VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 00-71
PAULINE LIESE	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On November 20, 2000, Pauline Liese ("Grievant") filed a grievance alleging that the State of Vermont Agency of Transportation violated Articles 15 and 16 of the collective bargaining contract between the State and the Vermont State Employees' Association ("VSEA") for the Non-Management Unit, effective July 1, 1999 – June 30, 2001 ("Contract") by not handling the classification review of her position in a timely manner. Grievant also contended that the State Department of Personnel violated Article 15 of the Contract by not scheduling the Step III grievance meeting within the timeframe established by the Contract, and by not notifying VSEA of the Step III grievance meeting in this matter. Grievant hand-delivered a copy of her grievance to the State Department of Personnel the same day it was filed with the Board.

On December 12, 2000, the State filed a motion to dismiss the grievance in lieu of filing an answer to the grievance. On December 26, 2000, Grievant filed a response to the State's motion to dismiss. Grievant also filed a motion that the Board deem the State's failure to file an answer to constitute an admission of the material facts alleged in the grievance and a waiver of an evidentiary hearing. The State did not file a response to Grievant's motion.

Section 18.6 of the Board Rules of Practice allows an employer to "file an answer within 20 days after service of the grievance." Section 18.6 provides:

> Failure to file a timely answer may be deemed by the Board to constitute an admission of the material facts alleged in the grievance and a waiver by the party of an evidentiary hearing, leaving a question or questions of law, alleged contract violation(s), or alleged violation(s) of a rule or regulation to be determined by the Board.

We grant Grievant's motion pursuant to Section 18.6, and deem the State's failure to file an answer as an admission of the material facts alleged in the grievance and a waiver by the State of an evidentiary hearing. The State has waived its right to file an answer to the grievance, and filing a motion to dismiss does not excuse the State's obligation to file an answer to the grievance. Grievance of VSEA (Re: Refusal to Provide Information), 15 VLRB 13, 15-18 (1992). Also, we are able to determine whether the State violated the Contract because Grievant has alleged sufficient material facts allowing us to do so. Id. at 17. The Findings of Fact which follow are those we have deemed relevant based on a review of the grievance and the Contract.

FINDING OF FACT

1. Article 15 of the Contract, entitled Grievance Procedure, provides in pertinent part:

> . . .
> 3. . . (c) . . . (2) If the aggrieved employee so requests, the Department of Personnel shall hold a meeting with the aggrieved employee, his or her representative, or both, within ten (10) workdays following receipt of the Step III grievance . . .
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> 4. . . (e) When a grievance meeting is held at Step III, the VSEA (whether or not it is representing the aggrieved employee) shall be notified by the Department of Personnel and shall have the right to be present, to participate in the proceedings as a party at interest, and to submit a statement (oral or written) to the Department of Personnel of its opinion of the merits or demerits of the grievance and the effect of any proposed solution on other employees. The VSEA will be sent a copy of any such grievance decision concerning bargaining unit employee(s).
> . . .

2. Article 16 of the Contract, entitled Classification Review and Classification Grievance, provides in pertinent part:

. . .

3. . . (b) Employee and management requests for classification review shall be made on a form provided by the Commissioner of Personnel . . . The form shall be fully completed by the employee or management as appropriate . . . The Request for Review shall state with particularity the change(s) in duties or other circumstances which prompt the Request for Review. The position's supervisor shall review the information provided on the form within ten (10) workdays, completing that portion which requests supervisory responses, and submit further written comments as appropriate. The Request for Review shall then be submitted to the position's appointing authority, who shall review it for accuracy, comment as deemed appropriate, and forward the original to the Department of Personnel within five (5) workdays.

. . .

(e) . . . (I)f corrective action results from either classification review or a classification grievance, any pay adjustment shall be retroactive to the date when a completed Request for Review was logged by the Department of Personnel . . .

An employee may initiate his or her review by concurrently filing a copy of the Request directly to the Department of Personnel at the same time the original is submitted to the supervisor. The effective date will then be computed 15 days from the date it was received by the Department of Personnel and logged in. This will permit the employee to ensure that the effective date of any corrective action is not delayed at the employee's department level due to management or supervisory review of the request.

3. At all times relevant, Grievant was employed by the New Motor Vehicle Arbitration Board of the State Agency of Transportation ("AOT").

4. In December 1998, Grievant completed a Request for Review form, a PER-10, for a review of the classification of her position. She signed the form on December 13, 1998, and provided it to her superior, Bert Moffat, Transportation Board Executive Secretary. On December 16, 1998, Moffat gave the form to Arthur Rock, Transportation Board Chairperson, to complete the form and submit it as a management request to review the classification of the position (Grievance, pages 25-27).

5. On December 30, 1998, and January 7, 1999, Grievant sent an e-mail message to Donna Pollard of the AOT Human Resources Division to check if the PER-10 for her position had been received. On both occasions, Pollard told Grievant that the

PER-10 had not been received. In her January 7, 1999, e-mail message, Grievant stated: "I'll check again Mon. and if you don't have it then I guess I'll submit it as an employee request" (Grievance, pages 31, 32)

6. On January 8, 1999, Rock informed Grievant that he gave the completed PER-10 to Moffat on January 6, 1999. On January 11, 1999, Moffat told Grievant that the PER-10 had been hand-delivered to the AOT Human Resources Division (Grievance, page 33).

7. On May 11, 1999, Grievant checked on the status of the classification review of her position. She was informed that the PER-10 had not been located at either the AOT Human Resources Division or the Department of Personnel (Grievance, pages 34-37.

8. On May 12, 1999, Moffat told Grievant the AOT Human Resources Division had informed him they had no record of the PER-10 and that it could have been lost.

9. On May 18, 1999, Grievant resubmitted a PER-10 to the AOT Human Resources Division with a request to have the effective date of any classification change be retroactive to January 11, 1999 (Grievance, page 39-40)..

10. In early June, Grievant attempted to contact Pam Ankuda of the AOT Human Resources Division on several occasions by either e-mail message or telephone to inquire whether the PER-10 had been found. Ankuda did not respond to Grievant's attempts to contact her (Grievance, pages 43-45).

11. On April 28, 2000, after discovering on the Department of Personnel website that there had been a classification change for her position dated April 1, 2000,

Grievant contacted the AOT Human Resources Division to inquire of the classification status of her position (Grievance, pages 49-51).

12. On May 2, 2000, Grievant received a notice from the Department of Personnel dated May 1, 2000, indicating that the Department of Personnel had upgraded Grievant's position one paygrade with an effective date of August 1, 1999. The effective date of August 1, 1999, indicates this is the first day of the pay period following the date the completed Request for Review was received by the Department of Personnel (Grievance, pages 52, 69-72).

13. Grievant filed a grievance requesting that the effective date of the reclassification of her position be changed to January 18, 1999. The grievance was denied at Steps I, II and III of the grievance procedure. The Step III grievance meeting occurred more than 10 days after Grievant had submitted the Step III grievance to the Department of Personnel. The Department of Personnel did not notify VSEA of the Step III grievance meeting.

MAJORITY OPINION

Grievant's primary contention is that the Agency of Transportation violated Articles 15 and 16 of the Contract by not handling the classification review of her position within the timeframes established in Article 16 of the Contract. As a remedy, Grievant requests that the effective date of the reclassification upgrade of her position be changed from August 1, 1999, to January 31, 1999, which is the first day of the first pay period after January 18, 1999, the date by when Grievant alleges the Department of Personnel should have received the PER-10 from the AOT Human Resources Division pursuant to the Contract.

The State contends this grievance should be dismissed because the following language of Article 16(3)(e) of the Contract addresses the exact situation involved in the grievance and precludes the contention made by Grievant:

> (I)f corrective action results from either classification review or a classification grievance, any pay adjustment shall be retroactive to the date when a completed Request for Review was logged by the Department of Personnel . . . An employee may initiate his or her review by concurrently filing a copy of the Request directly to the Department of Personnel at the same time the original is submitted to the supervisor. The effective date will then be computed 15 days from the date it was received by the Department of Personnel and logged in. This will permit the employee to ensure that the effective date of any corrective action is not delayed at the employee's department level due to management or supervisory review of the request.

Since the completed Request for Review was not logged by the Department of Personnel until immediately prior to the pay period beginning August 1, 1999, and Grievant did not file a copy of the Request with the Department of Personnel prior to that date, the State contends this contract language explicitly precludes any retroactive pay to Grievant predating August 1, 1999.

Grievant contends that, because the classification review of her position was based on a management request, she should not be required to submit a copy of the PER-10 request for review form to the Department of Personnel due to the mandatory timeline language of Article 16, Section 3(b) of the Contract. Article 16, Section 3(b), provides that a "position's appointing authority", upon receiving a completed PER-10, "shall review it for accuracy, comment as deemed appropriate, and forward the original to the Department of Personnel within five (5) workdays". Grievant contends there should be a consequence for non-compliance by an employing agency with this provision of the Contract.

A contract will be interpreted by the common meaning of its words where the language is clear. Id. at 71. If clear and unambiguous, the provisions of a contract must be given force and effect and be taken in their plain, ordinary and popular sense. Swett v. Vermont State Colleges, 141 Vt. 275 (1982). The Board will not read terms into a contract unless they arise by necessary implication. In re Stacey, 138 Vt. at 71. The law will presume that the parties meant, and intended to be bound by, the plain and express language of their undertakings; it is the duty of the Board to construe contracts; not to make or remake them for the parties, or ignore their provisions. Vermont State Colleges Faculty Federation v. Vermont State Colleges, 141 Vt. 138, 144 (1982).

We sympathize with Grievant since she was proceeding through proper channels to have the classification of her position upgraded, and her retroactive pay for the subsequent classification upgrade would have been greater if not for the negligence of her employing agency in submitting the PER-10 to the Department of Personnel several months after it should have been submitted. The PER-10 should have been submitted to the Department of Personnel in January 1999, yet it was not received by the Department of Personnel until late July 1999. It seems basically unfair to us that the employee should suffer monetary damages because of the inability of her employer to follow prescribed procedures, regardless of what provisions are made in the Contract for her to circumvent that possibility. It is indeed sad that, for the employee in this case to be entitled to redress, she is required to assume that her employer will not process her request properly, and therefore take preventative measures as a matter of course. It is a sorry standard under which to work.

Nonetheless, in applying the foregoing contract construction standards to this case, we conclude this grievance should be dismissed. Article 16, Section (3)(e) of the Contract provided Grievant with the specific means to protect herself against negligence by the Employer and to secure the full retroactive pay back to January 1999 she seeks in this grievance. Under the contract language, she simply had to file a copy of the PER-10 directly with the Department of Personnel at the same time she submitted the PER-10 to her supervisor, and she failed to do so. As explicitly stated in the Contract, filing directly with the Department of Personnel would have permitted Grievant "to ensure that the effective date of any corrective action is not delayed at the employee's department level due to management or supervisory review of the request." When contract language clearly and unequivocally provides employees with the means to avoid delay in the effective date of any retroactive wage increase, it would be inappropriate for the Board to go beyond this contractually provided remedy. To do so would be to remake the contract and ignore its specific provisions.

We disagree with Grievant's contention that, because the classification review of her position was based on a management request, she should not have to submit a copy of the PER-10 request for review form to the Department of Personnel due to the mandatory timeline language of Article 16, Section 3(b) of the Contract. We do not believe the terms of the Contract reflect the intent by the parties to absolve employees of their responsibility to file a copy of the PER-10 if management is initiating the request for review. The stated purpose of Article 16, Section 3(e) - "to ensure that the effective date of any corrective action is not delayed at the employee's department level due to management or supervisory review of the request" - makes it evident the parties intended

to allow employees to protect themselves against delay by the employing agency regardless of whether management or the employee initiated the request.

Also, we are not persuaded by Grievant's contention there should be a consequence for an employing agency's non-compliance with the mandatory timeframe provisions of the Contract concerning processing classification requests for review. The parties contracted to explicitly allow involved employees to protect themselves, rather than provide a consequence for the employing agency, in the event of noncompliance with timeframes.

Grievant also contends the Department of Personnel violated Article 16 of the Contract by not scheduling her Step III grievance within the timeframes set forth in the grievance and by not notifying VSEA of the Step III grievance meeting. In order to prevent dismissal of this grievance on these issues, Grievant would have to demonstrate she was harmed by the failures of the Department of Personnel. She has demonstrated no harm. Our conclusion that the remedy requested by Grievant before us - seeking retroactive pay to January 1999 – is explicitly preempted by the provisions of Article 16, Section 3(e), of the Contract is not impacted by the timeliness of the Step III grievance meeting or the failure to notify VSEA of such meeting.

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Catherine L. Frank, Chairperson

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Edward R. Zuccaro

DISSENTING OPINION

I dissent from the majority opinion. Grievant acted diligently in seeking to ensure that the classification review request for her position was timely handled. She submitted the PER-10 to her supervisor and then followed up with her supervisor and the Agency of Transportation Human Resources Division to ascertain that the PER-10 was submitted to the Human Resources Division. When her supervisor told her on January 11, 2000, that the PER-10 had been hand-delivered to the Human Resources Division, it was reasonable for her to rely on that assurance and assume that the Employer would process the classification review request properly. Grievant should not have to suffer monetary damages when it turns out her reasonable reliance on the Employer's ability to timely process the classification review request was misplaced.

The misplacement of the classification review request occurred due to the negligence of the Employer and through no fault of Grievant. Under these circumstances, it would be expected that the Employer would at least advise Grievant of the contractual provision concerning filing a copy of the PER-10 with the Department of Personnel. No such advice was forthcoming, however, which further convinces me that Grievant should not suffer monetary damages due to the Employer's inactions. I would grant this grievance and award Grievant retroactive pay on the revised classification of her position to January 31, 1999. This is the first day of the first pay period after January 18, 1999, the date by when the Department of Personnel should have received the PER-10 from the AOT Human Resources Division pursuant to the Contract.

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Carroll P. Comstock

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is hereby ordered that the Grievance of Pauline Liese is dismissed.

Dated this 27th day of February, 2001, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

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Catherine L. Frank, Chairperson

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Edward R. Zuccaro