VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 05-44
JEAN-SYLVAIN NEGRE	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On October 11, 2005, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of Jean-Sylvain Negre ("Grievant"). An amended grievance was filed on February 28, 2006. Grievant alleged that the State of Vermont ("State") violated Articles 5, 14, 15, 63 and 64 of the collective bargaining agreements between the State and the VSEA for the Non-Management Unit by dismissing Grievant from his position as an Epidemiology Surveillance Specialist for the Vermont Department of Health.

The State filed a motion to dismiss this grievance on March 14, 2006. Grievant filed an opposition to the motion to dismiss, and a motion for summary judgment, on March 29, 2006. On March 31, 2006, the parties filed a stipulation on the pertinent facts concerning the motions, which are adopted by the Board and incorporated below in the Findings of Fact. On April 13, 2006, the State filed a reply memorandum in support of the motion to dismiss and a memorandum in opposition to Grievant's motion for summary judgment. On April 20, 2006, Grievant filed a reply memorandum in support of his motion for summary judgment.

FINDINGS OF FACT

1. Grievant worked as a permanent status classified employee for the Vermont Department of Motor Vehicles ("DMV") until May, 2005. His job was slated for elimination due to a reduction in force in the Vermont Agency of Transportation. As a

result, Grievant was entitled to reduction in force ("RIF") rights under the terms of the 2003-2005 Non-Management Unit collective bargaining agreement ("2003-2005 Contract") between the State of Vermont and the Vermont State Employees' Association ("VSEA"). Pursuant to Article 64 of the 2003-2005 Contract, Grievant was entitled to mandatory re-employment rights as a result of the impending RIF from his position at DMV. He was entitled to mandatory re-employment rights to a vacant classified bargaining unit position which management intended to fill, at the same or lower pay grade as his DMV position and for which he had indicated a desire and willingness to accept, provided he met the minimum qualifications for the position.

2. Pursuant to Article 64 of the 2003-2005 Contract, Grievant accepted employment with the Vermont Department of Health in Burlington as an Epidemiology Surveillance Specialist ("ESS") on May 15, 2005. He entered a "working test period" as an ESS.

3. At the time Grievant started work as an ESS with the Department of Health, Article 64 of the 2003-2005 Contract provided in pertinent part as follows:

> . . .
> 2. **WORKING TEST PERIOD**
> An employee who accepts an offer of reemployment under this Section on or after July 1, 1994, shall be placed in a ninety (90) day probationary period, without recourse to the grievance procedure. Such period may be successfully completed after sixty (60) days at the discretion of the appointing authority.
>
> 3. **SEPARATION DURING THE WORKING TEST PERIOD**
> An employee who is separated during the probationary period referred to in subsection 2 above shall have reemployment rights reinstated to include the number of mandatory offers and amount of time left immediately before accepting the "probationary" position, and shall not have recourse to the grievance and arbitration process as a result of such separation.
> (Grievant's Exhibit 3)

4. On July 1, 2005, while Grievant was in his 90-day working test period pursuant to the 2003-2005 Contract, a new VSEA-State collective bargaining agreement covering the Non-Management Unit went into effect for the period July 1, 2005 through June 30, 2007 ("2005-2007 Contract"). Article 64, Sections 2 and 3, were amended in the 2005-2007 Contract to provide as follows:

> 2. **WORKING TEST PERIOD**
> An employee who accepts an offer of reemployment under this Section on or after July 1, 1994, shall be placed in a ninety (90) day probationary period, without recourse to the grievance procedure. Such period may be successfully completed after sixty (60) days, and may also be extended for an additional ninety (90) day period at the discretion of the appointing authority.
>
> 3. **SEPARATION DURING THE WORKING TEST PERIOD**
> An employee who is separated during the probationary period referred to in subsection 2, above, shall have reemployment rights reinstated to include the number of mandatory offers and amount of time left immediately before accepting the "probationary" position, plus any extension thereof, and shall not have recourse to the grievance and arbitration process as a result of such separation.
> (Grievant's Exhibit 4)

6. On August 12, 2005, Grievant's immediate supervisor, Jenney Samuelson, informed him that the Department of Health intended to extend his working test period. Subsequently, the Department of Health provided Grievant with a memorandum dated August 15, 2005, which stated in part: "The current 90-day working test period for the Epi Surveillance Specialist position officially expires today. As discussed with you on Friday, August 12, 2005 and per the revised VSEA contract agreement, may this memorandum serve as confirmation of a 30-day extension to the working test period for your mandatory reemployment (recall) rights." There is a dispute of fact as to when Grievant first received the August 15 memorandum. Grievant asserts that he received it

on August 24, 2005, at which time his supervisor provided it to him in an envelope. The Department of Health asserts that, because the Battle of Bennington holiday fell on August 16 and Grievant was out of the office on August 17, the earliest Grievant would have received it was August 18, 2005. This dispute of fact is not material (Grievant's Exhibit 1).

7. By memorandum dated September 12, 2005, the Department of Health notified Grievant: "Effective the close of business today, you are officially being separated from your position as Health Surveillance Specialist during your working test period" (Grievant's Exhibit 2).

8. Grievant's separation from his position at the Department of Health was based on the expiration of his working test period under Article 64, Sections 2 and 3, and was not discipline for misconduct. The progressive discipline provisions of Article 14 of the Contract were not followed.

9. On October 20, 2005, Grievant accepted employment as a Benefits Programs Specialist with the Vermont Department of Children and Families.

10. During collective bargaining negotiations between the State and the VSEA for the 2005-2007 Contract, the parties never engaged in discussions as to whether the new language contained in Article 64 of the 2005-2007 Contract would, or would not, apply to employees who were in a RIF status, or were already in a RIF working test period, prior to July 1, 2005.

OPINION

The State has moved to dismiss this grievance for lack of subject matter jurisdiction. The State asserts that dismissal is warranted because Grievant is seeking to

challenge his separation from his position as an Epidemiology Surveillance Specialist ("ESS") with the Department of Health at the conclusion of his working test period, and Grievant does not have a right to grieve such separation pursuant to the Contract and Labor Relations Board precedent.

The State cites Article 64, Section 3, of both the 2003-2005 Contract and the 2005-2007 Contract, which provides that an employee "who is separated during" a working test period "shall not have recourse to the grievance and arbitration process as a result of such separation". The State contends that the Board decision in Grievance of Barney, 22 VLRB 310 (1999), is directly on point in supporting dismissal of this case. In Barney, the Board concluded that Article 64, Section 3, plainly and expressly prohibits a grievance filed by an employee contesting a separation during a working test period.

We disagree that the Barney decision controls this case. In Barney, the Board resolved the question of whether an employee could grieve a dismissal that occurred during a working test period. That is not the issue here. The issue here is whether the Department of Health was authorized under the collective bargaining contract to extend Grievant's 90-day working test period when it ended August 15, 2005. The validity of an extension of a working test period under a contract is a separate and distinct question from a dismissal during a working test period.

In deciding this question, we need to determine whether the 2003-2005 Contract or the 2005-2007 Contract applied at the time Grievant's working test period ended on August 15, 2005. This case turns on such a determination, because a working test period was not subject to extension under the 2003-2005 Contract but is subject to extension under the 2005-2007 Contract.

Grievant contends that the 2003-2005 Contract applied because the working test period was created under that contract, and thus his working test period was not subject to extension since the 2003-2005 Contract did not allow for such an extension. As a result, Grievant contends that the extension of his working test period by the Department of Health was invalid, thereby making him a permanent employee, and that his subsequent dismissal from the ESS position was without just cause.

Grievant relies on the Board decision in Grievance of Farnsworth, 9 VLRB 197 (1986), to support his position that the 2003-2005 Contract applied. In Farnsworth, the State and VSEA had negotiated a contract change reducing the number of annual paid military leave days from 15 under the July 1, 1982 – June 30, 1984, Contract to 11 under the July 1, 1984 – June 30, 1986, Contract. The issue before the Board was whether the reduction in military leave days occurred on July 1, 1984, or if the 15 day benefit survived expiration of the old contract and continued on until the beginning of the 1985 calendar year. In holding that the 15 day benefit continued to the beginning of the 1985 calendar year, the Board stated:

> Both contracts speak of entitlement to military leave on a calendar year basis. This means the military leave benefits effective on January 1, 1984, were to remain in effect for the entire 1984 "calendar year" unless the parties specifically indicated otherwise in the 1984-86 Contract. No such provision was negotiated. For us to adopt any other interpretation of the Contracts would ignore the clear meaning of the term "calendar year", and to do so would be unfair to an employee who rightfully presumed at the beginning of calendar year 1984 that he would be entitled to 15 military leave days for the year, and planned accordingly. Id. at 200-201.

Grievant argues that, like the grievant in Farnsworth, he had the right to expect that contractual terms in place when he accepted employment with the Department of Health, and entered into a working test period, would be honored. Accordingly, since a

working test period was not subject to extension when Grievant started his working test period, Grievant maintains that it could not be extended.

We disagree that the Farnsworth decision is as helpful to Grievant as he asserts given significant distinctions between the two cases. The "calendar year" contract language in Farnsworth provided clear direction favoring the applicability of the earlier contract. There is no contract language in this case providing such clear direction with respect to time.

Further, the considerations of fairness favoring the grievant in the Farnsworth case are not as apparent in this case. Farnsworth involved an employee's entitlement to a better benefit under the old contract than the new contract. Here, it is not clear that the old contract language which did not provide for extension of a working test period generally is of greater benefit to an employee than is the new contract's provision for such an extension. We recognize that there are some cases where the lack of an extension may operate to the employee's advantage, but there are other cases where an extension may allow an employee who is having difficulty adjusting to the position the time to improve sufficiently to retain their position where they may otherwise be dismissed.

Instead of Farnsworth providing the best guidance to us in deciding this matter, the Board's reasoning in Grievance of Sherman, 7 VLRB 380 (1984), which also involved whether the expired contract or the new contract governed a case, better informs our decision. In Sherman, the Board held that where the parties had mutually agreed to a change in contract language concerning the Board's scope of review in dismissal cases, the change would be given effect on the effective date of the new contract absent contract language arguing against such a result. 7 VLRB at 399.

A similar rationale applies here. The parties mutually agreed to a change in contract language concerning supervisory review of the desirability of retaining employees in working test periods. It is not apparent that the old contract language generally provided a greater benefit to employees in working test periods than the new contract language. There is no contract language providing direction favoring the applicability of the old contract in cases where employees begin the working test period under the old contract and conclude it during the new contract's term. Under these circumstances, the new contract language should be given effect on its effective date.

Given the applicability of the new contract here, we conclude that this grievance should be dismissed. The 2005-2007 Contract allows for extension of a working test period "for an additional ninety (90) day period at the discretion of the appointing authority". The Department of Health properly applied this contract provision in informing Grievant before the end of his working test period that the period was being extended by 30 days. Thus, we disagree with Grievant that the extension of his working test period was invalid. Grievant did not become a permanent employee as he asserts, and the Department of Health does not have to establish just cause for Grievant's dismissal.

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered that the Grievance of Jean-Sylvain Negre is dismissed.

Dated this 16th day of June, 2006, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

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Edward R. Zuccaro, Chairperson

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Richard W. Park

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Joan B. Wilson