

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	DOCKET NO. 91-70
GLORIA DANFORTH)	

FINDINGS OF FACT, OPINION, AND ORDER

Statement of Case

On November 18, 1991, Gloria Danforth ("Grievant") filed a grievance with the Vermont Labor Relations Board, alleging that the State of Vermont, Department of Public Safety ("Employer") violated Article 5 of the collective bargaining agreement between the State and the Vermont State Employees Association for the State Police Bargaining Unit, effective July 1, 1990 to June 30, 1992 ("Contract"), provisions of the Personnel Rules and Regulations, and 20 VSA § 1922 (e). Specifically, Grievance alleges that she was discriminated against on account of her sex, in the promotion process, because she was not invited to a review session in which a member of the oral promotion panel counseled male officers on how to answer questions before an oral panel on which he sat, thereby disadvantaging her. Grievant further alleges that she was not provided with a similar opportunity for such counseling. Further, the grievance alleges that the review session counseling was fundamentally unfair and in conflict with the statutory guarantee of fair and known promotional practices.

A hearing was held on August 27, 1992, before Board members Louis Toepfer, Acting Chair; Catherine Frank and Carroll Comstock. Attorney Richard Cassidy represented Grievant. Special Assistant Attorney General Mary Lang represented the Employer.

The Employer filed a Motion for Rehearing on September 8, 1992. Grievant filed a Motion in Opposition to the State's motion on October 2, 1992, and the State filed a further memorandum in response on October 13, 1992. We exercise our discretion pursuant to Section 13.17 of the Board's Rules of Practice to not reopen the hearing to take further testimony.

Briefs were filed by the Employer on September 11, 1992, and by Grievant on September 14, 1992.

FINDINGS OF FACT

1. The Vermont State Police is a quasi-military organization within the Department of Public Safety. The following ranks are used to designate officers' positions within the Department: Trooper, Sergeant, Lieutenant, Captain, Major, Lieutenant Colonel.

2. Grievant holds a Bachelors Degree and received a Masters Degree in Public Administration in 1986. She has worked for the Vermont State Police since 1976. She was promoted from Trooper to the rank of Sergeant in 1981. Grievant worked for approximately three years in the training and criminal divisions in Waterbury where she helped develop and initiate the Department's child protection unit; she was in this position during all times relevant herein. Grievant currently works as a Detective Sergeant at the Bethel barracks.

3. There are presently ten female officers in the Vermont State Police. There are no female officers holding the rank of

Lieutenant, Captain, Major, or Lieutenant Colonel. Grievant and one other female officer presently hold the rank of Sergeant.

4. Promotions within the State Police to the ranks of Sergeant, Lieutenant, and Captain are based on a competitive promotional examination that is administered by the State Police every other year during May and June. Grievant was the only female officer eligible to compete in the Lieutenant's promotional examination in 1991 (Grievant's Exhibit 6).

5. In order to be eligible to take the competitive promotional examination, an officer must meet certain time in grade requirements in the rank immediately below the rank being sought. In addition, he or she must have received a satisfactory performance evaluation of "3" during the preceding two evaluation periods. There is no limit to the number of times an eligible officer may take the competitive promotional examinations (Grievant's Exhibit 6).

6. The competitive promotional examination consists of two parts, a written examination and an oral examination. The oral examination is called an oral board. A candidate competing on the written portion of the examination receives a raw score, reflecting the total number of questions answered correctly. The candidate also receives a raw score based on his or her appearance before the oral board.

7. Candidates' written and oral raw scores are forwarded to the Vermont Department of Personnel. The Department of Personnel applies each candidate's two raw scores to a complex formula, establishing an "overall weighed score". The written

exam accounts for 60% of the final overall weighed score and the oral examination accounts for 40% of the final overall weighed score. Candidates are then placed on a numbered list with the highest overall weighed score at the top and the lowest overall weighed score at the bottom. The first half of this list is published and generally consists of the top 20 officers and their respective scores (Grievant's Exhibit 3, 6; State's Exhibit 7).

8. Under Department procedures in place at all times relevant, if there is a posted vacancy for a Sergeant, Lieutenant, or Captain position, any officer who has taken the most recent competitive promotional examination is eligible to apply for the promotional opportunity, irrespective of the officer's ranking on the promotional list. After the application period is closed and all applications are submitted, the applicants are matched to the list. The five candidates with the highest respective scores are the only candidates considered for the promotion (Grievant's Exhibit 6).

9. Grievant has been eligible to take the Lieutenant's competitive promotional examination for approximately nine years and has taken it every year since she became eligible, most recently in 1989 and 1991 (Joint Exhibit 1).

10. Grievant received an overall weighed score of 64.7 on the 1989 Lieutenant examination. Her written examination raw score was 75; her oral examination raw score was 19.7. She ranked 17th out of 36 (Joint Exhibit 1).

11. Forty-four officers were eligible to participate in the 1991 Lieutenant's promotional competitive examination, scheduled

for May and June. In February, 1991, the Employer provided all eligible candidates with an exhaustive suggested reading list to prepare for the examination. Such list included three contracts, the Department's Manual of Rules and Regulations and Operational Policy, training bulletins, the Vermont Law Enforcement Manual, pertinent sections of Titles 13, 20 and 23 of the Vermont Statutes Annotated, general math and English review tests, and texts on police administration and criminal investigations. The written examination covered four general areas: investigative, legal, supervisory, and State Police operations (State's Exhibit 1, 6).

12. The panel administering the oral portion of the Lieutenant's examination were selected in March, 1991, and were all Captains in the Vermont State: Captains James Cronan, Donald Ravenna, and James Candon.

13. Cronan, Ravenna, and Candon met several times prior to the administration of the 1991 Lieutenant's oral board. The panel had the responsibility of determining the type of oral examination that they would conduct that year, as well as determining the specific contents of the 1991 examination. They decided by mid-April that they would use what is called an "in basket exercise" as the basis for the Lieutenant's oral examination. The Department had used the in basket exercise in previous years, most recently in 1989 (Grievant's Exhibit 7; State's Exhibit 8).

14. The in basket exercise is considered an "assessment exercise". It is a role playing exercise in which a candidate appears before an oral panel and is required to assume the role of a Lieutenant who is the Station Commander of the Colchester station. The candidate is first placed in a room with an in basket holding materials which are typical of incidents which would go through a Station Commander's in basket on a Monday morning after he or she has had the weekend off. The candidate has one hour to decide how to deal with all the problems in the in basket. The candidate then goes before the panel of three Captains for 45 minutes to describe his or her strategy in dealing with all the in basket materials (State's Exhibit 7).

15. During the spring, 1991, Cronan, Ravenna, and Candon developed various exercises. They ultimately determined that there would be 14 problems, or exercises, in the in basket. By April 22, 1991, their work was in progress, but the actual exercises were not finalized (State's Exhibit 8).

16. In developing the exercises, Cronan, Ravenna, and Candon determined the correct responses to the exercises. A candidate who responded accordingly would receive a higher score than a candidate who responded to an exercise in a different way. "Correct" responses and suggested follow up questions were set forth on rating sheets the Captains developed to rate each candidate during his or her 45 minute presentation before the oral board. Besides judging or rating a candidate on these objective predetermined correct responses, the Captains would

also be subjectively judging a candidate's performance as he or she appeared before the panel.

17. During the time that Cronan, Ravenna, and Candon were developing the oral exercises, several of the officers in the Colchester station decided to form a study group to help them prepare for the Sergeant and Lieutenant examinations. It was not unusual for officers to form study groups prior to the administration of the competitive promotional examinations.

18. The officers at the Colchester barracks are a particularly close knit group and regularly socialize together, often at Sergeant William O'Leary's house. O'Leary offered to host the study group at his house. He and other members of the group informally invited anyone who was preparing for either examination to attend. O'Leary possibly posted a notice at the Colchester station as well a notice in the St. Albans outpost, which is a separate barracks but part of the same troop. Neither O'Leary nor any of the other officers invited officers from other stations. O'Leary and Sergeant James Dimmick were the driving forces behind the study group and were particularly motivated to study hard and do well in the 1991 Lieutenant's examination because both performed poorly in the previous 1989 examination.

19. The study group consisted of five officers. Three of them were studying for the Lieutenant's examination: Sergeants O'Leary, Dimmick, and William Merritt. The two remaining officers were studying for the Sergeant's examination: Warren ("Wes") Relation and Michael Heston.

20. The Troop Commander of the Colchester barracks, Captain Cronan, had a unique relationship with his officers in that he was able to work as their commanding officer and still regularly socialize with them. O'Leary asked Cronan to attend one of the study sessions to assist them in preparing for their oral boards.

21. Cronan was interested in supporting his officers' efforts. He did not attend a study session until he obtained permission from his superior officer, Major Sinclair, because he had concerns over the propriety of attending such session. There have been various study sessions over the years, but no member of an oral panel had ever attended a study session and offered advice to candidates in advance of the examination.

22. The Department encourages officers to consult with panel members after the administration of their oral examinations to gain insight in improving performances for future examinations. After the 1989 examination, Captain Reggerio offered Grievant an opportunity to discuss her performance, but she did not accept his offer.

23. Cronan received permission from Sinclair and attended the Colchester study group's April 22, 1991, study session. He gave the officers general advice on how to present themselves before the oral panel. Cronan generally advised the officers to present themselves in a professional manner and told them things such as to sit up straight, not move their chair, look directly into the panelist's eyes, and make decisions and stick with them. Merritt took notes during Cronan's presentation which are the

only written record of Cronan's April 22, 1991, presentation.

Merritt's notes indicate:

- Decision making capabilities
- Handle what's given to you - be yourself
- Don't be a social worker
- Don't be afraid to delegate
- Deal with problems as they are presented
- Progressive discipline - use it. Take appropriate steps
- Professional demeanor
- Don't move chair
- Show confidence
- What are the current issues - know them
- Don't read anything into anything - black and white
- "It is an assessment exercise"
- "Sexual harassment" know this
- Get all the facts before making a decision
- Don't be afraid to go before internal affairs
- When you question whether or not to go to internal affairs
with an issue - do it
- Be fair/compassionate person (State's Exhibit 3).

24. Merritt used quotation marks to highlight "It is an assessment exercise" because he did not have a highlighter. Merritt had no recollection of Cronan using the specific example of sexual harassment, but recalled that sexual harassment came to his mind with respect to current issues and he used quotation marks to highlight the issue (State's Exhibit 3).

25. The rating sheets which Cronan, Ravenna, and Candon developed to rate the candidates for the 1991 Lieutenant's examination indicate that the correct answers to two of the 14 exercises required delegation. Although not noted specifically on the rating sheets, a correct answer to at least three of the exercises involved a referral to internal affairs. None of the exercises involved sexual harassment (State's Exhibit 9).

26. During the 1991 Lieutenant's oral examination, as a candidate appeared before the panel, Cronan, Candon, and Ravenna

indicated on their rating sheets whether or not the candidate selected the correct type of actions and responses. They also noted whether the response was an "above average", "average", "good" "fair" "okay", "below average", or a "poor" response (State's Exhibit 9).

27. After each candidate completed his or her appearance before the panel, each of the Captains assigned a tentative numerical rating, from one to ten, in the four general areas of problem solving, decision making, supervisory skill, and communications. A rating of "4" was a below average rating, and "5" and "6" were "average" ratings (State's Exhibit 9; Grievant's Exhibit 2).

28. After all candidates appeared before the panel, the Captains reviewed their notes with each other and reassessed their initial ratings. This served as an opportunity to pool observations and also as a check and balance on a rater's potential biases (State's Exhibit 9).

29. Grievant missed several of the key issues for which the panel was looking. Additionally, Grievant's responses to the incidents were not responses that Cronan, Candon, and Ravenna had previously determined were the "correct" responses or actions for a Station Commander to take. For example, Grievant noted that one officer, a Sergeant Jones, appeared in four of the fourteen exercises. Because Jones was generally involved in an improper or questionable act, Grievant generally focused her responses in those exercises on training issues, which was not an answer the panel was seeking. Grievant's response to another exercise

indicated that the problem should be considered a "miscellaneous complaint", which was not a correct response because the Department no longer had a "miscellaneous complaint" file. In a previous position with the Department, Grievant had filed a complaint over actions of officers in the Brattleboro barracks because they had hired a belly dancer to perform at the Station. At the time, the Department considered Grievant's complaint a "miscellaneous complaint".

30. Grievant received final identical raw scores on her 1992 oral board from Cronan and Candon and slightly lower scores from Ravenna:

	Cronan	Candon	Ravenna
Problem Solving Ability	5	5	4
Decision Making Skill	5	5	4
Supervisory Skill	5	5	5
Communications Skills	6	6	6

Grievant's final raw score was 20.3. She received a raw score of 62 on her written examination. Grievant's overall weighed score was 70.6 and she ranked 27th out of 44 on the 1991 Lieutenant's examination (Joint Exhibit 2; State's Exhibit 5, 6, 9; Grievant's Exhibit 2).

31. The three study group members who took the Lieutenant's examination did very well on their oral boards. O'Leary, Merritt, and Dimmick received the three highest oral examination raw scores and ranked in the top 7 overall weighed scores. By contrast, the other two officers who attended the study session and took the Sergeant's examination, Relation and Heston, did not perform particularly well on their examinations. They ranked

36th and 41st out of 56. Cronan did not sit on the Sergeant's oral panel (State's Exhibit 4).

32. O'Leary had received raw scores of 69 (written) and 17.7 (oral) on his 1989 Lieutenant's examination. He received an overall weighed score of 59.1 and was ranked 27th out of 36. In the 1991 examination, O'Leary received scores of 66 (written) and 33.3 (oral). He received an overall weighed score of 93.7 and was ranked 3rd out of 44. O'Leary's oral raw score of 33.3 was the highest raw score on the 1991 oral board. His written score was the 7th highest raw score.

33. In the 1989 Lieutenant's examination Dimmick received raw scores of 71 (written) and 16.7 (oral). He received an overall weighed score of 59.3 and was ranked 25th out of 36. In the 1991 examination, Dimmick received scores of 63 (written) and 30 (oral). He received an overall weighed score of 85.9 and was ranked 7 out of 44. Dimmick's oral raw score of 30 was the 2nd highest raw score on the 1991 oral board. His written score was the 11th highest raw score. Dimmick was promoted to Lieutenant in August, 1992.

34. Prior to Dimmick starting his 1991 oral examination, Cronan saw Dimmick in the hall waiting to start his oral examination. Cronan asked him how he was and said, "Just remember everything you studied and learned," or words to that effect.

35. Merritt did not participate in the 1989 Lieutenant's examination. He received raw scores of 69 (written) and 29.3 (oral) on the 1991 examination. He received an overall weighed score of 90.8 and was ranked 6 out of 44. Merritt's oral raw

score of 29.3 was the 3rd highest raw score on the 1991 oral board. His written score was the 5th highest raw score.

36. The three other officers in the Colchester barracks who participated in the 1991 Lieutenant's examination also scored higher than Grievant on the 1991 Lieutenant's examination. William Northrup ranked 7th and received an oral examination score of 27.7. James Filipek ranked 8th and received an oral examination score of 23.3. James Markiewicz ranked 18th and received an oral examination score of 24.7. None of these officers joined the study group.

37. Prior to the issuance of the 1991 results of the competitive promotional examinations, Lieutenant Colonel Horton heard rumors that officers in the Colchester Station had been given information prior to the oral examination. He immediately conducted a preliminary investigation to determine whether or not to initiate an internal affairs investigation.

38. Horton discovered that Sergeants Wilder and Contois were the apparent source of the rumors and he spoke with both men. Neither Wilder nor Contois provided Horton with specific allegations of wrongdoing, but both expressed general concerns regarding Cronan's participation in the Colchester study group (State's Exhibit 10).

39. Horton interviewed all the officers who had attended the April 22, 1991, study session. All the officers told Horton that Cronan only provided them very general suggestions about demeanor and how to appear before an oral board. Horton also

interviewed Cronan, who told him the same thing. Horton decided not to initiate an internal investigation (State's Exhibit 10).

40. Grievant, who had not been invited to the Colchester study session, learned about Cronan attending the Colchester study group after the 1991 examination. She heard different versions of the assistance he had given the officers. Grievant believed that any advice that Cronan had given the study group would have been helpful to her.

41. There have been seven Lieutenant position vacancies posted since the 1991 Lieutenant's examination. Dimmick successfully applied for a Lieutenant's position and was promoted on August 2, 1991. Grievant has not applied for any of these vacancies.

OPINION

Grievant makes two allegations. First, she alleges that she was discriminated against on account of her sex because she was not invited to a review session in which a member of the oral promotional panel counseled male officers on how to appear before the oral panel on which he sat, thereby disadvantaging Grievant.

Second, Grievant alleges that the conducting of the review session, in which a member of the oral panel participated, was fundamentally unfair and in conflict with the statutory guarantee, pursuant to 20 VSA § 1922(e), of fair and known promotional practices.

Sex discrimination

Grievant alleges that she was subject to disparate treatment due to sex discrimination in violation of Article 5 of the

Contract. 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, 328 (1992). Grievance of Smith, 12 VLRB 44 (VLRB). Grievance of Rogers, 11 VLRB 101 (1988). The central focus of the inquiry in a disparate treatment case always is whether the employer is treating "some people less favorably than others because of their . . . sex". Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978).

The U.S. Supreme Court has articulated the burdens of proof in disparate treatment cases. The proper analysis for this type of disparate treatment case is that which is set forth in Texas Department of Community Affairs v. Burdine, 450 US 248 (1981). Price Waterhouse v. Hopkins, 490 US 228 (1990).

First, the complainant carries the initial burden of establishing by a preponderance of the evidence a prima facie case of discrimination. Burdine, 450 US 248 at 252-253. Second, 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. Third, 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 time with the employee. Id.

First, we must determine whether Grievant has established a prima facie case of discrimination based on gender. The burden of establishing a prima facie case is not onerous. Id. at 253. 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 US 567, 577 (1978), the prima facie case "raises an inference of discrimination only because we presume these facts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors". Id. at 254.

Grievant's allegation of disparate treatment arises from her not being invited to a study session in which a member of the 1991 Lieutenant's examination oral panel counseled male officers on how to answer questions before the oral panel of which he was a member. Grievant contends that this disadvantaged her in her appearance before the oral panel, and contributed to her low ranking on the Lieutenant's promotional list. With respect to this claim, we first need to examine whether Grievant was excluded from such study session, or similar opportunity for such counseling, because of her sex. If we determine that Grievant was excluded because of her sex, we then must determine whether such exclusion resulted in Grievant's low ranking on the Lieutenant's promotional list.

Grievant's prima facie case rests on any evidence which would raise an inference, if otherwise unexplained, that the reason she was not invited to a study session on April 22, 1991,

was more likely than not the result of sex discrimination. In this regard, we consider the circumstances surrounding the study session, along with any evidence of discriminatory animus, to determine whether an inference of discriminatory motive can be supported.

The circumstances surrounding the April 22, 1991, study session are straightforward. Grievant was one of forty-four eligible officers who planned to participate in the 1991 competitive promotional Lieutenant's examination. During the Spring, 1991, a particularly close knit group of officers in the Colchester barracks decided to form a study group to prepare for both the Sergeant and Lieutenant examinations. They informally invited other officers from Colchester and the St. Albans outpost to join them. Such informal invitation was by word of mouth and possible postings at the barracks and outpost. There was no attempt to post notices or to invite officers from any of the other barracks or outposts in the state.

Five officers regularly attended the study sessions, three preparing for the Lieutenant's examination and two preparing for the Sergeant's examination. There were at least three other officers in Colchester who were also preparing for the Lieutenant's examination and did not join the group. The Troop Commander of the Colchester barracks and St. Albans outpost, Captain Cronan, was involved in developing the 1991 Lieutenant's oral examination and would sit on the Lieutenant's oral panel. Cronan was interested in assisting his officers in their study efforts and agreed to attend one of the sessions to offer advice

to the group on how to appear before an oral panel. He attended such session only after he received permission from his superior officer.

Grievant, who was stationed at headquarters in Waterbury, was the only female officer eligible to participate in the 1991 Lieutenant's examination. Thirty-eight of the forty-four officers who were preparing for the 1991 Lieutenant's examination were stationed someplace other than Colchester or St. Albans. Neither Grievant, nor any of the officers stationed outside of Colchester and St. Albans, were invited to join the study group.

We find no evidence that Grievant was singled out and excluded from the study group, or any individual sessions, for any reason except that she worked at a different geographical location than Colchester or St. Albans. She was treated no differently than the male officers stationed at different geographical locations.

Grievant suggests that she was excluded from the study group because she was outside the social male network which included Cronan and the members of the study group members. Cronan and the study group members acknowledged that they had a unique relationship in that Cronan was a friend as well as a Troop Commander. However, this does not create an inference of sex discrimination against Grievant. Instead, it is evidence only of the close relationship between Captain Cronan and his direct subordinates.

Grievant further alleges that she was not provided with a similar opportunity for counseling at a study group to support her claim of sex discrimination. The evidence indicates that

study groups were formed at the initiative of individual candidates for promotion. The fact that Grievant did not take the initiative to form such a group creates no inference of discrimination by the Employer.

Grievant also suggests that Cronan's April 22, 1991, advice to the study group that candidates not be "social workers" revealed his own negative attitude toward the type of work she was performing at the time of the examination. We first note that the ratings Grievant received from Cronan were as high, or higher, than she received from the other two panel members. Further, even if it could be shown that Grievant was harshly judged by any or all three panelists because her responses were responses typical of a social worker, we could not conclude on this basis, without more, that this is evidence of sex discrimination.

Similarly, Grievant suggests that the male oral board applied stereotypically male values in evaluating her responses before the oral board. We listened to much testimony with respect to Grievant's responses to the 14 in basket exercises, the panel's evaluation of those responses, and Grievant's explanation as to why she answered certain exercises in the way she did. We were presented with no evidence with which we could make a meaningful comparison of Grievant's responses to the responses of male candidates who performed better than she did, most notably the three study group members. Further, we did not have the benefit of expert testimony which would assist us in evaluating whether Grievant's responses were those stereotypically

viewed as female responses. Thus, we cannot conclude on the evidence before us that the oral board applied stereotypically male values in evaluating Grievant's performance.

In sum, we conclude that Grievant has not produced evidence of discriminatory animus in the events surrounding the study review session and Grievant's appearance before the oral panel to support an inference of intentional sex discrimination. Thus, Grievant has not established her prima facie case and we need not proceed any further in our analysis of Grievant's sex discrimination claim.

Nonetheless, Grievant contends that, even if the exclusion of Grievant from the review session did not constitute discrimination based on sex, the Employer violated the affirmative action provisions of the Contract by assisting the maintenance of an "old boy network". Apparently, this claim rests on the Employer sanctioning Cronan's presentation to the study group by giving him permission to attend such session, and, in so doing, served to assist the male participants and disadvantage Grievant.

Article V of the Contract provides in pertinent part as follows with respect to affirmative action:

SECTION 2. AFFIRMATIVE ACTION PROGRAMS

It shall be a goal and objective of the State to develop and implement positive and aggressive affirmative action programs to redress the effects of any discrimination and to prevent further discrimination in personnel actions which affect bargaining unit personnel. The VSEA shall furnish input in the development of such programs.

SECTION 3. ENFORCEMENT RESPONSIBILITIES

a. By the Employer - The State acknowledges its duty to practice good faith implementation of the goals contained in

this Article. The employer further acknowledges its duty to inform employees . . . of their obligation to adhere to any affirmative action plan or program that may be developed under applicable law or this agreement . . .

These contract provisions allow the Board to police adherence to any established affirmative action plan or program. However, Grievant has presented no evidence of any affirmative action plan or program which has not been adhered to by the Employer. Thus, we can find no violation of the Contract in this regard.

20 VSA §1922(e)

In her grievance filed with the Board, Grievant contended that the conduct of the review session, in which Captain Cronan participated in advance of the oral panel portion of the Lieutenant's examination violated the statutory guarantee of fair and known practices with respect to promotions as set forth in 20 VSA §1922(e). In her post-hearing brief, Grievant did not brief this issue, so it is unclear whether Grievant is still making this claim. In any event, we address the issue and decide that Grievant's claim is without merit.

20 VSA §1922(a) establishes "a state police advisory commission which shall provide advice and counsel to the commissioner in carrying out his responsibilities for the management . . . of the Vermont state police." Subsection (e) of §1922 provides:

To ensure that state police officers are subject to fair and known practices, the commission shall advise the commissioner with respect to and review rules concerning promotion, grievances, transfers, internal investigations, and discipline.

Grievant's reliance on §1922(e) is misplaced. This statutory provision is directed at the oversight role of the state police advisory commission with respect to state police personnel practices, and does not apply to conduct of individuals at review sessions. The conduct of the review session in this matter was simply an ad hoc effort by individual candidates to better prepare for the promotional examination, and Captain Cronan's involvement in the session was an isolated occurrence. Section 1922(e) applies only to the specific review of rules by the state police advisory commission, which clearly did not occur in this matter.

Discriminatory Application of Rule or Regulation

In her post-hearing brief, Grievant alleged that the conducting of the review session with Captain Cronan's participation constituted discrimination proscribed by the Vermont Supreme Court in Nzomo v. Vermont State Colleges, 136 Vt. 97 (1978). Therein, the Court concluded that an actionable grievance under 3 VSA §902(14), which defines a grievance in pertinent part as the "discriminatory application of a rule or regulation", simply means unequal treatment of individuals in the same circumstances under the applicable rule." Id. at 102.

Specifically, Grievant contends that the Employer violated 3 VSA §1921(a) and Article VI, Section 1.6, of its own regulations requiring that promotions be based upon standardized competitive written and oral examinations. Grievant contends that the Employer did not comply with this rule as written, and discriminated against her as compared with similarly situated

employees, due to the conducting of the review session with Cronan's participation.

We conclude that this claim was untimely raised by Grievant. Section 18.3 of the Board Rules of Practice requires that a grievance filed with the Board contain a concise statement of the nature of the grievance and specific references to the pertinent rule or regulation alleged to have been violated. The grievance filed here contained no reference to an alleged violation of the rule requiring that promotions be based upon standardized written and oral examinations. Grievant raised this specific issue for the first time in her post-hearing brief. Grievant thus raised this issue in an untimely manner. Grievance of Hood and Mahar, 11 VLRB 64, 72 (1988). Grievance of Regan, 8 VLRB 340, 364 (1988).

Even assuming this issue was timely raised, we find no discriminatory application of a rule or regulation. Grievant provided us with no evidence that the Employer failed to use a standardized written and oral Lieutenants examination, and provided us with insufficient evidence by which we can conclude that different standards were applied to different candidates. Grievant has not established by a preponderance of the evidence that she was subject to treatment that was unequal to other individuals in the same circumstances under the applicable rule. Nzomo, 136 Vt. at 102.

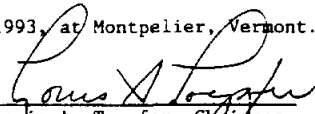
Although we do not sustain this grievance, we comment in closing that Cronan's participation in the review session showed poor judgment, given his membership on the oral promotional panel which would subsequently evaluate those employees, and others, for

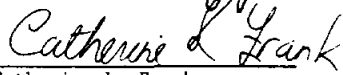
promotion. His presence at the review session gave an understandable appearance of impropriety. Such questions easily could have been avoided by Cronan declining to be involved in the review session.

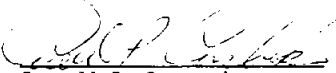
ORDER

Now therefore, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED that the Grievance of Gloria Danforth is DISMISSED.

Dated this 8th day of January, 1993, at Montpelier, Vermont.


Louis A. Toepfer, Chairman


Catherine L. Frank


Carroll P. Comstock