had to do, the filing "could wait". In response to a question about future plans, Grievant stated that she liked where she was and had no plans to take a high level position because it was more important to like a job (Grievant's Exhibit 23).

27. Becker took notes during the interviews. On the notes he took during Grievant's interview, Becker wrote "procrastination!" regarding her response that filing was a weak point. He also noted that Grievant had "no motivation!" (Grievant's Exhibit 23).

28. Becker had interviewed numerous candidates in his role as the Deputy Commissioner and was troubled by Grievant's interview. After the interview, he gathered some materials for her, including a video on interviewing skills, and at some point offered to assist her in developing her interview skills.

29. Becker and Polli recalled that there had been a few complaints that Grievant had taken telephone messages inaccurately. They did not ask her about this or give her an opportunity to respond to this criticism.

30. Polli was a new personnel officer and was under the impression that he could not review personnel records because of confidentiality concerns. None of the candidates' performance evaluations were reviewed, including Grievant's evaluations. Both Becker and Polli were aware that Grievant had received excellent performance evaluations. Parker had no knowledge of Grievant's performance evaluations.

31. The panel interviewed Holmes on April 10, 1997. All panel members

felt that Holmes' interview went the best of all the candidates. They felt that he showed self-assurance because he did not hesitate in answering questions; he volunteered information about his knowledge of accounting methods and procedures and accounting courses that he had taken in college. Holmes admitted in this interview that his telephone skills were his weak point. On the notes he took during Holmes' interview, Becker wrote that Holmes's answer in this regard was "honest". Holmes stated that his strength was his organizational skills, and Becker noted with regard to this statement that Holmes "knew his strengths and weaknesses". Becker also noted that Holmes seemed "ambitious" (Grievant's Exhibit 24).

32. Each panel member rated all the candidates and compared ratings. All agreed that Holmes was the number one candidate. They rated Grievant as the number five, or last, candidate (Grievant's Exhibit 22).

33. Polli chose Holmes because he had a recent Bachelor of Arts degree, and was working in a temporary position at another State agency in a higher level position than the Account Clerk B position. He did not know if Holmes had experience with the State's financial systems, but he knew he had experience working with various financial systems. Becker chose Holmes because he had a recent degree and had training and experience as an accountant, as well as a variety of computer experience beyond data processing. Becker also thought Holmes was motivated because he had professional goals and had worked in professional positions. Parker rated Holmes number one because of his job experience and knowledge.

34. Polli rated Grievant last because she was hesitant and strained during

the panel interview. Becker rated Grievant last because of her performance during the interview and because he did not believe that she could perform the job. Becker and Polli also took into consideration the reported inaccurate telephone messages *referenced in Finding of Fact No. 29. Parker rated Grievant last because of her lack of accounting experience and because he felt she had not responded to questions well during the panel interview.*

35. The candidates' gender was not taken into consideration by the panel in making their decision.

36. During the relevant time period, the Department employed 83 people, 30% of whom were women. Women traditionally have been under represented at the Department. *During the two years preceding the hiring of Holmes, two men and five women had been hired, five men and two women had been promoted and seven men and five women had their jobs reclassified (Grievant's Exhibit 21).*

37. On April 14, 1997, Polli notified Grievant by letter that she had not been selected for the Account Clerk B position. He sent an office E-mail that same day stating that Holmes had been selected for the position (Grievant's Exhibits 19, 20).

#### MAJORITY OPINION

Grievant contends that the Employer violated Sections 11.01 and 11.02 of the Personnel Rules and Regulations, the "Promotions" policy contained in the Employer's Employee Handbook, the Department of Agriculture's Non-Discrimination and Affirmative Action Policy, and Article 5 of the Contract. Grievant did not pursue her contention that the Employer had violated Section 11.02

in her post-hearing brief, and we limit our analysis to the remaining allegations. We address each issue in turn.

#### Section 11.01 and Promotions Policy

Grievant claims that the Employer violated Section 11.01 of the Personnel Rules and Regulations because it failed to take her written performance evaluations into consideration upon deciding not to promote her to the position of Account Clerk B. Section 11.01 of the Personnel Rules and Regulations states in pertinent part: "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." The Personnel Rules and Regulations are implicitly embedded in the contract as past practices unless explicitly altered by the contract. Grievance of Lehoullier, 19 VLRB 294, 300 (1996). Grievance of Allen, 5 VLRB 411, 417 (1982).

The Employer acknowledges that it did not take Grievant's written performance evaluations into consideration. The Employer contends that it was not practicable or feasible to promote Grievant because she did not have the capacity for the position, and the Employer selected the most qualified candidate. The Employer also contends that Grievant was not harmed by the failure to review performance evaluations because Grievant's evaluations were of limited relevance to the position and could not be compared to the other evaluations of the other candidates who did not work for the Employer.

Section 11.01 requires the Employer to take into account "recorded performance evaluations" and "capacity for the position" when making promotional decisions concerning employees who have been certified to "possess the qualifications" for the position. The Employer violated this section by not taking into account Grievant's performance evaluations when deciding whether to promote her.

The Employer contends that it would not have been practicable or feasible to promote Grievant because she did not have "the capacity for the new position" as required by Section 11.01. We disagree that Grievant did not have the capacity for the Account Clerk B position. Subsection 11.011 of the Personnel Rules and Regulations provides that a "candidate for promotion must be certified by the Commissioner to possess the qualifications for the higher position set forth in the specifications for the class of positions." The Department of Personnel reviewed Grievant's educational and work experience and certified that she possessed the requisite qualifications to take the accounting skills exam to be eligible to compete for the position. Grievant then attained a high score of 96 on the accounting skills exam.

Further, an Account Clerk B performs "elementary accounting work at a sub-professional level of responsibility" and is not required to have any experience if the candidate has an Associate degree with a major in accounting or business administration. Grievant more than met the minimum qualifications for the position given that she has a Bachelor of Arts degree in business management. Also, Grievant had several years experience with the Employer, a factor of some significance in

determining her capacity for the position. In sum, the Department of Personnel's certification of Grievant as qualified for the position, her high score on the exam, her educational background and her years of experience with the Employer demonstrate that she possessed the capacity for the new position.

The Employer also contends that Grievant was not harmed by the failure to review recorded performance evaluations because Employer selected a candidate with qualifications superior to hers. In support of this contention, the Employer relies on an earlier Board decision in which the Board found that the employer had violated Section 11.01 by its failure to review recorded performance evaluations in making a promotional decision, but found that the grievant had not been harmed by the violation because another candidate had a superior written performance evaluation. Grievance of Lehoullier, 19 VLRB 294, 302 (1996). This case is readily distinguishable from Lehoullier. Unlike the situation in Lehoullier, here no evidence exists comparing the performance evaluations of the respective candidates for the position.

We also reject the Employer's contention that Grievant was not harmed by the failure to review performance evaluations because Grievant's evaluations were of limited relevance to the position and could not be compared to the evaluations of the other candidates who did not work for the Employer. Performance evaluations address many facets of an employee's performance, including but not limited to work habits, quality of work, attitude, and ability to work under stress. It is apparent that

the intention of Section 11.01 is to ensure that State employees who have demonstrated excellent performance are given the opportunity for professional advancement by mandating that employing departments take such evaluations into consideration when vacancies can be filled by promotion. Further, the Department reaffirmed its obligation to review such performance evaluations in filling vacancies by promotion by substantially restating the pertinent section of Section 11.01 in its Employee Handbook.

As a State employee with excellent performance evaluations and capacity to perform in the position, Grievant should have benefited from these provisions, but did not due to the Employer's failure to take her performance evaluations into account and other actions. In fact, Grievant appeared to be at a disadvantage as an in-house candidate. Grievant was given only a few hours to prepare for her panel interview, whereas all other candidates from outside the Department had at least a day's notice to prepare. This lack of notice did not help her performance at the interview. In addition, two members of the interview panel took into consideration a recollection that Grievant may have made a few errors in taking telephone messages, but gave her no opportunity to defend herself against this consideration.

The other candidates, all of whom the interview panel rated higher than Grievant, were placed in a superior position to Grievant. They were given more time to prepare for their interviews and panel members did not use unproven information against them in rating their candidacy. Also, notes taken by one member of the interviewing panel, Deputy Commissioner Becker, indicate that unfair negative inferences were attributed to Grievant's comments compared to comments of Holmes

in his interview. For example, Becker criticized Grievant for admitting her weakness and praised Holmes for coming forward with his weakness. In short, Grievant received no benefit from her position as a qualified in-house candidate with excellent recorded performance evaluations, and appeared to have been disadvantaged.

If we were to accept the Employer's contentions in this matter, such a result would be contrary to the expressed intent of Section 11.01 to promote qualified employees, based upon demonstrated performance and capacity for the position, as far as is practicable and feasible. We conclude that Grievant would have been promoted into the Account Clerk B position if the Employer had not violated Section 11.01. We recognize that she did not have a good interview, but this shortcoming should not have outweighed the express intent of Section 11.01 to promote qualified employees.

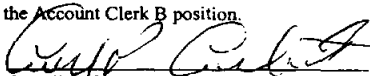
In cases where contractual violations or violations of rules and regulations occur during promotional processes, the proper remedy is to make aggrieved employees whole by placing them in the position they would have been in had the violations not occurred. Grievance of Lehoullier, 19 VLRB 294, 302 (1996). Grievance of Kirby, 16 VLRB 158, 194 (1993). In applying this standard, Grievant is entitled to be placed in the Account Clerk B position she was inappropriately denied in April 1997.

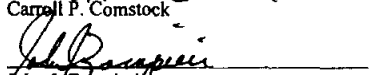
#### Article 5 and Affirmative Action

Given our conclusion, there is no need to discuss in detail Grievant's further contentions that the Employer's decision to not promote her violated Article 5 of the Contract, which provides that the State shall not discriminate against an employee



because of sex, and violated the Employer's Affirmative Action Policy. Suffice it to say that Grievant has not established that the Employer discriminated against her due to her gender in not selecting her for the Account Clerk B position.

  
Camell P. Comstock

  
John J. Zampieri

#### DISSENTING OPINION

I agree with my colleagues that the Employer violated Section 11.01 of the Personnel Rules and Regulations by its failure to review Grievant's performance evaluations while considering her for the position of Account Clerk B. However, I disagree with the conclusion that Grievant was harmed by the Employer's failure to do so. Her past performance evaluations addressed her performance in the job of Secretary B. They spoke to how well she performed the duties of that position; they did not add insight as to how well she could perform the quite different duties of an Account Clerk B other than to affirm that she was a responsible and diligent worker.

Other factors besides past performance evaluations were critical components in evaluating the ability of each candidate to successfully fulfill the job of Account Clerk B. These included educational experience, on the job accounting experience, a variety of computer skills and experience, as well as interpersonal skills of communicating with co-workers. Grievant was ranked last of five candidates by the interview panel. Her accounting experience clearly was inferior to the other candidates. Two of the candidates already were Account Clerk B's and one was an

Account Clerk A. The fourth candidate had a bachelor's degree in Business Administration with a concentration in Accounting. In contrast, Grievant had taken a few accounting course in college but never used the skills learned in those courses.

It is speculative for this board to conclude that Grievant was among the best qualified persons for the job simply on the basis that the Employer failed to consider her past job performance evaluations. The interview process apparently revealed candidates with stronger communications skills. Given that the successful candidate was rated first by all members of the hiring panel and Grievant was rated last of the five candidates by all members of the hiring panel, I cannot conceive how consideration of her past evaluations could have overcome her last place rating and moved her from fifth to first place in the overall ratings. In short, I disagree with the majority's determination that Grievant would have been promoted if the Employer had not violated Section 11.01.

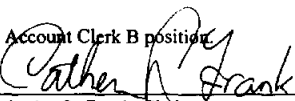
The procedural flaw of not considering the written evaluation of past performance would be more significant if Grievant's evaluations could be compared with evaluations of multiple candidates. It certainly would have been significant if Grievant was a close second as perceived by the consensus of the hiring panel or if the panel had been divided in its assessment. None of these circumstances, however, are present in this case. To substitute our judgment for that of a hiring panel due to a procedural flaw, making the last placed candidate the first and skipping over three other state employees, is an inappropriate use of Board authority, and creates more inequalities than it resolves.

Further, I disagree with my colleagues' interpretation of Section 11.01 of the

Personnel Rules and Regulations. They conclude that, because the Department of Personnel reviewed Grievant's educational and work experience and determined that she was eligible to compete for the Account Clerk B position when she passed the accounting test, Grievant then was entitled to the job regardless of the specific needs of the Account Clerk B position in this particular circumstance and regardless of the qualifications of other candidates. The Personnel Department's determination spoke to Grievant meeting the minimum standards for eligibility, not to the ultimate determination that she was the best person for this particular position.

The language of Section 11.01 does not directly state that an employee must be promoted above all others if she meets the minimum qualifications. Rather, it includes several qualifying phrases - "as far as is practicable and feasible", "a qualified employee based upon individual performance", and "capacity for the new position". No reader could reasonably conclude that these words guarantee that a minimally qualified employee has a right to a particular position without consideration of any other candidate or qualities and needs unique to a particular position.

I also conclude that Grievant does not prevail on her claim of sex discrimination. I concur with the majority view that Grievant has not established that the Employer discriminated against her due to her gender or violated its affirmative action policy in not selecting her for the Account Clerk B position.

  
Catherine L. Frank, Chairperson

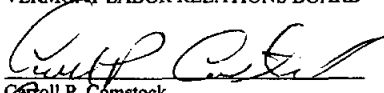
FINAL ORDER

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

- 1) The Grievance of Arlene Cerutti is SUSTAINED;
- 2) The State of Vermont Department of Agriculture shall immediately promote Grievant to the position of Account Clerk B consistent with this opinion and award her back pay and benefits from the date she was denied the promotion to the date she is promoted; and
- 3) The interest due Grievant on back pay shall be computed on gross pay and 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 she was denied the promotion, and ending on the date she is promoted.

Dated this 5<sup>th</sup> day of March, 1998, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

  
Carroll P. Comstock

  
John J. Zampieri