

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	
UNITED ELECTRICAL, RADIO)	
AND MACHINE WORKERS OF)	DOCKET NO. 99-74
AMERICA, LOCAL 267 and DAVID)	
MANNING)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On December 9, 1999, the United Electrical, Radio and Machine Workers of America, Local 267 ("Union") filed a grievance with the Vermont Labor Relations Board on behalf of the Union and David Manning ("Grievant") against the University of Vermont ("Employer"). Therein, the Union alleged that the Employer had violated Articles 7 and 17 of the collective bargaining agreement ("Contract") between the Union and the Employer, effective for the period July 1, 1999, to June 30, 2001. Specifically, the Union contends that the Employer violated the Contract on or about September 28, 1999, when it failed to award the position of solid waste specialist to Grievant in that he was the most qualified and most senior employee applying for the position.

A hearing was held on April 27, 2000, before Labor Relations Board Members Catherine Frank, Chairperson; Carroll Comstock and John Zampieri in the Board hearing room in Montpelier. Heather Riemer, Union Field Organizer, represented the Union and Grievant. Attorney Nicholas DiGiovanni, Jr., represented the Employer. The Employer filed a brief on May 11, 2000. The Union filed a brief on May 15, 2000.

FINDINGS OF FACT

1. Article 7 of the Contract states in pertinent part:

ARTICLE 7
SENIORITY

1. Except as noted in Section 4 below, seniority shall be an employee's length of continuous full-time or part-time regular service with the University . . .

. . .

2. Article 17 of the Contract states in pertinent part:

ARTICLE 17
JOB OPENINGS

. . .

3. All job openings within the bargaining unit will be posted for a period of five (5) full working days in appropriate locations on campus. Copies of job postings shall be furnished to the union at the time the openings are posted. Employees interested in applying for posted positions shall apply to the University's Employment Office.

4. Providing an employee who applies for a position meets the minimal qualifications for the position, he or she shall be given an interview for the position.

5. The University retains the discretion to decide who shall fill an open position. However, in making this determination when qualifications are equal, then current bargaining unit employees who apply for the position will be given preference for the position. If the choice is reduced to a decision between unit employees, then where qualifications are equal, the more senior employee will have preference for the position.

Qualifications shall include prior relevant work experience, skills and abilities, prior training, education and certifications or licenses held and documented past performance.

. . .

3. Grievant began his employment with the Employer in 1990 as a custodian, Grade 3, in the housekeeping division. Housekeeping is one of several divisions in the Physical Plant Services Department. In 1998, Grievant temporarily transferred to the solid waste division, another division in the Physical Plant Services Department.

4. The solid waste division is responsible for the collection and recycling of materials and refuse throughout the campus. A supervisor, Erica Spiegel, and three employees who work under her carry out the work of the department. Grievant performed duties in the solid waste division for approximately five months (Union Exhibit 3).

5. During this five-month period, Grievant worked with Ted Goad and James Bruley. Goad, Bruley and Grievant met each morning, reviewed work orders and decided among themselves who would perform which tasks. They generally worked independently of Spiegel, who met with them only one or two times each week. With the exception of Goad, all three employees generally performed the same tasks of picking up recycables and shredded paper and sorting bottles. Goad has a commercial driver's license and drives a front end loader one or two times each week and is the only solid waste team member to perform this duty.

6. There was no collective bargaining agreement in effect during the period of time that Grievant temporarily performed the duties of a solid waste specialist. Prior to the implementation of the Contract, performance evaluations were conducted every six months. After approximately five months of performing the duties of a solid waste specialist, on or about May 5, 1998, Spiegel gave Grievant an overall "satisfactory" performance evaluation. She noted that he was not always punctual and she also noted that "this is only based on (the) short time you worked with the S.W. team, at times your low enthusiasm can drag down the team." Grievant reviewed the evaluation but refused to sign it (University Exhibit 16; Union Exhibit 7).

7. Maureen Pelkey is the Assistant Director of Physical Plant Services and Spiegel's supervisor. Pelkey reviewed the evaluation and signed it on or about May 14, 1998.

8. Grievant returned to his custodial position in housekeeping in May 1998, and the Employer hired Peter Cross as a permanent member of the solid waste team. In 1998 and 1999, the Employer upgraded the three positions in the solid waste division and made them all solid waste specialist, Grade 4. Prior to this time, the three positions went by various titles, including receiving clerk, custodian and solid waste specialist. Although job titles have changed, the job has not changed for at least seven years. Team members perform interchangeable duties, except that Goad also records employees' daily duties on a computer, and operates a front-end loader. The position requires a high school diploma or "an equivalent combination of education and experience from which comparable knowledge and abilities may be required" (University Exhibit 5; Union Exhibits 3, 9).

9. In August 1998, Grievant received a written letter of counseling for sleeping while on duty. In October 1998, he received a "satisfactory" performance evaluation for the preceding six months. The evaluation noted the sleeping on duty incident and stated that he had received counseling for "poor judgment and negligence". In December 1998, Grievant received a letter of understanding for taking an unauthorized break. Although the Contract was not in effect at this time, Grievant had union representation when he received this letter of understanding. Grievant's subsequent April 1999 job performance evaluation referenced this second unauthorized break. Pelkey was aware of both incidents and signed both performance evaluations (University Exhibits 14, 15, 16; Union Exhibit 7).

10. A vacancy on the solid waste team occurred in September 1999, when Bruley transferred to a different department. The Employer posted the solid waste position vacancy pursuant to Article 17 of the Contract (University Exhibit 5; Union Exhibit 3).

11. Four individuals applied for the solid waste position, including an external candidate and three bargaining unit members: Grievant, Stanley Metivier, and Refik Sisic. Pelkey reviewed all the applications. Pelkey previously had terminated the external candidate and decided not to interview him. She determined that all three bargaining unit members should be granted interviews (University Exhibits 7, 8, 9; Union Exhibits 4, 5).

12. Metivier began his employment with the Employer in 1996 and worked as a custodian in housekeeping. He holds a high school diploma. Sisic began his employment with the Employer in January 1999 and worked as a custodian in housekeeping. Neither Grievant nor Sisic hold high school diplomas (University Exhibits 7, 8, 9; Union Exhibits 4, 5).

13. Pelkey, Spiegel and Goad interviewed the three candidates. Spiegel previously had developed experienced-based interview questions in her former position as a recycling coordinator at the University of Michigan. She modified these questions in May 1998 when the solid waste division interviewed and hired Cross. The panel used these same questions in interviewing Grievant, Metivier and Sisic (University Exhibits 10, 11, 20, 21).

14. Metivier told the interview panel that several years ago he had driven a truck for a company that picked up trash. In response to a question about the most challenging situation that he had faced in a job, Metivier described a previous working

situation at a cable company in which he found a bad cable and reported it to his supervisor. In response to a question about the most difficult decision he had to make because his supervisor was not around, Metivier described a situation while he worked at the cable company in which he prevented a flood by repairing a faucet before calling the repair team. In response to a question about what he thought his supervisor would say about him, Metivier stated that his supervisor would say he was a “self-starter” and was “not afraid” to do anything he was asked to do. Metivier expressed enthusiasm for the solid waste specialist position during his interview. He acknowledged that he had previous attendance problems, but claimed that his attendance had improved. Spiegel made a note of this attendance problems to remind herself to contact his present supervisor regarding this issue (University Exhibits 10, 21).

15. Grievant did not show enthusiasm during his interview and generally was not very responsive to the panel’s questions. He did not have an answer to the question about the most challenging situation he had encountered in a job and simply said, “I don’t know”. He did not have a response to the question about making a difficult decision in the absence of a supervisor and he stated that he would refer all emergencies to his supervisor. He stated that he thought his supervisor would say that he was “ok”. With respect to his attendance, Grievant acknowledged that it “could be better” and that he had a problem getting up in the morning because he does not hear his alarm clock (University Exhibits 11, 20).

16. Pelkey, Spiegel and Goad discussed all the candidates immediately after the last interview and agreed that Metivier was the most qualified candidate for the job because he had worked for a trash hauling trucking company, had a positive attitude and

had a higher level of education. His attitude was communicated to the panel by his enthusiasm for the position and his responsive answers to the panel's questions.

17. Neither Pelkey nor Spiegel reviewed the performance evaluations of Grievant or Metivier.

18. Spiegel agreed to check Metivier's references and, if they were positive, the panel agreed to offer him the job. Spiegel spoke with Metivier's supervisors. They told Spiegel that Metivier was a good worker and a good team player. They said that he showed initiative and was good at identifying problems and trying to fix them. Metivier's residential housing supervisor confirmed that he initially had problems with attendance, but had corrected those problems. Neither supervisor mentioned any disciplinary actions taken against Metivier or any performance problems.

19. Spiegel transmitted this information to Pelkey and Metivier was offered the job. On or about September 27, 1999, Spiegel sent a letter to Grievant informing him that the Employer had offered the position of solid waste specialist to another candidate who seemed "most appropriate for the position" (Union Exhibit 6).

OPINION

The Union and Grievant contend that the Employer violated Articles 7 and 17 of Contract because it failed to award the position of solid waste specialist to Grievant even though he was the most qualified and most senior employee applying for the position. The Employer agrees that Grievant had more seniority than any of the applicants for the solid waste position, but contends that the employee selected for the position, Stanley Metivier, was more qualified than Grievant.

. Article 17, Section 5, of the Contract provides:

The University retains the discretion to decide who shall fill an open position. However, in making this determination when qualifications are equal, then current bargaining unit employees who apply for the position will be given preference for the position. If the choice is reduced to a decision between unit employees, then where qualifications are equal, the more senior employee will have preference for the position.

Qualifications shall include prior relevant work experience, skills and abilities, prior training, education and certifications or licenses held and documented past performance.

We first look at the “skills and abilities” qualification set forth in Article 17. The Employer contends that initiative and a positive attitude are appropriate factors to consider under this qualification when considering candidates for the solid waste specialist position. Solid waste specialists are not under the daily supervision of a supervisor. They meet every morning and decide as a team who will perform what tasks and are expected to carry out their duties with very little oversight. The position requires certain mechanical or physical abilities. Given the nature of this position, we agree that initiative and a positive attitude displayed by employees in serving as a member of a team, and carrying out duties, also are relevant considerations in determining an individual’s skills and abilities to successfully perform the job.

In examining the “skills and abilities” qualification here, the Employer reasonably concluded that the successful candidate, Metivier, had a higher level of skill and ability than Grievant because of his initiative and positive attitude. Metivier demonstrated these qualities during his interview by fully responding to the interviewing panel’s questions and essentially describing himself as a self-starter. The subsequent reference checks, performed by solid waste division supervisor Erica Spiegel, confirmed the panel’s impression.

In contrast to Metivier, Grievant had a history of exhibiting low enthusiasm when he previously worked for Spiegel as a solid waste specialist in 1998. Although there was no indication that Grievant could not perform the mechanical or physical duties of a solid waste specialist, after five months of supervising him and observing him work, Spiegel concluded that his low enthusiasm had the effect of dragging down the team. Grievant's attitude and initiative did not improve when he returned to his custodial duties, as demonstrated by sleeping on the job and taking an unauthorized break. Both incidents were known to Spiegel's supervisor, Maureen Pelkey. Grievant's lack of enthusiasm and generally unresponsive answers at the interview did not serve to persuade Spiegel and Pelkey that he had overcome these deficiencies. Finally, Grievant also did not enhance his chances of demonstrating initiative and a positive attitude by acknowledging that he had a problem getting up in the morning because he did not hear his alarm clock.

We also conclude that, with respect to other qualifications set forth in Article 17 - prior relevant work experience, prior training, education and certifications or licenses held – Grievant has not demonstrated that he was superior to Metivier. Their prior experience and training in the collecting of trash and recyclables appeared comparable, and both held valid driver's licenses. However, Metivier had a higher level of education than Grievant in that he was a high school graduate and Grievant has not received a high school diploma.

With respect to the qualification of documented past performance, neither Spiegel nor Pelkey reviewed the past performance evaluations of Metivier or Grievant. Although we are troubled by the Employer's failure to take such documented performance into

consideration, we conclude that it does not affect the outcome of this case because the Union has not demonstrated that Grievant's performance was superior to Metivier's.

In sum, the Employer reasonably concluded that Metivier had superior qualifications to Grievant and, thus, the Employer did not violate Articles 7 or 17 of the Contract in not selecting Grievant for this position.

ORDER

NOW THEREFORE, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED that the Grievance of the United Electrical, Radio and Machine Workers of America, Local 267, and David Manning is DISMISSED.

Dated this 16th day of June, 2000, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Catherine L. Frank, Chairperson

Carroll P. Comstock

John J. Zampieri