VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 82-74
BERT SMITH	)	

OPINION AND ORDER

This matter is before the Board as an appeal from a decision of the Classification Panel pursuant to Article 17 of the collective bargaining agreement between the State of Vermont and the Vermont State Employees' Association ("VSEA") effective July 1, 1982 - June 30, 1984 ("Contract").

On September 22, 1982, Bert Smith ("Grievant") was verbally informed by Commissioner David Wilson of the Vermont Department of Social Welfare that his position as head of the Welfare Fraud Division was being reclassified downward from Pay Scale 21 to Pay Scale 19. On October 15, 1982, Department of Personnel Commissioner Jacquel-Anne Chouinard informed Grievant that the official Notice of the action relevant to his position provided:

> The class Social Welfare Support and Fraud Division Director is retitled Welfare Fraud Section Chief and reassigned to PS-19. Only position SW-26 is involved. The class retains class code 5015. The position remains in OT-18 and retains a management-level designation. The former class title, Social Welfare Support and Fraud Division Director is abolished.

On October, 18, 1982, Grievant filed a grievance over this action to the Classification Panel. Although Grievant is a classified manager not covered under the provisions of the Contract, the State agreed Grievant's right of appeal lay in Article 17 of the Contract, and Grievant's appeal was reviewed pursuant to that article.

The State and Grievant agreed to dispense with the tripartite classification panel provided for by the Contract and the case was heard by Panel Chairman Alan Weiss on November 23, 1982. Mr. Weiss issued Findings of Fact, Opinion and Order on December 8, 1982, in which he set aside the State's claim the classification panel had no jurisdiction over the case. In a decision on the merits issued December 20, 1982, Mr. Weiss denied the grievance.

Grievant filed an appeal from Mr. Weiss' decision with the Board on December 27, 1982, asserting that the decision was arbitrary and capricious in applying the factors listed in Article 17, Section 4, of the Contract. On January 4, 1983, the State cross-appealed from Mr. Weiss' opinion only insofar as the Classification Panel Chairman found the Panel had jurisdiction to hear the grievance. On May 3, 1983, VSEA applied for Intervenor Status in this matter. On May 19, 1983, the Board granted VSEA's application for intervention pursuant to Section 11.7 of the Board's Rules of Practice.

Oral argument was held before the full Board on August 11, 1983. Grievant appeared pro se. Special Assistant Attorney General Michael Seibert represented the state. VSEA was represented by Staff Attorney Michael Zimmerman. Each of the parties have filed memoranda in support of their respective positions. Board Members William G. Kemsley, Sr., has not participated in this decision as he was ill at the time the matter was deliberated.

The first issue is whether the Board has jurisdiction to review the Panel Chairman's ruling that the Panel had jurisdiction to review the

grievance. Grievant and VSEA assert the State is barred from raising that issue on cross appeal either because the issue of the Panel taking jurisdiction cannot be appealed from pursuant to Article 17, Section 7 of the Contract or because Article 17, Section 7, allows only employees to appeal a decision of the Classification Panel. Article 17, Section 7 provides:

> The decision of the Classification Panel shall be reviewable by the Vermont Labor Relations Board (VLRB) only on the question of whether the Panel was arbitrary and capricious in applying the factors listed in Section 4 or on a claim that the Panel's decision discriminated against an employee within the meaning of Article 8. In any such case the parties intend that the Board shall not conduct a de novo hearing but shall base its decision on the whole record of the proceeding before the Classification Panel. The parties waive judicial review of any such decision of the VLRB.

Section 4 of Article 17 provides:

> The Classification Panel shall base its decision in a grievance seeking upward reallocation on whether there was a substantial addition to significantly higher-level job duties, or in a grievance protesting downward reallocation, on whether there was a substantial shift to significantly lower-level job duties during the one-year period preceding the date of filing the grievance, measured by the following factors:
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> a. Knowledge, skills and abilities required for job performance, including a special degree, certification or licensing requirement;
> b. Variety and complexity of duties;
> c. Responsibility for independent action;
> d. Responsibility for managerial and/or supervisory functions;
> e. Effort and work conditions;
> f. Consequence of error; and
> g. Accountability.
>
> The burden shall be on the grievant to establish that the decision of the Personnel Department in denying the grievance was arbitrary and capricious or had no evident rational basis.

Article 8 is not at issue here.

We believe we have jurisdiction to determine whether the Panel has properly taken jurisdiction under this language. It is evident the parties intended the Board to oversee the performance of the Panel and it would be arbitrary and capricious for the Panel to take jurisdiction it did not have. The Panel would be "arbitrary and capricious in applying the factors listed in Section 4" of Article 17 if it applied those factors when it did not have jurisdiction to do so.

Also, we reject the view that only statutorily defined "State employees" may appeal, excluding the State from that process. Nowhere in Article 17 is the right of appeal limited to employees. It is conceivable management may have a question whether the Panel was arbitrary and capricious in applying the factors listed in Section 4 in cases where the Panel has upheld grievances seeking upward reallocation or protesting downward reallocation, and in cases like the one before us where the State contends the Panel did not have jurisdiction to hear the grievance.

We turn now to whether the panel had jurisdiction. At issue is the definition of a classification grievance. Article 17, Section 1 provides:

> A classification grievance is defined as a dispute over whether the position of an individual employee or the positions of a group of employees should be reallocated from one class to another existing class upward at the employee's request or downward at the request of management. Nothing in this Article shall be deemed to prevent management from exercising its unilateral authority to reallocate a position into a different class or to assign a class into a different pay scale or to use a point factor rating system or any other statutory requirement regarding position classification.

The Contract defines the relevant terms in this section as follows:

> Class - one or more positions sufficiently similar as to the duties performed, degree of supervision exercised or received, minimum requirements of training, experience, or skill, and such other characteristics that the same title, the same test of fitness, and the same pay scale may be applied to each position.

> Reallocation - change of a position from one class to another class.
>
> Reassignment - the change of a class from one pay scale to another pay scale.

The State contends the Panel did not have jurisdiction over this grievance because Grievant's class was reassigned from Pay Scale 21 to Pay Scale 19, and Section 1 does not permit grievances over reassignment.

The Panel Chairman's rulings on the issue of jurisdiction are reasonably clear. In his December 8, 1982, decision, which related exclusively to the matter of jurisdiction, the Panel Chairman retained jurisdiction, stating in part:

> A decision to have the panel accept jurisdiction of the case would sustain Mr. Smith's due process rights... A decision to have the panel accept jurisdiction of the case would not by itself establish a precedent as the merits of the grievance will be based exclusively and solely on the content, intent and processes as established in Article 17.

In assuming jurisdiction, Mr. Weiss was merely concluding he had authority to determine whether Article 17 was violated in Grievant's case, thus preserving Grievant's due process rights while reserving judgment on the merits. Clearly, it was within the Panel Chairman's authority to determine whether Article 17 was violated, and he thus correctly concluded he had the authority to resolve the dispute.

In turning to the merits of the issue, the Panel Chairman concluded Smith's claim was not meritorious in his December 20, 1982, decision on the merits, and stated:

> In summary, the grievant... requested that a reversal of the action of state personnel be reversed by reclassifying position SW-26 to PS-21. It is the conclusion of the chairman that: 1. The remedial action sought was not appropriate. The grievant failed to substantiate a claim his was indeed a case of reclassification not reassignment...

3. The grievant did not present a case showing how the Department of Personnel was arbitrary and capricious.
4. The matter of whether or not there was a reduction of job duties in the preceding year indicated there was not a reduction of duties. However, that factor by itself does not allow a decision in favor of Grievant.

We cannot tell precisely on what the Panel Chairman's decision was based. It is apparent the Panel Chairman attempted to resolve the case within the definitions of the concepts of persons being "reallocated" or "reassigned". This effort is dictated by the words of the contract, but to do so the overall purpose of this provision must be kept in mind, namely to determine that individuals are appropriately compensated for the work they do unless an entire group of similarly-situated workers are involved. It is apparent to us that attempting to fit the definitions to this case is impractical because of the unique nature of Grievant's situation of being in a one-position class. He could logically be considered either reallocated or reassigned. It is evident the contractual scheme was intended to apply to situations other than a one-position class.

The parties attempt to fit the contractual definitions of "reallocation" and "reassignment" to the situation here, where neither concept is appropriate and neither brings this unique case within the purpose of Article 17. This has resulted in a tautology, taking on the character of logomanchy.

We look to the intent of Article 17 as a whole to guide us. It is evident the intent of the parties was to provide employees whose job duties are changed and whose pay is subsequently reduced a limited right to grieve to the Classification Panel. The Panel determines whether the action is arbitrary and capricious or had no evident rational basis measured by the factors contained in Article 17, Section 4.

We believe the parties intended this limited right to grieve to apply to the unique situation of the one-person class and the factual circumstances by which Grievant was reduced in pay scale which exist in this case,[1] and that limited review is precisely what should occur here. Therefore, we remand to Mr. Weiss to determine whether the Department of Personnel was arbitrary and capricious in moving Grievant from Pay Scale 21 to Pay Scale 19 measured by the factors listed in Article 17, Section 4.

With regard to the Section 4 provision that the Panel shall base its decision "on whether there was a substantial shift to significantly-lower level duties during the one-year period preceding the date of filing the grievance", we believe Mr. Weiss' decision that this case does not turn on that provision even though there was not a reduction in Grievant's job duties the year preceding the filing of the grievance was reasonable. It was sufficiently unclear here whether the grievance fell within the purview of Article 17 so that it would be unfair to penalize the State for not meeting this one-year requirement. Our intent here is that Grievant be assured an independent review of whether the Department of Personnel acted arbitrarily and capriciously in reducing Grievant's pay scale because of a change in job duties, and we remand for that purpose.

We note that this is a unique case because of the one-position class situation, and should not necessarily be regarded as a precedent for any other case.

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[1] Grievant was reduced in pay subsequent to a change in job duties. Grievant's responsibilities had previously encompassed two areas: 1) child support enforcement and collection, and 2) welfare fraud prevention and detection, and as a result of the change the child support enforcement and collection activity was removed from Grievant's area of responsibility.

We would like to comment on other contentions raised by Grievant and VSEA to further guide the Panel Chairman in his determination on remand. The first area is the applicability of Article 17, Section 2 of the Contract. Contrary to the Panel Chairman's decision, this section is not pertinent to this grievance. Section 2 comes into play only when an employee initiates the action seeking to be reallocated to a higher class or to avoid being reallocated downward. Here, Grievant did not initiate this action but was grieving an action already taken by the Department of Personnel. The parties agreed Section 2 was not applicable to this grievance and the Panel Chairman should not consider that section on remand.

The second area requiring comment is the Panel Chairman's statement "Because the Grievant's form (PER-10) is not countersigned by the appointing authority, it is not possible to validate its contents". The Contract does not require PER-10's to be countersigned by the appointing authority. The Contract does provide that a "grievance submitted under Section 2 shall also include a job description (Form AA-PER 10) completed through the point of employee signature". Absent any other language, we cannot infer from this that in non-Section 2 grievances like this one, the appointing authority's signature is required.

Third, the Panel Chairman's decision stated: "The hearing itself, provided no information which was not contained within the respective portfolios". The transcript of the hearing indicates this statement is not accurate. The transcript, at Pages 29 through 39, contains Grievant's rebuttal of the State position which was not contained in Grievant's portfolio. On remand, this portion of the transcript should be considered by the Panel Chairman.

The final issue before us concerns whether Grievant should be reimbursed for the cost of furnishing the transcript of the hearing before the Panel to the Board. Grievant requests that the Board direct the State to reimburse Grievant for the total cost of the transcript.

No language in the Contract addresses who will pay the transcript costs of a classification appeal to the Board. In the absence of such language, we believe it appropriate to follow the practice as stated in VRAP 10 which we have adopted in appeals of our decisions to the Supreme Court; namely that the appellant pay the transcript costs. VRAP 10. Section 11.24, Board's Rules of Practice. Thus, we will not order the State to reimburse Grievant for any portion of the transcript costs.

ORDER

Now therefore, based on the foregoing reasons, it is hereby ORDERED the decision of the Classification Panel on the merits of this matter is REVERSED, and this cause is REMANDED for a decision, based on the existing record, consistent with this opinion.

Dated this 14th day of December, 1983, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney

Kimberly B. Cheney, Chairman

James S. Gilson

James S. Gilson