VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF: DOCKET NO. 78-100S

THE VERMONT STATE EMPLOYEES ASSOCIATION, INC. on behalf of All Employees Covered by Non-Management Contract, Articles XXXIII, XXXIV, XXXVI, XXXVII, Referred to Hereafter as "Phase Down" Employees, from a Step III decision of the Department of Personnel pertaining to the above-entitled provisions and Article XXXII of the Non-Management Contract, with its relevant contractual definitions.

FINDINGS OF FACT, OPINION AND ORDER

Statement of the Case

On October 5, 1978 the Vermont State Employees Association (hereinafter "VSEA") filed a grievance on behalf of all employees covered by the Non-Management Contract, Articles XXXIII, XXXIV, XXXVI, XXXVII referred to hereafter as "Phase Down" Employees, from a Step III decision of the Department of Personnel pertaining to the above-entitled provisions and Article XXXII of the Non-Management Contract, (hereinafter "Agreement"). The State of Vermont (hereinafter "State") filed a motion to dismiss on October 27, 1978.

On February 1, 1979 a hearing was held on the State's motion to dismiss and on the grievance. All members of the Board were present. The VSEA was represented by Alan S. Rome, Counsel for the VSEA, and the State was represented by Louis P. Peck, Chief Assistant Attorney General. Although no answer had been filed by the State to the grievance, the rule requiring an answer was waived by the Board. (V.L.R.B. Rules of Practice, §23.4). The State's failure to file an answer will not be deemed by the Board to constitute an admission of any of the material facts alleged in the grievance.

FINDINGS OF FACT

1. The Board takes judicial notice of the Agreement for the Non-Management Unit between the VSEA and the State, and in particular Articles XXXII, XXXIII, XXXIV, XXXVI and XXXVII.

2. The "Phase Down" employees referred to in this grievance are as follows: Cottage and house parents; certain employees of the Fish & Game Department; certain employees of the Department of Highways; certain communications technicians.

3. Richard C. Curtiss is a field representative for the VSEA. On July 24, 1978 Mr. Curtiss received an inquiry from certain Highway employees in Bethel, Vermont. This inquiry pertained to certain questions relating to the "Phase Down" provisions of the Agreement.

4. On July 27, 1978 Mr. Curtiss travelled to Bethel in order to discuss these questions with the aforementioned State employees.

5. About a week after he met with the Highway employees in Bethel, Mr. Curtiss requested a meeting with Joseph Kecskemethy, Director of Employee Relations, Department of Personnel. At this meeting and at a subsequent meeting on August 30, 1978, Mr. Curtiss and Mr. Kecskemethy discussed the State's position with regard to the "Phase Down" provisions of Article XXXII of the Agreement. At the meeting on August 30, Mr. Curtiss requested Mr. Kecskemethy to put the State's position in writing.

6. By his letter dated August 30, 1978, Mr. Kecskemethy confirmed the State's position with regard to Mr. Curtiss's inquiry on behalf of the Highway employees and other similar situated "Phase Down" employees. In his letter Mr. Kecskemethy stated:

> "It is our position, and has been since the referenced article was negotiated over two years ago, that Article XXXII would live only so long as the 'Phase Down' lived. As of the beginning of FY

1979 no employees are being phased down. Consequently, it is our position that the benefit described in the referenced article no longer applies to any employees."

Mr. Kecskemethy further stated that while the purpose of Article XXXII was to soften the impact of the phase down during the period of transition, the ultimate goal was to have all employees, particularly all employees in the same bargaining unit, receiving the same benefits. (Grievant's #1).

7. On September 13, 1978 the VSEA filed a Step III grievance from the 8/30/78 Kecskemethy letter.

8. During the negotiations for the Liquor Store Employees Contract in the winter of 1978, some discussions about Article XXXII took place between Rita Ricketson, Research Analyst for VSEA, and Joseph Kecskemethy.

9. As of July 1, 1978 the last lump sum payments were given to "Phase Down" employees under the auspices of Articles XXXIII, XXXIV, XXXVI, and XXXVII. As of that date, the State ceased to consider holidays as "Time Actually Worked" for purposes of computing eligibility for overtime compensation of "Phase Down" employees.

10. "Phase Down" employees have been working a 40 hour work week since September of 1976 when the Agreement went into effect.

MOTION TO DISMISS

We first consider the State's motion to dismiss on the grounds that the grievance was not timely filed. Article XII, Sec. 4 b. of the Agreement provides that grievances must be submitted "within ten workdays of the date upon which the employee could reasonably have been aware of the occurrence of the matter which gave rise to his grievance."

The State argues as follows: The VSEA was aware of the State's position with regard to Article XXXII as early as the winter of 1978 when Mr. Kecskemethy discussed the matter with Ms. Ricketson. Subsequently, Mr. Curtiss was

aware of the problem as early as July 27, 1978 when he spoke to the Highway employees in Bethel. There must, furthermore, have been certain employees who became aware of the State's position because they did not receive overtime compensation if they worked the weekend after the July 4th holiday occurred. Both the VSEA and its members were thus reasonably aware of the subject matter of the grievance long before Joseph Kecskemethy's letter of August 30, 1978 and the grievance is, therefore, untimely filed.

We disagree. A clear event is needed in order to measure the substantial rights of the parties. The State need not always put its position in writing in order for the VSEA to be reasonably aware of the occurrence of the matter giving rise to the grievance. However, office gossip, negotiations on unrelated matters or other such tangential events are simply not definitive enough to inspire action. Since this grievance affects a great many employees, we require evidence which is unequivocal that the grievance is untimely.

Reviewing the facts in this case, we believe that Mr. Kecskemethy's letter of August 30, 1978 was the first definitive event from which the rights of the parties can fairly be measured and we, therefore, believe that this grievance was timely filed. The State's motion to dismiss for this reason is, therefore, denied.

OPINION

At issue in this case is the duration of Article XXXII of the Agreement which states:

> "Notwithstanding other provisions of this agreement regarding Holiday Pay and overtime computation, holidays will be counted as Time Actually Worked' for purposes of computing eligibility for overtime compensation for those employees of the Department of Highways, Department of Liquor Control, Agency of Human Services, Department of Public Safety, and Department of Fish and Game, who are being phased down' to forty-hour weekly schedules and wages under Articles XXXII, XXXIV, XXXV, XXXVI, and XXXVII of this agreement."

When the Agreement was negotiated in 1976, there were certain groups of State employees who had traditionally worked more than 40 hours a week on a regular basis. When the State decided to phase down their work week to 40 hours with no guaranteed overtime, it was agreed between the State and VSEA that these employees should be provided with certain additional benefits to cushion the decrease in their annual salaries which would result from the phase down. A special provision was made in the Agreement for each group of "Phase Down" employees; to wit: Article XXXIII - Special Agreement for Certain Cottage Parents and Rehabilitation House Parents, Article XXXIV - Special Agreement for Certain Department of Fish and Game Employees; Article XXXVI - Special Agreement for Certain Employees of the Department of Highways; Article XXXVII - Special Agreement for Certain Communication Technicians. (We are not concerned here with the special agreement in Article XXXV for the Liquor Store employees since these employees now have their own separate contract with the State and are no longer part of the Non-Management Unit.)

These special agreements provided among other things that these groups of employees would receive lump sum payments at the end of a fiscal year if their gross earnings were less than a certain percentage of their annual salary. For example, at the end of 1977, the phased down Highway Department employees received a lump sum payment if their gross earnings for the 1977 fiscal year were less than 109.4% of their annual base pay. The purpose of the lump sum payment was to compensate these employees for the loss of guaranteed overtime which had been part of their annual earnings prior to being phased down to a 40 hour work week. As of July 1, 1978 the last lump sum payments were made to all "Phase Down" employees covered by these special agreements.

In addition to the lump sum payments, "Phase Down" employees were provided with an additional benefit through Article XXXII, the source of the present dispute. Article XXXII provides that holidays be considered as "time actually

worked" for the purposes of computing eligibility for overtime. Therefore, an employee who had the day off on Monday because it was a state holiday, would still be eligible the following weekend for overtime compensation even though he had not worked 40 hours that week.

The State argues that since Article XXXII applies specifically to the "Phase Down" employees covered by the special agreements, it should only endure for the length of the "Phase Down" period. It is the State's position that the termination of lump sum payments at the end of the 1978 fiscal year signifies the termination of the "Phase Down" period and thus the termination of Article XXXII. The VSEA argues, on the other hand, that the "Phase Down" period did not end with the lump sum payments but was intended to last for the life of the contract, and, since there is no specific expiration date in Article XXXII, it should remain in full force until the entire Agreement expires on July 1, 1979.

In interpreting a provision of a contract we must look closely at the specific language used by the parties. Article XXXII refers to certain employees who "<u>are being</u> 'phased down' to forty-hour weekly schedules and wages under Articles XXXIII, XXXIV, XXXVI, and XXXVII of this agreement." In our view this language, which speaks in the present, indicates that the provisions of Article XXXII are only effective while the provisions of Articles XXXIII - XXXVII are effective, in other words for the life of the "Phase Down" period. (While not now at issue, the use of the words "who are being phased down" also has the effect of making the provisions of Article XXXII applicable only to those employees who were employed prior to the signing of the Agreement.) While there is no specific definition in the Agreement as to the length of the "Phase Down" period, we agree with the State that the fact that all of the lump sum payments provided for in the special agreements in Articles XXXIII - XXXVII ended at the end of the 1978 fiscal year indicates an intention that the "Phase Down"

period end at that time. Since all of the affected employees now work a 40-hour weekly schedule with no lump sum payments, they have in fact been phased down and Article XXXII which by its very language indicates that it applies to employees who "are being phased down" is no longer in effect.

As Mr. Kecskemethy indicated in his letter to the VSEA the purpose of the "Phase Down" provisions was to soften the transition for certain employees to a 40 hour work week, the long term goal, however, being that once they were phased down, these employees would have the same work schedules and the same benefits as all other State employees. We believe that now that the "Phase Down" period has ended, these employees should not continue to receive a special benefit which is denied to all other State employees in the Non-Management Bargaining Unit.

ORDER

The grievance of the VSEA on behalf of "Phase Down" employees is hereby ORDERED dismissed and it is DISMISSED.

Dated this 1 day of March, 1979 at Chester, Vermont.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney, Chairman

William G. Kemsley, Sr.

Robert H. Brown

Supreme Court Reverse & Order Benefits in CB Agreement 9/1/79 Terminated Sept 11, 1980