

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:

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)  
RUSSELL BELDING, NANCY CHAFFEE)  
BEVERLY HOOD, ANITA PELKEY, )  
RUTH STANLEY, DOREEN WHITE AND)  
EVELYN WILSON )

DOCKET NO. 87-17

FINDINGS OF FACT, OPINION AND ORDER

On February 20, 1987, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of Russell Belding, Nancy Chaffee, Beverly Hood, Anita Pelkey, Ruth Stanley, Doreen White and Evelyn Wilson ("Grievants"). The grievance alleged that the State of Vermont, Department of Motor Vehicles ("Employer") violated Articles 18, 20 and 34 of the Agreement between VSEA and the State for the Non-Management Unit, effective July 1, 1986 to June 30, 1988 ("Contract") by requiring Grievants to perform duties which are not within the class specifications for their positions and which are hazardous to their health, causing reasonable fear of serious injury.

A hearing was held on September 24, 1987, before Board Members Charles H. McHugh, Chairman; William G. Kemsley, Sr., and Louis A. Toepfer. Michael Seibert, Assistant Attorney General, represented the Employer. Michael Zimmerman, VSEA Staff Attorney, represented Grievants. At the hearing, the Employer moved to dismiss the grievance. The Board reserved judgment on the motion. The parties filed briefs on October 8, 1987.

FINDINGS OF FACT

1. Grievants are employees of the Employer's Quality Control Unit. They occupy two classes. One class is Clerk C, pay grade 13, and the other is Data Clerk, pay grade 12. Grievants are all office

workers whose essential functions involve quality control review of the Employer's licensing and registration materials. Their work is clerical in nature. There is no requirement that occupants of the classes receive medical clearance for heavy manual labor, including moving heavy materials. The class specifications for the positions occupied by Grievants do not mention that transport duties may be part of job duties (Grievants Exhibits 3, 5).

2. The Quality Control Unit office is in the Employer's central office, which is located at 120 State Street, Montpelier, Vermont, directly across the street from the Capitol Building. Most employees of that unit work from 7:30 a.m. to 12:00 p.m., and from 1:00 p.m. to 4:30 p.m.

3. The source of the grievance herein is that Grievants are required each workday throughout the year, in any weather conditions, to transport material from the central computer services office, which is located on the ground floor of 133 State Street (which is across and down the street from 120 State Street), to the quality control office at 120 State Street.

4. Over the years, that job has evolved both in the means employed and in the volume of material required to be transported. As recently as about five years ago, the volume was light and two male employees daily carried material in their arms from 133 to 120 State Street. Since then, the volume of material has steadily increased, primarily because of the move toward computerization and the increased responsibility taken on by the Employer of registering boats, snowmobiles and recreational vehicles. At present, about 150-200 pounds of material (e.g. computer tapes, computer-generated paper) are

transported each workday. As the volume increased, and the material could no longer be arm carried, various wheeled devices were employed. The first such device was a small-wheeled office dolly. Then, the Employer purchased a single Garden Way cart, which Grievants wheeled across the street each morning and loaded at 133 State Street. Grievants then wheeled the cart across the street to 120 State Street, where they unloaded the cart. Recently, the Employer purchased a second Garden Way cart.

5. At present, Grievants wheel an empty Garden Way cart from 120 State Street to 133 State Street and exchange that cart for a cart already loaded by employees of the Computer Center. Grievants then wheel the loaded cart to 120 State Street and unload the cart. Unloading the cart does not require heavy lifting even though the boxes carted by Grievant may weigh as much as 50 pounds each. Grievants are able to empty the contents of the boxes piecemeal without lifting the box. Most of the material hauled by Grievants is used by the Quality Control Unit.

6. There are 10 employees in the Quality Control Unit who perform transport duties. Their supervisor daily assigns two employees on a rotating basis to transport material from 133 State Street to 120 State Street. Barring illness or other unforeseen circumstances, each employee can expect to perform that duty once a week. There are two employees (i.e. Grievants Pelkey and White) who are physically unable to push the loaded cart, so their duties are only to open doors for their co-worker pushing the cart.

7. It generally takes about 25 minutes to complete the route. The route consists of travel with the empty cart from the second floor

of 120 State Street, down the elevator, out the side door, down the handicapped ramp attached to 120 State Street, down State Street to the crosswalk in front of 133 State Street, then across the street, through the parking lot to the handicapped ramp at the rear of 133 State Street, then up the ramp to the first floor. After leaving the empty cart at 133 State Street, Grievants then make the return trip, via the same route in reverse order, to 120 State Street with the fully loaded cart.

8. Maneuvering the cart is particularly difficult in the winter. If snow has fallen, sidewalks often are not cleared of snow. This necessitates Grievants pushing the cart in the roadway or through snow. The building ramp at 133 State Street is not always cleared of snow. Also, the street and sidewalk may be slippery. On occasion, Grievants' supervisors have made State vehicles available to them on winter days so they can avoid using the carts. However, Grievants are expected to shovel any snow surrounding the vehicle and to unload any materials in the vehicle to make room for the materials to be transported from 133 State Street.

9. The following employees have been injured in the course of transport duties:

A. Doreen White: While transporting 40-50 mail trays with an automobile in early 1986, White felt a pulling in her back while loading and unloading the trays. She suffered a lower back injury, including some permanent damage. She is under a doctor's orders not to lift heavy objects. She is one of the two employees physically unable to push the cart. Subsequent to White's injury, the Employer made arrangements with the State

mail system to transport the mail trays. Thus, Grievants no longer load and unload the mail trays.

B. Rodina Lamell: On March 10, 1986, Lamell suffered a back sprain and torn rib cartilage while pushing a loaded cart during transport duty. She collected worker's compensation for eight weeks due to the injury. Lamell is not under any medical restrictions concerning lifting or transport duty. On the day she was injured, Lamell made one trip pushing an unusually heavy load. At all times relevant, Grievants' supervisors have allowed employees to make two trips if the load is heavy.

C. Nancy Chaffee: On November 10, 1986, Chaffee suffered some strained back tendons in the course of transport duty. Chaffee visited a chiropractor as a result of the injury. She missed no work due to the injury.

10. Grievants fear that they or their co-workers may suffer permanent injury if they continue to perform these transport duties.

11. Among the classes of employees in State service are the classes of Stock Clerk A and Stock Clerk B. Both classes are required to lift and move heavy objects. There are two stock clerks in the Motor Vehicle storeroom at 120 State Street (Grievants Exhibit 6).

12. Grievants have sought help from their superiors in finding some alternative means of transporting materials from 133 to 120 State Street. Their superiors looked into placing a computer printer at 120 State Street, but that option was rejected as too expensive and because of a shortage of space. They also considered and rejected hiring a commercial taxi to transport the material. William Conway, Commissioner of Motor Vehicles, considered whether to assign the stock

clerks to transport duties, but determined that the responsibility ought to remain with Grievants and their co-workers. Grievants' superiors had discussions with the State Division of Purchasing, which manages the State mail system, concerning the State mail trucks delivering the materials which are now carted. While these discussions resulted in the mail truck transporting some materials, Grievants and their co-workers still regularly transport 150-200 pounds of material by cart (State Exhibits 1-4).

#### OPINION

At issue is whether the Employer has violated the Contract or a rule or regulation in requiring Grievants to transport materials from 133 State Street to 120 State Street in a Garden Way cart.

Grievants' claim is based on two alternative theories. One theory is that they improperly are being worked out of class. 3 VSA §902(14) defines grievance, in pertinent part as, "the... expressed dissatisfaction... with aspects of employment or working conditions under collective bargaining agreement or the discriminatory application of a rule or regulation". Grievants contend that a class specification assumes the character of a binding rule or regulation on the Employer and that a violation of such specification constitutes a grievable event. Under this theory, Grievants contend they have a valid grievance because the class specifications of their positions say nothing about performing transport duties of the type involved here.

We disagree with Grievants that an allegation that employees performing duties different than those contained in a class specification can be validly grieved by claiming the violation of a

binding rule or regulation. The parties have contracted that claims that employees are being worked out of class are to be filed under Article 19 of the Contract, Classification Review and Classification Grievance.

Section 1(b) of that article defines a classification grievance as "a dispute over whether the position of an individual employee, or the positions of a group of employees, is incorrectly classified and/or assigned to a pay grade". Section 8 of Article 19 provides that "the grievance and appeal procedures provided herein for classification disputes shall be the exclusive procedures for seeking review of the classification status of a position or group of positions". It is clear by these Contract provisions that Grievants have chosen the wrong avenue to pursue their claim they were working out of class.

Grievants' other theory is that they should be excused from performing the complained-of duties pursuant to Article 34, Section 10 of the Contract by reason of their reasonable fear of serious injury through performance of those duties. Article 34, Section 10, provides:

An employee who establishes a reasonable fear of death or serious injury resulting from performance of an assigned task shall be exonerated from a charge of insubordination or violation of the rule--"work now, grieve later". This section shall not excuse non-performance of duty when risk of death or injury is an inherent part of the job.

The Employer contends that this Contract provision is not applicable to this matter because the conditions precedent to its protection to the employee have not occurred. The Employer interprets this provision to contemplate a situation in which an employee will have refused to do a task and the employer will have imposed

discipline either for "insubordination" or for failure to follow the rule, "work now, grieve later"; that situation is not applicable herein because none of the employees have refused to perform the duties and the employer has never disciplined the employees for either prohibited reason.

We do not interpret the Contract language to have as limited an application as the Employer contends. While the provision clearly covers an employee's refusal to perform assigned duties because of fear of serious injury, we conclude it is not limited to that set of circumstances and extends to the situation present here where Grievants have complied with the "work now, grieve later" rule. The underlying policy expressed in the Contract provision is that employees should not be required to subject themselves to risk of serious injury or death, unless those risks are an inherent part of their jobs. We do not believe the parties intended that employees necessarily would have to subject themselves to potential discipline for this policy to be applied. Employees who opt not to risk discipline and who comply with the "work now, grieve later" rule also enjoy the protection of the underlying policy.

We turn to determining whether Grievants have "establish(ed) a reasonable fear of... serious injury" resulting from their transport duties. We conclude that the fact three employees have suffered back injuries in transport duties, one employee suffering permanent damage, and the condition under which Grievants transport materials has created a reasonable fear among Grievants of serious injury resulting from their transport duties.



We recognize that one of the injured employees was injured loading and unloading mail trays, a task Grievants are no longer required to perform. We also recognize another of the injured employees was injured while making one trip with an unusually heavy load, when she could have opted to make two trips. However, it is evident that Grievants place themselves at risk of suffering injuries as serious as that of the employee who suffered permanent back damage by pushing a cart containing 150-200 pounds of material up and down ramps and through streets and sidewalks which may be slippery and snow-covered. We also recognize that the amount and weight of the materials transferred has increased over time from a few file folders to several boxes of material weighing as much as 200 pounds. There is reason to believe that in the future there will be further increased weight of materials to be moved.

Although not dispositive, it is persuasive to us that Grievants are essentially clerical employees who were hired specifically to perform clerical duties and who, therefore, cannot be expected as part of their duties to possess the necessary physical strength and pushing skills to perform the transporting duties at issue herein. Given the essential nature of their duties, they have established a reasonable fear of serious injury whereas employees who are required to move heavy objects as part of their essential duties may not establish such a reasonable fear.

In sum, we conclude the Employer has failed to act responsibly and has placed Grievants in a position where they reasonably fear serious injury in violation of Article 34, Section 10, of the Contract by not using alternative means to ensure the transport duties are performed.

ORDER

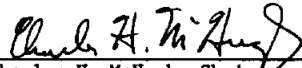
Now therefore, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED:

1. The Employers' Motion to Dismiss is DENIED and the grievance of Russell Belding, Nancy Chaffee, Beverly Hood, Anita Pelkey, Ruth Stanley, Doreen White and Evelyn Wilson is GRANTED; and

2. The State of Vermont, Department of Motor Vehicles, shall cease and desist from requiring Grievants to transport materials between 133 State Street and 120 State Street.

Dated this 8th day of January, 1988, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

  
Charles H. McHugh, Chairman

  
William G. Kemskey, Jr.

  
Louis A. Toepfer