VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 01-76
LOWELL NOTTINGHAM	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On December 14, 2001, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of Lowell Nottingham ("Grievant"), an employee of the State of Vermont Department of Forests, Parks and Recreation, alleging that the State violated Appendix A and Article 45 of the collective bargaining agreement between VSEA and the State for the Non-Management Unit ("Contract") by placing Grievant in a promotional probationary period, and issuing him a promotional performance evaluation, after there was an upward reassignment of Grievant's position.

A hearing was held before Labor Relations Board Members Richard Park, Acting Chairperson; John Zampieri and Edward Zuccaro on July 18, 2002. Assistant Attorney General William Reynolds represented the State. VSEA Associate General Counsel Michael Casey represented Grievant. The parties filed post-hearing briefs on August 22, 2002.

FINDINGS OF FACT

1. Appendix A of the Contract contains the following pertinent definitions:

> . . .
> **PROMOTIONAL PROBATIONARY PERIOD** – that working test period which applies when an employee is promoted to a position assigned to a higher pay grade and in certain upward reallocation situations.
> **PROMOTION** – a change of an employee from a position of one class to a different position of another class assigned to a higher pay grade.
> . . .
> **REALLOCATION** – change of a position from one class to another class.

REASSIGNMENT - the change of a class from one pay grade to another pay grade.

. . .

2. Grievant has been employed by the Department of Forests, Parks and Recreation for approximately 21 years. He has been in a Park Maintenance Technician position for the last 15 years. On February 27, 2001, Department of Forests, Parks and Recreation management filed a request with the State Department of Personnel Classification Unit to review the classification of the Park Maintenance Technician position. The Classification Unit had not reviewed the classification of the position since 1990 (State's Exhibit 1, Grievant's Exhibit 2).

3. The classification review committee established to examine the Park Maintenance Technician position concluded that the position should be reassigned from pay grade 17 to pay grade 19. The title of the position remained "Park Maintenance Technician", and the position remained in the "Park Maintenance Technician" class (State's Exhibits 2, 3).

4. The Classification Unit sent a Notice of Action on May 24, 2001, to the Department of Forests, Parks and Recreation Commissioner announcing the reassignment of the Park Maintenance Technician position. A copy of the Notice of Action was sent to the VSEA. The Notice of Action indicated that a probationary period was required as a result of the reassignment. Grievant was informed that his position had been reassigned from pay grade 17 to 19, but he did not receive a copy of the Notice of Action, and was not aware that he had been placed in a promotional probationary period (State's Exhibits 2, 3).

5. On September 5, 2001, Grievant was approached by his supervisor and asked to sign a performance evaluation report on Grievant covering the evaluation period March 11, 2001, to September 10, 2001. The performance evaluation report indicated that the "type of evaluation" was "Promotion". This was the first time Grievant knew he had been placed in a promotional probationary period as a result of his position being reassigned (Grievant's Exhibit 7).

6. Charles Eddy was in a Park Maintenance Technician position at the time of the upward reassignment, and like Grievant was placed in a promotional probationary period. Prior to the completion of the promotional probationary period, Eddy was promoted to a supervisory position. As a result of being in a promotional probationary period at the time of his promotion, Eddy received a smaller immediate salary increase pursuant to Article 45 of the Contract than he would have received had he not been again promoted during a promotional probationary period.

7. For at least 20 years, the Department of Personnel has placed employees in promotional probationary periods after their positions have been upwardly reassigned in most cases. This practice continues to the present. Section 6.2 of Personnel Policies and Procedures issued by the Department of Personnel provides that "(e)mployees whose positions are reassigned to a higher pay grade will be required to serve a promotional probationary period" (State's Exhibit 8).

8. On July 15, 2002, shortly before the hearing in this matter, the State rescinded and destroyed Grievant's performance evaluation for the promotional probationary period beginning March 11, 2001, and ending September 11, 2001 (State's Exhibit 9).

OPINION

Grievant contends that the State violated the Contract by placing him in a promotional probationary period after there was an upward reassignment of Grievant's position, and then issuing him a promotional performance evaluation. There is a threshold issue of whether this grievance is moot. The State contends this grievance should be dismissed on mootness grounds because there is no actual controversy between the parties. The State contends that Grievant suffered no harm as a result of being required to serve a promotional probationary period, and has not demonstrated the likelihood of being harmed if upwardly reassigned in the future.

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). Where future harm is at issue, the existence of an actual controversy "turns on whether the plaintiff is suffering the threat of actual injury to a protected legal interest, or is merely speculating about the impact of some generalized grievance." Id. at 424.

When an employer, prior to the Board hearing the case, has provided as a remedy the most that the Board could award as a remedy, the Board has determined that the "actual controversy" requirement has not been met. Grievance of Rennie, 16 VLRB 1 (1993) (no actual controversy where employer had removed adverse performance evaluation at issue from employee's personnel file, rescinded it and destroyed it, and that

is the most the Board would have granted as a remedy). Grievance of Ray, 14 VLRB 67, 78-79 (1991) (no actual controversy where Step III grievance officer required the employer to reimburse employee for mileage traveled on the job, and the Board lacked authority to order any further remedy). Grievance of Sherbrook, 13 VLRB 359 (1990) (no actual controversy where employer rescinded letter of reprimand at issue, and the Board was without authority to order any further remedy). There must be more than an argument over whether the contract was violated to provide an adequate basis for the Board to have jurisdiction; there also must be a request for action that the Board is able to order. Rennie, 16 VLRB at 6. Sherbrook, 13 VLRB at 362-63.

In deciding whether there is an actual controversy in this case, the Board needs to examine the remedy requested by Grievant in the grievance filed with the Board, and determine whether there are any remaining remedies that the Board has the authority to order. Among the remedies requested by Grievant was that the Board order the State to cease and desist from placing employees in promotional probationary periods, and issuing promotional performance evaluations, when employees receive upward reassignments.

An order requiring an employer to cease and desist from a particular practice is an appropriate remedy in grievance cases. *See e.g.,* Grievance of VSEA, Friot, et al, 24 VLRB 211, 224-225 (2001). Since the State has a continuing practice of placing employees in promotional probationary periods and issuing promotional performance evaluations when employees receive upward reassignments, it is appropriate to decline to dismiss this case on mootness grounds. Unlike the cases cited above that the Board has dismissed because the aggrieved employer action has been rescinded and has no

continuing effect, here the State continues with its practice on an ongoing basis. This practice will be applied to Grievant in the event of future upward reassignments to his position, and we conclude that the potential application of a practice allegedly in violation of the Contract constitutes a threat of actual injury to his protected legal interests.

It would not be a wise use of our resources, and those of VSEA and the State, to dismiss this case on mootness grounds. If we did, we would just be leaving to another day the resolution of an ongoing dispute between VSEA and the State on a significant employment practice. It is better to decide the issue now, where the parties and the Board already have expended significant resources, then to cause the expending of unnecessary resources in the future.

Given our determination that this case should not be dismissed on mootness grounds, we turn to deciding the merits of whether the State violated the Contract by placing Grievant in a promotional probationary period, and issuing him a promotional performance evaluation, after there was an upward reassignment of Grievant's position.

In deciding this case, we apply the general rules of contract construction developed by the Vermont Supreme Court. A contract will be interpreted by the common meaning of its words where the language is clear. In re Grievance of VSEA on Behalf of "Phase Down" Employees, 139 Vt. 63, 65 (1980). If clear and unambiguous, the provisions of a contract must be given force and effect and be taken in their plain, ordinary and popular sense. Swett v. Vermont State Colleges, 141 Vt. 275 (1982).

Extrinsic evidence under such circumstances is inadmissible as it would alter the understanding of the parties embodied in the language they chose to best express their

intent. Hackel v. Vermont State Colleges, 140 Vt. 446, 452 (1981). Resort to extraneous circumstances such as past practice to explain or interpret the meaning of contractual language is appropriate only if sufficient ambiguity exists in the contract. Nzomo, et al. v. Vermont State Colleges, 136 Vt. 97, 101-102 (1978). Grievance of Majors, 11 VLRB 30, 35 (1988).

In following that guidance here, we conclude that the Contract clearly prohibits the State from placing employees in a promotional probationary period, and issuing them a promotional performance evaluation, after there has been an upward reassignment of their positions. Appendix A of the Contract allows promotional probationary periods to be applied "when an employee is promoted to a position assigned to a higher pay grade and in certain upward reallocation situations."

Grievant was not promoted, which is defined in the Contract as "a change of an employee from a position of one class to a different position of another class assigned to a higher pay grade." Grievant was not changed to a position of another class; he remained in the same position and class as a result of the classification action here. Grievant's position was not reallocated, which is defined in the Contract as the "change of a position from one class to another class". Grievant's position remained in the same class.

Instead, Grievant was subject to a "reassignment", which is defined in the Contract as "the change of a class from one pay grade to another pay grade." Since a reassignment occurred here, rather than a promotion or upward reallocation, it is clear under the Contract that it was inappropriate to place Grievant in a promotional probationary period.

Given our conclusion that the Contract unambiguously prohibits the State from placing employees in a promotional probationary period after there has been an upward reassignment of their positions, the fact that the Department of Personnel has had a practice for many years of usually placing employees in promotional probationary periods after their positions have been upwardly reassigned does not aid the State's case. A mistaken interpretation by the State of a provision of the Contract does not justify denying employees rights to which they are entitled under a correct interpretation of the Contract. Grievance of VSEA (Re: Compenstory Time Credit), 11 VLRB 300, 306 (1988). A contractual provision which is incorrectly interpreted for a period of time does not render the provision invalid. Id. The practice of the Department of Personnel at issue here must give way to the provisions of the Contract.

Also, the fact that a section of the Personnel Policies and Procedures issued by the Department of Personnel provides that "(e)mployees whose positions are reassigned to a higher pay grade will be required to serve a promotional probationary period" does not change our conclusion. Employment rules and regulations promulgated by the employer concerning a particular condition of employment are superseded by the collective bargaining agreement where the agreement addresses the same issue that is covered by the employer policy. Grievance of Graves, 147 Vt. 519, 522-23 (1986). In re Muzzy, 141 Vt. 463, 476 (1982). The provisions of the Contract cited above supercede this section of the Personnel Policies and Procedures.

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered that the Grievance of Lowell Nottingham is sustained, and the State of Vermont

Department of Personnel shall cease and desist from placing employees in promotional probationary periods, and issuing promotional performance evaluations, when employees receive upward reassignments.

Dated this ____ day of September, 2002, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

_____
Richard W. Park, Acting Chairperson

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John J. Zampieri

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Edward R. Zuccaro