

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	
VINCENT HANIFIN)	DOCKET NO. 87-21

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On April 3, 1987, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of Vincent Hanifin ("Grievant"). The grievance alleged that the State of Vermont, Department of Corrections ("Employer") violated the disciplinary provisions of the Agreement between the State and VSEA effective for the period July 1, 1986 to June 30, 1988 ("Agreement") and merit system principles by demoting Grievant. On October 19, 1987, the Employer filed a Motion In Limine and/or for Dismissal.

A hearing was held on October 22, 1987, before Board Members Dinah Yessne, Acting Chair; William G. Kemsley, Sr.; and Louis A. Toepfer. Michael Zimmerman, VSEA Staff Attorney, represented Grievant. Michael Seibert, Assistant Attorney General, represented the Employer. The parties filed briefs on November 5, 1987.

FINDINGS OF FACT

1. Grievant has been continuously employed by the Department of Corrections, Probation and Parole Division, since December of 1971. In January of 1984, he was promoted to the position of Intensive Supervision Probation and Parole Officer. His present duty station is the Morrisville Probation and Parole Office.

2. The Morrisville Probation and Parole Office is one of 12 to 14 such offices throughout the State. In October of 1986, the Morrisville Probation and Parole Office was staffed by four positions: one Intensive Supervision Probation and Parole Officer, Grievant; one Probation Officer; one case aide; and one secretary.

3. In October of 1986, the chain-of-command between Grievant and Department of Corrections Commissioner Patrissi was as follows: Grievant reported to James Spinelli, District Manager for the Central District, which included Morrisville; Spinelli reported to Robert Smith, then-Director of the Probation and Parole Division of the Department; Smith reported to Tom Ferras, Deputy Commissioner of Corrections; and Ferras reported to Patrissi.

4. In October of 1986, the three Probation and Parole Offices of the Central District were the Barre office (out of which office Spinelli oversaw the Central District), the Morrisville office, and the Chelsea office. The Chelsea office had an Assistant District Manager, Harry Goodsell, but Morrisville had none.

5. Prior to October of 1986, Spinelli, unbeknownst to Grievant, had been trying to convince his superiors to promote Grievant to permanent Assistant District Manager of the Morrisville Probation and Parole Office.

6. In late October 1986, Goodsell, the Assistant District Manager of the Chelsea Probation and Parole Office, and Robert Charlton, the probation officer in the Morrisville Probation and Parole Office, both encountered medical problems necessitating their immediate absence from work. At the time, the duration of their respective absences was unknown, but was anticipated to be about two months for each (Grievant's Exhibit 8).

7. Due to the anticipated absences of Goodsell and Charlton, Spinelli was asked by his superiors to make a plan to cover the absences of the two. Spinelli developed a plan that could accomplish two goals: 1) provide for Goodsell's and Charlton's absences, and 2) convince Commissioner Patrissi that Grievant should be made permanent Assistant District Manager of the Morrisville office. The means by which Spinelli would accomplish those goals was to make Grievant a "working" Assistant District Manager of the Morrisville District Office (i.e., one who would perform the duties of an Intensive Supervision Probation and Parole Officer and, in addition, would perform the duties of manager) during Goodsell's and Charlton's absences so as to demonstrate to Patrissi the feasibility and desirability of that arrangement on a permanent basis (Grievant's Exhibit ~~8~~).

8. Before broaching his plan to his superiors, Spinelli, in October 1986, approached Grievant and revealed to him that he had been trying for the past year to convince his superiors to promote Grievant to permanent Assistant District Manager of the Morrisville office. Spinelli explained the plan described above in Finding #7 to Grievant, and asked Grievant if he would be interested in accepting an appointment to Assistant District Manager on that basis. Spinelli made it clear that he had not yet discussed his plan with his superiors. Grievant said that he was interested.

9. Spinelli then went to Smith and proposed making Hanifin a "working" Assistant District Manager on an interim basis (Grievant's Exhibit 8).

10. Spinelli's proposal concerning Hanifin's promotion to Assistant District Manager was conveyed to Patrissi by Perras. Patrissi approved.

11. By memo dated October 28, 1986, Michael Chater, the Employer's Personnel Officer, requested that the Department of Personnel temporarily reallocate Grievant's position, effective November 2, 1986, from Intensive Supervision Probation and Parole Office to Assistant District Manager "for a period of approximately two months", citing Goodsell's anticipated absence. Grievant did not see that memo until shortly before the hearing herein (Grievant's Exhibit 9).

12. On October 30, 1986, the Department of Personnel issued a "Report of Personnel Action" reflecting the following action taken concerning Chater's request:

Position IN-346, Intensive Supervision Probation and Parole Officer, PS-15, is temporarily reallocated to the class Probation and Parole Assistant District Manager, PS-16, OT-15, ML/S, effective 11/2/86. The duration of the temporary reallocation is indefinite due to illness of a current Assistant District Manager, but is likely to be a minimum of two months. A probationary period should be served.

Grievant did not see that document until shortly before the hearing herein. The Department of Personnel sent VSEA a copy of this Report of Personnel Action (Grievant's Exhibit 10).

13. Based on the Report of Personnel Action, a Personnel Action was prepared, and a copy given to Grievant shortly after he assumed his new duties. In the "action requested" block appeared the words, "Temporary Reallocation/Promotion". The effective date was given as November 2, 1986. It indicated that Grievant's gross salary was increased by about 10 percent, that he moved from the Non-Management

Unit to the Supervisory Unit, that his title was Probation and Parole Assistant District Manager, that he was to serve a six-month promotional probationary period, and that he was credited with 3.75 supervisory personal leave days. The block entitled "ending date" was left blank. Grievant viewed the personnel action as consistent with what he had understood from his earlier conversation with Spinelli (Grievant's Exhibit 11).

14. The Contract contained the following pertinent provisions:

ALLOCATION - the determining of the classification of a new position.

...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.

...CLASSIFIED POSITION - a position in the State classified service which is assigned to a class and appointment to which is made in accordance with merit principles.

...DEMOTION - the change of an employee from one pay scale to another pay scale for which a lower maximum rate of pay is provided.

...PERMANENT STATUS - that condition which applies to an employee who has completed an original probationary period and is occupying a permanent classified position. Rights and privileges of permanent status include, but are not limited to, reduction in force, reemployment, appeal, and consideration for promotion, transfer and restoration.

...PROMOTIONAL PROBATIONARY PERIOD - that working test period which applies when an employee is promoted to a position assigned to a higher pay scale and in certain upward reallocation situations.

...PROMOTION - a change of an employee from a position of one class to a different position of another class assigned to the higher pay scale.

...REALLOCATION - a change of a position from one class to another class.

ARTICLE 51

ALTERNATE RATE PAY

...2. From time to time, employees may be required by higher authority to take over the job of an employee assigned to a higher pay grade than their own when that higher-level employee is absent from duty. When time and circumstances permit, vacant higher-level positions will be filled through the merit system under the applicable Rules and Regulations for Personnel Administration. However, because of the absence of an employee for a short period of time, and in management's judgment job continuity must be maintained, eligible employees in this bargaining unit who are required to take over the higher-level job shall receive "alternate rate pay" provided all the following criteria are met:

- a. The employee takes over the job of the higher level employee...;
- b. The higher-level work is performed with the authorization of appropriate supervisory personnel;
- c. The position is at least one pay grade higher than the employee's own pay grade; and
- d. The employee takes over the job of the higher level employee for one full work shift per day.

3. The "alternate rate pay" rate shall be 108 percent of the employee's base rate...

15. The Department of Personnel has employed two methods to compensate employees for temporary performance of higher-level duties:

1) alternate rate pay pursuant to the above-cited Contract provision; and 2) temporary reallocation of the position held by the involved employee. The Director of Employee Relations, Department of Personnel, makes the decision concerning whether to use alternate rate pay or temporary reallocation based upon the nature and duration of the temporary duties. If the employee is to assume duties on a full-time basis greater than a short period of time, which period of time can be estimated, then a temporary reallocation will be done. If the employee is to assume the temporary duties from time-to-time, then the employee is provided alternate rate pay.

16. The Department of Personnel reallocates positions on both a permanent and temporary basis.

17. Approximately 30 temporary reallocations occur a year. The Department of Personnel has been making temporary reallocations for at least the past 30 years. Before the effective date of the Contract (i.e., July 1, 1986), the Department of Personnel only sporadically mailed VSEA notices of temporary reallocations. Since then, VSEA has been on the distribution list for such notices of temporary reallocations (Grievant's Exhibit 10, State's Exhibits 11, 12 and 13).

18. Subsequent to Grievant assuming the Assistant District Manager position on a temporary basis, Spinelli spoke with Grievant concerning Grievant being appointed to the position on a permanent basis. Spinelli indicated to Grievant that Commissioner Patrissi was concerned that by creating an Assistant District Manager position in that office, the Employer would lose the service capabilities of the Intensive Supervision Probation and Parole Officer. Spinelli indicated that the Commissioner specifically was concerned about whether the Employer could afford the increased salary required by the position, whether the office could keep up with the caseload if Grievant was made permanent Assistant District Manager, and whether there were more important priorities. Spinelli told Grievant that he could not promise that Grievant would be in the Assistant District Manager position on a permanent basis; but led him to believe that if he performed satisfactorily in the position on an interim basis and the office functioned smoothly, and if Patrissi decided to make the reallocation of Grievant's position permanent, then Grievant would have the position. Spinelli indicated to Grievant that he would

support Grievant being placed in the position on a permanent basis.

19. As appointing authority, Commissioner Patrissi had the authority on the Department level to determine whether the Intensive Supervision Probation and Parole position occupied by Grievant should be reallocated to Assistant District Manager. Patrissi did not delegate that authority. Grievant knew that Patrissi possessed such authority and did not believe that Patrissi had delegated it. At no time did Commissioner Patrissi decide that the position would be reallocated on a permanent basis if certain conditions were met.

20. In early January, 1987, Grievant received a Notice of Personnel Action entitled "Willis Plan Implementation". The Willis Plan was issued as a result of a comprehensive review of state classification. The notice Grievant received indicated that, effective December 28, 1986, his title was Assistant District Manager, his pay grade was 23, and that his status was permanent classified in a promotional probationary period. In the block entitled "ending date", the form indicated "99/99/99". Grievant did not inquire of anyone at that time what the notice meant to his status.

(Grievant's Exhibit 13)

21. On January 5, 1987, both Goodsell and Charlton returned to work. Notwithstanding that fact, Grievant continued to serve as Assistant District Manager in the Morrisville office.

22. On January 19, 1987, Patrissi appointed Richard Bashaw, who at the time was Superintendent of the St. Albans Correctional Facility, Assistant District Manager of the Morrisville Probation and Parole Office. The position was permanent. Bashaw began duties on January 25, 1987 (Grievant's Exhibit 14).

23. The method used by the Employer to create the permanent Assistant District Manager position occupied by Bashaw was to take a vacant position in the Department, have the position reallocated upward to Assistant District Manager, and transfer the position to the Morrisville Probation and Parole Office.

24. Effective January 30, 1987, Grievant was informed that his temporary reallocation had ended and that his position was reallocated back from Assistant District Manager to Intensive Supervision Probation and Parole Officer. As a result, his salary went back to his former rate (i.e., he lost the 10 percent increase), he went from the Supervisory Unit back to the Non-Management Unit, and went from a Pay Grade 23 to Pay Grade 21 (Grievant's Exhibits 17-19, 23).

25. As a result of these actions, at present there are five positions in the Morrisville Probation and Parole Office, where previously there were four positions. Grievant is now under Bashaw in the chain of command.

OPINION

Grievant contends that the Employer violated the Contract by demoting Grievant from the Assistant District Manager position in the Morrisville District Office since the Contract no longer allows for involuntary disciplinary demotions, and since no performance deficiencies were cited as the basis for the demotion.

A necessary prerequisite for the Board to rule that an employee was demoted from a position in violation of the Contract is that the employee occupied the position on a permanent basis. A serious question exists whether Grievant occupied the Assistant District Manager position on a permanent basis since the evidence establishes that he occupied the position as a result of a temporary reallocation.

Nonetheless, Grievant contends that the use of temporary reallocations as a means to compensate employees assigned to higher level duties is invalid. Accordingly, Grievant contends that he occupied a permanent Assistant District Manager position on a promotional probationary basis, and that he could not be demoted from that position absent some failure of performance on his part.

We reject Grievant's claim that the use of temporary reallocations is invalid. The use of temporary reallocations is nowhere prohibited by the Contract or the Personnel Rules and Regulations. Moreover, the evidence indicates that the use of temporary reallocations has become a mutually accepted past practice.

We have recognized that day-to-day practices mutually accepted by the parties may attain the status of contractual rights and duties, particularly where they are significant, long-standing and not at variance with contract provisions. Grievance of Allen, 5 VLRB 411, 417 (1982). Grievance of Beyor, 5 VLRB 222, 238-239 (1982). Here, the Department of Personnel has been employing the method of temporary reallocations for over 30 years and does approximately 30 per year. While the Personnel Department was mailing such notices to VSEA only sporadically prior to July 1, 1986, we presume VSEA know of the practice for many years and accepted it. We infer this from the very volume of temporary reallocations which occurred over a long period of time and the fact that VSEA received such notices at least sporadically. The practice may be changed by the State and VSEA through negotiations but, in the interim, the use of temporary reallocations is valid.

Grievant further contends that the Employer is estopped from denying that Grievant occupied a permanent Assistant District Manager position. Central to Grievant's claim of estoppel is that representations were made to Grievant by his supervisor, James Spinelli, which created an entitlement of Grievant to the Assistant District Manager position on a permanent basis. In the past, the Board has held that an employee had a right to act on a supervisor's prior approval where the supervisor presumably possessed the requisite authority to grant approval. Grievance of Wilson, 7 VLRB 252, 255 (1984). Grievance of Gray, 6 VLRB 409, 411-412 (1983).

Here, however, Spinelli did not possess the authority to approve the placing of Grievant in the Assistant District Manager on a permanent basis, and Grievant knew that such authority resided only with Commissioner Patrissi. While Spinelli did lead Grievant to believe that he would be made Assistant District Manager on a permanent basis if certain conditions were met, one of those conditions was that Patrissi would decide to permanently reallocate Grievant's Intensive Supervision Probation and Parole Officer position to that of Assistant District Manager. Patrissi decided not to do that, but instead added a position in the Morrisville office to create the Assistant District Manager Position. It is clear that Spinelli wished to see Grievant placed in the position permanently, and conveyed that to his superiors and to Grievant. However, such a hope does not translate into a promise.

Grievant points to a number of other reasons to demonstrate that the Employer is estopped from denying that Grievant occupied the Assistant District Manager position on a permanent basis. Suffice it

to say that the Employer took no action and made no representations which indicated to Grievant that he was occupying the position on anything but a temporary basis. Accordingly, the return of Grievant to his Intensive Supervisor Probation and Parole Officer position was the termination of a temporary reallocation, not a demotion. While we can sympathize with Grievant in the way circumstances developed in this matter, the Employer committed no violation of the Contract.

Grievant also alleges that the Employer violated merit system principles by demoting Grievant. We find Grievant was not demoted.


ORDER

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

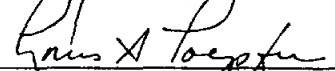
The Grievance of Vincent Hanifin is DISMISSED.

Dated this 8th of January, 1988, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Dinah Yessne, Acting Chair


William G. Kemsley, Jr.


Louis A. Toepfer