

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:

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DOCKET NO. 15-23

JESSICA LANG

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FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On May 21, 2015, the Vermont State Employees' Association ("VSEA") filed a grievance with the Vermont Labor Relations Board on behalf of Vermont Agency of Transportation employee Jessica Lang ("Grievant") contending that the State of Vermont ("State") violated Article 47 of the collective bargaining agreement between the State and the VSEA, effective July 1, 2014 to June 30, 2016, for the Non-Management Unit ("Contract") by failing to provide Grievant with higher assignment pay.

A hearing was held in the Labor Relations Board hearing room in Montpelier on January 28, 2016, before Board Members Richard Park, Acting Chairperson; Alan Willard and Edward Clark, Jr. VSEA General Counsel Timothy Belcher represented Grievant. Senior Assistant Attorney General Michael Duane represented the State. The parties filed post-hearing briefs on February 11, 2016.

FINDINGS OF FACT

1. Article 47 of the Contract provides in pertinent part:

**HIGHER ASSIGNMENT PAY**

1. An employee who, in the absence of an incumbent, is assigned by the appointing authority:
  - (a) To perform a majority of those duties of the higher level job which are substantially different from his or her own duties; or
  - (b) To assume the responsibilities of a higher level supervisory or managerial job without any substantial change in duties; shall, commencing with the fifth consecutive workday . . . in which the employee actually worked a

full shift, be eligible for higher assignment pay, retroactive to the first day worked.

2. Effective July 5, 1992, the amount paid shall be a differential rate equal to the same rate as the “rate on promotion” in the Salary article. In no case shall it exceed the maximum or be less than the minimum of the pay grade of the higher level position.
3. An employee’s overtime category shall not change when working in this status.
- ...
4. The position must be at least one (1) pay grade higher than the employee’s own pay grade.
- ...

(Joint Exhibit 1)

2. Grievant has been an Information Technology (“IT”) Specialist, Level II, for the Agency of Transportation Finance and Administration Division since 2010. This is a Pay Grade 23 position. The Finance and Administration Division includes an IT section. There is an Enterprise Infrastructure Support Unit within the IT section. Grievant and Karen Willey were part of that unit and under the immediate supervision of IT Systems Administrator Jason Boyd (Pay Grade 27). Both Boyd and IT Manager I Jim Wood (Pay Grade 28) reported to IT Manager III Thomas Hurd (Joint Exhibit 11, pages, 43, 47).

3. The job specifications for the IT Specialist II position held by Grievant has provided at all times relevant:

**Class Definition:** Technical work providing support for the operation of large and small computer and telecommunications systems, all operating systems, hardware configurations and network connections for a department or agency of Vermont State Government. Incumbents in this class are expected to perform assignments with a high degree of independent action and may provide some instruction or assistance to entry level specialists. This class is the second of three classes in a series and is considered to be the fully-functioning operations specialist. Work is performed under the supervision of an administrative or technical supervisor.

**Examples of Work:** Works with department and unit staff to establish optimal solutions to computing or telecommunications problems and performs the design of technical solutions. Designs new computer applications and modifications to existing systems. Installs and analyzes operating systems, network configurations, communications and software. Responsible for in-house computer system or network including development

of applications and system maintenance. Reviews and recommends technical purchases. Responds to user problems and works with users on problem definition and solutions. Performs hardware and software evaluations. Executes security provisions in accordance with established procedures. Provides reports as assigned. Performs related duties as required.

...

(Joint Exhibit 8)

4. Willey held the position of Network Administrator III. This was a Pay Grade 26 position. The job specifications for Network Administrator III provided at all times relevant:

**Class Definition:** Technical work at a senior level of responsibility providing support for the operation of large computer and telecommunications systems, hardware configurations and network connections for a department or agency of Vermont State Government. Class incumbents may function as the supervisor or team leader of focused work groups on a regular basis. Class incumbents should be technical experts in the field and will be required to deal with both management and other technical employees to solve major technical problems. Supervision of subordinate Network Administrators may be required. Work is performed under the general supervision of an administrative or technical supervisor.

**Examples of Work:** Develops optimal solutions to major computing or telecommunications problems and performs the design of technical solutions. Responsible for design, implementation, and maintenance of a large Local Area Network (LAN), multiple LANs, or a Wide Area Network (WAN). Presents technical data and information to a wide range of publics including non-technical groups. Prepares technical proposals on configurations and solutions. May provide technical support in the advancement of proposals through management or the legislature. Acts as liaison within and outside of government as part of the technical decision making process. May negotiate with vendors. Performs related duties as required.

...

(Joint Exhibit 9)

5. Although Willey's position title was Network Administrator III, she was not performing certain aspects of this position such as dealing with hardware issues. Instead, she was performing the duties of an IT Specialist III, which dealt more with software issues, at all times relevant to this grievance. An IT Specialist III performs identical work to that of an IT Specialist II, and performs the following additional responsibilities: 1) technical expert in one or more fields or technologies; 2) IT representative on agency or technical steering committees, 3) team

leader or supervisor for technical projects or units; 4) compiling technical research and development of recommendations including risks and budget resource requirements, and 5) responsibility for major project's research, scope definition, design, implementation and support. An employee can be an IT Specialist III without performing supervisory duties (Joint Exhibit 6).

6. In early 2014, Lang started reporting directly to Willey, and Willey reported to Jason Boyd. Grievant's and Willey's desks were close together. They interacted on a daily basis. Willey assigned tasks to Grievant at times; at other times Grievant worked independently. Willey kept most of her work to herself without involving Grievant (Joint Exhibit 11, page 49).

7. Willey suddenly and unexpectedly went on a leave of absence beginning on July 14, 2014. Willey never returned from her leave of absence and resigned effective February 15, 2015. During Willey's absence from July 14, 2014, through February 15, 2015, her position remained vacant.

8. During the seven-month period of Willey's absence, Grievant performed all the duties expected of her as an IT Specialist II, and she also assumed many tasks Willey would have been performing. Many of these tasks were unfamiliar to Grievant when she assumed these new responsibilities. Grievant worked some overtime during this period for which she received compensatory time.

9. On July 24, 2014, Hurd met with Boyd and Wood. They decided that Wood would oversee the work previously performed by Willey. They decided that Grievant would cross-train two other staff in the IT section, Richard Couture and Dylan Covington, to learn how to do some of the duties previously done by Willey and Grievant. Couture and Covington both were in the position of IT Specialist III (Joint Exhibit 11, page 44).

10. Wood and Boyd met subsequently on July 24, 2014, with their staff, including Grievant. They informed Grievant that she would continue to perform her same duties and, in addition, would assume some of Willey's duties. They also informed her that she would cross-train Couture and Covington.

11. During the period of Willey's absence, Grievant continued to report directly to Boyd. She worked closely with Wood on some projects.

12. During the period of Willey's absence, Grievant acted as the primary administrator and technical expert for McAfee ePolicy Orchestrator, a virus scanning administrative console; and 2) Backup Exec, an administrative console for creating, editing, and monitoring all backup jobs. These were duties that Grievant had not previously performed, that required learning on her part, and which had previously been done by Willey (Joint Exhibit 12, p. 3-7).

13. Grievant acted as team leader on the McAfee upgrade in Willey's absence. Willey would have performed this work. This required research to ensure the upgrade was performed correctly, attending the McAfee Upgrade Project Committee meetings to provide updates on the program, implementing the upgrade, and providing support to users. If Willey had been present, Grievant would have been involved in just implementing the upgrade and providing support to users, and Willey would have performed the other functions involved in the upgrade (Joint Exhibit 12, p.6-7).

14. In Willey's absence, Grievant took the lead on a project requiring a migration of files from the G: drive to the Z: drive on Backup Exec. Willey would have performed this work. This required research to determine the best way to move the files and how to backup and restore files, meeting with units of the Agency of Transportation to schedule the move and discuss folder

structure, and performing testing of backup/restore jobs. Grievant worked on the G: drive move project with Jim Wood. Grievant was responsible for aspects involving security, while Wood dealt with storage issues (Joint Exhibit 12, p.1-2, 9-17).

15. Willey previously had worked with a vendor on this migration project. Grievant realized in doing research on the project that she would be able to do the necessary work on the project without a vendor. She presented this information at a meeting, resulting in the vendor not being hired and Grievant performing the work. This saved the Agency of Transportation approximately \$3,200.

16. Grievant trained IT Specialist III Dylan Covington on how to properly manage McAfee within the Agency of Transportation. Grievant trained IT Specialist III Richard Couture on how to manage Backup Exec within the Agency. Subsequently during this period, if Grievant had too much work, she would ask Covington and Couture to perform work in these areas (Joint Exhibit 12, p.7).

17. Prior to training Covington and Couture during this period, Grievant had not trained other employees.

18. In Willey's absence, Grievant took the lead on researching a new anti-exploit feature of Malwarebytes which would prevent a user from being redirected to a malicious website. She determined that this was a valuable product for the Agency and presented her findings to the McAfee Committee and Boyd. After it was determined that the product should be purchased, Grievant contacted a vendor, solicited the price quote from the vendor, and presented it to Boyd for approval. She then implemented the new anti-exploit feature of Malwarebytes. Prior to Willey's absence, Grievant was not required to contact vendors. Willey had contacted vendors (Joint Exhibit 12, p. 7, 19-39).

19. During Willey's absence, Grievant was an IT representative on the Active Directory Technical Steering Committee, the Backup Technical Steering Committee, and the McAfee Upgrade Project Committee. Grievant had been on the first two committees during the period Willey was working, but Grievant had not been on the McAfee Upgrade Committee. Willey had served on this committee (Joint Exhibit 12, p.7).

20. Grievant answered questions on technical matters from her co-workers during Willey's absence that Willey previously would have answered (Joint Exhibit 7; Joint Exhibit 12, p. 3 – 7).

21. Grievant performed no supervisory responsibilities over employees in Willey's absence.

22. In July of 2014, Lang learned of the provisions of the Contract concerning higher assignment pay. She believed she was qualified to receive it, and discussed the issue with Boyd. On July 31, 2014, Boyd sent Grievant an email which provided:

I just wanted to follow up on our conversation from this morning.

As discussed Higher Assignment Pay was not deemed appropriate in this situation as the majority of the tasks of Karen's that you have taken on in her absence fall under Level II of the Decentralized Reallocation Chart of the IT Specialist series of positions. Everyone here does appreciate the fact that you have stepped up and volunteered to do these tasks in Karen's absence and that it has resulted in increased effort and time on your part as well as a shuffling of priorities...for which you are being compensated when it results in overtime. We have also brought together a team of people to assist going further in these areas so that the Agency's interests are protected (not having "all our eggs in one basket"). In Karen's absence, Jim Wood is the technical lead of many of Karen's areas of expertise as he has a historical background, knowledge, and experience in managing these areas himself.

We also discussed that there does continue to be the opportunity for you to take on additional responsibilities over time and for you to become the technical lead in these areas. While it won't happen overnight, there are steps you can take now and in the future to further your development in this position. Many of these responsibilities are coming to you as a result of Karen's absence.

- Reach out to McAfee and Backup Exec contacts to determine training resources that are available
- Schedule and lead steering committees on topics such as WSUS, McAfee Upgrade, McAfee HIPS deployment, Backup Exec
- Perform and document research, analysis, risks and make recommendations on potential Backup Exec upgrade
- Perform and document research, analysis, risks and make recommendations on upcoming McAfee EPO upgrade

Performing and excelling at these duties will help to ensure that you become the technical expert in these areas and will help prove your case when it comes to applying for the IT Specialist III upgrade.  
(Joint Exhibit 5)

23. VSEA filed a Step II grievance on Grievant's behalf on August 22, 2014, contending that she was entitled to higher assignment pay in Willey's absence. The grievance was denied on September 24, 2014. VSEA filed a Step III grievance. John Berard, Director of Labor Relations of the Department of Human Resources, denied the grievance on April 20, 2015 (Joint Exhibits 2, 3).

### OPINION

The issue in this grievance is whether the State violated Article 47 of the Contract by failing to provide Grievant with higher assignment pay during the period that Karen Willey, Grievant's supervisor, was absent from work from June 2014 to February 2015. Grievant would be entitled to higher assignment pay pursuant to Article 47 if she was "assigned by the appointing authority . . . to perform a majority of those duties of the higher level job" held by Willey "which are substantially different from" Grievant's "own duties".

Grievant contends that she warrants higher assignment pay because she performed the majority of the duties of Willey's higher level job in her absence which were substantially different from Grievant's own duties. The State asserts that the grievance should be dismissed



because Grievant has not proven that she was assigned and performed a majority of the duties of the higher level job, and that she performed a majority of those higher level job duties which were substantially different from her own duties.

The Board has had occasion to previously interpret this language. In a 1993 decision involving the same pertinent contract provision, the Board determined that four Maintenance Workers of the Agency of Transportation “performed a majority of the duties of Bridge Mechanics . . . which were substantially different from their own duties as Maintenance Workers” for a portion of a summer construction season. Grievance of Bagley, et al, 16 VLRB 448, 466. Such duties were the skilled bridge construction and repair responsibilities of Bridge Mechanics. These duties constituted more skilled work than the unskilled and semiskilled duties required of Maintenance Workers in assisting in bridge construction and repair work. Id. The Board concluded that the employer violated the contract by not granting higher assignment pay to employees in these circumstances. Id. at 469.

Thus, Grievant would prevail in this case if the preponderance of the evidence establishes that she performed a majority of the duties of Willey as IT Specialist III which were substantially different from her own duties as IT Specialist II during Willey’s absence from July 2014 to February 2015. We conclude by a preponderance of the evidence that Grievant has met this contractual standard for entitlement to higher assignment pay.

Although much of the work performed by an IT Specialist II and IT Specialist III is of the same type, an IT Specialist III performs the following additional responsibilities: 1) technical expert in one or more fields or technologies; 2) IT representative on agency or technical steering committees, 3) team leader or supervisor for technical projects or units; 4) compiling technical research and development of recommendations including risks and budget resource

requirements, and 5) responsibility for major project's research, scope definition, design, implementation and support.

Grievant performed work in these areas of responsibility of Willey in Willey's absence which were substantially different from her own duties. Grievant acted as the primary administrator and technical expert for McAfee and Backup Exec software programs, duties that Grievant had not previously performed and which had previously been done by Willey.

Grievant acted as team leader on the technical project of the McAfee upgrade in Willey's absence, work which would have been performed by Willey. In performing this work, Grievant was an IT representative on the McAfee Upgrade Project Committee. Willey had previously served on this committee instead of Grievant.

Grievant also took the lead on technical research and the other necessary work on the security aspects of a project requiring a migration of files on Backup Exec, work which also would have been performed by Willey. Technical research which Grievant performed on the project resulted in her making a recommendation that a vendor previously used on the project was not needed. Her recommendation was accepted, saving the State money. This work rose to a level of IT Specialist III work substantially different from Grievant's own duties as an IT Specialist II.

Her IT Specialist III- type role as a primary administrator, technical expert and team leader with respect to these significant projects is reflected in her training of two higher-level staff to be able to properly manage McAfee and Backup Exec within the Agency of Transportation. This was substantially different than her own duties as an IT Specialist II as she had not previously trained other employees.

Further, the work Grievant performed in Willey's absence on the new anti-exploit feature of Malwarebytes reflects the additional responsibilities of a IT Specialist III different from Grievant's own duties as a IT Specialist II. This is demonstrated by her comprehensive work of researching the product, recommending its purchase, dealing with the product vendor, and then implementing the new feature.

In sum, Grievant performed substantial duties in Willey's absence covering most of the areas of additional responsibilities performed by the position of IT Specialist III held by Willey which were substantially different than the duties Grievant performed as an IT Specialist II. One significant duty performed by Willey which was not assumed by Grievant was supervisory responsibilities. This is not fatal to Grievant's claim of higher assignment pay because an employee can be an IT Specialist III without performing supervisory duties. On balance, we conclude by a preponderance of the evidence before us that Grievant performed a majority of the duties of Willey as IT Specialist III which were substantially different from her own duties as IT Specialist II during Willey's absence.

Thus, Grievant is entitled to higher assignment pay during the period of Willey's absence. We note that our decision is limited to the circumstances of this case as presented to us.

### ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered:

1. The Grievance of Jessica Lang is sustained;
2. The State of Vermont Agency of Transportation shall provide Grievant with back pay, plus interest at 12 percent per annum, pursuant to Article 47, Higher Assignment Pay, for performing the majority of the duties of higher level employee Karen Willey

which were substantially different than her own duties during the period of Willey's absence from July 14, 2015, to February 15, 2015; and

3. Such payment shall be made within 30 days of the date of this final order.

Dated this 22nd day of March, 2016, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Richard W. Park

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Richard W. Park, Acting Chairperson

/s/ Alan Willard

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Alan Willard

/s/ Edward W. Clark, Jr.

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Edward W. Clark, Jr.