

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	DOCKET NO. 94-23
LARRY ORVIS)	

FINDINGS OF FACT, OPINION AND ORDER

On May 13, 1994, Larry Orvis ("Grievant"), Transportation Technician C with the Agency of Transportation, filed a grievance alleging that the State of Vermont, Department of Personnel ("State") violated the salaries and wages article of the collective bargaining agreement between the State and the Vermont State Employees' Association ("VSEA") for the Non-Management Unit. Specifically, Grievant alleged that he was treated differently than a similarly situated employee with regard to the retention of a market factor adjustment when the employees moved to positions with a higher pay grade.

A hearing was held before Board Members Charles McHugh, Chairman; Louis Toepfer and Carroll Comstock on December 1, 1994. Grievant appeared on his own behalf. Michael Seibert, Assistant Attorney General, represented the State. The parties did not file post-hearing briefs.

FINDINGS OF FACT

1. Article 49, Section 11(h) of the 1988-90 State - VSEA collective bargaining agreement for the Non-Management Unit provided as follows:

In the event that an employee in a classification which has received a market factor adjustment demotes, transfers, or promotes to a different class, or whose position is reassigned or reallocated, the employee's salary Step in the new position shall be determined under normal rules established in the collective bargaining agreement currently in effect based on the salary which the employee would have been earning but

for the application of the market factor adjustment. This requirement may be waived, in whole or in part, at the request of the appointing authority making the hiring decision, and with the approval of the Commissioner of Personnel. Thereafter, any market factor adjustment pertaining to the employee's new job classification shall be applied.

2. The 1990-1992 State - VSEA collective bargaining agreement for the Non-Management Unit provided in pertinent part as follows:

**ARTICLE 51
SALARIES AND WAGES**

Section 3

c. Effective July 7, 1991, all employees covered by this agreement shall receive a 2.0% increase based on rates in force on July 6, 1991.

Section 16. Other Adjustments

g. Employees receiving an adjustment to their salary based on a Market Factor Adjustment implemented prior to July 1, 1990, shall retain those rights to salary outlined in the 1988-90 Agreement.

**ARTICLE 76
AGENCY OF TRANSPORTATION
ENGINEERS/TECHNICIANS**

Section 2. Special Adjustment:

Effective at the beginning of the first full biweekly payroll period following the day and month (but not necessarily the year) of an employee's Step Date in fiscal year 1991, employees in the classes of Technician C, Project Technician Supervisor, and Senior Civil Engineer whose rate of pay is not adjusted with a previously granted market factor adjustment, and who are not at the maximum of the pay grade for their class, shall be advanced to the next higher step in their pay grade in addition to any other step movement otherwise due . . .

3. Grievant and Richard Gilman were both hired by the Agency of Transportation in July 1978. They became Transportation Technician 3's in 1979, and remained Transportation Technician 3's until 1991. In 1989, a Market Factor Adjustment was made to the wages of Transportation Technician 3's so that 3.5 percent was added to the employees' base pay and step. Grievant and Gilman both received a 3.5 percent increase to their pay rate at that time.

4. In February, 1991, Gilman was promoted from Transportation Technician 3, a pay grade 17 position, to Transportation Technician C, a pay grade 19 position. The Transportation Technician C acts as a survey party chief. Gilman, who was at Step 7 in his pay grade 17 position, was paid at an hourly rate of \$11.64 prior to his promotion. This rate was calculated based on the base rate of pay grade 17, step 7, of \$11.25 multiplied by the 3.5 percent market factor adjustment which Gilman had received in 1989. At the time Gilman was promoted, the wage increase upon promotion was 8 percent. Pursuant to Article 51, Section 16 (g) of the 1990-92 collective bargaining agreement (which incorporated Article 49, section 11 (h), of the 1988-90 agreement), this 8 percent increase was made on Gilman's base pay without factoring in the market factor adjustment which he had received in 1989. This calculation would have placed him at pay grade 19, step 6. However, because of the operation of Article 76 of the agreement; making an adjustment in pay in fiscal year 1991 (i.e., July 1, 1990 - June 30, 1991) under the circumstances of Gilman's promotion; Gilman was placed at pay grade 19, step 7, upon promotion. His

hourly rate of pay was established at \$12.62. This was a 8.4% increase from his prior rate of pay.

5. In July, 1991, Gilman and Grievant received the 2% wage increase granted to employees pursuant to Article 51, Section 3, of the collective bargaining agreement.

6. In September, 1991, Grievant was promoted from Transportation Technician 3 to Transportation Technician C. Like Gilman, Grievant was to act as a survey party chief in the Transportation Technician C position. Grievant, who was at Step 7 in his pay grade 17 position, was paid at an hourly rate of \$11.88 prior to his promotion. This rate was calculated based on the base rate of pay grade 17, step 7, of \$11.48 multiplied by the 3.5 percent market factor adjustment which Grievant had received in 1989. At the time Grievant was promoted, the wage increase upon promotion was 8 percent. Pursuant to Article 51, section 16 (g), of the 1990-92 collective bargaining agreement, this 8 percent increase was made on Grievant's base pay without factoring in the market factor adjustment which he had received in 1989. This resulted in a calculation of \$11.48 multiplied by 8 percent, equalling \$12.40. Pursuant to the collective bargaining agreement, Grievant was slotted into the next highest step at pay grade 19 from this pay rate, which was step 6 at an hourly rate of \$12.44. Since Grievant was promoted in fiscal year 1992, Article 76 of the agreement did not apply to him, since the adjustment under that article only applied during fiscal year 1991. Grievant's hourly rate of pay of \$12.44 was a 4.7% increase from his prior rate of pay.

7. Grievant was aware by October of 1991 of the difference in wage treatment between Gilman and him upon their respective promotions. He contacted Richard Boulanger, Personnel Administrator for the Agency of Transportation. Boulanger told Grievant that he would seek to obtain a waiver from the Department of Personnel, pursuant to Article 51 of the collective bargaining agreement, of the requirement of basing the promotional wage increase "on the salary which the employee would have been earning but for the application of the market factor adjustment". In May, 1992, Boulanger informed Grievant that the Department of Personnel would not approve the waiver. There is no evidence concerning why a waiver was not granted by the Department of Personnel.

8. On the day Grievant was informed by Boulanger that the waiver would not be approved, Grievant spoke with Steven Janson, VSEA Director of Field Services, about the issue. Janson informed Grievant that VSEA would look into the matter. VSEA filed a grievance on Grievant's behalf in January 1994. The grievance was denied throughout the grievance procedure.

OPINION

At issue is whether the State violated the salaries and wages article of the State - VSEA collective bargaining agreement. Grievant alleges that the agreement was violated because he was treated differently than a similarly situated employee with regard to the retention of a market factor adjustment when the employees were promoted to positions with a higher pay grade.

We recognize that substantial questions exist concerning the timeliness of this grievance, including whether this is a continuing grievance. Nonetheless, we do not address the timeliness issue and proceed directly to the merits. This is because, even assuming that the grievance is timely, it is clear that the State did not violate the provisions of the collective bargaining agreement.

It is true that Grievant was treated differently than Richard Gilman upon their respective promotions. Grievant received a much lower percentage wage increase than Gilman even though they were promoted seven months apart from positions with the same title, pay grade, and responsibilities to positions with the same title, pay grade and responsibilities. Also, they were treated differently even though the same market factor adjustment had been applied to the positions from which they were promoted.

Yet, this does not establish a violation of the collective bargaining agreement. Gilman received different treatment than Grievant pursuant to a contract provision, Article 76, which provided for a special upward adjustment during the fiscal year in which Gilman was promoted, but provided no such adjustment during the fiscal year in which Grievant was promoted. The adjustment applied during fiscal year 1991 in circumstances where a market factor adjustment received by employees, in the positions from which they were promoted, was not factored in when wage increases upon promotion were calculated. Grievant simply was a victim of timing. If he had been promoted during fiscal year 1991 like Gilman, Grievant would have received the same percentage wage increase;

however, he was promoted during fiscal year 1992.

The basis of Grievant's claim that the difference in treatment between him and Gilman was due to the discriminatory application of the market factor adjustment is erroneous. The difference was based on the application of Article 76 of the Contract; this applied to Gilman but not to Grievant. The problem was a matter of timing.

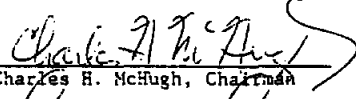
Under these circumstances, and where there is no evidence indicating why a waiver from the Department of Personnel of the contractual requirement of basing the promotional wage increase "on the salary which the employee would have been earning but for the application of the market factor adjustment" was not granted, we conclude that there was no violation of the collective bargaining agreement.

ORDER

NOW THEREFORE, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED that the Grievance of Larry Orvis is DISMISSED.

Dated this 8th day of December, 1994, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Charles H. McHugh, Chairman


Louis A. Toepfer

/s/ Carroll P. Comstock
Carroll P. Comstock