

STATE OF VERMONT  
VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:

ROBERT P. D'ORAZIO

Docket No. 78-20 S

FINDINGS OF FACT, OPINION AND ORDER

Statement of the Case.

This matter is a grievance brought by Robert P. D'Orazio against the State of Vermont. Grievant's petition in this matter, as amended on November 17, 1977, alleged that the grievant was discharged from his position as "Criminal Justice Information Systems Project Officer" effective October 31, 1977, in connection with a reorganization of the Commission. In accordance with the reduction in force ("RIF") provisions of the applicable collective bargaining agreement, the Department of Personnel notified the grievant that he appeared to meet the minimum qualifications for two positions then held by employees whom, under the collective bargaining agreement, the grievant was entitled to replace.

The Executive Director of the Commission interviewed the grievant and advised the grievant that the job descriptions which were on file with the Department of Personnel for those two jobs were not current because in the course of the same reorganization which had resulted in the RIF of the grievant those jobs had been modified. The Director concluded that grievant did not meet

the minimum qualifications for either such job as so modified, and the Director offered the grievant another position at a lower pay scale than either the original position from which he had been terminated or the two positions suggested by the Department of Personnel.

For the reasons set forth below, the Board finds that the grievant was denied rights to which he was entitled under the applicable collective bargaining agreement and has awarded him back pay at pay grade 17 for five months.

#### Findings of Fact.

1. At all times pertinent to this grievance, the grievant was a permanent status classified State employee and a member of the non-management unit. He held a position entitled "Criminal Justice Information Systems Project Officer" with the Governor's Commission on the Administration of Justice until he was discharged from this position in connection with a reduction in force. This is a pay scale 20 position.

2. On August 29, 1977, the grievant was notified by the Director of the Governor's Commission on the Administration of Justice ("Director") that the position he held, and his employment with the Commission, would expire effective October 31, 1977. This action was a part of a reorganization of the Commission then underway. Grievant's termination of employment was reconfirmed by letter dated September 27, 1977, which also advised grievant of his reduction in force rights and advised him to contact the Department of Personnel.

3. The collective bargaining agreement for non-management employees of the State of Vermont provides in Article XXXI, Section 5 (2), that an employee with permanent status (such as the grievant) who would otherwise be laid off shall not be laid off provided "there are contractual employees, temporary employees, employees in their original probationary period, provisional employees or limited status employees who fill positions at the same or lower pay scale within the

same department, and the employee about to be laid off meets the minimum qualifications and is able to perform the duties of the position these other employees fill".

4. The usual and customary procedure for implementing the provisions of Article XXXI, Section 5 (2), is for the State Department of Personnel to determine the applicable "minimum qualifications" and for the appointing authority, in this case the Director, to determine the "ability to perform" requirements of the contract.

5. As suggested by the Director, grievant contacted the State Department of Personnel relative to his reduction in force rights and was told by the Department that grievant met the minimum qualifications for two positions within the Commission on the Administration of Justice to which he was entitled to be considered under the Collective Bargaining Agreement, namely, positions entitled "Criminal Justice Program Planner", No. CC-0007 and "Criminal Justice Program Planner-Juvenile", No. CC-0009. Both of these positions were classified at pay scale 17 and were occupied by probationary employees.

6. On or about September 26, 1977, the Department of Personnel notified the Director its determination that grievant met the minimum qualification for these positions.

7. The Director did not offer the grievant either the position of Criminal Justice Program Planner or Criminal Justice Program Planner-Juvenile on the ground that the job descriptions on file with the Department of Personnel (which had formed the basis for the Department of Personnel's determination that grievant met the minimum qualifications for these jobs) were not current. During the Director's reorganization of the Commission, the Director had, effective September 1, 1977, enlarged the responsibilities of both positions and he believed that the grievant was unable to perform the duties of either position as then existed, notwithstanding the job descriptions then on file with the Department

of Personnel.

8. The Director did offer to the grievant on or about October 24, 1977, the position with his Commission entitled "Administrative Assistant", No. CC-20, which was at pay scale 13. Grievant declined to accept this position by letter dated October 31, 1977.

9. The Director, as department head of the Commission, was required to reorganize the Commission at the time he first assumed responsibilities as Director because the funding for the Commission had been substantially reduced from prior periods. The Director's reorganization of staff was effective September 1, 1977, but the Director delayed in providing the Personnel Department with new position descriptions and specifications upon the advice of Claude Magnant, the Director of Personnel Operations of the Department of Personnel, who stated that a "trial run" of the restructured positions would be advisable before making such submissions.

10. On or about October 26, 1977, the Director provided the Department of Personnel with job descriptions for the position of "Courts/Corrections Planner/Monitor/Legal Advisor" and "Youth and Juvenile Justice Planner/Monitor", the new titles for the positions numbered CC-0007 and CC-0009. In April, 1978, the Department of Personnel issued final job descriptions following generally the specifications made by the Director in his October 26, 1977, submissions. The position descriptions and specifications for positions CC-0007 and CC-0009 approved by the Department of Personnel in April, 1978, describe and otherwise reflect the duties and requirements of those positions as they were performed in fact since September 1, 1977, the effective date of the general reorganization of the Commission.

11. The grievant does not meet the minimum qualifications for positions CC-0007 and CC-0009 as set out in the descriptions of April, 1978.

12. The position CC-0007 was abolished entirely effective May 1, 1978.

Conclusions of Law and Opinion.

13. The Board has jurisdiction of this matter pursuant to 3 V.S.A. § 927.

14. Grievant, as a permanent status classified employee of State government is entitled to the benefits of the Collective Bargaining Agreement between the State of Vermont and the Vermont State Employees' Association for the Non-Management Unit in force during the period in issue.

15. There is no allegation by any party that the State of Vermont or the Executive Director of the Governor's Commission on the Administration of Justice acted in bad faith during this controversy and the Board finds no such bad faith existed.

16. The issues involved in this matter are not susceptible of a facile solution. On the one hand, State government must be given sufficient flexibility in its personnel operations to effectively and efficiently carry out its responsibilities. On the other hand, the Vermont state employment scheme mandated by law is a merit system which relies heavily on procedural safeguards. See Chapter 13 of Title 3 V.S.A.

17. Vermont law requires that a uniform and equitable plan of classification be established for each position in state employment (with exceptions for some positions not here pertinent). See 3 V.S.A. § 310(a). The purpose of such a plan is to remove personal bias, political preference, race, religion and such matters from influencing personnel decisions and to substitute a merit system as the determinant in personnel matters for classified employees. 3 V.S.A. § 312.

18. The classification plan mandated by law is specific and detailed as to the procedures to be followed in implementing the plan, and central to the proper function of the plan is the job description. Job descriptions are required to be prepared and reviewed with clear responsibility for these functions

specified in the law. 3 V.S.A. § 310(b). Such descriptions form an essential prerequisite to salary determinations on the point factor comparison method (3 V.S.A. § 310(a)) and establish the nature, scope and accountabilities for positions which enable management to determine qualifications (3 V.S.A. § 312(b) (1)) and evaluate performance (3 V.S.A. § 312(b) (4)). The Federal Civil Service has analagous functions which the job description must similarly serve. See Burton v. United States, 404 F.2d 365, 372 (Court of Claims 1968).

19. The case before the Board illustrates the desirability of having current job descriptions on hand in one narrow area, the carrying out of RIF procedures under the collective bargaining agreement. The identification of other positions for which a RIFed employee may be eligible depends on the existance of readily available job descriptions. The absense when needed of current and accurate job descriptions is the cause of the instant controversy.

20. The Board recognizes that the workings of state government cannot be wholly shackled by paperwork requirements. A major and involuntary reorganization such as that facing the Director of the Commission in his first weeks in office requires a pragmatic flexibility so that the work at hand can proceed and new arrangements may be tested before being memorialized in writing. cf. Bielec v. United States, 456 F.2d 690, 695 (Court of Claims 1972); Albert v. United States, 437 F.2d 976, 978 (Court of Claims 1971). The applicable statutes do not mandate that paperwork be done before jobs are modified. To the contrary, the evidence in this case shows clearly that the long-standing practice of state government is to use "trial runs" before committing to writing job descriptions for positions which are in a state of flux. The Board must interpret the governing statutes in light of the factual setting in which the statutes were enacted.

21. The responsibility of management to maintain job descriptions under 3 V.S.A. § 310(b) is ongoing. The use of the word "current" in the statute is

legislative recognition that the nature of any employment position is not static. The issue which determines this grievance is how long after an existing description is obsolete must another evaluation be performed to meet the statutory mandate to maintain "current" job descriptions. The practical realities preclude instantaneous evaluations. See Skrobot v. United States, 334 F.2d 237, 241 (Court of Claims 1975). But because of the central importance of the descriptions to classified service, prolonged delay invites abuse and undermines confidence in the system.

22. The Board concludes that during a period of involuntary reorganization, the statutory requirement for maintenance of current descriptions is satisfied when evaluations are completed in the time it would take for competent management acting in good faith to perform the task with reasonable dispatch. Obviously, this standard involves a case by case determination considering all the facts and circumstances of each case.

23. Measuring the facts in this grievance against this test, the performance of management falls far short. A reorganization which took less than one month for the Agency to accomplish took over six months for the Personnel Department to describe. Only a few positions were involved in the reorganization and only two were changed materially. Even granting arguendo the need for a trial run under the reorganization, the evidence is devoid of any acceptable explanation why two job descriptions submitted in October, 1977, were not finalized by the Personnel Department before April, 1978.

24. The Board concludes that 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 responsibilities under the statute. The failure to maintain current job evaluations and descriptions prevented the State from performing its obligations under Article XXXI, Section 5(2) of the collective bargaining agreement.

25. The Board concludes further that the proper relief in this matter is a pay award to grievant for the period when the statutory mandate for having current job descriptions was not met. Grievant has a legal entitlement to compliance with the statutes governing job descriptions in which he is interested. The denial of grievant's entitlement by failing to adhere to statutory requirements is sufficient to cause this Board to invoke a back pay award to make grievant whole. cf. Bielec v. United States, 456 F.2d 690 (Court of Claims 1972); Skrobot v. United States, 534 F.2d 237, 239-41 (Court of Claims 1975). On the facts of this case, grievant's entitlement to compensation ended with the filing of current job descriptions on April 7, 1978, since he was not qualified for either of the positions set forth in the revised job descriptions at issue.

26. Determination of the beginning date for the back-pay entitlement depends on a determination of when proper and current descriptions should have been prepared under the standard in paragraph 22 above. If the Agency involved in the reorganization could accomplish the reorganization and prepare tentative job descriptions within sixty days, the Board is inclined to believe that the Department of Personnel could within the same length of time prepare final job descriptions. There is no evidence to indicate that Personnel's task, which appears less burdensome than the Agency's in such matters, should take longer. Accordingly, the Board concludes that the grievant's entitlement to back pay should begin on December 26, 1977, sixty days after tentative job descriptions were available to Personnel.

27. The Board recognizes that a back-pay award was not anticipated by the parties and the evidence on damages available to the Board is meager. The Board will, therefore, retain jurisdiction of this matter for ten (10) days following the date of this Order and, during that time, will entertain a motion from any concerned party to re-open the evidence and argument for further exposition of the damage issue.

Order.

The Grievant, Robert P. D'Orazio, shall receive from the State full back pay for the period December 26, 1977, to April 7, 1978, in an amount determined by the grievant's pay level at the time he separated from State service. The Board will retain jurisdiction over this matter for ten (10) days following the date hereof to consider any further proceedings the parties may request as above provided.

DATED at the City of Montpelier, County of Washington and State of Vermont this 7 day of September, 1978.

VERMONT LABOR RELATIONS BOARD

*Kimberly B. Cheney*  
Kimberly Cheney

*Robert Brown*  
Robert Brown

*William Rensley Sr.*  
William Rensley

*Order reversed*  
*Feb. 19 81*