

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	DOCKET NO. 01-63
ELLEN PIERSON)	

MEMORANDUM AND ORDER

The issue before the Labor Relations Board is whether to grant a motion filed by the State of Vermont Department of Motor Vehicles, Agency of Transportation (“Employer”) to dismiss the grievance filed in this matter. On August 30, 2001, Ellen Pierson (“Grievant”) filed a grievance alleging that the Employer violated Article 33, Section 2(b) of the collective bargaining agreement between the State and the Vermont State Employees’ Association (“VSEA”), effective July 1, 1999 – June 30, 2001 (“Contract”), by not paying Grievant the difference between her basic salary and workers’ compensation benefits for injuries Grievant sustained while working. Article 33, Section 2(b) provides in pertinent part:

- 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:
...
(b) An Agency of Transportation employee . . . injured in a highway accident. . .

On July 26, 2002, the Employer filed a motion to dismiss this grievance on the grounds that the Employer has granted Grievant all the relief to which she is entitled and the grievance is moot. In the alternative, the Employer moved for summary judgment. Grievant filed a response to the Employer’s motions on August 9, 2002. A hearing on the Employer’s motions was held on August 29, 2002, before Labor Relations Board Members Richard Park, Acting Chairperson; John Zampieri and Edward Zuccaro.

Grievant represented herself. Assistant Attorney General William Reynolds represented the Employer.

The pertinent facts necessary to decide this motion are as follows: On August 31, 1998, Grievant, an employee of the Department of Motor Vehicles, was injured in a motor vehicle accident while working. On September 21, 1998, Grievant was reinjured while working. Grievant missed a great deal of work as a result of her injuries, including not working at all after July 1999, and received workers' compensation benefits due to her injuries (Exhibits 1-A and 1-B to Grievant's response to motions). Grievant was unaware of the injury on the job provisions of Article 33, Section 2(b) of the Contract until the late Fall of 2000. Grievant then spoke to her attorney and a VSEA field representative concerning whether she qualified for compensation pursuant to Article 33, Section 2(b). The VSEA representative recommended to Grievant that she make a verbal request to her supervisor for the compensation, and follow that up with a written request. In December 2000, Grievant spoke with her supervisor, Paul Houghton, seeking retroactive payment for all wages lost and annual and sick leave used since her first on the job injury on August 31, 1998. On January 28, 2001, Grievant made her request in writing to Houghton, stating that she believed the provisions of Article 33 supported her request (Exhibit 1 to Employer's motions, Exhibit 3 to Grievant's response to motions). Grievant received no response to her request until her receipt of an April 9, 2001, letter from Elizabeth Trott, Personnel Administrator for the Employer, denying her request (Exhibit 2 to Employer's motions, Exhibit 6 to Grievant's response to motions).

On April 23, 2001, VSEA filed a Step II grievance on behalf of Grievant, alleging that the Employer violated Article 33, Section 2(b) of the Contract, and requested that

Grievant be made whole by paying her the difference between her basic salary and the workers' compensation benefits she received since the time she was injured in 1998 while working, and restoring leave she had lost (Exhibit 3 to Employer's motions). On June 13, 2001, the Step II hearing officer granted the grievance to the extent he concluded Grievant was eligible for injury on the job benefits as of April 3, 2001, which was fifteen workdays prior to the filing of the Step II grievance, and denied the grievance in all other respects (Exhibit 4 to Employer's motions, Exhibit 8 to Grievant's response to motions). Subsequently, Grievant filed a Step III grievance, which was denied (Exhibits 5 and 7 to Grievant's responses to motions). On August 30, 2001, Grievant filed this grievance with the Board.

Based on these facts, Grievant seeks benefits pursuant to Article 33, Section 2(b) of the Contract, dating back to the Fall of 1998 when she was injured while working. The Employer contends that, because Grievant allowed more than two years to pass subsequent to her injury before filing a grievance seeking injury on the job benefits pursuant to the contract, she has waived the rights to any injury on the job benefits for all periods prior to fifteen days before she filed a grievance. Grievant responds that she should receive injury on the job compensation dating back to her injury because she was unaware of the injury on the job article of the contract until shortly before filing her grievance.

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 Brewster, 23 VLRB 96, 98 (2000). Grievance of Kimble, 7 VLRB 96, 108 (1984). Grievance of Amidon, 6 VLRB 83, 85 (1983). The leading area where the Board

has dismissed grievances on procedural grounds has been if grievances were not timely filed, or issues were not raised or were untimely raised, at earlier steps of the grievance procedure or in the grievance filed with the Board.

Under contracts providing that grievances must be filed within specified times at earlier steps of the grievance procedure, 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 Adams, 23 VLRB 92 (2000). Grievance of Boyde, 18 VLRB 518 (1995); *Affirmed*, 165 Vt. 624 (1996). Here, the Grievance Procedure article of the Contract requires that Step II grievances be filed “within fifteen workdays of the date upon which the employee could have reasonably been aware of the occurrence of the matter which gave rise to the grievance”. Article 15, Section 4(b). If a grievance is not filed within contractual time frames, the “matter shall be considered closed”. Article 15, Section 3(b)(1).

The Board has accepted the validity of continuing grievances in cases where pay practices were involved and employees initially did not grieve the alleged violations within contractual time limitations, but grieved the alleged violations during the period they were still occurring. The Board held that grievants were permitted to institute grievances over the matter at any time during the period in which the alleged violations were occurring, since there was a new occurrence of the alleged violation every time a paycheck was issued, with the restriction that the grievants waived their right to back pay for all periods prior to the pay period immediately preceding the filing of the grievances. Grievance of Shine, 21 VLRB 103 (1998). Grievance of Reed, 12 VLRB 135, 143-44 (1989). Grievance of Cole, 6 VLRB 204, 209-210 (1983). In limiting the time period for

aggrieved employees to receive back pay, the Board has indicated that the purpose of a grievance is to officially bring to the employer's attention a grievable action, and an employer cannot be held financially liable for an action of theirs of which they were never made officially aware was a source of employee dissatisfaction. Grievance of VSEA on Behalf of Meat Inspectors, 4 VLRB 144, 154 (1981).

In applying these precedents to the facts of this case, we grant the Employer's motion to dismiss. Grievant was permitted to file a grievance concerning not receiving benefits pursuant to Article 33, Section 2(b) of the Contract at any time during the period in which she did not receive such benefits, since there was a new occurrence of the violation of this contract provision every time a paycheck was issued, with the restriction that Grievant waived her right to back pay for all periods prior to the pay period immediately preceding the filing of the grievance. At the Step II level of the grievance process, the hearing officer granted Grievant all the relief to which she was entitled by concluding that Grievant was eligible for injury on the job benefits as of April 3, 2001, which was fifteen workdays prior to the filing of her Step 2 grievance.

We reject Grievant's contention that she should receive injury on the job compensation dating back to her injury because she was unaware of the provisions of Article 33, Section 2(b), of the Contract until shortly before filing her grievance. Ignorance of the provisions of the Contract is not a valid defense to failing to adhere to the contractual timeframes for filing grievances. Article 15 of the Contract requires that a grievance be filed "within fifteen workdays of the date upon which the employee could have reasonably been aware of the occurrence of the matter which gave rise to the grievance", and provides that if a grievance is not filed within contractual time frames the

“matter shall be considered closed”. Here, the “occurrence of the matter” which gave rise to the grievance is not Grievant’s knowledge of the Contract’s provisions, but instead receipt of a paycheck which did not pay Grievant the difference between her basic salary and workers’ compensation benefits for the injuries Grievant sustained while working.

Grievant contends that all the responsibility for not following time constraints should not lie with her since she asked the Employer to provide her with the injury on the job benefits of Article 33, Section 2(b), as soon as she was aware of the Contract’s provisions, and the Employer did not respond to her request for more than three months. Grievant maintains that she had nothing to grieve until she received an answer from her employer, and that she could have presented a grievance much quicker if she received a quicker answer from an employer. We note that, even if we agreed with this position of Grievant, it would cover just over three months of retroactive injury on the job benefits. It would not affect the preceding two-year period prior to Grievant becoming aware of the provisions of Article 33, Section 2(d), for which Grievant continues to seek injury on the job benefits.

However, we do not agree with Grievant’s position in this regard. Grievant did not have to await an answer from the Employer on her request for injury on the job benefits before filing a grievance. As soon as she became aware of the provisions of Article 33, Section 2(b), of the Contract and discussed her situation with her VSEA representative, she or the VSEA could have filed a grievance. As discussed above, the “occurrence of the matter” which gave rise to the grievance was Grievant’s receipt of a paycheck which did not pay Grievant the difference between her basic salary and workers’ compensation benefits for the injuries Grievant sustained while working. There

was a new occurrence of the alleged violation of Article 33, Section 2(b) every time a paycheck was issued, triggering the ability to file a grievance.

Based on the foregoing reasons, it is ordered that the Employer's motion to dismiss the grievance of Ellen Pierson is granted.

Dated this ____ day of September, 2002, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Richard W. Park, Acting Chairperson

John J. Zampieri

Edward R. Zuccaro