

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:

WAYNE DYER

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DOCKET NO. 81-13

FINDINGS OF FACT, OPINION, AND ORDER

Statement of the Case

This grievance was filed on February 25, 1981, by the Vermont State Employees' Association ("VSEA") on behalf of Wayne Dyer ("Grievant"). Grievant alleges that the failure of the Department of Public Safety to grant Grievant alternate rate pay for the period January 8, 1979 to July 15, 1979, during which period Grievant was a Trooper First Class and assigned to the Medicaid Fraud Unit, was a violation of the Agreements between the State of Vermont and the VSEA and a violation of the Personnel Rules and Regulations.

A hearing was held in the Board hearing room in Montpelier on July 9, 1981. Board members Kimberly B. Cheney and James S. Gilson were present. William G. Kemsley, Sr. was absent. Michael R. Zimmerman, Counsel for VSEA, represented Grievant. Louis P. Peck, Chief Assistant Attorney General, represented the State. Requested Findings of Fact and Memoranda were filed by the VSEA and the State on July 31 and August 4, 1981, respectively.

14. The work of the Unit was highly technical, involving the investigation of so-called "white collar crime". Essentially, the Unit investigated Medicaid "providers" (i.e. doctors, dentists, pharmacies, etc.) who were suspected of submitting false claims for medical services rendered to welfare recipients. The investigators reviewed the claim forms the providers sent into Medicaid and determined whether they were proper or fraudulent. The nature of the investigative work was more technical than any Grievant had performed as a Trooper prior to his assignment to the Unit, and was not included as "examples of work performed" on the class specification for Trooper 1st Class (State's Exhibit J).

15. At the time Grievant commenced his assignment with the Unit his rank was Trooper 1st Class (Pay Scale 12). On July 16, 1979, Grievant was promoted to Corporal, at which time his pay scale increased to 14.

16. Grievant's promotion to the rank of Corporal was based entirely on results of a competitive promotional examination, and had no relation to his temporary assignment with the Unit.

17. The second investigator, Corporal Candon, was at all material times in Pay Scale 14.

18. The weekly salaries of Grievant and Corporal Candon from the date they commenced their assignment with the Unit until July, 1979, were as follows:

<u>Grievant (PS 12)</u>		<u>Candon (PS 14)</u>
\$ 235.50	Base	\$ 261.00
<u>29.44</u>	("Built-in" overtime per contract)	<u>32.60</u>
\$ 264.94	Total	\$ 293.62

19. When the time came to replace Grievant as an investigator with the Unit (Spring 1980), Paul R. Philbrook had become Commissioner of Public Safety. Commissioner Philbrook then learned that both

#### FINDINGS OF FACT

1. Grievant is a permanent, full-time, classified employee. Since January 1972, Grievant has been employed as a uniformed member of the Department of Public Safety. From January 1973 to July 16, 1979, Grievant held the rank of Trooper 1st Class (Pay Scale 12). On July 16, 1979, Grievant was promoted to the rank of Corporal (Pay Scale 14), which rank he had held continuously since then.

2. In 1978 the Attorney General's Office was awarded a grant by the US Department of Health, Education and Welfare to establish a State Medicaid Fraud Control Unit ("Unit"). The Unit was to be a cooperative undertaking of the Department of Social Welfare, the Office of the Attorney General, and the Department of Public Safety.

3. The Department of Public Safety was to furnish two members to the Unit as investigators on a rotating basis (minimum approximately 18 months). In the planning stages it was anticipated that the two investigators assigned to the Unit would be a senior investigator (Pay Scale 16), and an investigator (Pay Scale 13)(Joint Exhibit 4-D, pgs. 11, 31-32).

4. On October 25, 1978, the Department of Public Safety informed its members of the existence of the Unit, and invited members interested in training for "White Collar Crime Investigation" to apply. Corporals and Troopers having three years of uninterrupted service as such, were eligible to apply for the training (State's Exhibit A).

5. The decision relative to the eligibility of Troopers and Corporals was made by the Commissioner of Public Safety (at that time Francis E. Lynch) with the concurrence of Attorney M. Jerome Diamond.

6. 26 members of the State Police applied for the assignments, of these, 15 (including Grievant) were Troopers; and 11 were Corporals.

7. At the time Grievant applied for assignment to the Unit, he knew that both Troopers 1st Class and Corporals were eligible for such assignment.

8. Following interviews on November 13, 14, 1978, a panel consisting of the Chief of the Unit, Assistant Attorney General Jeffrey L. Amestoy, State Police Captain Richard Spear, and State Police Lieutenant Wesley Newman selected Corporal James Candon and Grievant (the latter was at that time a Trooper 1st Class) for the initial assignment to the Unit.

9. The panel which selected Grievant and Corporal Candon for assignment to the Unit was not obligated to select a Corporal and a Trooper. It could have chosen two Corporals or two Troopers.

10. Grievant was not required to undertake the assignment, but applied and entered upon the duties voluntarily and of his own will.

11. On or about January 8, 1979, Corporal Candon and Grievant commenced their duties as investigators with the Unit.

12. At the time Grievant commenced his duties with the Unit he knew that James Candon was a Corporal and in a higher pay scale.

13. During the period Grievant was with the Unit (i.e. from January 8, 1979 to August 17, 1980), the Chief of the Unit, Assistant Attorney General Amestoy, made no distinction in making work assignments to the investigators (Grievant and Candon) based on their respective ranks, complexity of investigations, or on any other basis. Neither of the investigators was assigned any supervisory or subordinate function in relation to the other, or on any other basis within the Unit. The duties of Grievant and Candon were virtually identical.

investigators were Corporals; he assumed, without any in-depth examination of the requisite qualifications for the assignment, that it was a Corporal's job and that the Department of Personnel had so determined. Further, he felt it would be inequitable and, he believed, contrary to the Personnel Rules and Regulations for a Trooper to be performing the same duties as a Corporal. In view of the above, he made the decision that only Corporals would be eligible to apply for the assignment.

20. Prior to Commissioner Philbrook's decision there had been no change in former Commissioner Lynch's decision that the original assignment was open to both Corporals and Troopers 1st Class.

21. It is a function of the Department of Personnel to classify and assign pay scales to positions in the State classified service. The Department was never requested, and never did classify or assign a pay scale to either or both the Unit investigators.

22. At the time his replacement in the Unit was to be selected, Grievant was informed by Lieutenant Wesley Newman that only Corporals were eligible to apply for the assignment. It is unknown precisely when Newman so informed Grievant. This was the first knowledge Grievant had that the position he then occupied was open only to Corporals.

23. On July 18, 1980, in a memorandum to Commissioner Philbrook, Grievant requested that he be paid back-pay for the period January 8, 1979 (when he joined the Unit) to July 16, 1979 (when he was promoted to Corporal and he began receiving a Corporal's pay). (Grievant's Exhibit 2)

24. By memorandum dated October 3, 1980, Commissioner Philbrook responded to the July 16 request. Philbrook rejected the request reasoning:

This request for redress comes to me well over a year after the period of time in which the alleged wrong occurred...While this matter was not presented as a formal grievance and is not being treated as such, an analogy can be drawn from a timeliness viewpoint. I find this request to be untimely and therefore deny it.

(Grievant's Exhibit 3)

Grievant received the memorandum October 20, 1980.

25. On November 3, 1980, Grievant filed a Step II grievance with Commissioner Philbrook (Grievant's Exhibit 4), wherein he requested alternate rate pay for the period January 8, 1979 to July 15, 1979.

26. By memorandum dated November 21, 1980, Commissioner Philbrook denied the Step II grievance on the basis of timeliness (Grievant's Exhibit 5).

27. Subsequently, a Step III grievance was filed and denied (Grievant's Exhibit 6, Grievant's Exhibit 8).

28. Grievant seeks alternate rate pay for the period January 8, 1979 - July 15, 1979. His claims span two collective bargaining agreements between the State and WSFA: the one in effect from July 5, 1976 to June 30, 1979 for the Non-Management Unit, and the one in effect from July 1, 1979 to June 30, 1981 for the State Police Unit.

29. Article XII of the collective bargaining agreement in effect from July 5, 1976 to June 30, 1979, provided, in pertinent part, as follows:

2. From time to time employees may be required by higher authority to take over the job of an employee assigned to a higher pay grade than their own when that higher-level employee is absent from duty... eligible employees...who are required to take over the higher-level job shall receive 'alternate rate pay' providing all the following criteria are met:

a. The employee takes over the job of the higher-level employee (see Paragraph 7 below for definition);

b. The higher-level work is performed with the authorization of appropriate supervisory personnel;

c. The position is at least one pay grade higher than the employee's own pay grade; and

d. The employee takes over the job of the higher-level employee for one full work shift per day.

3. The 'alternate rate' pay rate shall be 105% of the employee's base rate...

7. For the purposes of this agreement, the term 'to take over the job of an employee in a higher-level position', means that an employee is required by appropriate higher authority to perform a majority of those duties of the higher-level job which are substantially different from his own normal duties, and that the employee would be held accountable for poor performance in the higher-level job.

(Grievant's Exhibit 9)

30. Article XLII of the collective bargaining agreement in effect from July 1, 1979 to June 30, 1981, was identical to Article XII of the previous agreement, except that the alternate pay rate was set at 108% of the employee's base rate (Grievant's Exhibit 10).

31. Under both collective bargaining agreements, grievances initiated at the Step II level were required to be filed "within ten workdays of the date upon which the employee could reasonably have been aware of the occurrence of the matter which gave rise to his grievance" [Article XII, Section 4b of 1976-79 Agreement (Joint Exhibit 5-E); Article III, Section 4b of 1979-81 Agreement (Grievant's Exhibit 11)]

32. At all times relevant herein, Section 6.076 of the Rules and Regulations of Personnel Administration provided, in pertinent part, as follows:

Alternate Rate: An employee's basic classification shall determine his salary during alternate class employment. If the alternate class is assigned to a higher pay scale, salary shall be increased in accordance with subsection 6.071, Promotion...

(Grievant's Exhibit 12)

### OPINION

There are two issues before the Board: 1) was this grievance timely filed, and 2) was Grievant entitled, under the alternative rate provision of the Agreements, to alternate rate pay. We find this grievance was filed in an untimely manner, and, consequently do not deal with the merits of the grievance.

Under both Agreements applicable here, grievances initiated at Step II were required to be filed within 10 workdays of the date upon which the employee could reasonably have been aware of the occurrence of the matter which gave rise to his grievance.

Grievant contends the failure of the Department of Public Safety to pay him alternate pay for the period January 8, 1979 to July 15, 1979, was a violation of the alternate rate pay provision of the Agreements. Thus, the occurrence of the matter which gave rise to the grievance was the actual failure of the State to pay Grievant alternate rate pay. Such failure occurred initially when Grievant received his first pay check as a result of his work with the Medicaid Fraud Unit, and there was a subsequent occurrence of the alleged violation every time a paycheck was issued to Grievant during the period he was paid as a Trooper 1st Class while working with the Unit. Cf. Grievance of VSEA on behalf of the Meat Inspectors, Department of Agriculture, 4 VLRB 144, at 153-54 (1981).

Grievant was aware of the occurrence of the matter which gave rise to the grievance at the time he received his first pay check as a result of his work with the Unit. He was then aware that his job duties with the Unit were the same as the other Investigator on the Unit, James Candon, who performed virtually identical duties; and he was aware



Candon was a Corporal and being paid at a higher pay scale than Grievant. It was at that time, and at each subsequent time Grievant recieved a paycheck as a result of his work with the Unit during the period in question the grievance clock began running.

Grievant was permitted to institute a grievance over this matter at any time during the period in which the alleged violation was occurring, with the restriction that Grievant waived his right to back-pay for all periods prior to the pay period immediately preceding the filing of the grievance. Cf. Grievance of VSEA on behalf of Meat Inspectors, supra at 153-54. Thus, we would find this grievance timely if it were filed within 10 workdays of the day Grievant received any paycheck during the period in question; the grievance being considered timely with respect to that paycheck and any subsequent paychecks at a pay rate which he deemed incorrect. Grievant received his last paycheck during this period sometime in late July, 1979. However, he did not file this grievance with Commissioner Philbrook until November 3, 1980. This grievance is clearly untimely.

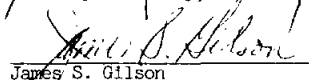
ORDER

Now, therefore, based on the foregoing findings of fact and for all the foregoing reasons, the Grievance of Wayne Dyer is ordered DISMISSED and is DISMISSED.

Dated this 2nd day of October, 1981, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

  
Kimberly B. Cheney, Chairman

  
James S. Gilson