VERMONT LABOR RELATIONS BOARD

IN RE: GRIEVANCE OF WILLIAM O. GRAVES	)	
	)	
v.	)	DOCKET NO. 79-26S
	)	
STATE OF VERMONT	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of the Case

The grievance of the Vermont State Employees' Association, Inc., (hereinafter "VSEA") on behalf of William O. Graves, a member of the Non-Management Unit, was filed with the Vermont Labor Relations Board (hereinafter "Board") on April 25, 1979. The grievance arose from a Step III decision of the Director of Employee Relations, Department of Personnel, dated March 24, 1979.

The State filed an answer with the Board on May 17, 1979.

On July 3, 1979, a hearing was held before Board Members Kimberly B. Cheney, William G. Kemsley, Sr. and Robert H. Brown, at which time the Grievant and the State stipulated the facts related to the grievance.

The Grievant was represented by Alan S. Rome, Esq., counsel for the Vermont State Employees' Association. The State was represented by Bennett E. Greene, Assistant Attorney General.

FINDINGS OF FACT

The Board finds the following facts, the majority of which were stipulated by the parties at the July 3 hearing.

1. VSEA is the exclusive collective bargaining representative of the State of Vermont non-management classified employees.

2. On April 25, 1979, VSEA filed a Step IV grievance with the Board, on behalf of member William O. Graves, grieving the implementation of the 1978 economic increase for classified employees.

3. The collective bargaining agreement in evidence in this grievance is the AGREEMENT between the STATE of VERMONT and the VERMONT STATE EMPLOYEES ASSOCIATION for the Non-Management Unit, effective July 5, 1976, through June 30, 1979.

4. On May 31, 1978, the Grievant resigned from the classified position of "Accountant A" with the State of Vermont, Department of Social and Rehabilitative Services.

5. At the time of his resignation, Grievant was earning $277.00 a week in pay scale 12. This was then the maximum weekly pay rate within pay scale 12.

6. On February 13, 1979, Grievant was restored to a permanent-status classified position, "Accountant A" with the Department of Social and Rehabilitative Services, the same position held by the Grievant prior to his May 31, 1978 resignation.

7. Upon being restored, Grievant was compensated at the same rate he received prior to his May 31, 1978 separation from state service, $277.00 a week. As of July 2, 1978, the maximum weekly pay rate within pay scale 12 had been raised to $294.00 a week as a result of a revision of the pay plan which increased the maximum weekly rates by six percent. If Grievant had received a six percent increase at the time he was restored, he would receive $294.00 a week.

8. The Board takes official notice of the following terms pertinent to this case, as defined in the State Rules and Regulations

for Personnel Administration.

a. "Restoration", Rule 2.037:

> "...the rehiring of a former permanent-status employee to the position previously held by him, or in a position of the same class, or in a position assigned to an equal or a lower pay scale than the class of position previously held by action dependent upon his qualifications as exhibited by his former employment."

b. "Permanent Status", Rule 2.028:

> "... that condition attained by an employee upon satisfactory completion of an original probationary period entitling him to tenure and the statutory right of appeal. Additional rights and privileges including consideration for promotion, transfer, restoration, reinstatement and re-employment apply at any level where an appropriate probationary period has been completed."

c. "Position", Rule 2.029:

> "...a group of current duties and responsibilities assigned or delegated by competent authority and requiring the full-time or part-time employment of one person."

d. "Class", Rule 2.018:

> "...one or more positions sufficiently similar as to the duties performed, degree of supervision exercised or received, minimum requirements of training, experience, or skill, and such other characteristics that the same title, the same test of fitness, and the same schedule of compensation may be applied to each position."

9. On February 28, 1979, VSEA grieved the action of the Department of Personnel (Grievant's Exhibit #1), denying the Grievant the right to a six percent salary adjustment granted to certain State employees, effective July 2, 1978, under Section 1(b) of the FY 1979 "Pay Act" [(No. 222, Public Acts, 1977 Adj. Sess.)(State's Exhibit #2)].

10. On March 27, 1979, Director of Employee Relations Joseph Kecskemethy denied the February 28 Step III grievance. (Grievant's Exhibit #2).

11. In accordance with Section 1(f) of the Pay Act, the parties subject to this grievance developed procedures for the imple-

mentation of the 1978 economic adjustment and compensation provisions of the Act (State's Exhibit #3) subject to the collective bargaining agreement between the parties and the State Rules and Regulations for Personnel Administration.

12. The "Guidelines for Implementation of the 1978 Economic Increase for Classified and State Police Employees" (State's Exhibit #3) adopted by the parties, distinguish "Compensation Provisions" from the "Economic Adjustment" provisions of the Pay Act. Part II of the Guidelines, "Compensation Provisions", refers for the most part to Section 1(a) of the Pay Act, whereas the Guidelines set forth in Part I, "Economic Adjustment", refer mainly to Section 1(b) of the Act.

13. The compensation plan set forth in Section 1(a) of the Act is a schedule of minimum and maximum weekly pay rates for pay scale level one through pay scale level thirty. (State's Exhibit #2) The enactment of Section 1(a) which increased the maximum weekly pay rates by six percent, constitutes a "revision of the pay plan" in accordance with Rule 6.02 of the State Rules and Regulations for Personnel Administration.

14. Under Section 12 - "TENURE, SEPARATION AND REINSTATEMENT" of said Rules, Rule 12.07, "Restoration in Previous Class" states:

> "A permanent-status employee separated without prejudice may for a period of two years be restored to a vacant position in the class formerly held or to a vacant position of another class assigned to the same or lower pay scale, provided that he is eligible and qualified for the position."

15. Rule 6.077 of Section 6 - "COMPENSATION" sets forth the provision governing adjustments in the rate of pay of employees who are restored.

> "An employee restored (subsection 12.07)... to fill a position as provided in these rules shall be paid at any rate in the pay scale not in excess of the salary

> received in the previous position plus any increase which would have accrued to such rate in the interim because of adjustment to the pay scale or compensation plan."

16. Rule 6.042 provides for the rate of compensation for new employees, stating:

> "The minimum rate for the class shall be the hiring rate which shall apply upon original appointment to a position in the State service, except as approved by the Personnel Director in instances in which (a) a shortage of qualified applicants is known to exist; (b) special qualities of training and experience are requested by the appointing authority; or (c) a candidate possesses exceptional and outstanding qualifications for a position."

OPINION

The issue before the Board is whether the Grievant is entitled to the 1978 six percent salary increase given classified employees by Public Act 222 (1977 Adj. Session) as of July 2, 1978; even though he was "restored" to State service on February 13, 1979.

One factor in resolving this question is the proper interpretation of Rule 6.077, Section 6. The other is the application of the negotiated "Guidelines". The rule provides:

> "An employee restored (subsection 12.07)... to fill a position as provided in these rules shall be paid at any rate in the pay scale not in excess of the salary received in the previous position plus any increase which would have accrued to such rate in the interim because of adjustment to the pay scale or compensation plan."

At issue is whether the rule sets a mandatory maximum salary for restored employees. That question turns in part on whether the six percent pay increase legislated in Public Act 222 (1977 Adj. Session) (hereafter "The Act") is a "compensation plan" within the meaning of the rule. We discuss the second issue first, because if there is no adjustment to the "compensation plan", the "mandatory" question is moot.

Plainly, the six percent increase authorized by Section 1(b) of the Act is not an adjustment to "pay scales". "Pay scales" were expressly changed, at least the maximums were, by Section 1(a) of the Act, and Section 1(b) is an additional pay increase. For a technical sense the six percent 1(b) increase is not an adjustment to the "compensation plan" either. Section 1(a) of the Act expressly refers to itself as a "plan of compensation". Hence one could reasonably argue, as the State does, that Rule 6.077 does not apply to the 1(b) increase but only 1(a) increases. We believe, however, that the six percent increase should be regarded as a "compensation plan" for purposes of interpreting Rule 6.077. The parties so treated it while bargaining and gave the six percent increase to restored employees then on the payroll. Moreover, Section 1(f) of the Act uses the term "compensation plan" in a non-technical sense to include all pay provisions in the Act. We shall do likewise. Even so, we agree with the State's argument that the language of Rule 6.077 is permissive and not mandatory, allowing the appointing authority discretion in setting the rate of compensation for restored employees. In our analysis, the phrase, "... at <u>any</u> rate ..." within Rule 6.077 is controlling. The rule does not say restored employees <u>shall be paid at the highest rate</u>. Instead, the appointing authority is given discretion to pay at a rate "...<u>not in excess</u> of the salary received in the previous position plus ...", (Emphasis added). This language sets forth a <u>maximum</u> amount of compensation payable to a particular restored employee. That maximum rate is dependent upon his prior rate of compensation, the position to which he is restored, and the affect of any adjustment to the pay scale or compensation plan.

In summary, applying the terms of Rule 6.077, the Grievant was restored to the same position he held prior to his May 31, 1978 resignation ("Accountant A") at the same rate of compensation ($277.00 a week), despite an adjustment to the compensation plan which increased the maximum pay rate in Grievant's pay scale 12 by six percent ($294.00 a week).

Since we hold the appointing authority could legally set Grievant's pay at the rate he did, we dismiss the grievance.

However, we strongly suspect that the parties in negotiating the Guidelines for implementing the 1978 economic adjustment did not fully treat the subject of restored employees. Considering that a permanent-status employee may be restored for a period of two years following separation from State service (see Finding #14), the FY 1979 Pay Act effective July 2, 1978, has the potential of affecting restored employees through June 30, 1980. For this reason, we disagree with the State's argument which presumes the parties "dealt with the entire subject matter" in treating those employees restored between January 3 through July 1, 1978.

It is possible that a restored employee, eligible for the increase under Guideline I.A. 2. (State's Exhibit #3), had been separated from State service for as long as two years. It would seem unlikely to us that the parties, if they had thought about it, would have intended an employee restored after July 2, 1978, to be denied a substantial salary increase granted to employees restored during January 3 through July 1, 1978. The discriminatory effect is obvious, and the justification for it is not.

While it is true, as the State argues, that Grievant is conspicuously absent from the group "restored" between January 3 to July 1,

1978, it is also true that nothing in Section 1(b) of the Act requires a person to be on the payroll on July 2, 1978, and to have served six months continuously prior to that date in order to qualify for the six percent raise. In our view, then, the Grievant could legally be given the six percent increase if the employer in its discretion choose to do so either at the bargaining table or when hired. But, the discretionary provisions of Rule 6.077 prohibit our ordering this result.

We presume, as a mandatory subject of bargaining, the affect of the FY 1979 Pay Act on employees restored after July 2, 1978 who would be affected through June 30, 1980, would be subject to mid-term collective bargaining, at least there is no evidence before us indicating any waiver of this right. Accordingly, we dismiss the grievance without prejudice to the right of the VSEA to request bargaining on the subject of this grievance. See e.g. VSEA v. State of Vermont, 2 VLRB 155 at 168.

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ORDER

For all the foregoing reasons, this grievance is hereby ORDERED dismissed, and is dismissed, this 25th day of October, 1979.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney, Chairman

William G. Kemsley, Sr., Member

Robert H. Brown, Member