

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	DOCKET NO. 97-56
JEFFREY MARSHALL)	

FINDINGS OF FACT. OPINION AND ORDER

Statement of Case

On October 8, 1997, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of Jeffrey Marshall ("Grievant"). Therein, Grievant alleged that the Vermont State Hospital ("Employer") violated the "Injury on the Job" article of the collective bargaining agreement between the State of Vermont and the VSEA for the Non-Management Unit effective for the period July 1, 1996 to June 30, 1997 ("Contract") by denying him the difference in pay between his basic salary and the workers' compensation benefits he had received while out of work due to an injury he received as a result of an assault by a patient at the Hospital.

A hearing was held on February 5, 1998, in the Labor Relations Board hearing room in Montpelier before Board Members Catherine Frank, Chairperson; Carroll Comstock and Richard Park. Assistant Attorney General David Herlihy represented the Employer. VSEA Legal Counsel Samuel Palmisano represented Grievant. The parties filed post-hearing briefs on February 19, 1998.

FINDINGS OF FACT

1. Article 35 of the Contract, entitled "Injury on the Job", provides in pertinent part as follows:

2. For an injury relating to the performance of a State job under the special circumstances described below, an employee will be paid the difference between basic salary and Workers' Compensation . . . without charge to paid leave:

(a) The injury results from an assault (physical contact by a person, or by an animal). . .

2. Grievant has been employed as a Ward Aide at the Vermont State Hospital since 1989. His duties include direct patient care, including providing for the safety and cleanliness of patients. At all times relevant, Grievant was assigned to the Dale 3 wing of the Hospital. Dale 3 houses transitional, overflow and involuntarily committed individuals.

3. Grievant has injured his back, while on the job, on two separate occasions since 1989. In 1992, Grievant suffered a herniated disc in his back when a patient slipped getting out of a bath tub, and Grievant caught him. Grievant applied for, and received, workers' compensation benefits as a result of this injury. He did not apply for assault pay pursuant to the "Injury on the Job" article of the collective bargaining agreement.

4. Grievant sustained the second back injury on May 26, 1997. Grievant sustained the injury while assisting Registered Nurse Patricia Bostock and two ward aides, Dale Malley and Larry Godfrey, in giving a patient a bath. Grievant had observed the patient on previous occasions and had seen no prior violent behavior.

5. Grievant and the other ward aides began the process of bathing the patient by first placing him in a chair facing the bathtub. They then placed the feet of the patient in the tub, and stood the patient up so that he was standing in the tub. At this point, Godfrey was standing behind the chair, Malley was holding onto the

patient's right arm, and Grievant was holding onto the patient's left arm. Grievant had one hand on the patient's upper arm and his other hand on the patient's wrist. Without warning, the patient became resistive by twisting and turning his body, and pushing Malley and Grievant with his upper body and arms. The patient then went limp and dropped himself. During these actions by the patient, Grievant felt a sharp pain going down his back, buttocks and leg. Despite his pain, Grievant did not let go of the patient until he was placed into the tub as he did not want the patient to injure himself or the staff (Grievant's Exhibits 2, 3; State's Exhibits 1, 2).

6. Once the situation had been brought under control, Grievant was seen by a physician on duty at the hospital who instructed Grievant to go home. The next day, Grievant was seen by another doctor who advised Grievant to stay out of work due to the injury to his back. Grievant was referred to a specialist, Dr. Martin Krag of the New England Spine Institute in Williston. Dr. Krag informed Grievant that he had a herniated disc and would need surgery to correct it.

7. On August 7, 1997, Grievant had surgery on his back. Several bone fragments were removed from Grievant's back. Following surgery, Grievant was required to attend physical therapy sessions for several months. Grievant's physician cleared him to return to work on December 1, 1997. Grievant returned to work that day (Grievant's Exhibits 5, 6).

8. Grievant applied for workers' compensation benefits shortly after he sustained the back injury on May 26, 1997, and his claim was approved. He received workers' compensation benefits effective from late May until his return to work on December 1, 1997. The benefits consisted of two-thirds of Grievant's regular salary.

9. Grievant applied for assault pay under the "Injury on the Job" article of the Contract to make up for the one-third of his regular salary he would lose during the time he was out of work. By letter dated July 11, 1997, Laura DeForge, Personnel Administrator for the Employer, informed Grievant that his request for assault pay was denied. In support of her opinion that Grievant had not been assaulted, DeForge stated:

Staff are considered to have been assaulted when they have been hit, kicked, bitten, punched, tackled, pushed/shoved, had their hair pulled, pinched, tripped, head butted, or hit with objects, such as chairs, televisions or pool cue/balls. Past examples of "non-assault" injuries have involved staff wrapping a patient in a basket hold, and then the patient has "gone limp". Another example of an injury not considered to be assault was a staff intervening in a patient's attempt to hang him/herself. Even when staff are injured by restraining clients, if the client did not actually hit, kick, bite, head butt, punch, or hit staff with a foreign object, etc., the injury is not considered to be a patient assault. I believe if you substitute patient "attack" for patient "assault", you will have the intended meaning for Special Injury/Assault pay (Grievant's Exhibit 7).

OPINION

Grievant alleges that the Employer violated the "Injury on the Job" article of the Contract by denying him the difference in pay between his basic salary and the workers' compensation benefits he received while out of work due to an injury he received as a result of an assault by a patient at the Vermont State Hospital.

The Employer contends that the grievance should be dismissed because the injury sustained by Grievant did not result from an assault within the meaning of the Contract. The Employer requests that we look to the criminal definition of assault, and conclude that the person causing the injury must have a certain level of intent to harm the injured employee to bring the injury within the intended scope of the

Contract provision. The provision applies only to injuries caused by an intentional attack, the Employer maintains, as opposed to the incidental sort of injury that occurred here where Grievant was injured assisting an uncooperative patient.

We disagree with the Employer that the Contract provision requires intent to harm the injured employee to bring the injury within the scope of the Contract provision. If we were to accept the Employer's restrictive reading of the Contract, an employee injured by a mentally incompetent patient would have the unfair burden of seeking to establish that a mentally incompetent person formed the requisite intent to harm the employee. We cannot presume the parties intended such a result in negotiating the Contract provision. Further, the Contract provision contemplates assault pay for injuries caused by animals. Clearly, requiring proof of intent to harm by an animal is an incongruous result which could not have been contemplated by the parties.

We conclude that the resistive behavior engaged in by the patient in this case was sufficient to trigger the assault pay provision of the Contract. This is not to say, and Grievant does not argue, that every instance of physical contact causing injury results in assault pay. An injury caused by an accident, such as a patient inadvertently slipping or tripping, would not lead to assault pay. The injury sustained by Grievant, however, would not have happened but for the physically resistive actions by the patient. Such uncooperative behavior constituted assault within the meaning of the Contract. When an adult male purposely goes limp, the potential consequences to the persons who must suddenly uphold that weight are significant.

A contrary ruling on our part would result in creating a economic disincentive for an employee to perform job duties. As a ward aide, Grievant has the responsibility to provide for the safety of Hospital patients and staff. He was injured by following through on that obligation in dealing with an uncooperative, resistive patient. If Grievant lost wages under these circumstances, he and other employees could be deterred in future similar instances from fulfilling their responsibilities.

FINAL ORDER

NOW THEREFORE, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED that the Grievance of Jeffrey Marshall is SUSTAINED; and

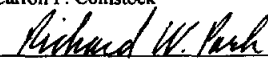
1. The Vermont State Hospital shall pay Grievant the difference in pay between his basic salary and the workers' compensation benefits he received while out of work due to an injury he received on May 26, 1997, as a result of an assault by a patient at the Vermont State Hospital, without charge to paid leave; and
2. The interest due Grievant on back pay shall be computed on gross pay, shall be at the rate of 12 percent per annum, and shall run from the date each paycheck was due during the period commencing with the date Grievant began receiving workers' compensation benefits and ending on the date Grievant discontinued receiving such benefits.

Dated this 20th day of April, 1998, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Catherine L. Frank, Chairperson


Carroll P. Comstock


Richard W. Park