

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	DOCKET NO. 85-27
WAYNE DYER)	

FINDINGS OF FACT, OPINION AND ORDER

On May 24, 1985, Wayne Dyer, State Police Corporal ("Grievant"), filed a grievance with the Vermont Labor Relations Board. Grievant alleged he was the victim of the discriminatory application of Sections 1.1, 3.3, 5.1, 5.3 and 6.6 of the Department of Public Safety promotion rules and regulations when he was not promoted to Sergeant in October 1984.

A hearing was held before Board Chairman Kimberly Cheney and Member James Gilson on February 20, 1986. Member William Kemsley, Sr., was not present at the hearing and has not participated in the decision. Assistant Attorney General Michael Seibert represented the State of Vermont, Department of Public Safety ("Employer"). Vermont State Employees' Association ("VSEA") staff attorney Michael R. Zimmerman, who had earlier intervened on Grievant's behalf, represented Grievant. At the hearing, the parties submitted a limited stipulation as to various facts and for admission of evidence and agreed on the issues for the Board to decide. At the conclusion of the hearing, the record was left open to have the deposition of Paul Philbrook taken and transcribed. The deposition was filed with the Board on March 10, 1986.

Grievant filed Requested Findings of Fact and a Memorandum of Law on March 21, 1986. The State filed a Memorandum of Law on March 21, 1986.

FINDINGS OF FACT

1. During the period from at least 1976 to 1980, the Department of Public Safety rules and regulations provided, in pertinent part, as follows:

ARTICLE VII

PROMOTIONS

7.1 General

Vacancies...shall be filled by promotions of qualified members of the Department of Public Safety...

7.2 Promotion by Competitive Examination

Vacancies in the rank of Corporal, Sergeant and Lieutenant shall be filled by promotional competitive examination, which shall consist of the following: written tests, promotional potential rating score, and oral examinations.

... 7.5 Competitive Examination

The combination and weights applied to the types of tests for position classes shall be as follows:

Corporal; Sergeant; Lieutenant:

Written Score50 percent

Oral Score.30 percent

Promotional Potential Score20 percent

7.6 Written Examination

The written examination will be prepared and administered by the Department of Personnel from current material provided by the Commissioner of the Department of Public Safety...

7.7 Oral Board Composition

The Department of Personnel will arrange for an oral board, consisting of not less than three State Police Officers from other State Police organizations...

7.8 Promotional Potential

The complete personnel records of all applicants for promotion to the grade of Corporal, Sergeant, and Lieutenant shall be reviewed for promotional potential by a committee consisting of at least five commissioned officers of the Department, which shall include a commissioned officer from the division or troop to which the applicant is attached, and the applicant's immediate supervisor(s).

... 7.10 Passing Score

The final score for each applicant will be determined only after all phases of the examination have been completed... An applicant must receive a final score of not less than 70 percent to be placed on the register.

... 7.11 Register

The Commissioner will advise each candidate for promotion of his score in each tested area, his average score and his standing on the register.

The Commissioner shall select for appointment one person from among the persons on the register having the three highest scores, including ties if such exist.

(Exhibit B)

2. In 1980, the General Assembly prohibited the use of promotional potential boards in the promotion process through the following amendment to 21 VSA §1921:

(a) The commissioner of public safety shall revise and promulgate rules for the department of public safety under the following guidelines:

...(2) Promotions. Promotions shall be based upon standardized written and oral examinations and the results of a performance review rating system developed by the department. A promotional potential board, or similar panel within the department, shall not be utilized in the promotion process... All components of the promotional system shall be applied equally to all applicants.

3. Following the passage of Act 156, then-Commissioner Paul Philbrook promulgated new rules and regulations governing the State

Police, which rules were in effect at all times pertinent to this grievance, including the following pertinent rules concerning promotions:

ARTICLE VI PROMOTIONS

- 1.1 Promotions of members to higher ranks shall be effected in accordance with the procedures set out in this Article.
- ... 1.6 Promotions to the ranks of... Sergeant... will be based upon standardized written and oral examinations devised and administered by the Department...
- ... 3.1 No member will be promoted unless and until he/she has served the time in grade stated below.
- ... 3.3 To be eligible for promotion to the rank of Sergeant, a member must have served three years or more as a Corporal and must have had at least two years of uninterrupted service as a Corporal immediately prior to promotion...
- ... 5.1 The examination process will consist of two parts: a written examination and an oral examination. The written examination shall be conducted first...
- 5.2 After the written examinations have been given, oral examinations will be conducted. Every member who took the written examination will be scheduled for and advised of the date of an oral examination before an oral examination board.
- 5.3 Oral examination boards shall consist of three members... During any given examination process, only one oral examination board will be used for each rank...
- ... 6.1 After oral examinations have been given and scored, promotional registers which rank all members who participated in the examination process will be prepared.
- 6.2 Members shall be ranked on such promotion registers in accordance with the overall, weighted scores attained by them on the written and oral examinations.
- ... 6.6 (T)he selection of a member to be promoted to the rank of... Sergeant... will be made by the Commissioner from among those members then eligible for promotion to the rank whose overall weighted scores are among the three highest such scores on the promotion register at that point in time... No member will be promoted prior to the date on which he/she is eligible for promotion.

(Exhibit F)

4. In 1982, the General Assembly amended 20 VSA §1921, in pertinent part as follows:

- a) Promotions to the ranks of corporal, sergeant and lieutenant shall be based upon standardized written and oral examinations...

The statutory bar against the use of promotional potential boards or similar panels in the promotion process, which had been contained in §1921, was not included in the section when amended (Exhibit E).

5. With respect to promotions, Philbrook's practice was to make no use of promotional potentials, or anything similar. Philbrook did believe he had the right to supplement the examination process with substantive questions of his own concerning a member's ability to do the job. In familiarizing himself with candidates for promotion, particularly those in the lower ranks, he would speak to their supervisors, and would conduct private, face-to-face interviews with the candidates. He would rarely seek advice from his Captains.

6. It was also Philbrook's practice, notwithstanding the fact that the regulations allowed him to select any one of the candidates with the top three scores, to select the first person then on the promotional register. The only exception to that practice was if the top person on the list requested not to be promoted. Despite this practice, Philbrook did not view the regulations as requiring him to select the top person and it was his position he could select any person in the top three.

7. In 1983, Grievant took the competitive examinations (both written and oral) for Sergeant. Thereafter, a promotional register was prepared, showing the respective scores of the Corporals qualified

for promotion to Sergeant. Grievant was ranked No. 3 on the register, which was in effect from July 1, 1983 to June 30, 1985 (Exhibit G).

8. In December of 1983, or January 1984, Robert Vallie (who was in position No. 1 on the promotional register) was promoted to Sergeant. The result of Vallie's promotion was that Grievant moved up from position No. 3 to position No. 2 on the promotional register.

9. On August 1, 1984, Charles Bristow replaced Philbrook as the Commissioner of the Department of Public Safety.

10. In the Fall of 1984, there were vacancies in the Department in the following positions: one Major, two Captains, four Lieutenants, seven Sergeants, and 12 Corporals. In addition, there was a class of newly-hired Troopers who would be graduating from the State Police Academy in October 1984. Upon such graduation, it would be necessary to assign such Troopers to their first assignments. Since filling the vacancies in the higher ranks would have the effect of determining where the vacancies in the Trooper ranks would occur, it was desirable to make decisions with respect to the higher ranks before Academy graduation.

11. To assist him in making his selections for promotion, Bristow requested John Heffernan (who had been recently retired, as Captain and Commander of the Field Force Division) and Lane Marshall (Captain and Commander of the Field Force Division) to make contact with the immediate supervisors (i.e., the supervising Sergeant and Lieutenant) of the 10 candidates for promotion to Sergeant, including Grievant, and to ask those supervisors for subjective ratings and recommendations in specific categories. That was done, and the results

of the Heffernan/Marshall survey were made available to the seven men who, on October 19, 1984, interviewed the 10 Corporals being considered for promotion to the Sergeant vacancies.

12. On October 19, 1984, the 10 Corporals were interviewed by a panel of seven men. The panel was comprised of Bristow, Major Robert Horton, Richard Spear (Captain and Commander, Criminal Division), George Patch (Captain and Commander, Staff Services Division), Wesley Newman (Lieutenant, Special Investigations Unit, Criminal Division), Marshall and Heffernan.

13. The interviews were brief, lasting not more than 15 minutes each. Prior to the interviews, Commissioner Bristow knew very few of the candidates for promotion to Sergeant. The interviews were, for most of the candidates, their first opportunity to meet Bristow. The interviews dealt primarily with establishing the availability of each candidate. Candidates were asked 1) whether they were interested and in what order they preferred the available vacancies, and 2) whether and to what extent the candidate placed geographical limitations on his availability for promotion. The panel emphasized to candidates that it did not intend such interviews as part of the substantive evaluation process.

14. Of the seven Sergeant vacancies, one was in the Criminal Division (headed by Captain Spear), two were in the Support Services Division (under Captain Patch), and four were in the Field Force Division (under Captain Marshall).

15. Bristow, taking into account not only the weighted scores of the written and oral examinations, as reflected on the promotional

register, but also the material gathered by Heffernan and Marshall, the information concerning candidate preferences gained by the October 19, 1984, interviews, and the recommendations of the panel present for the interviews on October 19, 1984, made his selections for promotion to Sergeant.

16. Bristow made his selections in accordance with Paragraph 6.6 of the Department regulations; that is one at a time from among the top three scores. Bristow did not make all seven selections as a group (Exhibit W).

17. By teletype dated October 22, 1984, Bristow announced his selection of those Corporals to be promoted to the seven Sergeant positions. Grievant was not selected for promotion to Sergeant, even though he had occupied the No. 2 position on the promotional register at the time the selections were made. The other two Corporals who were not selected occupied the No. 3 position (Johnson) and No. 10 position (Mitchell) on the register (Exhibit H).

18. The following members were promoted to the following vacancies:

- 1) One vacancy in Criminal Division:
Candon (No. 1 on promotional register)
- 2) Two vacancies in Support Services Division:
Davis (No. 4 on promotional register)
Yates (No. 8 on promotional register)
- 3) Four vacancies in Field Force Division:
Cutting (No. 5 on promotional register):
D Troop Station Commander at Rockingham
Moriarty (tied for No. 5 on promotional register):
D Troop Station Commander at Brattleboro

Gauthier (No. 7 on promotional register):
A Troop Station Commander at Colchester
Fields (No. 9 on promotional register):
C Troop Station Commander at Shaftsbury

19. Two of the candidates selected for promotion, Davis and Cutting, were not eligible for promotion on the date of selection, and the effective dates of their promotions were thus delayed until they were eligible. They were not eligible for promotion until November 22, 1984. By Special Order dated November 9, 1984, Bristow announced Davis and Cutting were promoted to Sergeant effective December 2, 1984. Commissioner Bristow had earlier decided that any candidate who would be eligible for promotion before January 1, 1985, would be considered eligible for selection in October 1984. That decision was made in light of his desire to make the selections, and thus to know what vacancies would thereby be created, prior to the graduation of the Academy class.

20. By special order, dated October 30, 1985, Bristow eliminated the title of Corporal with the Vermont State Police, and ordered, among other things, that those members holding the rank of Corporal would, after December 1, 1985, be known by the title "Sergeant", and those holding the rank of Sergeant would be known by the title "Lieutenant". That action was merely a change in titles, was not a promotion, and does not render this matter moot (Exhibit T).

21. The register for regular promotion to Sergeant herein at issue expired on June 30, 1985. All candidates seeking promotion during the period July 1, 1985, through June 30, 1987, had to retake the oral and written examination to be eligible for promotion to Sergeant. Grievant did not take such examinations and therefore is not eligible for regular promotion during that period.

OPINION

The parties have agreed the issues for the Board to decide are as follows:

1. Whether the Board has jurisdiction over this matter as a grievance;
2. Whether the State's selection of Davis and Cutting before they were eligible for promotion, despite the fact their promotions were delayed until they were eligible, violated Section 6.6 of the rules,
3. Whether the State violated Section 6.6 of the rules by not, in fact, selecting from among the candidates with the top three scores;
4. Whether the use of the Heffernan/Marshall material by Commissioner Bristow in the selection of individuals for promotion violated the rules, including Section 1.1, in light of the language of such rules and the statutory evolution of the Commissioner's authority with respect to promotions; and
5. Whether the October 19, 1984, interviews constituted a "second oral board" in violation of the rules, including Sections 1.1 and 5.3.

We discuss each of these issues in turn.

Board's Jurisdiction

The Employer contends this case is not a grievance so the Board does not have jurisdiction. It argues Grievant's allegations are a claim Department rules and regulations were violated, and the Board has no jurisdiction to entertain such issues. The Employer cites the unique nature of the State Police operation and particularly that portion of Article 17 of the State Police Unit Contract which provides "nor shall any rules, policies or procedures be subject to the grievance procedure".

We believe a review of Article 17 in its entirety¹ indicates the lack of grievability refers to the substance of the rules, not their application.

Nonetheless, the Employer contends Grievant still has not met the test for a grievance since, while Grievant has claimed he was discriminated against, he has not demonstrated, as he must, that he was treated differently from another employee because of one of the factors prohibited by the Contract - i.e., race, color, religion, creed, ancestry, sex, marital status, age, national origin, VSEA membership or non-membership or any other factor for which discrimination is prohibited by law (Article 5, Section 1, State Police Unit Contract).

We believe the Employer's definition of a grievance is too restrictive. 3 VSA §902(14) defines grievance, in pertinent part, as "the ...expressed dissatisfaction... with aspects of employment or working conditions under collective bargaining agreement or the discriminatory application of a rule or regulation".

¹ Article 17 provides:

Departmental Administrative Rules

Affected Employees shall be notified of Departmental administrative policy changes (as set forth in the State Police Operations Manual), in writing, by posting, or otherwise, 15 days prior to the date these changes become effective.

This notification requirement shall not apply to rules, policies or procedures established pursuant to statutory authority, or which concern matters of police procedure or policy, nor shall any rules, policies or procedures be subject to the grievance procedure.

Grievant is claiming no contractual violation but alleges the "discriminatory application of a rule or regulation". Implicitly, he also expresses dissatisfaction with his employment because the Employer did not follow its own rules.

In essence, Grievant's claim is he was treated dissimilarly to individuals promoted to Sergeant because the Department of Public Safety's rules concerning promotion were not properly applied to him. This is sufficient to meet the definition of grievance. Nzomo v. Vermont State Colleges, 136 Vt. 97, 102 (1978). Grievance of Roll v. Vermont State Colleges, 2 VLRB 228, 233 (1979).

Thus, Grievant has stated a grievable claim and we have jurisdiction.

Davis and Cutting Selections

Grievant claims the October 19 (or 22), 1984, selections of Corporals Davis and Cutting for promotion to Sergeant violated Section 6.6 of the rules, in that they were not, on the date of selection, eligible for promotion.

The important distinction here is between "selection" and "promotion". Commissioner Bristow selected Davis and Cutting to be promoted on October 22, 1984, one month before their November 22 eligibility date for promotion. However, the effective date of their promotion was December 2, 1984, after their eligibility date.

An interpretation of section 6.6 could support Grievant's claim since it provides that "selection of a member to be promoted... will be made by the Commissioner from among those members then eligible for promotion". However, in reading that section in its entirety together with the promotion rules as a whole, it is evident the intent of the

rules is to focus on the effective date of promotion, not the date the choice is made. In addition to the above-cited provision, Section 6.6 also provides that "no member will be promoted prior to the date on which he/she is eligible for promotion". Also, Sections 3.1 and 3.3 of the rules focus on the date of promotion, not selection.

For us to hold otherwise would place an impractical constraint on management in filling a vacancy which is anticipated well in advance, such as a vacancy arising from retirement. Such a ruling might have the result of encouraging management to manipulate the timing of its choices to get around Section 6.6 requirements. Given the language of the rules when considered in their entirety, we decline to adopt such a construction.

Selection From Among Top Three Candidates

Grievant claims Commissioner Bristow did not make his selection for Sergeant one at a time from among the top three scores, as required by Section 6.6 of the rules, but rather that the seven selections were made all at once as a group. As indicated in our findings of fact (See Finding No. 16), we have concluded, by a preponderance of the evidence, the Commissioner did, in fact, make his selections in accordance with Section 6.6.

Heffernan/Marshall Information Gathering

Grievant next claims the information sought by Heffernan and Marshall from promotional candidates' supervisors was similar to information gathered in the past by the promotional potential board, which board or "similar panel" was now statutorily barred, and that Commissioner Bristow improperly used this information.

We disagree with Grievant the Heffernan/Marshall information-gathering was similar to the promotional potential board. The promotional

potential board process was part of the examination process and accounted for 20 percent of the candidate's examination score. Thus, it directly impacted whether a candidate would get on the promotional register and be considered for promotion and, if so, what their ranking would be. On the other hand, the Heffernan/Marshall information-gathering occurred after the promotional register had been established. Unlike the promotional potential board, the Heffernan/Marshall survey did not have the potential to exclude anyone from consideration for selection, nor did it have numerical value.

Also, we do not find this information-gathering violated the Department's rules on promotion. We recognize the rules do not explicitly approve such a procedure but neither do they prohibit it.

In allowing the Commissioner to pick a candidate for promotion from among the top three scores on the promotional register, the rules give the Commissioner a great deal of discretion. It necessarily follows that the rules permit the subjective evaluation of the Commissioner to play an important factor in the selection process. Given the discretion permitted the Commissioner by the rules, we cannot find Commissioner Bristow's attempt to solicit input from the candidates' supervisors to aid his promotion decisions violated the rules.

October 19 Interviews

Grievant's final contention is the panel interviews conducted on October 19, 1984, constituted a second oral board in violation of Section 5.3's prohibition against the use of more than one oral board. Grievant contends the proper way for Commissioner Bristow to get acquainted with candidates was the private interview method used by prior-Commissioner Philbrook.

Once again, we do not find Grievant's comparison apt. The oral board mandated by Section 5.3 is part of the examination process and thus directly impacts on a promotional candidate's rating and placement on the promotional register. The October 19 interviews occurred after the examination process was completed and the promotional register established. This interview gave Commissioner Bristow an opportunity to meet the candidates, few of whom he knew, and find out their preferences for position vacancies and geographical locations. The fact Commissioner Bristow conducted group interviews rather than private interviews was simply an appropriate exercise of discretion by the new commissioner to become more familiar with candidates and in no way violated the rules.

ORDER


Now therefore, based on the foregoing findings of fact and the foregoing reasons, it is hereby ORDERED:

The Grievance of Wayne Dyer is DISMISSED.

Dated this ^{21st} day of April, 1986, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Kimberly B. Cheney, Chairman


James S. Gilson