

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:  
ROBERT P. D'ORAZIO

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DOCKET NO. 78-20S

FINDINGS OF FACT, OPINION AND ORDER

Statement of the Case

On September 7, 1978 this Board issued findings of fact, opinion and order in this matter in which it found that the grievant was denied rights to which he was entitled under the Non-Management Unit Agreement between the Vermont State Employees Association and the State of Vermont (hereinafter "Agreement"). The Board awarded grievant back pay at pay grade 17 for five months; however, in light of the insufficiency of the evidence before the Board on the subject of damages, the Board by its order retained jurisdiction of the matter for a period of ten days during which it would consider a motion from any concerned parties to reopen the evidence for further exposition of the damage issue.

On September 18, 1978 grievant filed a motion to reconsider and on November 9, 1978 the Board held a hearing on the motion in Burlington. All members of the Board were present. Grievant was represented by John C. Fitzpatrick, Esq. and the State was represented by Bennett E. Greene, Assistant Attorney General. As a result of this hearing the Board by its order dated November 27, 1978 determined that it required further evidence on the good faith of management and ordered that a hearing be held to take evidence on that issue.

On December 6, 1978 the State filed a motion to modify the Board's order of November 27, 1978 on the grounds that the issue of good faith of management was irrelevant to the question of damages and that the issue had not been raised by grievant in his initial pleading at the original hearing on the matter or in his proposed findings of fact after the

hearing. On December 12, 1978 grievant filed a request for order for the production of documents. On December 14, the State filed a memo in opposition to grievant's motion to produce.

On December 14, 1978 a hearing was held in Montpelier on the issue of good faith of management. In the absence of Kimberly B. Cheney, Member Robert Brown presided as acting chairman. Member William G. Kemsley, Sr. was also present for the Board. Grievant was represented by John C. Fitzpatrick, Esquire and the State was represented by Bennett E. Greene, Assistant Attorney General.

At the hearing the Board ruled that it would take State's motion to modify under advisement and would consider it in light of the evidence. The Board then took evidence on grievant's request for documents. The dispute between the grievant and the State centered around a document prepared by Claude Magnant, Director of Personnel Operations of the Department of Personnel (State's Exhibit 2a) which the State had refused to produce on the grounds of privileged communication. After reading the document the Board ruled that it was not privileged and over State's objection turned the document over to the grievant. The parties then proceeded to give evidence on the issue of the good faith of management. Since the evidence could not be completed on that date, the hearing was continued on January 18, 1979. At the close of the hearing the Board ordered that the requests for findings and memoranda be submitted within three weeks.

#### FINDINGS OF FACT

In addition to the facts found in the Board's prior opinion in this matter dated September 7, 1978, the Board finds the following facts based on the evidence presented at the hearings on December 14, 1978 and January 18, 1979:

1. At all times pertinent to this grievance William H. Baumann was the Director of the Governor's Commission on the Administration of Justice (hereinafter "Director").

2. By his letter dated October 14, 1978, Joseph C. Kecskemethy, Director of Employee Relations with the Department of Personnel, informed Barbara Scott, Chief Planner for the Governor's Commission on the Administration of Justice (hereinafter "Commission") that in the Department of Personnel's view, grievant met the minimum qualifications for the position of criminal justice programmer and that in the absence of documentation by the Director that grievant was not able to perform the duties of the job, grievant must be offered the job no later than October 24, 1977.

3. Mr. Kecskemethy's purpose in making this statement was to put pressure on the Commission to ensure that the grievant was accorded all of his rights under the RIF provisions of the Agreement. The role of the Department of Personnel in RIF situations is to advise the department head of the employee's rights. Mr. Kecskemethy acknowledged that under the terms of the Agreement the department head has the right to determine whether or not an employee can perform the duties of a job within that department and that furthermore there is no requirement that this determination be in writing.

4. The Director reorganized the Commission effective September 1, 1977 because of proposed budgetary restraints. The reorganization necessitated changes in job descriptions within the Commission.

5. Following the Director's memo of October 26, 1977 to the Department of Personnel providing new job descriptions for the positions of "courts/corrections planner/monitor/legal advisor" (Position #CC-0007) and "youth and juvenile justice planner/monitor" (Position #CC-0009), Claude Magnant, Director of Personnel Operations, requested in writing that the descriptions for these positions be submitted for classification action on the standard signed AA Per 10 job description forms.

6. The standard AA Per 10 job descriptions for planner positions CC-0007 and CC-0009, plus an organizational chart were received by the Department of Personnel under cover memo of William Baumann to Commissioner Chouinard on November 23, 1977.

7. On January 13, 1978 job audits were conducted by the Department of Personnel with respect to positions CC-0007 and CC-0009.

8. On February 1, 1978 the Department of Personnel affirmed a classification of criminal justice programmer planner with an assignment to pay scale 17 for both positions CC-0007 and CC-0009.

9. On February 22, 1978 the Department of Personnel submitted to the Justice Commission class specifications which rejected any requirement of a legal education as a requirement for position CC-0007.

10. In the Director's opinion a law degree was required to carry out approximately 20% of the duties of position CC-0007 as it was restructured. Specifically the person holding the position was required to: interpret federal guidelines for the Commission; draft legislation; interpret privacy and security regulations as they related to the information systems which had been divided by the Commission; and generally provide the Director with legal advice when it was required.

11. Grievant was minimally qualified for position CC-0007 unless a legal education was made a minimum requirement.

12. By memo dated February 24, 1978 the Justice Commission rejected the class specification as submitted by the Department of Personnel and indicated the intent to comment further upon the return of one of the position incumbents on March 8, 1978.

13. On March 10, 1978 the Justice Commission presented its views in writing as to why a legal education was a necessity for position CC-0007.

14. Thereafter and on March 23, 1978 the Personnel Analyst handling this on behalf of the Department of Personnel requested

and received a review of this requirement with the staff of the Commission and again concluded that a legal education was not necessary for the position CC-0007.

15. The matter was then transferred and handled by the Director of Personnel Operations, Claude Magnant, who after conferring with the Commission capitulated to the demands of the Commission and agreed to the stricter qualification requirements which were approved by the Department of Personnel on April 8, 1978.

16. In April, 1978 the incumbent of position CC-0007 left the position and on May 1, 1978, the position was abolished by the Commission.

17. The Director's reasons for abolishing the position CC-0007 after the incumbent resigned was that the planning functions of the Commission were being phased out completely. The Commission was changing its role to monitoring existing programs and there would no longer be any need for a court planner.

18. Previous incumbents for the position of court planner have held a law degree although the job specifications for the position have not always required one.

#### MOTION TO MODIFY

The State's motion to modify the Board's order of November 11, 1978 is denied. The Board itself raised the issue of the good faith of management by its order of September 7, 1978 and in light of that order the hearing which was ordered by the Board on November 27, 1978 was necessary. We have therefore considered all of the evidence which was presented at the hearings.

#### OPINION

In our earlier opinion in this matter we found that there was no allegation or evidence that the State of Vermont or the Director of the Governor's Commission on the Administration of

Justice had acted in bad faith during this controversy. (Findings of Fact, Opinion and Order #78-205, dated September 7, 1978, page 5). On the other hand, we could not find from the evidence before us at that time any acceptable explanation why two job descriptions submitted in October 1977 were not finalized by the Personnel Department before April 1978.

As a result of the recent hearings on the issue of the good faith of management, we now have that explanation. The inordinate delay was due in large part to a dispute between the Director of the Commission and the Department of Personnel as to whether a law degree was required as a minimum qualification for the position of CC-0007. After reviewing all of the evidence, however, we conclude that the dispute was an honest one and that there is no evidence to show anything which could be construed as bad faith.

Under Section 5 b. of Article XXXI of the Agreement, the Director of the Commission had the authority to determine whether or not the grievant was able to perform the duties of the position. While he may have caused the Department of Personnel a certain amount of confusion by using the term "does not meet the minimum qualifications" interchangeably with "unable to perform the duties" when he refused to offer grievant the position CC-0007, this was an unintentional mistake on his part, not one which was motivated by bad faith. As the head of an agency the Director also had a right to require a law degree as part of the restructured job description. His reasons for requiring one were in our view not only legitimate but were well within his discretion as the head of an agency. Previous incumbents in the position of court planner had held law degrees, and the Director was in the best position to know the functions of the agency. The Director also had legitimate budgetary reasons for eliminating the position once the incumbent, Mr. Robinson, resigned.

While we find that there is no proof that either of the agencies acted in bad faith, we do believe that even honest

disputes between agencies in State government should not be prolonged at the expense of an employee, particularly one who like grievant is in a RIF situation. Since the head of the department does have the authority to make the final determination with regard to job qualifications for positions in his department, any disputes between the appointing authority and the Department of Personnel as to the appropriateness of a job qualification should be resolved within a maximum of 30 days. In our view this is a question of prompt administration of State government which can only inure to the benefit of both State employees and the State. Absent a strong showing by the State to the contrary we would be inclined to view any delay in classifying a position which is prolonged for more than 30 days as proof that the State has been dilatory in performing its statutory functions with respect to the maintenance of the classified system.

In conclusion, while we find that neither agency acted in bad faith in the particular circumstances of this case, we reaffirm our prior opinion that the job descriptions in the Commission were not maintained with the promptness required by law and that the grievant suffered because of the State's failure to meet its responsibility under the statute. We reaffirm moreover our prior conclusion that the proper relief in this case is a back pay award. However, having found that a reasonable time in which final job descriptions should be prepared is 30 rather than 60 days, we amend our prior order and grant grievant full back pay for the period November 26, 1977 to April 7, 1978 in an amount to be determined by the grievant's pay level at the time he separated from State service.

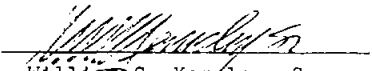
#### ORDER

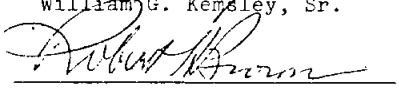
It is hereby ORDERED that the Board's order of September 7, 1978 in the Grievance of Robert P. D'Orazio be amended as follows: The grievant, Robert P. D'Orazio, shall received from

the State full back pay for the period November 26, 1977 to April 7, 1978 in an amount to be determined by the grievant's pay level at the time he separated from State service.

Dated this 9<sup>th</sup> day of March, 1979, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

  
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William G. Kemsley, Sr.

  
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Robert H. Brown,  
Acting Chairman

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:

ROBERT P. D'ORAZIO

DOCKET NO. 78-20S

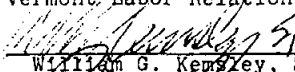
AMENDED ORDER

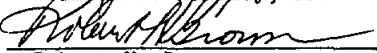
The Labor Relations Board, pursuant to V.L.R.B. Rule 11.1 adopting Vermont Rules of Civil Procedure, Rule 60, on its own initiative modifies its order in Docket No. 78-20S entered March 8, 1979 to read as follows:

It is hereby ORDERED that the Board's order of September 7, 1978 and March 8, 1979 in the Grievance of Robert P. D'Orazio be amended as follows: The grievant, Robert P. D'Orazio, shall receive from the State full back pay, less the amount actually received, for the period November 26, 1977 to April 7, 1978 in an amount to be determined by the grievant's pay level at the time he separated from State service.

Dated this 29th day of March, 1979 at Montpelier, Vermont.

Vermont Labor Relations Board

  
William G. Kembley, Sr.

  
Robert H. Brown