VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 97-31
FLORENCE LAUGHLIN	)	

MEMORANDUM AND ORDER

At issue is whether to grant a Motion to Dismiss filed by the State of Vermont Agency of Transportation ("Employer"), and a Motion to Amend filed by Florence Laughlin ("Grievant").

In her original grievance filed with the Labor Relations Board, Grievant alleged that the Employer discriminated against her on the basis of her sex by failing to hire her as a Transportation Maintenance Worker B ("TMW-B") in June of 1995, and by failing to promote her, or provide her alternate rate pay, during the winter of 1995-96 when she was performing the job duties of a TMW-B. Grievant set forth the following facts in support of her grievance:

1. In 1995, Grievant was hired as a Transportation Maintenance Worker A ("TMW-A"), a position with a lower pay grade than a TMW-B.

2. At the time of hiring, Grievant possessed a commercial driver's license.

3. At the time she was hired, Grievant was qualified to be hired as a TMW-B.

4. During the winter of 1995-96, Grievant was performing the job duties of a TMW-B without alternate rate pay or a promotion to TMW-B.

5. As a result of complaints to the Employer by Grievant and her VSEA representative, Grievant was promoted to the position of TMW-B in August of 1996.

6. Men, with similar qualifications, have been hired directly into the position of TMW-B.

As a remedy, Grievant requested that she receive back pay, plus interest, for the difference in pay between a TMW-A and TMW-B position, from the date of her 1995 hiring until the time she was promoted in August of 1996.

Employer's Motion to Dismiss

The Employer presents two alternative theories in support of the motion to dismiss this grievance. The Employer first contends that this grievance was not timely filed at Step II of the grievance procedure because the collective bargaining agreement provides that a Step II grievance must be filed within 10 workdays after receiving the Step I grievance decision, and Grievant did not adhere to these requirements. The Employer contends that Grievant received a Step I grievance decision no later than September 12, 1996, when she received a paycheck paying her at the higher rate of a TMW-B effective August 18, 1996, with no retroactive back pay. Since Grievant did not file her Step II grievance until October 10, 1996, more than 10 workdays beyond September 12, the Employer contends that the Step II grievance was untimely filed.

The Board will resolve an issue on the merits if at all possible unless the collective bargaining agreement requires it to be dismissed on procedural grounds. Grievance of Kimble, 7 VLRB 96, 108 (1984). Grievance of Amidon, 6 VLRB 83,

85 (1983). The Board, with the approval of the Vermont Supreme Court, has refused to consider grievances which were untimely filed at earlier steps of the grievance procedure. Grievance of Boyde, 18 VLRB 518 (1995); *Affirmed*, ___ Vt. ___ (1996). Grievance of Giffin, 10 VLRB 204 (1987). Grievance of Dyer, 4 VLRB 306 (1981).

We decline to dismiss this grievance based on untimely filing at Step II of the grievance procedure. It is unreasonable for the Employer to rely on Grievant's receipt of her September 12 paycheck as notification that the Step I complaint process had been completed. In her grievance, Grievant sought placement in a TMW-B position and retroactive pay. Receipt of the paycheck constituted sufficient notification to Grievant that she had been placed in a TMW-B position, but did not provide notification from the Employer whether she would receive back pay. The fact that the paycheck provided notification to Grievant that some of her grievance had been granted does not result in a conclusion that Grievant should have known that the rest of her grievance was denied. The Employer has presented no evidence to demonstrate that any representative of the Employer actually denied Grievant's request for back pay and so notified Grievant prior to the time she filed her Step II grievance. These circumstances do not warrant dismissal of this grievance on timeliness grounds as there was no notification to Grievant that the Step I complaint process had been completed. Grievance of Wilson, 20 VLRB 133, 140-41 (1997).

The Employer contends, as an alternative basis for dismissal, that Grievant already has obtained all the relief that she may gain under the collective bargaining agreement. The Employer relies on the Classification Review and Classification Grievance article of the agreement, which provides that, "if corrective action results

from either classification review or a classification grievance, any pay adjustment shall not be retroactive earlier than the date of filing of the request for classification review". The Employer contends that, since Grievant was reclassified as of the effective date of her request, any additional relief would be barred by the Classification Review and Classification Grievance article of the agreement.

We conclude that the Classification Review and Classification Grievance article of the agreement does not preclude the grievance which was filed in this matter. This article must be considered in conjunction with the provisions of Article 5 of the agreement, under which article this grievance was filed. Article 5 prohibits discrimination against employees because of sex. A contract must be construed, if possible, so as to give effect to every part, and from the parts to form a harmonious whole. In re Grievance of VSEA on Behalf of "Phase Down" Employees, 139 Vt. 63, 65 (1980). The contract provisions must be viewed in their entirety and read together. In re Stacey, 138 Vt. 68, 72 (1980).

In construing the agreement as a whole, we conclude that the parties did not intend to restrict an employee's entitlement to retroactive pay to the date a classification review is submitted when the employee claims, as Grievant does here, that sex discrimination occurred in the employee's placement in a position with a lower rate of pay than another position. Grievant is not submitting a standard request for classification review seeking an upgrade of her position because it is incorrectly assigned to a pay grade. Rather, Grievant is alleging that she should not have been placed in the lower paid position of TMW-A, and that she would have been placed in the higher paid TMW-B position but for sex discrimination.

The ability of employees to redress discrimination would be unduly hindered if the limitation on retroactive pay set forth in the Classification Review and Classification Grievance article of the agreement was applied. Thus, Grievant is able to seek a retroactive adjustment effective prior to the date of filing of the request for classification review and we deny the Employer's motion to dismiss. We make no judgment at this point as to the duration of any potential retroactive pay adjustment.

Grievant's Motion to Amend Grievance

On January 29, 1998, Grievant filed a motion to amend her grievance. Therein, Grievant requested to add the following allegations to her grievance: 1) at the time Grievant was hired, the TMW-B criteria contained discriminatory provisions which have a disparate impact on women; 2) the Employer maintains a pervasive pattern and practice of discrimination, including that the majority of newly hired males are hired as TMW-B's, and that the majority of newly hired females are hired as TMW-A's; 3) the Employer more frequently fills TMW-B positions than TMW-A positions; 4) the Employer maintained informal hiring procedures that had the effect of discriminating against females; 5) the effect of this pervasive pattern of discrimination is that there are far fewer female employees in TMW-A and TMW-B positions than male employees statistically as compared to the relevant qualified female population; and 6) the Employer operated a discriminatory work environment and denied Grievant the opportunity to work with other female workers in similar positions. In her motion to amend, Grievant also sought to add the following requested remedies to her grievance: 1) that the Board declare that the job classification for a Transportation Maintenance Worker B is unlawful and

discriminatory; and 2) that the Board order that the discriminatory job classification language be cured, and that the employer submit a plan for eliminating the discriminatory classification and correcting the discrimination caused thereby.

The Employer contends that Grievant's Motion to Amend should be denied for two reasons. First, the Employer contends that the proposed amendment raises issues which were not raised at earlier steps of the grievance procedure. Second, the Employer contends that the amendment is prejudicial to the Employer and was filed too long after the filing of the grievance.

Generally, there must be specific and timely raising of issues at earlier steps of the grievance procedure or the right to raise the issue is waived. Grievance of Ulrich, 12 VLRB 230, 239 (1989); *Affirmed*, 157 Vt. 290 (1991). Grievance of Bagley, et al, 16 VLRB 448, 464 (1993). We conclude that the allegations raised by Grievant in the motion to amend for the most part can be incorporated within the specific claims Grievant has made throughout the grievance procedure that the Employer discriminated against her on the basis of her sex by failing to hire her as a TMW- B, and by failing to promote her, or provide her alternate rate pay, during the winter of 1995-96 when she was performing the job duties of a TMW-B. We do not perceive new issues are being raised by Grievant, subject to the exceptions noted below. The motion to amend for the most part sets forth specific legal theories and factual allegations in support of issues in dispute throughout the grievance procedure.

However, we are not prepared on the current record before us to rule on Grievant's proposed amendment to the extent Grievant alleges that the Employer operated a discriminatory work environment. At the outset of the evidentiary hearing

in this matter, the parties will need to present evidence as to whether this issue was specifically raised at earlier steps of the grievance procedure.

Also, Grievant's motion to amend is not proper to the extent Grievant is seeking that the Board declare that the job classification for a Transportation Maintenance Worker B is unlawful and discriminatory; and that the Board order that the discriminatory job classification language be cured, and that the employer submit a plan for eliminating the discriminatory classification and correcting the discrimination caused thereby. These additional requested remedial actions were not sought at earlier steps of the grievance procedure, and cannot properly be requested for the first time in the grievance filed with the Board.

We further reject the Employer's contention that the proposed amendment should not be granted because it is prejudicial to the Employer and was filed too long after the filing of the grievance. In deciding whether to permit amendment of grievances as proper pursuant to Section 12.7 of the Board Rules of Practice, the Board examines whether amendment would prejudice the employer, or be disruptive to the orderly and efficient processing of cases by the Board. Grievance of Barnard, et al, 17 VLRB 203, 225 (1994). Given our conclusion that Grievant's motion to amend generally sets forth specific theories and factual allegations in support of issues in dispute throughout the grievance procedure, we do not find the amendment to be prejudicial to the Employer or disruptive to the processing of cases.

NOW THEREFORE, based on the foregoing reasons, it is hereby ORDERED that the Employer's Motion to Dismiss is DENIED, and Grievant's Motion to Amend Grievance is GRANTED to the extent specified herein.

Dated this 24th day of July, 1998, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Richard W. Park

Richard W. Park, Acting Chairperson

Leslie G. Seaver

Carroll P. Comstock