

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	
FRANK TROYSE, ET AL.)	DOCKET NO. 79-85S

FINDINGS OF FACT, OPINION, AND ORDER

Statement of the Case

This grievance was filed on November 30, 1979, by the Vermont State Employees' Association, Inc., ("VSEA") on behalf of several members of the Non-Management unit employed by the State of Vermont Department of Agriculture. The grievance results from a Step III decision denying those employees payment of an office allowance under Article XLI of the current collective bargaining agreement. The State filed an answer on December 24, 1979.

An investigatory hearing was held on July 3, 1980, and was conducted by Board-appointed attorney Peter Monte. As a result of that hearing, counsel for the Grievants and the State reached a number of procedural and factual agreements, which agreements are included in the findings of fact which follow.

Three additional evidentiary hearings were held at the Board hearing room in Montpelier on July 10, July 17, and November 13, 1980. Members Kimberly B. Cheney and William F. Kemsley, Sr. were present at all three of these hearings. Member Robert H. Brown was present only at the July 10 hearing. At all hearings before the Board and the Board attorney, Michael R. Zimmerman, counsel for VSEA, represented the Grievants. Assistant Attorney General Bennett E. Greene represented the State.

Requests for findings of fact and memorandum were filed by Mr. Zimmerman on December 4, 1980. Requests for findings of fact, conclusions of law and order were filed by Mr. Greene on December 4, 1980.

FINDINGS OF FACT

1. Grievants agreed, notwithstanding that the instant grievance originally alleged a claim under the collective bargaining agreement in effect for the period July 5, 1976, to June 30, 1979, that this claim is limited to the period of the effectiveness of the present contract between the State and the VSEA Non-Management unit (the "Agreement"), i.e. beginning on July 1, 1979, and ending June 30, 1981. The Board takes official notice of that agreement, which shall be considered as findings of fact here.

2. Grievants and the State agreed that the reference in Article XII to Federal tax law is to the law in existence prior to the effective date of the 1976 Tax Reform Act, sometime in the fall of 1976.

3. Grievants and the State agreed that whenever the term "at all times relevant" is used with reference to a Grievant, that term refers to the period beginning with that Grievant's employment with the Department of Agriculture, or July 1, 1979, whichever is later.

4. Grievants and the State agreed that, at all times relevant, the Grievants were employees of the Department of Agriculture.

5. Grievants and the State agreed that, at all times relevant, Grievants had telephones in their homes.

6. Grievants and the State agreed that, at all times relevant, no Grievant has been paid office allowance.

7. Grievants and the State agreed that between July 1, 1979, and August 7, 1979, Grievants submitted requests for office allowance to the Commissioner of Agriculture, and that, by memorandum dated August 7, 1979,

(Grievant's Exhibit #47) the Grievant's requests were denied.

8. Prior to the giving of testimony on the first day of hearing (July 10, 1980), Grievants Carley Newcity, Robert Howard, and Philip Urie requested that they be dismissed as Grievants without prejudice. In addition, Byron Moyer moved that he be added as a party-Grievant. The Board granted those requests.

9. Between the second day of testimony (July 17, 1980) and the final day of testimony (November 13, 1980), the Chairman approached both attorneys and asked, rather than require the Board to hear testimony from all of the Grievants, would they be amenable to some alternatives the Chairman set forth. The one selected by counsel was this: that the Board would schedule only one additional day for testimony, and, based upon the testimony the Board had heard, the Board would issue a decision affecting only those Grievants who had already testified, Mr. Troyse, Mr. Atwood, Mr. Roy, and Mr. Emery, but which would give the remaining Grievants guidance in their claims for office allowance.

10. At the third day of hearing (November 13, 1980), Grievants Byron Moyer and Charles Sartelle requested that they be dismissed as Grievants, such request being based on a settlement of their claims against the State. A stipulation for dismissal was filed with the Board on November 26, 1980.

11. The names of the remaining named Grievants herein are as follows: Kenneth Atwood, Stanley Baker, Frank Bump, James Emery, David Haynes, Floyd Lamott, Charles Lavery, Gerald Marckres, Bruce Martell, Richard Rogers, Blake Roy, George Severance, Durwood Todd, Frank Troyse, and Keith Tupper. This opinion and order shall decide the grievances of Atwood, Roy, Emery, and Troyse only.

12. At all times relevant herein, each Grievant was a permanent status employee, as that term is used in the Agreement.

JAMES EMERY

13. Mr. Emery is one of the named Grievants herein. He has been continuously employed by the Department of Agriculture since July of 1948. From 1948 until 1962, Mr. Emery's position was Dairy Inspector. In 1962, Mr. Emery was promoted to the position of Dairy Inspection Supervisor, a pay scale 14 position (Grievants' Exhibit #1, Page 1), which he has held continuously since then. In addition to being Dairy Inspection Supervisor, Mr. Emery, since 1962, still has continued to operate in a limited fashion as a Dairy Inspector (Grievants' Exhibit #1, Page 2) in a small geographic area consisting of Caledonia and (part of) Essex counties. Within that small district there are less than 100 farms making Mr. Emery's inspection workload about 20 percent of that carried by other Dairy Inspectors.

14. As Dairy Inspection Supervisor, Mr. Emery is the immediate supervisor of the following Dairy Inspectors: Gerald Mreckres, Floyd Lamott, Stanley Baker, Durwood Todd, Byron Moyer, George Severance, and Keith Tupper. Mr. Emery and all of the men he supervises are within the Dairy Division of the Department of Agriculture. Within the supervisory chain of command of that Division, Mr. Emery occupies the position immediately between each of the above-named Dairy Inspectors, on the one hand, and Donald F. George, the Director of the Dairy Division, on the other. Mr. George is directly accountable to George M. Dunsmore, Deputy Commissioner of Agriculture, who, in turn, is accountable to William H. Darrow, Jr., Commissioner of the Department of Agriculture.

15. Since 1948, Mr. Emery has continuously resided in Lyndonville, Vermont.

16. When he was hired as an employee of the Department of Agriculture, in 1948, Mr. Emery was informed by Mr. H. E. Bremer, who was at the time Director of the Dairy Division, that the Department expected Mr. Emery to install a telephone, maintain files and a supply of Department pamphlets in his home. From 1948 to 1962, when Mr. Emery held the position of Dairy Inspector, he did set aside space in his home for equipment and materials used in his job. During that period, the Department did not provide him with an office.

17. Since 1962, and his promotion to the position of Dairy Inspection Supervisor, the Department has provided Mr. Emery with an office in Montpelier, Vermont. Mr. Emery spends one day of a typical 40-hour week in the Montpelier office. During that one day per week, Mr. Emery reads and answers correspondence, reviews inspection reports submitted by the men he supervises, keeps abreast of Federal food and drug laws and regulations, and confers with Donald George, Director of the Dairy Division.

18. Of the remaining hours of a typical work week, Mr. Emery spends about 30 hours on the road, and about two hours per week doing work in his home. The duties he performs at home consist of completing reports of daily activities and expense accounts, and using the telephone to make and take calls relating to his work. In so doing, Mr. Emery uses a portion of his dining room and a portion of his basement in connection with his work. He has (and has had for 31 years) the following State-owned equipment in his home: a typewriter (which has been broken for several years), typewriter stand, and two file cabinets. He uses a desk of his own for State work. He also stores some equipment and work

materials in his home, such as pamphlets, inspection sheets, high temperature test kit, water test kits, dairy chemicals, and paraphernalia for cleaning, testing, and sanitizing dairy equipment.

19. Mr. Emery receives between 15-20 telephone calls per week at home from people in the milk industry. He makes between 7-10 telephone calls per week from his home on work-related matters. People who call Mr. Emery at home get his telephone number either from the Department of Agriculture, or from Mr. Emery himself. Donald George, Director of the Dairy Division, knows that Mr. Emery (and, for that matter, the other Dairy Inspectors) receives work-related telephone calls at home.

20. One of the other work-related uses for which Mr. Emery (and other Dairy Inspectors) uses his home is to give license examinations to bulk milk collectors, although he is not required to, as such examinations may be given in his Montpelier office.

21. In actual practice, the major part of Mr. Emery's job is to supervise Dairy Inspectors, and not to engage in inspection activities himself (see finding 13, infra).

22. Mr. Emery uses a business card in his work (Grievant's Exhibit 17) and has done so for about 18 years. He has the cards printed at his own expense. The card in its present form has a Vermont seal, shows Mr. Emery's name, title (Dairy Inspection Supervisor), gives his home address and both his Montpelier office and his home telephone number. He uses it both in his capacity of Dairy Inspection Supervisor, and as a Dairy Inspector, giving the card to people in the dairy industry, to regulatory agencies in other states, and to people working in the chemical industry.

23. Mr. Emery's home telephone number is listed in the public telephone directory for the Lyndonville area.

24. In the event of a toxic chemical accident in the State of Vermont (e.g. an overturned chemical truck), the Department of Agriculture would be involved because of the potential danger to water and food supplies. In order to assist in the notification of appropriate personnel in such an event, the Department has published a list of key Department personnel (Grievants' Exhibit #22). It is broken down into geographic area, and lists the home telephone numbers of Department employees in a particular geographic area. Mr. Emery's name and home telephone number is listed for the Lyndonville area. The list is provided to State personnel who might conceivably become involved in the event of a toxic substance accident.

25. The Northeast Dairy Practices Council is an organization made up of representatives of regulatory agencies and the milk industry in 13 Northeastern states. It exists in order to encourage some degree of uniformity in the laws and regulations governing the milk industry in the 13 states represented. Vermont is a member of the Council, and is represented in Council affairs by the Department of Agriculture. Each year since 1972, save one (1976), the Council has published something entitled "Selected Personnel in Milk Sanitation", which lists key personnel in governmental positions affecting the milk industry in each of the 13 participating states (Grievants' Exhibit #33). In the October 1979 version of that publication, Mr. D. F. George (the same Donald George who is the Director of the Dairy Division, Vermont Department of Agriculture) is listed as the Chairman of the Council (Grievants' Exhibit #33, Page 1).

Mr. Emery's name and Montpelier office telephone number appear under the heading "Certified State Milk Sanitation Rating Officers" (Grievants' Exhibit #33, Page 4). The names and home telephone numbers of all of the Dairy Inspectors whom Mr. Emery supervises are also listed in the publication (Grievants' Exhibit #33, Page 5).

26. Neither Mr. Emery, nor any of the men he supervises is provided with a State-owned vehicle for use in connection with work. Mr. Emery, and the men he supervises, must use their own vehicles, although they are reimbursed for their mileage in accordance with the contract. Mr. Emery regularly submits mileage requests to Donald George, Director, Dairy Division, and his requests are regularly approved and he is paid mileage. Mr. Emery is paid mileage from his home in Lyndonville, not from his Montpelier office. The men he supervises are also paid mileage from their homes.

27. As Dairy Inspection Supervisor, Mr. Emery is involved in the hiring and training of new Dairy Inspectors. His practice is to instruct the newly hired Dairy Inspectors that the Department expects him to: 1) have a telephone in his home; 2) to maintain files at his home; 3) to take and make work-related telephone calls at home; and 4) store information pertinent to his employment (e.g. inspection reports, pamphlets) at his home.

28. In 1970, Mr. Emery requested and obtained from W. I. Carr, who was Director of the Dairy Division from 1962 to 1974, a letter addressed to the "Collector of Internal Revenue". The letter provides, in pertinent part as follows:

"this is to certify that Mr. James Emery...is employed as a dairy inspector with the Vermont Department of Agriculture. As a condition of employment he is required to maintain a telephone and office space at his residence." (Grievants' Exhibit #25).

Mr. Emery had requested, and obtained, similar letters from Mr. Carr before 1970. Mr. Emery cannot recall whether similar letters were requested or obtained after 1970.

29. Grievants' Exhibit #23 was not an order or requirement that Mr. Emery dedicate office space in his home for the purpose of conducting State business, but was prepared by him and signed at his request for tax purposes only.

30. Prior to July 1 of 1979, Mr. Emery prepared and gave to Durwood Todd, an employee under his supervision, a similar letter for tax purposes. Mr. Emery did so knowing that then Commissioner Albee proscribed the distribution of such letter as the one given to Durwood Todd because it was the position of the Department that Mr. Emery and the employees he supervised need not dedicate office space in their homes for the purpose of conducting State business.

31. Notwithstanding his knowledge that the Commissioner disapproved of such letters, and notwithstanding his knowledge of the Department's position, Mr. Emery testified that he gave such letters to Mr. Todd and any others who requested them in order to "help out the boys".

32. At all times pertinent, Mr. Emery was given no order or directive from any of his superiors to dedicate office space in his home for the purpose of conducting State business.

33. In the performance of his duties, Mr. Emery was required to complete no forms which could not be completed at the site of inspection or at the office provided him in Montpelier.

FRANK TROYSE

34. Frank Troyse, a Grievant herein, has been an employee of the State of Vermont, Department of Agriculture, since August of 1976. From August of 1976 to November of 1977, Mr. Troyse' position was Markets Inspector. Since June of 1978, Mr. Troyse' position has been Weights and Measures and Retail Inspector, Pay Scale 11 position (Grievants' Exhibit #1, Page 7; Grievants' Exhibit #52).

35. As a Weights and Measures and Retail Inspector, Mr. Troyse is part of the Weights and Measures Division of the Department of Agriculture. The Director of that Division is Trafford Brink.

36. As a Weights and Measures and Retail Inspector, Mr. Troyse functions, in essence, as a compliance officer for the State of Vermont. He is responsible for checking the accuracy of all measuring devices (e.g. scales, gas pumps) used in retail operations. He must also inspect agricultural products (e.g. apples, potatoes, maple products, meat) in retail outlets for wholesomeness. He grades those products as well. He is also charged with checking retail outlets for compliance with unit pricing laws, and State packaging and labeling laws. He also checks the sanitation of dairy product storage facilities in retail outlets.

37. Mr. Troyse resides in Waterbury, Vermont, a distance of about 13 miles from Montpelier, Vermont.

38. Like other Weights and Measures and Retail Inspectors, Mr. Troyse is assigned a geographic area in which to perform his duties. Mr. Troyse' assigned area covers Franklin, Lamoille, Grand Isle, and Orleans counties. He is the only Weights and Measures and Retail Inspector assigned to that area. There are roughly 300 to 400 retail establishments within Mr. Troyse' assigned area.

39. Mr. Troyse is furnished with a State vehicle for daily travel. The vehicle is garaged at the District 6 Highway Garage in Morrisville, Vermont (which is within his assigned geographic area), rather than at his home in Waterbury, Vermont (which is not within his assigned area). Morrisville is Mr. Troyse's official duty station. Mr. Troyse, each day, travels from Waterbury to Morrisville, and back, in his private vehicle.

40. A duty station is the place where a State employee begins and ends his workday, from which place mileage reimbursement is measured, and to and from which place use of a State motor vehicle is authorized.

41. State's Exhibits A through G, inclusive, are the forms, or samples of forms, used in the performance of inspections, reporting of inspection information and citation of "inspectees" by Mr. Troyse in his work as Agricultural Inspector, Associated Class: Weights, Measures and Retail.

42. State's A (Form 1) is required to be completed by Mr. Troyse at the site of the inspection to which it applies, and is required to be signed on the reverse side by the owner or agent of the establishment inspected.

43. State's B (Form 2) is required to be completed daily as a summary of the data entered on all "Form 1" sheets; completion of said "Form 2" normally requires 15 or less minutes, and may be easily completed at the last site inspected that day or in the State motor vehicle.

44. State's C (Form 18) is required to be completed at the site of inspection to which it applies.

45. No summary of "Form 18" is required. Rather, it is mailed in to the Division of Weights, Measures and Retail Inspection in Montpelier upon completion.

46. If "Form 18" reveals a violation, then it is used as informational material in preparation of the form known as "Certificate of Violation", in evidence as State's D.

47. State's D, the "Certificate of Violation", is required to be completed by Mr. Troyse in the event he discovers a violation of law or regulation.

48. The "Certificate" may be easily completed at the site of the discovered violation. It need not be typed.

49. State's E is a copy of an actual "Certificate" completed by Mr. Troyse, and State's F and G are copies of actual "Certificates" completed by others. They are representative of the style and length of these "Certificates" when completed.

50. The "Certificate" when completed is mailed to the central office of the Weights and Measures Division in Montpelier. A copy is retained for the files and a copy is mailed from the central office to the violator, which usually is the end of the matter since the violator usually corrects the problem which led to the violation.

51. Repeat violations may lead to a request by the Division for prosecution by a State's Attorney, at which time the accumulated "Certificates" serve as data for development of an affidavit of probable cause which would be prepared by Mr. Troyse (or other inspector) at Division headquarters in Montpelier. That occurs, in the case of Mr. Troyse, on the average of once a year, and the affidavit is normally prepared at Division headquarters in Montpelier.

52. In addition to State's A through G, inclusive, and the aforementioned affidavit, the only other form which requires completion by Mr. Troyse

is his personal expense claim, submitted on a biweekly basis, more or less.

53. Office space is available at Division headquarters in Montpelier for use by Mr. Troyse, although it is not specifically allocated to him personally, together with secretarial services and any file space required.

54. Out of a typical workweek, Mr. Troyse spends between one-half hour to an hour working at his home. He has done this since June of 1978, when he became a Weights and Measures and Retail Inspector. The kind of work Mr. Troyse does at home includes completing his daily reports (State's Exhibit B), weekly reports, and occasionally preparing affidavits.

55. By choice, since January of 1980, Mr. Troyse has made no work-related telephone calls at home and has instructed those people who might wish to telephone him at home not to do so, but, instead, to telephone Division headquarters in Montpelier and leave a message, a practice which the Department is knowledgeable and approves of.

56. Mr. Troyse has a telephone in his home, and his number is published in the public telephone book for the Waterbury area, but the listing does not indicate that Mr. Troyse is an employee of the Department of Agriculture. Mr. Troyse's home telephone number is listed on the toxic substance emergency list published by the Department (Grievants' Exhibit #22).

57. Until January of 1980, Mr. Troyse regularly gave his home telephone number to the people whom he met in his work.

58. Neither Trafford Brink, Director of the Weights and Measures Division of the Department, nor anyone else in a position of authority in the Department has directed Mr. Troyse to do work at home. Since the

alternative is to do all of his work (including the associated paperwork) in either the retail establishments he inspects, or in the vehicle he uses, Mr. Troyse has found it more convenient to do certain work in his home.

59. Any work done at home by Mr. Troyse is done in one room of his home. The room contains the following equipment, owned by Mr. Troyse and used in connection with his work: a desk, a chair, a lamp, and a file cabinet. Mr. Troyse does not use that room or that equipment for any purpose other than his work. Mr. Troyse also stores about two full file drawers of inspection and related records in his home.

60. Mr. Troyse stores most of the files he needs during a normal workday in his State vehicle; and his files such as he finds convenient to keep are easily hand carried. All forms and reports completed by Mr. Troyse in the performance of his duties are either sent to Montpelier in original or copy form, where they are channelled and processed as necessary, then filed. Mr. Troyse is not required by the nature or magnitude of his workload to maintain a separate filing system more extensive than can be kept in his State vehicle.

BLAKE ROY

61. Blake Roy is a Grievant herein. For a period of 20 years (i.e. from 1960 until June 1, 1980), Mr. Roy was an employee of the State of Vermont, Department of Agriculture. From 1960 until July of 1979, Mr. Roy's position was Markets Inspector (Grievants' Exhibit #1, Page 5). That position was in the Markets Division of the Department. In July of 1979, the Markets Division was abolished, and Mr. Roy assumed a new position, Agriculture Development Specialist (Grievants' Exhibit #25),

which he held until his retirement on June 1, 1980.

62. Mr. Roy, for the entire period of his State service, resided in Rutland, Vermont, a distance of about 67 miles from Montpelier, Vermont.

63. As Markets Inspector, Mr. Roy's duties were primarily those of compliance officer (Grievants' Exhibit #1, Page 5). As Development Specialist, Mr. Roy's duties changed; he became less of a compliance officer, and more of a public relations man involved in promoting agricultural development in Vermont. He did, however, remain involved in Federal egg and apple inspection programs. As Development Specialist, Mr. Roy would meet with various agricultural groups, such as, for example, the Maple Producers' Association.

64. As Development Specialist, Mr. Roy's duties took him primarily throughout the southern portion of the State, although when he was working in the Federal egg inspection program, he would travel to all parts of the State.

65. During most of the time Mr. Roy was employed by the Department, he used his own car for travel on State business. The only exception was from 1966 to 1970 (while Mr. Roy was still a Markets Inspector), when the State provided him with a State-owned vehicle for his use.

66. When he used his own vehicle for work-related travel, Mr. Roy regularly submitted requests for mileage reimbursement to the Department, which requests were regularly paid. Mr. Roy used his Rutland home as the starting and ending point in calculating mileage.

67. During his entire period of State service, Mr. Roy was never told by any of his superiors that he was required to maintain an office in his home, although he was told that his home was his official duty station.

68. Mr. Roy was not provided with an office by the Department when he was a Markets Inspector.

69. During the last year of his employment with the Department, Mr. Roy's regular workweek was 40 hours, although he did work a considerable number of overtime hours at various agricultural shows and similar activities. During that period, Mr. Roy spent about 35 hours per week on the road. During that same period, Mr. Roy spent about five hours per week working in his home.

70. The time Mr. Roy spent in his home doing work each week can be broken down as follows. About two and one-half of the five hours time spent working at home was spent on the telephone, both making and taking work-related calls. Total incoming and outgoing calls at home averaged about five or six per day. One of those calls was always at the beginning of the workday, when Mr. Roy would call the Montpelier office of the Department in order to discuss matters with Everett Willard, Director of the Division. That call would normally last between 15 to 20 minutes. Mr. Roy had been instructed by Mr. Willard and his two predecessors (Bill Shute and Keith Hooker) to regularly make that particular call. The other two and one-hours was spent on making reports (including daily activity reports), filing, and reviewing Federal regulations governing the egg program.

71. Mr. Roy, either as Markets Inspector or Agricultural Development Specialist, was never ordered or directed by any Department supervisor to dedicate space in his home for the purpose of conducting State business.

72. Nevertheless, when he built his house in 1970, he testified, he had an office room built into it. All of the furniture in that office room was owned by Mr. Roy except for a file cabinet and a typewriter which were owned by the State. Besides using that separate room for working Mr. Roy used it to store various pieces of equipment used in his work.

Specifically, Mr. Roy stored his files, bulletins, reports, manuals, maple samples, apple testing equipment, and maple inspection equipment in that room.

73. Mr. Roy has had a telephone in his home since 1970 and his telephone number is listed in the public telephone directory for the Rutland area.

74. During the period he was an Agricultural Development Specialist, Mr. Roy did not use a business card because he had run out of cards. While he was a Markets Inspector, Mr. Roy did use a business card, which had been printed at State expense. The card was printed prior to 1970, and lists Mr. Roy's pre-1970 home address. The card also gives Mr. Roy's home telephone number, which remained the correct number even after he moved to his present residence in 1970. (Grievants' Exhibit #16).

75. Mr. Roy's home telephone number appears on the 1978 Vermont Farm Show announcement (Grievants' Exhibit #9), published by the Department, and on the toxic substance emergency notification list (Grievants' Exhibit #22).

76. For a considerable number of years before 1980, the Department of Agriculture, Markets Division, produced a booklet entitled "Maple Quality Control". The booklet was distributed to maple products producers, within and without the State of Vermont, and to agriculture students, within and without the State of Vermont. Mr. Roy was involved in the writing in those booklets, which were normally updated every couple of years. A 1980 version has not yet been produced, and the 1978 and 1979 editions of the booklet are still being distributed. The 1979 version (Grievants' Exhibit #10) and an earlier version (Grievants' Exhibit #11) both contain Mr. Roy's name and home telephone number after this paragraph:

The following Markets Division personnel are available to you to assist you with practical information in the production and marketing of maple products, or with any special problems you may have...

KENNETH ATWOOD

77. Kenneth Atwood is a Grievant herein. Since 1968, Mr. Atwood has been employed by the State of Vermont, Department of Agriculture, in the position of Plant Industry Agent A (Grievants' Exhibit #1, Page 6), within the Plant Industry Division of the Department. His duties involve inspection of all Class A and B pesticide dealers in the western one-half of the State of Vermont to determine whether Federal and State standards for labeling have been complied with. This also involves inspection of plant suppliers in order to determine compliance with applicable Federal and State standards in that business.

78. Mr. Atwood has resided in Orwell, Vermont, since 1948.

79. Mr. Atwood's duties take him throughout a geographic area of the State covering Grand Isle County, Franklin County, Windham County, and the western one-half of Addison County.

80. Mr. Atwood is not provided with an office by the Department.

81. Mr. Atwood was provided with a State-owned vehicle from 1968 to 1976, but since then has used his own vehicle in connection with his work. He is paid mileage from and to his home in Orwell, Vermont.

82. Mr. Atwood was never ordered or directed by any Department supervisor to dedicate space in his home for the purpose of conducting State business. However, his supervisor, Mr. Benedict, once commented to him that, 'if anyone needed office space, he (Atwood) did', or words to that effect.

83. Mr. Atwood's workweek is 40 hours. Out of a typical week, he spends about 32 hours on the road; he spends about eight hours per week working in his home. The kind of work performed in his home primarily consists of updating his workbooks of new licensees and doing reports of his inspection activities.

84. Mr. Atwood does use a small den in his home for work purposes. The den contains a desk, chair, and file cabinet, all owned by Mr. Atwood.

85. Mr. Atwood also stores equipment provided by the Department in his home. Specifically, he stores a rainsuit, rubber boots, camera equipment, a respirator, a file box, books, reference manuals, regulations, and various forms in his home. This equipment is too bulky to store in his personal vehicle.

86. Mr. Atwood has had a telephone in his home since 1952, and his home telephone number has been listed in the public telephone directory for the Orwell area since 1952.

87. Mr. Atwood receives two to three work-related calls per week at his home, and he occasionally makes a work-related phone call from his home.

88. Mr. Atwood receives all of his work-related mail at home.

89. Mr. Atwood uses business cards that provide the recipient with the Division's Montpelier office address and telephone number, and not his home address or telephone number.

90. Mr. Atwood's name and address are provided on the toxic substance emergency list published by the Department (Grievants' Exhibit #22).

91. Article XLI of the Agreement, Office Allowance, provides that:

Employees

- (a) who are required by the appointing authority to dedicate office space in their homes for the purpose of conducting State business, and have telephones in their homes, the numbers of which are provided to the public for the purpose of conducting State business, and
- (b) whose home office spaces would have qualified for a deduction as office space under Federal income tax laws in force on July 1, 1976, shall receive a monthly allowance of \$75.00, effective July 1, 1979, increased to \$100.00, effective July 6, 1980. This allowance shall be in addition to their base pay and shall be considered full compensation for all costs and inconvenience incurred as a result of maintaining offices at home in accordance with the above provisions.

The failure of the State to publish phone numbers shall not be the sole basis for denying office allowance under this Article.

HISTORY OF THE GRIEVANCE

92. At some time between July 1, 1979, and August 7, 1979, the Grievants submitted requests for office allowance to the Department of Agriculture.

93. By memorandum dated August 7, 1979, Commissioner Darrow denied the Grievants' requests (Grievants' Exhibit #47).

94. On August 31, 1979, VSEA, representing the Grievants, filed a Step II grievance with the Department of Agriculture, alleging a violation of Article XLI of the contract.

95. By letter dated September 4, 1979, Deputy Commissioner of Agriculture Dunsmore denied Grievants' Step II grievance.

96. On September 7, 1979, VSEA filed a Step III grievance with the Commissioner of the Department of Personnel on behalf of the Grievants, alleging a violation of Article XLI of the contract (Grievants' Exhibit #50; Step IV grievance, Paragraph 18, State's Answer, Paragraph 18).

97. On November 1, 1979, VSEA received a letter dated October 31, 1979, from Joseph G. Kecskemethy, Director of Employee Relations, Department of Personnel, wherein the Grievants' Step III grievance was denied (Grievants' Exhibit #51, Step IV grievance, Paragraph 19, State's Answer, Paragraph 19). In that letter, Mr. Kecskemethy characterized Article XLI of the contract as establishing three tests which employees must satisfy in order to establish eligibility for office allowance: "1. They are required (by the appointing authority) to dedicate office space in their homes to conduct State business; 2. They have phones at home and the numbers are provided to the public for the purpose of conducting State business; 3. They would have qualified for Federal tax deductions under the July 1, 1976, Federal tax laws relating to home office space deductions." Mr. Kecskemethy's letter cites two reasons for the denial of the Step III grievance, as follows:

...the Commissioner of Agriculture has never required the Dairy Inspectors, Markets Inspector (sic) or Weights and Measures and Retail Inspectors to dedicate office space in their homes for the purpose of conducting State business. Thus, prerequisite #1 has not been met. Similarly, prerequisite #3 has not been met. I have no evidence that any of these employees would have qualified for home office space income tax deductions under July 1, 1976, Federal law.

(Grievants' Exhibit #51)

OPINION

I

THE TEST OF ELIGIBILITY

Here we are required to decide whether the Grievants are entitled to the payment of an office allowance as provided in Article XLI of the Agreement. The answer to that question as it pertains to each Grievant

lies in the application of their respective factual situations to the three criteria set forth in the Agreement: 1) were the Grievants required by their appointing authority to dedicate "office" space in their homes for the purpose of conducting State business; 2) do the Grievants have telephones in their homes, and have their home telephone numbers been provided to the public for the purpose of conducting State business; and 3) would the Grievants have qualified for a Federal income tax deduction for home office space under tax laws in force on July 1, 1976.

We do not regard all these criteria as equally determinative or helpful in finding the Grievants entitled or not to an office allowance under the Agreement. In our opinion, the key factor which contributes to an employee's real need for home office space and thus some sort of compensation recognizing that fact (and the intent of the parties in negotiating such a contractual provision) is whether that employee is required to do so by the nature of his work, combined with the absence of any other adequate space to perform certain job responsibilities. We do not think that requirement must be expressly and specifically imposed by the appointing authority. Rather, the test is whether an employee's job responsibilities, and not any particular written or oral directive or order, compels the use of space in one's home for State business. See Grievance of Donald Sheehan, 1 VLRB 144, 148 (1978), and Grievance of Richard Holbrook et al., 1 VLRB 270, 272 (1978). However, essential to a finding that such home office space is required by virtue of an employee's duties and responsibilities is a finding that this practice is necessary for the efficient operation of the State's business as well, and is not merely more convenient for the employee in view of the alternatives.

The next criterion for a finding of entitlement to an office allowance requires more than a finding that one's home phone is used in the normal course of an employee's duties. The phone activity contemplated in the Agreement must be generated by the provision of an employee's home phone number to the "public" for the purpose of conducting State business and must be sufficiently burdensome to require space for record keeping and storage of information. It is not enough, in meeting this requirement, to be required to make and take occasional calls to other Department employees which are necessary to the performance of one's duties and the State's operation of the Department generally. This factor is determinative of the Grievants' situations here only to the extent State business telephone activity, at home, is found to be promulgated by contact with the "public", which we conclude are persons other than Department employees.

The last criterion in Article XLI, qualification for a Federal income tax deduction for home office space under pre-1976 tax laws, is one which provides us with little guidance here. Section 162(a) of the Internal Revenue Code permitting deductions for expenses incurred for maintaining office space in one's home lacks specificity. Moreover, a reading of the legislative history of the Tax Reform Act of 1976, the law which succeeded the pre-1976 tax laws referred to in Article XLI, reveals major disagreements of interpretation between IRS and the Federal courts regarding those broad qualifications. In any event, we agree with the Grievants and find no conditions added to the Agreement by the inclusion of the tax deduction qualification which are not already required by the first criterion set forth in Article XLI, to wit: that only employees "who are required by the appointing authority to dedicate office space in their homes for the purpose of conducting State business" are eligible for the office allowance. Finally, any evidence admitted

regarding a particular Grievant's filing in any given year for a Federal tax deduction is neither determinative nor helpful. That evidence is totally self-serving. Absent evidence of an IRS audit, we have no means of determining the accuracy of the facts submitted and whether in fact that Grievant qualified for the deduction. Moreover, no employer sanction for the claim was required at any time when giving such permission also required the employer to pay extra compensation.

The pay available to an employee under Article XII is compensation for the inconvenience and potential added expense incurred by an individual and his family due to the regular and necessary performance of work responsibilities at home. It is not the same as a tax deduction, which means to "rebate" a taxpayer for a certain amount of expenses the taxpayer can substantiate were incurred in the production of income. Here we must determine not if a taxpayer does in fact use part of his home for the purpose of producing income, but rather, whether a particular State employee should receive compensation above that which his position description calls for to acknowledge the imposition of inconvenience and expense on him distinct from most other State employees.

THE GRIEVANTS' ELIGIBILITY

The question now is how much inconvenience is required before an employee is entitled to receive the extra pay under Article XII? Certainly, it is a matter of degree. See e.g., Grievance of Hugh Brady et al., 3 VLRB (1980), where we were required to make a judgment on the inconvenience imposed on an employee by the relative states of "availability" and "on call" status. Federal court decisions are not compelling, as the Federal employee guidelines for office allowance eligibility are more liberal than those applicable here. In the Federal cases, because of less

stringent requirements, doubt (of eligibility) is resolved in favor of the employee. Here, where the State is required to pay out extra money not included in an eligible employee's basic income, doubt, we feel, should be resolved in favor of the employer.

Based on the foregoing findings of fact regarding each Grievant's actual work habits and responsibilities as determined by their particular positions, and the extent and nature of work-related telephone calls made and received by each Grievant at home, we make the following determinations. We find only Grievant Atwood eligible for the office allowance provided in the Agreement, having met what we consider the essential requirements of Article XII. Grievants Roy, Troyse, and Henry do not.

We consider first the prevailing Grievant. Kenneth Atwood's duties involve the inspection of licensed pesticide dealers and suppliers throughout a large part of western Vermont to ensure compliance with State and Federal pesticide industry regulations. He is not provided with office space by the Department. The nature of his work requires that he be on the road approximately 32 hours out of every 40-hour week. The remaining eight hours a week are spent doing certain work-related duties at home. For example, he receives and makes two to three work-related phone calls on his home telephone per week. Some calls which he receives are generated by the release of his home telephone number to persons other than Department employees for the purpose of conducting State business. He uses space at home to complete daily activity reports accounting for time spent on the job and to update his records of (pesticide dealer) licensees. His work-related mail comes to his home.

His duties also require him to carry various pieces of equipment and supplies that are needed on any given day of inspection duties. Because he has not been provided with an office by the Department, and because he must have a number of supplies readily accessible to him, Mr. Atwood must dedicate some space in his home to store a substantial amount of State-owned equipment and materials used in the normal course of his duties. (See finding # 85 , infra.)

In our opinion, all of these factors combine to make Grievant Atwood's work-related use of his home a necessary and continuing condition of his employment and the efficient operation of the Department.

We now consider Grievant Emery. Mr. Emery does not qualify for an office allowance mainly because the Department at all times relevant here has provided him with adequate office space to do what record keeping, report writing, and filing his position requires. The time he currently spends doing these activities at home could be reallocated in conjunction with his road work to complete those functions at his Montpelier office. Mr. Emery's use of home space for work appears to be motivated more by personal convenience and not for the employer's benefit.

Mr. Roy, as well, does not qualify for the office allowance. Notwithstanding the facts that he does some work-related activities at home, and has chosen to dedicate some space in his home for that purpose, we cannot find that the nature of his position actually requires the maintenance of home office space. Mr. Roy spends five hours a week working at home. During this time, he spends two and one-half hours making and receiving work-related telephone calls at his home, and two and one-half hours doing some record keeping, report writing, and reading of Federal egg

inspection program regulations. In our judgment, however, the portion of his time spent doing so does not rise to the level of inconvenience contemplated as compensable under Article XII. The need to designate office space in one's home does not automatically follow the regular yet relatively light use of one's home phone for work-related purposes. Nor does it result from an employee's practice of doing some work-related paperwork or reading at home. Mr. Roy was merely required to use some space (less than office space would constitute) at his home and to be available by telephone at home, no more, no less.

Finally, Grievant Troyse is not entitled to the office allowance for three reasons. First, and most compelling, the nature of his work does not require it. The efficiency of his inspections is increased by being unannounced. He does not need to telephone regulatees to explain or to counsel them regarding compliance methods. His job requires little discretion or follow-up negotiations. In Mr. Troyse's case, the amount of time he found it necessary to work at home was one-half to one hour a week, or 10-15 minutes a day. Testimony of Mr. Troyse and his supervisor indicated that the paperwork done by Mr. Troyse at home could, and in most instances should, be done at each inspection site throughout his workday in the State vehicle provided Mr. Troyse. Second, any equipment and supplies required in the course of his duties could be stored in the vehicle provided him by the Department. Thus he was not required to designate space in his home, as was Grievant Atwood, for this purpose. Third, for the greater period of time upon which this claim is based, Grievant Troyse, at his request, received no work-related phone calls at his home from the "public". All in all, Mr.

Troyse' option to do some required reporting functions at home was motivated by personal convenience, and was not necessary to his effective job performance or the efficient operation of the inspection program under his control.

ORDER

NOW, THEREFORE, based on these findings of fact and for the foregoing reasons, it is hereby ORDERED that:

1. the grievances of FRANK TROYSE, BLAKE ROY, and JAMES EMERY are DISMISSED; and
2. the grievance of KENNETH ATWOOD is ALLOWED; and
3. KENNETH ATWOOD shall be paid an office allowance pursuant to Article XLI of the current Agreement between the State of Vermont and Vermont State Employees' Association, Inc., for the Non-Management unit, retroactive to July 1, 1979.

Dated this 8th day of January, 1981, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

[Signature]
Kimberly B. Cheney, Chairman

[Signature]
William G. Kemsley, Jr.
Sr.

Appeal
Dismissed pursuant to
Shop 4/22/82

Reaffirmed as to Emery
Reversed & remanded as to Roy
Feb 1985