

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF: )  
 )  
SHEILA KIRBY, MARCIA ) DOCKET NO. 91-48  
LAPLANTE, ANITA BELLEN )  
AND BARBARA FREY )

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On July 31, 1991, the Vermont State Employees Association, Inc. ("VSEA"), filed a grievance of behalf of Sheila Kirby, Marcia LaPlante, Anita Bellen and Barbara Frey ("Grievants"). The grievance alleged that the Agency of Human Services, Office of Alcohol and Drug Abuse Programs ("Employer"), violated Articles 5 and 19 of the collective bargaining agreement between VSEA and the State for the Non-Management Bargaining Unit, effective for the period July 1, 1990 to June 30, 1992 ("Contract"), and 3 VSA §312, in filling the position of Southern Vermont Substance Abuse Field Supervisor. Grievants allege that the selection process discouraged qualified female applicants from applying for promotion, discriminated against the qualified female applicant who did apply, and resulted in the hiring of a male applicant with inferior credentials. Grievants allege the hiring decision was based on sex discrimination.

Hearings were held before Labor Relations Board Members Charles McHugh, Chairman; Catherine Frank and Louis Toepfer on July 28, 1992, September 21, 1992, and October 8, 1992. Assistant Attorney General Michael Seibert represented the Employer. VSEA Counsel Jonathan Sokolow represented Grievants. The parties filed briefs on November 5, 1992.

FINDINGS OF FACT

1. The Contract provides in pertinent part:

Article 5, No Discrimination or Harassment; and Affirmative Action

Section 1. No Discrimination, Intimidation or Harassment.

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, intimidate, nor harass any employee because of race, color, religion, creed, ancestry, sex, marital status, age, national origin, handicap, membership or non-membership in the VSEA, filing a complaint or grievance, or any other factor for which discrimination is prohibited by law.

...

Article 19. Vacancies and Promotion

1. When management decides to fill a permanent, vacant bargaining unit position through competitive procedures, notice shall be posted for ten (10) workdays prior to the application deadline, statewide in the case of a state promotional or open competitive procedure, agency-wide when only an agency promotional procedure is being utilized. If a change is made in the minimum qualifications after the announcement is posted, the new vacancy notice shall be posted for a period of five (5) workdays.

...

2. The Office of Alcohol and Drug Abuse Programs ("ADAP") is a division of the Agency of Human Services of the State of Vermont. ADAP provides substance abuse prevention, intervention and treatment services. Prevention work generally involves educating the community in an effort to prevent substance abuse. Intervention work is directed at confronting and convincing individuals with substance abuse problems to enter treatment. Treatment is the provision of services to substance abusers to rehabilitate them. Together, intervention and treatment work to form the "clinical" aspect of ADAP's work.

3. Richard Powell has been the Director of ADAP since 1980.

4. Prior to August, 1990, ADAP was divided into three units providing, respectively, substance abuse prevention, intervention and treatment services. The heads of all three units were males.

a) The Substance Abuse Prevention Unit was headed by Steven Gold. Under Gold was a prevention specialist supervisor, Frank McIntosh. McIntosh supervised nine prevention specialists, most of whom were women. The prevention specialists were stationed in the two ADAP district offices, White River Junction and St. Albans, and within other State Offices throughout the State. Among the prevention specialists were Marcia LaPlante, based in White River Junction; Barbara Frey, based in Rutland; Anita Bellen, based in Bennington; and Candidate #1, based in Brattleboro.

b) The Substance Abuse Treatment Services Unit was headed by Stuart Friedman. The Treatment unit included staff in the two district offices. Each office had a coordinator who supervised substance abuse counselors. Sheila Kirby was one of four substance abuse counselors in the White River Junction office. Candidate #2 was the district coordinator of that office.

c) The Intervention Services Unit was headed by Jim Bellino. Under Bellino were two employee assistance intervention specialists (State's Exhibit 13).

5. In the summer of 1990, a reorganization of ADAP was implemented. This reorganization was in response to two legislative initiatives: passage of new legislation concerning

driving under the influence ("DUI") and a legislative directive to close the treatment offices in St. Albans and White River Junction. The new DUI legislation required that first offenders be assessed by an ADAP certified substance abuse counselor. This certified counselor was to determine whether the DWI offender would attend the CRASH school or require more intensive treatment. ADAP, as then organized, was unable to meet the requirements of the DUI legislation.

6. In the course of the 1990 ADAP reorganization, Steve Gold became ADAP's Director of Field Operations. Gold reports to Powell and supervises four positions, all of which are occupied by males. These are the Chief of Prevention Services, Rufus Chaffee; the Chief of Intervention and Treatment Services, Jim Bellino; and two regional Field Supervisor positions, one for northern Vermont, Frank McIntosh; and one for southern Vermont, Candidate #1. The process which led to the appointment of Candidate #1 to the southern regional Field Supervisor position is the subject of this grievance (Grievant's Exhibit 1).

7. Under the reorganization, the substance abuse counselors in the two district offices were renamed intervention specialists. The new intervention specialists were to provide the screening required by the new DUI legislation. They were to work with the prevention specialists in various offices around the State. ADAP decided to split the State into two regions. The southern and northern regional Field Supervisors were created to supervise the prevention and intervention specialists in their

region. ADAP management decided that McIntosh, the sole incumbent Prevention Specialist Supervisor, would become the northern regional Field Supervisor, and that an internal hiring process was to be used to fill the southern regional Field Supervisor position.

8. In April, 1990, Gold called Marcia LaPlante to inform her of the new southern Regional Field Supervisor position. LaPlante has a Master's Degree in Applied Psychology - Clinical Specialization, and had a total of approximately twelve years experience in substance abuse prevention, intervention and treatment work at the time of the hiring process. At all times relevant, LaPlante was a certified substance abuse counselor. Gold invited LaPlante to apply for the position and told her he was interested in her because of her clinical and prevention background. Gold indicated to LaPlante that she was a strong candidate (Grievant's Exhibit 21, p.1-3).

9. On May 15, 1990, LaPlante and Gold met in Randolph to discuss the Field Supervisor position. Gold told LaPlante that the Field Supervisor would supervise prevention and intervention staff, including clinical supervision of the intervention specialists. LaPlante said that, although she had a clinical background, she was not interested in clinical supervision of the intervention specialists. In particular, LaPlante indicated that she did not want to have the responsibility of reviewing the intervention specialists' decisions regarding the driving licenses of people assessed under the new DUI legislation. Gold responded by telling LaPlante that "this probably isn't the job for you".

10. On or about June 15, 1990, LaPlante spoke with Rufus Chaffee at a training session. Chaffee asked LaPlante if she was going to apply for the Field Supervisor position. LaPlante said she would not apply because she did not want to be involved in clinical supervision. Chaffee told LaPlante that it was "too bad" that administrative and clinical supervision responsibilities were going to be combined in the field supervisor position because LaPlante would be a good administrator. Later in June, 1990, LaPlante had a conversation with her supervisor, Frank McIntosh, in which she told him that she was not applying for the Field Supervisor job due to the clinical supervision duties.

11. On July 10, 1990, Gold circulated a memorandum to ADAP staff announcing the opening for the southern Regional Field Supervisor position. Gold's memorandum indicated that the position would "directly supervise the ADAP prevention specialists . . . and intervention specialists . . . in five counties and would provide "immediate oversight of the full continuum of services, whether delivered by ADAP staff or contractors". The class specification for the position was circulated with Gold's memorandum (Grievant's Exhibits 6, 7).

12. The class specification for the Field Supervisor position was drafted in 1988 and has not been changed since then. It defines the position as including "(a)dmministrative, advisory, coordinating and supervisory work involving the delivery of services such as education, counseling, prevention and

intervention activities..." Among the examples of work performed, the class specification includes the following:

Directs the integration and delivery of State substance abuse counseling, prevention, early intervention or treatment review on a district, regional or statewide basis. Provides direct supervision over a staff of field workers. Defines and monitors casework goals. Identifies staff training needs and assists in setting up development and training programs... Provides consultative service to the community when necessary... Explains program and objectives before a variety of public service, educational and other groups... (Grievants' Exhibit 7).

13. The Field Supervisor class specification indicates that the minimum qualifications for the position are a bachelor's degree and "four years at or above a technical level of responsibility in a client-oriented service delivery program, at least one involving supervisory, consultative or administrative duties, and including one in a substance abuse field". The class specification further indicates that graduate work in "education, public administration or a human service field may be substituted for up to two years of the general experience on a semester for six months basis" (Grievants' Exhibit 7).

14. Upon reading Gold's job announcement and the class specification, LaPlante concluded that the position did include clinical supervision, as she had been told by Gold and Chaffee. She drew this conclusion from the fact that the class specification stated that the position provided direct supervision over both the prevention specialists and intervention specialists, and that it required the definition and monitoring of casework goals and the identification of staff training needs. For these reasons, LaPlante decided not to apply for the

position. If clinical supervision had not been a part of the job, LaPlante would have applied.

15. Three people applied for the southern regional Field Supervisor position: Sheila Kirby, Candidate #1 and Candidate #2. An interview panel of three men was set up, consisting of Gold, Chaffee and Bellino. The panel was to interview the three candidates and make a hiring recommendation to Powell, who retained the final authority for hiring.

16. Sheila Kirby had been in the substance abuse field since 1976, giving her 14 years of experience at the time of her application. Prior to 1976, Kirby had been a nurse for seven years. This included four years (1971-75) as a charge nurse in a nursing home, during which time she was responsible for supervising nurses aides and fellow nurses. Kirby has been a recovering alcoholic since 1974. In 1974, Kirby decided to devote herself to helping other people by working within the substance abuse field. After working with Alcoholics Anonymous, Kirby took a job as an intake counselor and physicians assistant for a methadone maintenance program in Providence, Rhode Island. She remained in that position from 1976-78. From 1978 to 1983, Kirby worked as a clinical supervisor and senior counselor in an alcohol and family counseling program in Cranston, Rhode Island. While in that position, Kirby became a licensed substance abuse counselor. As the clinical supervisor, Kirby supervised a staff of three to five full-time counselors as well as a volunteer staff of eight. This position also included the "prevention" functions of community outreach and education on substance abuse,

and this constituted a substantial part of her duties. In 1982, Kirby, who already was a licensed practical nurse, obtained a Bachelor of Science degree in Social and Health Services (Grievant's Exhibit 8, p. 3-4).

17. In 1984, Kirby moved to Vermont and was hired by ADAP as a substance abuse counselor in the Springfield office. At the time Kirby was hired, ADAP was not providing any services in Springfield except for a counselor who came to Springfield for a few hours per week from White River Junction. Kirby was hired to redevelop ADAP's treatment services in the Springfield area. Kirby spent six months reintroducing ADAP to the community. She met with people from all of the relevant agencies, including the police department, housing authority and health and social services, as well as with physicians and lawyers. Kirby's first ADAP evaluation, completed by her supervisor Stuart Friedman in August, 1984, indicated that Kirby "frequently exceeds job requirements/standards" and was doing an "excellent job representing OADAP in Springfield". The evaluation went on to note that Kirby was "innovative", "able to think on her feet", and able to maintain "her outstanding performance" in spite of stresses. Summarizing Kirby's first six months in Springfield, the evaluation stated:

Our Springfield office had been a sub-par operation for a number of years and the community was not accustomed to getting good services. Being based in Springfield means running a one-person satellite... Sheila had little first-hand knowledge of the community. Looking back, six months later, it is my assessment that Sheila has dramatically turned the situation around. The Office of Alcohol and Drug Abuse Programs is now recognized as a viable and credible service provider and that reputation is almost entirely the result of Sheila's acute clinical and community skills (Grievants' Exhibit 9, p. 1-5).

18. Kirby's next evaluation, also completed by Friedman, covering the period November 1984 - November 1985, also rated her performance as frequently exceeding the requirements of the job. In addition to noting that Kirby was a "skilled clinician with years of experience", the evaluation stated that she had "played a large role in establishing (ADAP's) credibility in the Springfield-Ludlow region", a fact which the evaluation attributed to Kirby's "ability to meet and impress other professionals in the system". The evaluation concluded by praising Kirby's "knowledge and personal wisdom" (Grievants' Exhibit 9, p. 6-10).

19. Kirby's next annual evaluation, completed by her new supervisor Candidate #2, covering November 1985 - November 1986, likewise rated her as frequently exceeding the requirements of the job. In summing up her work, Friedman, who was by then Chief of Treatment Services and supervisor of Candidate #2, stated on the evaluation:

It is difficult to recall the turmoil and ineffectiveness that reigned in Springfield before Sheila. She has single handedly made the outpost a respected treater of substance abuse, as well as an important and vital force for the Agency of Human Services in that community. A tremendous asset! (Grievants' Exhibit 9, p. 11-14)

20. Kirby's 1986-87 evaluation, completed by Candidate #2, once again rated her as frequently exceeding job requirements, noting that she was "an extremely organized person" who had earned "respect from many persons and agencies in the area". Kirby was given a similar "frequently exceeds job requirements" rating on her 1987-88 evaluation by Candidate #2. Friedman made the following comment in that evaluation:

At numerous junctures in the past several years, I have had to recommend a counselor to individuals in the Springfield area. Sheila is always at the top of my list in that community. Bravo! (Grievants' Exhibit 9, p. 15-23).

21. Kirby's 1988-89 evaluation, completed by Candidate #2, rated Kirby's overall performance as "consistently meets job requirements/standards". This was the only evaluation received by Kirby during her employment which rated her overall performance as below "frequently exceeds job requirements/standards" (Grievant's Exhibit 9, p. 24-26).

22. While working for ADAP in Springfield, Kirby also continued her education. In 1986, she received a Masters of Science degree in community psychology.

23. Powell was aware of Kirby's performance with ADAP, having reviewed and signed each of her performance evaluations (Grievants' Exhibit 9).

24. In the summer of 1989, ADAP contracted out its treatment services in the Springfield area. This resulted in the counselors, including Kirby, reducing their treatment activities and increasing their work in intervention. Their intervention work involved a presence in the community as well as assessments of persons charged with driving under the influence.

25. In addition to her work with ADAP, Kirby had been a lecturer and coordinator for the CRASH school for DUI offenders in Springfield. Like all CRASH school lecturers, Kirby worked with clients in the program. As coordinator, she also supervised a staff. Kirby performed this work from 1984 through 1990. Kirby also has taught as an adjunct professor at Springfield College in Springfield, Massachusetts and participated in numerous substance

abuse related programs, both as a facilitator/trainer and as a student. She maintains her certification, in both Vermont and Rhode Island, as a substance abuse counselor and her status as a licensed practical nurse. In addition, Kirby is certified by the National Counselors Association at Senior Status Level 2, the highest credential in the field of substance abuse treatment. She also has attended many workshops and training sessions, amassing at least 100 various certifications in her field (Grievants' Exhibit 8).

26. After joining ADAP in 1984, Kirby worked full-time until her first child was born in 1986. After completing her Masters Degree later that year, Kirby returned to full-time status. In December, 1987, after her second child was born, Kirby began a job-sharing arrangement. Because Kirby's oldest child has Downs Syndrome, Kirby and her husband cannot work full-time simultaneously. When the field supervisor position opened up in July, 1990, Kirby and her husband decided that if she were to get the position, her husband would return to part-time status and she would work full-time.

27. On July 18, 1990, Kirby applied for the Field Supervisor position by sending a letter of application, a resume and a letter of reference to Steve Gold. The letter of reference was from Alan Willard, a regional manager for the Department of Social and Rehabilitative Services. Willard's office in Springfield was adjacent to Kirby's office and they had much interaction as they had mutual clients. Willard indicated that Kirby had "demonstrated excellent substance abuse skills in the

areas of assessment, counseling and intervention". Willard also noted that Kirby "is flexible, has a sense of humor and is a team player" (Grievant's Exhibit 8).

28. Candidate #1 attended college from 1970-74, receiving a Bachelor's Degree in Perceptual Psychology and Sculpture. After graduating, Candidate #1 was "self-employed" in the fields of sculpture and cabinet making. Through the mid-1970's, Candidate #1, in his own words, "engaged in a series of varying successful entrepreneurial ventures". From 1977-83, Candidate #1 managed a land clearing and wildlife habitat improvement business, which included supervising crews of workers. Candidate #1 was convicted of distribution of marijuana in 1983 and served a prison sentence in the Federal correctional institution in Lexington, Kentucky from 1983-84. While in prison, Candidate #1 worked as a pipefitter and participated in Narcotics Anonymous and Alcoholics Anonymous. After being released from prison, Candidate #1 was placed on Federal probation. He completed his probation in January, 1987 (State's Exhibit 5).

29. After his release from prison, Candidate #1 continued his work in the pipefitting field. Then, from January 1985 to April 1986, he worked as a sales representative for a roofing supply company. From June 1986 until May 1987, Candidate #1 took some graduate courses at the Harvard Extension School, some in psychology and some in management. He did not receive a degree. For a three month period (January to March, 1987), Candidate #1 worked as a recruiter and interviewer for the Harvard Cocaine Treatment Project, during which time he wrote a paper which he

submitted as part of his application materials for the Field Supervisor position (State's Exhibit 5).

30. In November, 1987, Candidate #1 was hired as a prevention specialist with ADAP. His supervisor was Frank McIntosh, who would later become the Field Supervisor for northern Vermont. While with ADAP, Candidate #1 also participated in the CRASH program as a group leader and lecturer. As of July, 1990, when he applied for the Field Supervisor position, Candidate #1 had been with ADAP for less than three years (State's Exhibit 5).

31. In the performance evaluation which Candidate #1 received after his first six months of employment with ADAP, covering the period November 1987 - May 1988, his overall performance was rated as "consistently meets job requirements/standards". The next evaluation which Candidate #1 received, covering the period May 1988 - May 1989, also rated his overall performance as "consistently meets job requirements/standards." In the final evaluation received by Candidate #1, prior to his applying for the Field Supervisor position, covering the period May 1989 - May 1990, Candidate #1 received an overall performance rating of "frequently exceeds job requirements/standards". On the evaluation, Gold, the supervisor of Candidate #1's immediate supervisor, Frank McIntosh, noted that Candidate #1 had "improved understanding and skill as a preventionist significantly during the past year" and stated that he was "a positive person with a strong commitment and capability." (State's Exhibit 14 - 16).

32. Prior to applying for the Field Supervisor position, Candidate #1 has been active in Narcotics Anonymous and Alcoholics Anonymous for a number of years. He also had engaged in a variety of training and lecturing in the substance abuse field (State's Exhibit 5).

33. Although the State Department of Personnel certified Candidate #1 as having met the minimum qualifications for the field supervisor position, it is unclear given the state of the evidence whether Candidate #1 met the minimum qualifications for the position. The position requires four years of experience at or above a technical level of responsibility in a client-oriented service delivery program, at least one of which involves supervisory, consultative or administrative duties. Candidate #1 had less than three years of experience in such a program and none of that involved supervisory, consultative or administrative duties. Although graduate work may be substituted for up to two years of work experience, this must have been in education, public administration or a human services field. Some of Candidate #1's graduate work was in psychology, which would qualify as a human services field. However, some of his graduate work was in management, which would not appear to qualify as either work in education, a human services field, or public administration. There is no evidence as to what portion of Candidate #1's graduate work was in psychology and what portion was in management (State's Exhibit 5).

34. Candidate #1 received a letter of recommendation from Dr. Valery Yandow, Director of the Division of Adult Addictions at the Brattleboro Retreat. In her letter, Yandow stated that Candidate #1 "has a tremendous amount of enthusiasm and seems to have excellent liaison with the community". Further, Dr. Yandow stated that he had "an excellent knowledge of substance abuse and certainly has shown leadership capability in working with agencies" (State's Exhibit 5, p. 34).

35. Candidate #2 was the most senior of the three candidates and had the most years of experience in the substance abuse field. Candidate #2 had 18 years of experience in the treatment field, including eight years with ADAP. In six of his eight years with ADAP, Candidate #2 was a supervisor (State's Exhibit 6).

36. The interview panel viewed the key issue in selecting a candidate for the position as fulfilling the emerging emphasis in ADAP on the integration of prevention, intervention and treatment. This reflected ADAP's new direction of moving towards more emphasis on the prevention of alcohol and substance abuse. They were seeking a leader who had strong abilities in public relations, community organization and a firm grasp of the continuum of services in the substance abuse field. The panel was seeking the candidate who best understood, and demonstrated commitment to, ADAP's new direction. The panel viewed the interview process as playing a very significant role in the selection decision.

37. The interview panel interviewed Kirby on July 26, 1990 and Candidates #1 and #2 on August 7, 1990. The interviews consisted of questioning by each of the interviewers, in which they solicited information regarding the candidate's background, their views on various substance abuse related issues and the response to a series of "scenarios".

38. The emphasis during Kirby's first interview was on the spectrum of services which ADAP provided. Gold's impression of Kirby's first interview was that it was a "strong interview". However, Gold viewed Kirby's strengths as limited to treatment and that she was weak in the areas of prevention, community organizing and public relations. In contrast to Gold, Chaffee believed that Kirby was "a little stiff", and that she had "a humorless affect" during the first interview. Chaffee considered this alleged lack of humor as a negative factor to handle the "tough" situations posed by substance abuse work. Bellino viewed Kirby as "up tight" and "rigid" in the interview.

39. Gold viewed Candidate #1's first interview as "impressive" and concluded that he was the most energetic and enthusiastic of the three applicants. Gold also thought Candidate #1 had a clear understanding that the emphasis of the position was to integrate the prevention, intervention and treatment services. Gold, however, believed Candidate #1 had "little in the way of overall planning skills, timeframes, objectives, responsibilities assigned". Both Chaffee and Bellino viewed Candidate #1 as enthusiastic during this first interview and as

having a good understanding of the scope and integrative nature of the position (State's Exhibit 9, p. 9).

40. After the first round of interviews, none of the panel members were impressed with Candidate #2. Although recognizing his extensive experience in the field of alcohol and substance abuse, the consensus was that he was weak in community organization and training, and lacked a clear understanding of prevention. The panel concluded that Candidate #2 did not present the enthusiasm, vision or breadth of understanding necessary to successfully implement the new course on which ADAP had embarked.

41. After the first round of interviews, the panel concluded that Candidate #1 and Kirby had performed well and that Candidate #2 had performed poorly. The panel consulted with Powell, who directed that there be a second round of interviews. The purpose of the second round was to focus on the perceived weaknesses of each candidate. The second interviews were held on August 13, 1990.

42. The second interview of Kirby focused on the area of prevention, which the panel viewed as Kirby's "weak" area. The panel members viewed Kirby differently during the second interview. Although Gold viewed Kirby as angry and resentful, Bellino viewed Kirby as "loose" and "more at ease" (noting that she laughed eight times during the interview) and Chaffee believed that she displayed "a little more humor". The panel concluded that Kirby did not adequately address her perceived weaknesses in prevention during this interview because

her understanding of prevention appeared to be superficial. When questioned about a perception that she was inflexible, Kirby stated that she did not think she was inflexible. At this interview, Kirby emphasized the importance of "team spirit".

43. The panel viewed Candidate #1 as frank and direct in dealing with his perceived weaknesses that the panel presented. One of the major weaknesses for Candidate #1 was that he was perceived as a "loose cannon" because of reports ADAP management had received of Candidate #1 aggravating various people. Candidate #1 recognized the criticism, and stated that he had learned from various situations. He also indicated that he believed there was a positive side to this weakness because he created a "moment of decision, and the opportunity for change". Candidate #1 also was asked about the fact that he was not a certified counselor. He indicated that he did not think that was a problem because he had a good reputation with treatment providers.

44. Chaffee was concerned about Kirby's ability to handle a full-time job. He was aware of the fact that Kirby had a child with Down's Syndrome, resulting in her part-time schedule. Although Kirby made it clear she was prepared to work on a full-time basis, Chaffee "had a hunch" that Candidate #1 would be prepared to make more time sacrifices. Candidate #1 was single at the time of the hiring process. Chaffee also had doubts whether Kirby could function well as a member of the management team.

45. At some point prior to the hiring decision actually being made, ADAP management discovered that clinical oversight of the intervention specialists, who had to be certified counselors, could only be performed by a certified counselor and that neither Frank McIntosh, the northern Field Supervisor, nor Candidate #1 were certified counselors. ADAP management decided to remove the requirement of clinical supervision of intervention specialists from the Field Supervisor position. It was decided that a senior intervention specialist position would be created to handle the clinical supervision of the intervention specialists. No ADAP manager involved in the hiring process contacted LaPlante and informed her that this aspect of the job had changed, and the change was not otherwise publicized among ADAP employees.

46. After conducting the second round of interviews on August 13, 1990, the committee agreed to recommend that Powell hire Candidate #1. Gold and Bellino gave as the main reason for the recommendation that Kirby was weak in the area of prevention and Candidate #1 had a better overall understanding of the continuum of services provided by ADAP. Chaffee did not see Kirby's "weakness" in prevention as a primary reason for not hiring her, but gave as a basis for the recommendation that Candidate #1 would work as a member of the management team better than Kirby. The panel concluded that Candidate #1 was better suited to accomplish the changing goals of ADAP with respect to the continuum of services. Powell, although concluding that "on paper" Kirby was the stronger candidate for the position, agreed to accept the panel's recommendation to select Candidate #1.

47. On August 27, 1990, two weeks after the hiring decision, a staff meeting of the prevention specialists was held in Burlington. During the morning session, Gold distributed a draft of ADAP's reorganization plan (Grievant's Exhibit 3). He indicated that the staff should review the draft over lunch and that it would be discussed in the afternoon. Over lunch, LaPlante reviewed the draft and learned that the clinical responsibilities which had kept her from applying for the field supervisor position had been removed from that position and given to the new senior intervention specialist position (Grievant's Exhibit 3, p.3-4). LaPlante was surprised to learn not only that the job duties had been changed but that the men who had spoken to her about the position (i.e., Gold and Chaffee) had failed to tell her about the change in duties, knowing that the clinical duties were the reason why she had not applied. In the afternoon session, LaPlante confronted Gold and asked him whether the job description had been changed. He said it had been. LaPlante asked when the change had occurred. Gold responded by saying, "I cannot give an exact answer; maybe around two weeks ago".

48. Barbara Frey chose not to apply for the Field Supervisor position because the materials sent by Gold announcing the position suggested to her that the position required clinical supervision and McIntosh told her that the job required clinical experience. Because her experience largely was in prevention work, she did not feel qualified for the position. Upon reviewing the new job description contained in the August, 1990 draft reorganization plan, however, Frey concluded that she was

qualified for the position and would have applied had she known that the job description had been changed.

49. Both prior to and after the 1990 reorganization of ADAP, all of the ADAP management positions selected by ADAP management were held by men. The ADAP business manager is a woman. However, it was the Secretary of the Agency of Human Services, and not ADAP, who chose the woman to fill that position.

50. Since Richard Powell became Director of ADAP in 1980, he had to make five hiring decisions with respect to management positions. In four of the five cases, men were hired. The woman who was hired, Leslie Dowling, was Chief of Treatment, and she left employment with ADAP prior to the 1990 reorganization. Since 1985, there have been six vacancies in supervisory positions which ADAP management has filled. In five of the six cases, a male was hired. The woman who was hired, Madeline Motta, left the supervisory position after one year (Grievant's Exhibit 2).

51. Kirby no longer works for ADAP. She is now employed as a vocational rehabilitation counselor with the State Department of Aging and Disabilities. Barbara Frey resigned from ADAP effective September 1992 to take a position outside of state government. Marcia LaPlante and Anita Bellen remain with ADAP as prevention specialists.

### OPINION

Grievants contend that the Employer's decision to hire Candidate #1 for the position of southern regional Field Supervisor constituted discrimination on the basis of sex. Grievants further contend that the Employer violated contractual provisions requiring management to provide advance notice whenever there is a change in the minimum qualifications for a position open for promotion. Prior to addressing the merits of these claims, we first need address a threshold issue raised by the Employer concerning the Board's jurisdiction to hear these grievances.

#### Jurisdiction of the Board

The Employer contends that the Board lacks jurisdiction over the claims made by each of the Grievants in this matter because the "actual controversy" requirement is not present. The jurisdiction of the Board in grievance proceedings is limited by the requirement that there be an "actual controversy" between the parties. In re Friel, 141 Vt. 505, 506 (1982). To satisfy the actual controversy requirement, there must be an injury in fact to a protected legal interest or the threat of an injury in fact. Id. Grievance of Boocock, 150 Vt. 422, 425 (1988).

The Employer contends that the Board lacks jurisdiction over the grievance of Sheila Kirby and Barbara Frey because they have voluntarily resigned from employment with ADAP. The Employer reasons that, even if the Board were to conclude that the hiring of Candidate #1 should be invalidated, the most the Board could

order based on the relief requested is to have ADAP reopen the selection process for ADAP employees only. We believe the Employer has construed the relief requested by Grievants too narrowly. In their grievance filed with the Board, Grievants have requested as relief that the "selection process be reopened and conducted according to law." Such a request for relief does not preclude the Board from ordering as a "make whole" remedy that the selection process be open to individuals who were employed by ADAP at the time of the original selection decision, and whose rights were violated, even though they subsequently left employment, as well as employees presently employed by ADAP. Such individuals continue to have a protected legal interest under such circumstances.

Also, with respect to Grievant Sheila Kirby, an additional basis for concluding that we have jurisdiction over her grievance is that she continues to be employed in another branch of state government. The Board has previously recognized that, where an employee makes the very serious allegation of retaliation because of union activity, the Board continues to have jurisdiction even though the employee has left employment with one department of state government to work for another state department and is not seeking reinstatement with the allegedly discriminating department. Grievance of Santorello, 14 VLRB 203, 221-222 (1991). The Board reasoned that the employee was still subject to the pressures and procedures which gave rise to his grievance against the State as his employer. Id. Similarly, an allegation of discrimination based on gender is very serious, and Kirby is still working for the State as the same general employer.

The Employer further contends that the Board lacks jurisdiction over the grievance of Marcia LaPlante because she did not apply for the Field Supervisor position. The Employer reasons that her failure to do so deprives her of standing to contest the decision to hire Candidate #1 and thus there is no "actual controversy" in her case.

The Employer's contention ignores the reality of the situation in which LaPlante found herself. She did not apply for the position because of the Employer's failure to inform her that the certification requirement of the position to perform clinical supervision duties, which caused her not to apply for the position in the first instance, had been removed from the position. She alleges this violated the contractual requirement to give employees advance notice of changes in the minimum qualifications of the position. The Employer cannot credibly claim an employee lacks standing to contest a management hiring decision, because the employee did not apply for the position, where the reason the employee did not apply was because of an alleged violation of the Contract by the Employer. We conclude LaPlante has standing to have the Board address the merits of her claim.

The Employer further contends that the Board lacks jurisdiction over the grievance of Anita Bellen given that she did not appear as a witness before the Board and no record has been established of any alleged violation of her rights in this case. We agree that we have insufficient evidence to conclude whether Bellen's rights were violated, and we conclude that an "actual controversy" does not exist with respect to her claims.

### Sex Discrimination Claim

Grievants contend that the Employer's decision to hire Candidate #1 for the position of southern regional Field Supervisor violated Article 5 of the Contract, which provides that the State shall not "discriminate against...any employee because of...sex..." Grievants further contend that the Employer violated the merit system principles set forth in 3 V.S.A. §312, which requires "advancing employees on the basis of their relative ability, knowledge and skills," and assures fair treatment of employees "without regard to...sex." The focus of Grievants' sex discrimination claim is the disparate treatment of Sheila Kirby in her unsuccessful candidacy for the Field Supervisor position.

In disparate treatment cases, we have previously adopted the analysis developed by the U.S. Supreme Court in determining whether an employee was discriminated against on account of gender. Grievance of Lowell, 15 VLRB 291 (1992). Grievance of Smith, 12 VLRB 44 (1983). Grievance of Rogers, 11 VLRB 101 (1988). The central focus of the inquiry in a disparate treatment case is always whether the employer is treating "some people less favorably than others because of their...sex". Furnco Construction Corp. v. Waters, 438 US 567, 577 (1978).

The United States Supreme Court articulated the burdens of proof in disparate treatment cases, distinguishing between the burden of proof in a "mixed motive" case and a "pretext" case involving alleged sex discrimination. Price Waterhouse v. Hopkins, 490 US 228 (1989). Grievants contend that this is a

"pretext" case; that the legitimate business reason offered by the Employer for the classification decision is just a pretext for the real reason of sex discrimination. Id. The issue in pretext cases is whether illegal or legal motives, but not both, were the true motives behind the decision. Id. In pretext cases, the analysis used is that which is set forth in Texas Department of Community Affairs v. Burdine, 450 US 248 (1981). Lowell, 15 VLRB at 329.

The complainant carries the initial burden of establishing by a preponderance of the evidence a prima facie case of discrimination. Burdine, supra. If the complainant succeeds in proving the prima facie case, the burden shifts to the employer to articulate some legitimate, non-discriminatory reason for the adverse action against the employee. Id. Should the employer carry this burden, the employee must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the employer were not its true reasons, but were a pretext for discrimination. Id. The ultimate burden of persuading the trier of fact that the employer intentionally discriminated against the employee remains at all times with the employee. Id.

Thus, we first determine whether Grievant has established a prima facie case of discrimination based on gender. The burden of establishing a prima facie case of disparate treatment is not onerous. Burdine, 450 U.S. at 253. Lowell, 15 VLRB at 330. The complainant must prove by a preponderance of the evidence that she was subject to an adverse employment action under

circumstances which give rise to an inference of discrimination.

Id. The Burdine court stated:

As the Court explained in Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978), the prima facie case "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors". Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case. Id. at 254.

A prima facie case of discrimination when employment hiring is involved consists of proving that 1) the employee belongs to a protected class, 2) that he or she was qualified for the position, 3) that despite such qualifications he or she was rejected, and 4) that after the rejection, a party not part of the protected class was hired for the position. McDonnell Douglas Corp., supra at 802.

We conclude, and it is conceded by the Employer in its brief at page 12, that a prima facie case of sex discrimination has been established here by Kirby: i) Kirby was in the protected class of women, ii) she was qualified for the Field Supervisor position, iii) she was rejected for the position, and iv) the Employer instead hired a male for the position.

A prima facie case having been established, the burden shifts to the Employer to articulate some legitimate, non-discriminatory reasons for the hiring decision. Burdine, 450 U.S. at 253-54. Lowell, 15 VLRB at 335. In putting forth its non-discriminatory reasons, the Employer need not persuade the

Board that it was actually motivated by the proffered reasons. Id. It is sufficient if the Employer's evidence raises a genuine issue of fact as to whether it discriminated against the complainant. Id.

The Employer has met this burden. The Employer contends that Candidate #1 was hired because he was better suited than Kirby to accomplish the changing goals of ADAP with respect to better integration of prevention, intervention and treatment services of ADAP. This was based on the proffered reasons that Candidate #1 demonstrated more energy and enthusiasm than Kirby, Kirby was weak in the area of prevention whereas Candidate #1 demonstrated a good understanding of the continuum of services provided by ADAP and Candidate #1 would work as a member of the management team better than Kirby. These constitute legitimate, non-discriminatory reasons for hiring Candidate #1, and the Employer's evidence raises a genuine issue of fact as to whether it discriminated against Kirby.

The Employer, having carried its burden of production, Grievant must have the opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the Employer were not its true reasons, but were a pretext for discrimination. Burdine, 450 U.S. at 253. McDonnell Douglas, 411 US at 804. Lowell, 15 VLRB at 336. The ultimate burden of persuading the trier of fact that the employer intentionally discriminated against the complainant remains at all times with the complainant. Burdine, 450 U.S. at 253. Lowell, 15 VLRB at 336.

In Burdine, the Supreme Court indicated what needs to be shown to prove pretext:

The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. 450 US at 256.

In determining whether the employer's explanation was pretextual, the trier of fact may consider the evidence, and inferences properly drawn therefrom, previously introduced by the complainant to establish a prima facie case. Id. at 255, n. 10. Lowell, 15 VLRB at 336-37.

We conclude by a preponderance of the evidence that, under all the circumstances, the proffered reasons for the hiring decision are unworthy of credence and are a pretext for sex discrimination against Kirby.

First, and most important, it is apparent that Kirby had far superior credentials and stronger qualifications for the Field Supervisor position than did Candidate #1. Kirby had fourteen years experience in the substance abuse field, whereas Candidate #1 had less than three years. Kirby's work duties during these fourteen years included broad experience in community organizing, prevention, intervention and treatment, whereas the work duties of Candidate #1 had been concentrated in community organizing and prevention.

She had several years of supervisory experience as a clinical supervisor in a alcohol and family counseling program, was coordinator of a CRASH school and was a charge nurse for four years. On the other hand, the supervisory experience of Candidate #1 was limited to work unrelated to substance abuse work. Kirby had a Bachelor's Degree in Social and Health Services and a Master's Degree in Community Psychology, whereas the sole degree held by Candidate #1 was a Bachelor's Degree in a field having no apparent relationship to substance abuse work.

Kirby demonstrated impressive work performance during her six years with ADAP, receiving overall performance ratings of "frequently exceeds job requirements/standards" in all performance evaluations she received during her years of employment except for one year. Candidate #1, on the other hand, received "consistently meets job/requirements/standards" ratings on his first two performance evaluations and only achieved the higher rating regularly achieved by Kirby on his last performance evaluation prior to applying for the Field Supervisor position.

It is noteworthy in this regard that, while Kirby easily met and exceeded the minimum qualifications for the Field Supervisor position, it is unclear on the state of the evidence whether Candidate #1 even met such minimum qualifications. However, the Department of Personnel certified that Candidate #1 met the minimum qualifications. In any event, it is clear that Kirby's qualifications were much stronger.

The Employer attempts to downplay the distinctions between Kirby and Candidate #1 by alleging that the most senior and

highly qualified of the three candidates - Candidate #2 - was not hired for this position. Since Candidate #2 was a male, the Employer contends that this belies the claim that sex discrimination occurred. We disagree. The evidence is clear that it was the consensus of the interview panel that Candidate #2 did not remain a serious candidate after the first round of interviews because of his lack of understanding and apparent interest in areas of substance abuse beyond that of his direct work experience (i.e., treatment). No such consensus was reached with respect to the other candidates.

Given the superior credentials and stronger qualifications which Kirby brought to the application process than did Candidate #1, the State would have to establish compelling reasons why Candidate #1 was better suited for the Field Supervisor position than was Kirby. This, as we ultimately conclude, they have failed to do.

Second, the proffered reason articulated by the Employer of Kirby's weakness in the area of prevention is unworthy of credence. During Kirby's five years of work as a clinical supervisor and senior counselor in an alcohol and family counseling program in Rhode Island, a substantial part of Kirby's duties included the "prevention" functions of community outreach and education on substance abuse. Also, her strength in community organizing, which is important in prevention work, is demonstrated by her recognized community skills in redeveloping ADAP's treatment services in Springfield upon first being hired by ADAP. It is fairer to assess Kirby's background as having

broader, more extensive experience with respect to the continuum of services offered by ADAP than any other candidate. Since the focus of the Field Supervisor position was to integrate the continuum of services, it was inappropriate for the Employer to emphasize her perceived deficiencies in but one area.

Third, the Employer's proffered reason of Candidate #1's greater energy and enthusiasm to carry out the changing focus of ADAP, demonstrated during the interview process, is unworthy of credence as a significant basis for selecting him for the position. Although he may have displayed greater visible energy and enthusiasm, Kirby's energy and enthusiasm also are amply demonstrated by her performance evaluations over the years praising her commitment to, and effectiveness of, her work. Also, the importance given this factor is diminished by the interview panel's differing perceptions of her attitude, humor and flexibility during the interview process. This is particularly so given that any negative perceptions of Kirby in these areas seem at odds with the evidence before us of her work experience. There is no evidence before us by which we can conclude that Kirby would not have brought energy and enthusiasm to her work as a Field Supervisor.

Fourth, one member of the interview panel asserted as a reason for selecting Candidate #1 that he doubted whether Kirby could function well as a member of the management team. There is no basis in the evidence for such a conclusion.

Fifth, the "hunch" by the same member of the interview panel that Candidate #1 would be prepared to make more time sacrifices strikes us an impermissible sex-based stereotype. Employment

decisions must not be predicated on stereotypical impressions concerning the characteristics of males and females. Grievance of Lowell, 15 VLRB at 334. Kirby had assured the interview panel that she was prepared to work on a full-time basis. Given this assurance, the "hunch" by the member of the interview panel appears to be based on the unwarranted stereotypical impression that a married female with children, one with special needs, is going to be unwilling to make the time sacrifices a single male would make.

Sixth, ADAP's record of a male-dominated management and supervisory structure is a factor relevant towards our ultimate conclusion that selecting Candidate #1 rather than Kirby was based on discrimination against Kirby due to gender.

In sum, we conclude that the Employer's proffered reasons that Candidate #1 was better suited than Kirby for the Field Supervisor position are unworthy of credence under all the circumstances. An objective review of the evidence before us contradicts the subjective reasons given by the interview panel that Kirby was less suited to the Field Supervisor position than Candidate #1. We conclude that the proffered reasons constitute discrimination against Kirby based on gender.

Further, we feel it necessary to state our clear impression that the management of ADAP, male-dominated at this time, was entirely insensitive to their obligation to treat all candidates openly and fairly without regard to sex and gender. In fact, we consider the actions taken by management in connection with the issues at hand to be entirely without any redeeming justifications.

### Change in Minimum Qualifications

Grievants also contend that the Employer violated Article 19 of the Contract, which requires that the State issue a new vacancy notice whenever there is a change in the minimum qualifications for a position being filled after the initial announcement of the position is posted.

Thus, we must determine whether such a change in a minimum qualification occurred in this case. We conclude that such a change did occur. The evidence indicates that one of the initial minimum qualifications for the Field Supervisor position was that the person hired be a certified substance abuse counselor. This is demonstrated by a combination of the following factors: 1) Steve Gold's July 10, 1990, memorandum that the Field Supervisor would "directly supervise the ADAP...Intervention Specialists" and provide "immediate oversight of the full continuum of services"; 2) the representations by ADAP managers Gold and Rufus Chaffee to Marcia LaPlante that clinical supervision of intervention specialists was a requirement for the position; and 3) the representation by ADAP supervisor Frank McIntosh to Barbara Frey that the position required clinical supervision.

Due to the new legislation requiring the evaluation of all persons charged with driving under the influence, intervention specialists would be conducting such evaluations. This required that the intervention specialists be certified. The Field Supervisor could only provide clinical supervision of the intervention specialists' evaluations in this regard if the Field

Supervisor was certified. Thus, the Field Supervisor had to have the minimum qualification of being a certified substance abuse counselor to provide clinical supervision, or immediate oversight, of the intervention specialists.

However, at some point prior to the hiring decision actually being made, ADAP management removed the clinical supervision of intervention specialists from the Field Supervisor position. This removed the certification requirement from the position. The Employer was required by Article 19 of the Contract to post this change in "minimum qualifications," but failed to do so.

This violation of the Contract was not without serious negative consequences. The failure to make employees aware of the change caused LaPlante, who appeared to be well-qualified for the position, not to apply for the position. Also, Frey chose not to apply for the position because she did not believe herself qualified for the position due to the clinical supervision requirement.

#### Remedy

We turn to determining what remedy to grant Grievants due to the Employer's discrimination against Kirby based on gender and the violation of Article 19 of the Contract with respect to not posting the change in minimum qualifications for the position. Grievants request that we order that the appointment of Candidate #1 to the Field Supervisor position be declared invalid and that the "selection process be reopened and conducted according to law."

The proper remedy in such a case is to make Grievants whole and to restore the non-discriminatory, merit-based nature of the selection process. Grievance of Lowell, 15 VLRB 339-40. To make Grievants whole is to place them in the position which they would have been in had the contractual violations not occurred. Id. Towards this end, the remedy requested by Grievants is appropriate. To declare the appointment of Candidate #1 invalid and to reopen the selection process is the best remedy we can order under the circumstances.

However, we recognize that a substantial period of time has passed since Candidate #1 was selected for the position and many changes have occurred in the interim. Under the circumstances, we conclude it is appropriate to propose the following specific remedy based on the evidence before us, but provide the parties with an opportunity to propose a different remedy based on changing circumstances:

1. The appointment of Candidate #1 to the Field Supervisor position is declared invalid, and the selection process for the position shall be reopened forthwith.
2. Candidate #1 shall remain in the Field Supervisor position on an acting basis until the position is filled. He shall be eligible to apply for the position but shall be given no consideration or credit based on his performance in the position.
3. The selection process for the position shall be internal to ADAP, except that Sheila Kirby and Barbara Frey shall be eligible to apply for the position.

4. In the event that Candidate #1 is not selected for the position, he shall be placed in a position in ADAP which is at least the same pay grade as the position he occupied immediately prior to being selected as Field Supervisor, and shall be treated for pay purposes as if he was involuntarily demoted.

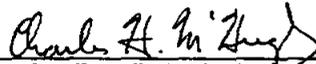
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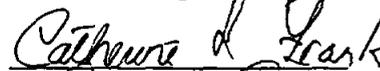
NOW THEREFORE, based on the foregoing findings of fact, and for the foregoing reasons, it is hereby ORDERED:

1. The Grievances of Sheila Kirby, Marcia LaPlante and Barbara Frey are SUSTAINED;
2. The Grievance of Anita Bellen is DISMISSED; and
3. The parties shall file with the Labor Relations Board by May 14, 1993, a proposed remedy in this matter consistent with the conclusions reached by the Board in this decision.

Dated this 30th day of April, 1993, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

  
Charles H. McHugh, Chairman

  
Catherine L. Frank

  
Louis A. Toepfer