

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	
CLINTON GRAY)	DOCKET NO. 83-3

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On January 10, 1983, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of State Police Corporal Clinton Gray ("Grievant"). The grievance alleged the State of Vermont, Department of Public Safety ("Department"), unilaterally rescinded a past practice and thus violated Article 5 of the Agreements between the State and VSEA effective for the period July 1, 1982 to June 30, 1984 by requiring Grievant to "pay back" days off which had previously been approved as part of a "swap" so that Grievant would be on-duty while traveling to a training assignment rather than off duty.

On August 11, 1983, a hearing was held before Board Members James S. Gilson, Acting Chairman, and William G. Kemsley, Sr. Chairman Kimberly B. Cheney was absent from the hearing. Michael Seibert, Special Assistant Attorney General, represented the Department. Grievant was represented by VSEA Staff Attorney Michael R. Zimmerman. Prior to the hearing, the parties submitted a stipulation of various facts and the admission of exhibits.

Requested Findings of Fact and a Memorandum of Law were submitted by VSEA on September 1, 1983. The Department submitted a Memorandum of Law and Argument on September 1, 1983.

FINDINGS OF FACT

1. Grievant has been a member of the Vermont State Police since June 24, 1968. During the period of his service, Grievant has been assigned to the St. Albans Barracks (part of Troop A), the Newfane Outpost (part of Troop D), the Wells River Outpost (part of Troop B), and, at all times relevant to this grievance, the St. Johnsbury Barracks (part of Troop B).

2. Grievant has, at all times relevant to this grievance, been a permanent-status State Police Corporal, and, as such, a member of the State Police Bargaining Unit and entitled to all rights afforded to such employees by the State Police Unit Agreement.

3. Members of the Vermont State Police work unusual schedules, with rotating days off. Since 1947, it has been a practice for members of the State Police to "swap" days off (i.e., taking a day off on a normally-scheduled workday, and, in exchange, working on a normally-scheduled day off) in certain situations. The two situations where days off are swapped most frequently are when members' scheduled days off fall on days where training sessions are scheduled and on days members are scheduled to appear as witnesses in court proceedings.

4. Prior to 1978, State Police members were allowed to swap days off when they had to travel out of state for training sessions so that the member did not lose a day off. Outside of this instance grievance, no evidence before us indicates that any State Police member was allowed to so swap days off while traveling to training sessions after 1977.

5. Since 1972, there have been collective bargaining agreements covering State employees, including State Police. Since 1976, the Department of Personnel has interpreted the overtime provisions in the

various "Master" contracts as denying compensation altogether for employees who travel during non-working hours to and from training assignments (Exhibit 11, Page 3).

6. The State Police Unit Agreement in effect from July 1, 1981 to June 30, 1982 was the first collective bargaining agreement for the State Police Unit wherein members were entitled to overtime, rather than a flat percentage addition to salary. Since that agreement went into effect, the Department of Public Safety has interpreted the overtime provision of the State Police Unit Agreement as denying compensation altogether for members who travel to and from training assignments on their days off.

7. Since the 1981-82 State Police Unit Agreement went into effect, State Police have been entitled to overtime for attendance at training sessions (but not for travel to or from such sessions). It is not unusual for members who are scheduled for a day off on a training day to "swap" that day off for a regularly-scheduled work day, thereby allowing the Department to avoid paying the member overtime for his attendance at training.

8. In June of 1981, in connection with new time reports, the Department of Public Safety issued instructions for the completion of such time reports. Those instructions provided, among other things, that codes 08 and 09 were to be used to report the temporary exchange of a day off for a day worked - code 08 to reflect that an employee worked on a normally-scheduled day off, and code 09 to reflect that an employee took a day off on a normally-scheduled work day. Those instructions did not prohibit the temporary exchange of a day off for a day worked for the purpose of travel to or from training assignments. Those instructions

were made available to all employees of the Department of Public Safety (Exhibit 2).

9. The collective bargaining agreements (including the State Police Unit Agreement) in effect from July 1, 1982 to June 30, 1984 were bargained during the period beginning in July 1981 and ending on November 13, 1981. Paul Philbrook, who has been Commissioner of Public Safety since February 28, 1980, attended some of the State Police Unit bargaining sessions. At no time during those bargaining sessions did the subject of swapping days off arise.

10. On July 1, 1982, the State Police Unit Agreement for the period July 1, 1982 to June 30, 1984 went into effect. Article 8 of that agreement (entitled "Regular Hours and Overtime") provides, in pertinent part, as follows:

2. Regular workweek, workday:

The regular workweek is 47.5 hours with the regular work day of 9.5 hours as presently constituted, averaged over a multi-week cycle... (E)mloyees shall be paid their basic weekly salary even though the regular work schedule for that particular week requires fewer than 40 hours or more than 47.5 hours.

3. Base Pay:

Base weekly pay for bargaining unit employees shall be base hourly rate multiplied by 47.5 hours per week.

4. Overtime

h. Overtime work does not include:

travel time to and from assigned training, whenever scheduled... nor any of the following:

- self-activation during travel time to and from any training scheduled on a day off...

Notwithstanding any contrary provision of this section, the following shall be considered to be overtime...

- iii. assigned training activities scheduled on an employee's day off, but excluding travel time to and from the training site.

(Exhibit 1)

11. Unlike members of the State Police Unit, State employees covered by the "Master" agreement between VSEA and the State work a 40-hour workweek on a regular basis. (Article 18 of the "Master" agreement in effect from July 1, 1982 to June 30, 1984).

12. Monthly work schedules for State Police Unit members assigned to the St. Johnsbury Barracks are prepared by a Patrol Commander (a Corporal), approved by the Sergeant, and posted one or two days before the beginning of the month. There has never been a Departmental restriction placed upon the swapping of days off after a monthly schedule is posted.

13. Prior to August 1982, Grievant applied to attend a training course to be held in Ohio. Later in August, Grievant was informed that he had been selected to attend the September course, although he was not advised as to the exact dates.

14. After Grievant was advised of his selection for the Ohio training, he spoke to his Sergeant about the possibility of his swapping days off if he discovered that he would be scheduled to travel on regularly-scheduled days off. Grievant's purpose in making that inquiry was to make certain that he would be in an on-duty status while traveling so as to be covered by Worker's Compensation benefits, widow's benefits,

and a \$50,000 life insurance policy covering on-duty death. Grievant's purpose was not to obtain additional compensation for travel, and he knew that the Contract prohibited the payment of overtime for such travel.

15. The Department of Public Safety has never determined whether a State Police Officer who is traveling to a training assignment on a day off is covered by Worker's Compensation or other benefits, although it is the understanding of Commissioner Philbrook that officers would be covered.

16. On August 30 or 31, 1982, the September 1982 schedule for the St. Johnsbury Barracks was posted. Included among Grievant's scheduled days of work and scheduled days off were the following days: Grievant was scheduled to work Wednesday, September 15. He was scheduled to be off duty September 25 and 26.

17. Shortly after September 10, 1982, Grievant received confirmation that he had been selected to attend the Ohio training course, and learned, for the first time, that the dates of the training would be from September 27, 1982 to October 1, 1982.

18. Upon notification of the days of the Ohio training course, Grievant, knowing that travel to the training location would take place on Saturday, September 25, and Sunday, September 26 (his scheduled days off), spoke to his superior, Sergeant Reed, and requested that he be allowed to swap Saturday the 25th for Wednesday, September 15 (a scheduled work day), and Sunday the 26th for Wednesday, October 6 (a scheduled workday). Grievant made that request because he wanted to be certain he would be on duty while traveling to Ohio. Grievant requested swapping

Wednesdays because he knew that on Wednesdays at the St. Johnsbury Barracks, another Corporal was regularly assigned to perform the duties of Patrol Commander (Grievant's normal duty), and that, on Wednesdays, Grievant was just an extra Corporal at the Barracks. Sergeant Reed verbally approved Grievant's request.

19. On or about September 21, 1982, Grievant and three other members of the State Police Unit who were to attend the Ohio training course (i.e., Corporal Chenard, Corporal Bailey and Trooper Stokes) received their "travel orders" for the training course. Such travel orders indicated that they were to travel in a State-owned vehicle, and that they were to depart Vermont on Saturday, September 25, 1982 (Exhibit 4).

20. Prior to his departure for the Ohio training, Grievant submitted his time report for the two-week period ending on September 25, 1982. In accordance with his previous discussions with Sergeant Reed, Grievant reported Saturday, September 25 with code 08 (i.e., "regular hours in excess of work schedule hours"), and Wednesday, September 15 with code 09 (i.e., "subtract from work schedule hours"). Sergeant Reed approved that time report, and Grievant was paid in accordance with that time report. Grievant's pay for that pay period did not reflect any additional amount by virtue of his travel on September 25 (Exhibit 5, Page 1).

21. On Saturday, September 25, 1982, Grievant, Corporal Chenard, Corporal Bailey and Trooper Stokes, all in a State-owned vehicle, departed about 8:27 a.m. and drove until about 10:30 p.m. (a total of about 14 hours). Grievant did not request overtime compensation for any part of that travel day.

22. On Sunday, September 26, 1982, Grievant, Corporal Chenard, Corporal Bailey and Trooper Stokes traveled for about nine hours, reaching their Ohio destination about 5:30 p.m.

23. Grievant, Corporal Chenard, Corporal Bailey and Trooper Stokes departed Ohio during the afternoon of Friday, October 1, 1982, and arrived in Vermont in the early hours of Sunday, October 3, 1982. Friday, October 1, Saturday, October 2 and Sunday, October 3 were regularly-scheduled workdays for Grievant.

24. Upon Grievant's return to Vermont, he discovered that Tuesday, October 5, his regularly-scheduled day off, was a training day. In order that he could attend that training without charging overtime to the Department, Grievant requested that Sergeant Reed allow Grievant to work October 5 as a regularly-scheduled workday, and to take Wednesday, October 6 (a regularly-scheduled workday) as a day off in exchange for Tuesday, October 5, and to take Saturday, October 9 (a regularly-scheduled workday) as a day off in exchange for Sunday, September 26. Sergeant Reed approved the request.

25. On October 9, 1982, Grievant submitted a time report for the two-week pay period beginning Sunday, September 26 and ending Saturday, October 9, 1982. On that time report, Grievant reported Sunday, September 26 and Tuesday, October 5 with code 08 (i.e., "regular work hours in excess of work schedule hours"), and Wednesday, October 6 and Saturday, October 9 with code 09 (i.e., "subtract from work schedule hours"). Grievant did not request overtime compensation for September 26. Sergeant Reed approved Grievant's time report, and Grievant was paid in accordance with that time report. Grievant's pay for that period

did not reflect any additional amount by virtue of his travel on September 26 (Exhibit 5, Page 2).

26. Grievant did not submit claims for overtime for either September 25 or September 26, and did not receive overtime pay for either day.

27. By memorandum dated November 16, 1982, Captain Heffernan, Field Force Commander, instructed Grievant's Troop Commander to require Grievant to "pay back" September 25 and 26, either by working (without pay) on two days off, or by deducting two days of pay or a combination of the two methods (Exhibit 6).

28. When the alternatives set forth in Heffernan's memorandum were presented to Grievant, he elected to work on December 7 and 9, 1982, two of his days off. On his time report for the period ending December 18, 1982, Grievant reported those two days with code 14 (i.e., "overtime which is ineligible for compensation") (Exhibit 10).

29. Since he has been Commissioner, Philbrook has never approved of swapping scheduled days off for scheduled work days so that a State Police member would be on on-duty status while traveling to training sessions. Prior to the action resulting in this grievance, Philbrook did not circulate any memorandum prohibiting swapping in this kind of situation because he did not see any need for it as he did not imagine such swapping would be allowed.

30. Philbrook does not object to "scheduled swapping" if it has no adverse impact on the Department. He believes Grievant's "swap" had an adverse impact on the Department because the Department lost two days of Grievant's services as a result of the swap; that is, if the swap

had not been made, Grievant would have been in off-duty status while traveling to the training session and would have worked his regularly-scheduled shifts on September 15 and October 9, instead of being off work on those days.

31. With respect to Corporal Chenard and Corporal Bailey, the following is true:

1) Corporal Chenard: His duty station, at all times relevant herein, was Shaftsbury, Vermont. September 25, 1982, and September 26, 1982 (as well as the days on which he and the others traveled back to Vermont) were normally-scheduled workdays for him. He was not required to "pay back" salary he earned on those days.

2) Corporal Bailey: His duty station, at all times relevant herein, was Rockingham, Vermont. September 25, 1982, and September 26, 1982, were normally-scheduled workdays for him. One of the days of the return trip from Ohio to Vermont (i.e., Saturday, October 2, 1982) was his regularly-scheduled day off. Bailey, upon his return, claimed nine and one-half hours of overtime for Saturday, October 2, 1982, and was paid. Later, however, Bailey was informed that he had been ineligible for overtime for travel on October 2, 1982, and was required to "pay back" the overtime he had received, which he accomplished by working a day off (i.e., November 12, 1982)(Article 8, Section 4h).

OPINION

The parties agree the primary issues herein are as follows:

a. Whether or not, prior to Captain Heffernan's memorandum of November 16, 1982, there was a past practice of allowing bargaining unit

members to exchange days off and days worked in order that travel to and from training would be workdays; and

b. Irrespective of the existence of such a past practice, whether Article 8 of the State Police Unit Contract precludes a bargaining unit member from receiving regular pay (as opposed to overtime pay) for travel to or from training.

We have recognized that day-to-day practices mutually accepted by the parties may attain the status of contractual rights and duties, particularly where they are significant, long-standing and not at variance with contract provisions. Grievance of Allen, 5 VLRB 411, 417 (1982).

Grievance of Beyor, 5 VLRB 222, 238-239 (1982). If contractual effect is to be granted to a past practice, that practice must be of sufficient import to the parties that they can be presumed to have bargained in reference to it and reached a mutual agreement or understanding.

Grievance of Cronin, 6 VLRB 37, 68-69 (1983).

It is true that a practice exists for members of State Police to take a day off on a normally-scheduled workday and, in exchange, working on a normally-scheduled day off in certain situations, but it is evident this practice does not extend to the circumstances involved in the instant grievance. Prior to 1978, State Police members were allowed to swap days off so that they were on duty when they had to travel out of state for training sessions so that the member did not lose a day off. However, no evidence before us indicates that any State Police member was allowed to so swap days off while traveling to training sessions after 1977, and Public Safety Commissioner Philbrook has never approved of such swaps

since he became Commissioner in February 1980. Where, as here, there is no evidence of any instance since 1977 of the Department of Public Safety approving requests to swap days off in circumstances identical to those involved here, it is obvious no past practice "mutually accepted" by the parties exists allowing members to exchange days off and days worked in order that travel to and from training would be workdays.

The parties have framed the remaining issue before us as whether Article 8 of the State Police Unit Contract precludes a bargaining unit member from receiving regular pay (as opposed to overtime pay) for travel to or from training.

The issue as framed turns labor law on its head by its implicit assumption that an employee can change a work schedule as he or she sees fit unless such change is prohibited by the Contract. cf. State of Vermont v. Ludlow Supermarkets, 141 Vt. 261, 264 (1982). There the Ludlow court observed the State's contention that there is no constitutional right to shop on Sunday stood constitutional law on its head because in our society the Constitution is a limit on governmental power, not citizens' freedom. So too would labor law be stood on its head if we adopted the proffered analysis. The discretion of employees to change a work schedule unless such change is prohibited by the Contract is not an acceptable tenet of labor law. Such discretion is not granted to the employee. Management has the right to direct the workforce, including determining when an employee will work, unless limited by the Contract, binding past practice or personnel rules not explicitly altered by the Contract. Cronin, supra at 68-69. Grievance of Cronan, et al., 6 VLRB 347 (1983).

Accordingly, we must determine whether Commissioner Philbrook violated a specific provision of the Contract by not allowing Grievant to swap days off in order to be on duty the days he was traveling to out-of-State training, not whether the Contract precludes such a swap. To determine whether the Contract precludes such a swap would be to judge whether the swap requested by Grievant which was initially approved by his supervisor was permitted by the Contract. That is not the grievable issue. The grievable issue is whether Commissioner Philbrook violated the Contract by rejecting such a swap.

We can find no such contract violation. Article 8, Section 4(h) of the State Police Unit Contract does prohibit the payment of overtime for travel time to and from assigned training on an employee's day off, but nowhere in the Contract is swapping days off for travel to and from training sessions addressed. We will not presume by such silence that the prohibition of such swaps is a contractual violation. We will not read terms into a contract, unless they arise by necessary implication. In re Stacey, 138 Vt. 68, 71 (1980). It is our duty to interpret the provisions of a disputed contract, not remake it, or ignore it. In re Grievance of VSEA on Behalf of Certain Phase-Down Employees, 139 Vt. 63, 65 (1980). To find Commissioner Philbrook violated the Contract by prohibiting Grievant from swapping days off so he would be on duty while traveling to a training session would be to "add to" the parties' Contract in violation of 3 VSA §1002(d).

We can understand how Grievant could perceive some unfairness here since he was off duty and not paid when traveling to the Ohio training

session while troopers he was traveling with were on duty and paid. However, if there is any injustice in such a situation, the way to correct it is through negotiating contract language which addresses the problem. Absent such language, there is no redress available by appealing to the Board.

Mr. Kemsley suggests that the parties negotiate language concerning entitlement of State Police members while traveling to and from training sessions, to Worker's Compensation benefits, surviving spouses' benefits, and a life insurance policy covering on-duty death since the evidence indicates it is unclear whether they are now covered under that circumstance while off duty. This is an important matter which should not be left unclear by the parties.

ORDER


Now therefore, based on the foregoing findings of fact and for all the foregoing reasons, it is hereby ORDERED:

The Grievance of Clinton Gray is DISMISSED.

Dated this 2nd day of November, 1983, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


William G. Kemsley, Sr.


James S. Gilson