

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	DOCKET NO. 83-2
GERALD GOUPEE)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On January 7, 1983, The Vermont State Employees' Association ("VSEA") filed a grievance on behalf of Gerald Goupee ("Grievant"). The grievance stated Grievant had been rehired by the State of Vermont, Department of Corrections ("Department") on June 21, 1982, at an hourly rate of pay of \$7.84 and subsequently became eligible for three separate salary increases as a result of two promotions and a contractual general salary increase. Grievant contends the three salary increases should have been added to his hourly rate of pay of \$7.84, but he was not properly paid by the Department.

On January 17, 1983, the State filed a Motion to Dismiss in part for Untimely Filing. The State claimed Grievant was precluded from grieving that portion of his grievance contesting the change in his restoration rate of pay and its effect on subsequent salary increases because it was untimely filed. On March 25, 1983, the Board ruled that portion of the grievance timely, but for a limited time period; that by not grieving until October 29, 1982, Grievant waived his right to back-pay for all periods prior to the pay period immediately preceding the filing of the grievance.

A hearing was held before Board Members James S. Gilson, Acting Chairman, and William G. Kemsley, Sr., on July 7, 1983. Chairman Kimberly B. Cheney was absent from the hearing, and the parties stipulated that he would participate in the decision only if Mr. Gilson and Mr. Kemsley disagreed and would advise in matters of law. Grievant was represented by VSEA Staff Attorney Susan Dole. The Department was represented by Michael Seibert, Assistant Attorney General. At the hearing, Grievant, for purposes of this decision, withdrew his claim as to contract violations in regard to his October 4, 1982, promotion to Corrections Security Operations Supervisor, Pay Scale 15, but reserved the right to later raise the issue once the Vermont Supreme Court issued its decision in the appeal of Grievance of Byrne, 6 VLRB 1 (1983), which involves an identical issue. The State indicated it would apply the decision of the Supreme Court in the Byrne case to Grievant's October 4, 1982, pay increase calculation.

Requested Findings of Fact and Memoranda of Law were filed by VSEA and the Department on August 1, 1983, and August 2, 1983, respectively.

FINDINGS OF FACT

1. Grievant has been, at all times relevant, a permanent-status employee of the Department. As a permanent-status employee, Grievant has been entitled to all rights afforded to such employees by statute, by regulations, and by the Agreements between the State of Vermont

and VSEA, effective for the periods July 1, 1981 to June 30, 1982 ("1981-82 Contract") and July 1, 1982 to June 30, 1984 ("1982-84 Contract").

2. Grievant began working for the Department on May 14, 1973, as a Correctional Officer, Pay Scale 8 (State's Exhibit 1).

3. On February 2, 1981, Grievant received an interim promotion to Correctional Counselor Supervisor B, Pay Scale 13, and completed promotional probation at that position July 2, 1981, receiving a wage of \$7.24 per hour (State's Exhibit 1, Grievant's Exhibit B).

4. On October 11, 1981, Grievant was reallocated upward to Correctional Facility Shift Supervisor, Pay Scale 14, his hourly wage was increased to \$7.82, and he was placed in a six-month promotional probationary period (State's Exhibit 1, Grievant's Exhibit C).

5. On January 31, 1982, Grievant received a 2 percent contractual salary adjustment, which increased his base hourly wage to \$7.95 (State's Exhibit 1).

6. On March 19, 1982, Grievant resigned from his job. At the time, he was earning \$7.95 per hour. He had not yet completed his six-month promotional probationary period at his new position, Correctional Facility Shift Supervisor (Grievant's Exhibit D).

7. At some time in late May or early June, 1982, Grievant telephoned Superintendent Ray Pilette of the St. Johnsbury Community Correctional Center ("SJCCC"), his former superintendent, to inquire about his chances of gaining reemployment with the Department. Pilette told Grievant he was

willing to rehire Grievant at SJCCC to a position as Correctional Officer C, Pay Scale 12, for which Pilette believed he would have a vacancy in mid-July, 1982.

8. Grievant wished, however, to return to the Department before the position at SJCCC would open up and Pilette agreed to try to find Grievant a job with the Department for the interim. At Pilette's request, Richard Turner, Superintendent of the Chittenden Community Correctional Center ("CCCC"), employed Grievant from June 21, 1982, to July 4, 1982, as a Correctional Officer B, Pay Scale 9.

9. During his discussions with Grievant concerning his rehire, Pilette promised Grievant his salary upon his return to SJCCC would equal the wage he would have earned if he had not resigned his job in March, 1982. Grievant understood and expected, after talking with Pilette initially, that he would be restored at his salary earned at the time of his resignation, which was \$7.95 per hour.

10. Will Young was, at all times relevant herein, the supervisor of the records section of the Department of Personnel. It was part of Young's function, which was delegated to him by the Commissioner of Personnel, to review and approve "Personnel Action" forms. It was his responsibility to ensure actions taken with respect to State employees were appropriate and correctly undertaken, under the guidance provided by statute, the contract, the Personnel Rules and Regulations, and the Department of Personnel's own internal procedures. Young had the ultimate authority to disapprove and stop processing actions he believed inconsistent with such guidelines.

11. Part of Young's function was to provide agencies with technical assistance as to the procedure for and rules concerning the restoration of former employees. As to restoration salaries, Young typically assisted agencies to establish a permissible range, which was consistent with all rules and regulations, and within such range the agency could exercise its discretion to establish the employee's restoration salary. If the agency failed to set the salary within the appropriate range, Young had the authority and responsibility to reject the proposed action.

12. Rosemary Trombley, a Department of Corrections central office personnel employee, consulted Young in June, 1982, to secure his assistance in setting Grievant's restoration salary. Trombley told Young that Pilette intended to hire Grievant at SJCCC in July, 1982, and had promised Grievant a restoration salary which equaled what Grievant would have been receiving as a Facility Shift Supervisor at SJCCC if he had not resigned in March, 1982. She informed Young that Grievant had taken a Correctional Officer B position at Pay Scale 9 at CCCC for the time until a position became available at SJCCC.

13. With these concerns in mind, Young and Trombley established Grievant's restoration rate of pay as \$7.84 per hour. At the hearing on this matter, Young could not reconstruct their calculations or remember how he and Trombley established that rate.

14. At the time Grievant was restored, on June 21, 1982, \$7.84 per hour was the maximum rate of pay for Pay Scale 9 and \$4.94 per hour was the minimum rate of pay, pursuant to Article 35, Section 1, of the 1981-82 Contract.

15. Under the 1981-82 Contract, restoration is defined as:

the rehiring within two years of a former permanent-status or limited-status employee who was not dismissed under Article 15 and whose performance at the time of separation was at least satisfactory. Restoration rights apply to classes of positions assigned to the same or lower pay scale than the class of position previously held and for which the employee meets the minimum education and experience requirements.

16. Under the 1981-82 and 1982-84 Contracts, permanent status is defined as:

that condition which applies to an employee who has completed an original probationary period and is occupying a permanent classified position. Rights and privileges of permanent status include, but are not limited to, reduction in force, reemployment, appeal and consideration for promotion, transfer and restoration.

17. Section 6.077 of the Personnel Rules and Regulations provides:

an employee restored (Subsection 12.07)... to fill a position as provided in these rules shall be paid at any rate in the pay scale not in excess of the salary received in the previous position plus any increase which would have accrued to such rate in the interim because of adjustment to the pay scale or compensation plan (Grievant's Exhibit M).

18. Under Subsection 12.07 of the Rules and Regulations for Personnel Administration, restoration applies to "a permanent-status employee separated without prejudice (who) may for a period of two years be restored to a vacant position in the class formerly held or to a vacant position of another class assigned to the same or lower pay scale, provided that he is eligible and qualified for the position".

19. On July 4, 1982, Grievant was promoted to Correctional Facility Shift Supervisor, Pay Scale 14, and was transferred to SJCCC (Grievant's Exhibit G). Pilette had not anticipated this vacancy during earlier discussions with Grievant.

20. Article 35, Section 2 of the 1982-84 Contract provides:

Effective July 4, 1982, employees covered by this Agreement shall have their base hourly salaries increased by 8.5 percent rounded to the nearest whole cent, over their base hourly salaries in force on July 3, 1982.

21. Grievant was eligible for the July 4, 1982, general salary increase of 8.5 percent (Grievant's Exhibit F).

22. During his restoration salary discussions with Grievant, Pilette did not consider that the Contract would entitle Grievant to an 8.5 percent salary increase on July 4, 1982.

23. Article 36, Section 6 of the 1982-84 Contract provides:

Upon promotion from one position to another, a permanent-status or limited-status employee will receive a salary increase in accordance with the following:

One pay scale	8%
Two, three or four pay scales	9%
Five or more pay scales	10%

or to the end-of-probation rate of the new pay scale, whichever is greater, subject to the maximum of that pay scale...

24. Employees restored to State employment are, upon restoration, permanent-status employees who do not serve an original probationary period.

25. Grievant was entitled, under Article 35, Section 6 of the 1982-84 Contract, to a 10 percent salary increase upon transfer and promotion to the position at SJCCC.

26. When Pilette discussed Grievant's return to work at SJCCC with Grievant and with Richard Turner, Pilette assumed Grievant would not be eligible for a salary increase under Article 35, Section 6 when he was transferred and promoted to the position at SJCCC in July, 1982. Pilette based that assumption upon his belief that Grievant, when restored, would serve a probationary period, and would not be a permanent-status employee when promoted and transferred in July, 1982. When Pilette made representations to Grievant as to his restoration salary, he did so with this belief in mind.

27. Based on discussions with Pilette, Grievant assumed that when a position opened up at SJCCC, he would receive \$7.95 per hour when he was placed in that position plus the 8.5 percent contractual increase.

28. If Grievant had not resigned in March, 1982, and had successfully completed his promotional probationary period in his Correctional Facility Shift Supervisor position and had remained in that position, he would have been making \$8.63 as of July 4, 1982, as a result of receiving the 8.5 percent contractual increase.

29. In late July, 1982, Trombley called Young and told him that she believed Grievant's restoration rate had been incorrectly established. Trombley asked Young to review the matter. Young determined that he had made an error by setting \$7.84 as the maximum permissible salary. Young concluded it was incorrect to have used \$7.95 as the salary received in the previous position pursuant to Section 6.077 of the Personnel Rules when establishing the restoration pay rate because when Grievant had resigned making that salary, he had not completed his promotional probationary period.

30. Article 35, Section 6, of the 1981-82 Contract provided:

The salary upon which any increase resulting from promotion, upward re-allocation, or upward reassignment is computed for a given employee, is that employee's most recent salary in the last position at which he completed any required probationary period, plus any subsequent general salary adjustment, except that no employee will be reduced in salary as a result of this provision.

31. In interpreting Section 6.077 of the Personnel Rules in conjunction with Article 35, Section 6 of the 1981-82 Contract, Young determined that a restored employee could not be paid a salary in excess of the salary received in the last position at which the employee completed any required probationary period, plus any subsequent general salary adjustment.

32. Since \$7.24 had been the last rate at which Grievant had completed the required probationary period, Young and Trombley concluded Grievant's restoration rate should not exceed that rate, plus any increase which would have accrued to such rate in the interim because of adjustment to the pay scale or compensation plan.

33. Young and Trombley, therefore, calculated Grievant's maximum restoration rate as \$7.38 per hour, which represented \$7.24 per hour plus the 2 percent January 31, 1982, general salary increase of \$.14. Grievant's restoration rate was changed to \$7.38 per hour on August 5, 1982 (Grievant's Exhibit H).

34. The salary increases for which Grievant was eligible due to the July 4, 1982, general salary increase of 8.5 percent and the promotional increase of an additional 10 percent were recomputed.

35. Trombley and Young calculated Grievant's corrected salary at \$7.38 plus a 8.5 percent general salary increase = \$8.01 plus a 10 percent promotional increase = \$8.81 per hour. On August 5, 1982, Grievant's pay rate was changed to \$8.81 per hour (Grievant's Exhibit I).

36. The Department corrected Grievant's restoration salary prospectively only, and did not recoup any past salary payments.

37. VSEA filed a Step II grievance on Grievant's behalf on October 29, 1982 (State's Exhibit I).

OPINION

At issue is whether the State violated the relevant Contracts and the applicable Personnel Rules and Regulations when it initially established Grievant's restoration rate of pay as \$7.84 per hour and later changed that restoration pay rate to \$7.38.

We have closely considered the various claims made by Grievant and the State. Many of these claims are technical claims which, as we see it, are unnecessary to resolve to get to the heart of this matter.

The expectation of Pilette and Grievant when they agreed to Grievant's restoration pay rate was that Grievant's salary upon assuming a position at SJCCC would equal the wage he would have earned if he had not resigned his job. Grievant assumed his position at SJCCC on July 4, 1982. Grievant's corrected salary upon assuming the SJCCC position, once his restoration rate was changed from \$7.84 per hour to \$7.38 per hour and promotional and contractual wage increases were added on, was \$8.81 per hour. If Grievant had not resigned in March, 1982, and had successfully completed his promotional probationary period in his Correctional Facility Shift Supervisor position and had remained in that position, he would have been making \$8.63 as of July 4, 1982. Accordingly, the expectation of Grievant and Pilette regarding Grievant's rate of pay was fulfilled after the correction of Grievant's restoration rate of pay.

We are not persuaded by Grievant's claim that he is entitled to the restoration rate initially established by the State - \$7.84 per hour. For whatever reason, the State made a mistake in setting this restoration rate. It was clearly a mistake because it resulted in Grievant's salary upon his assuming a position at SJCCC being well in excess of the wage he would have earned if he had not resigned from State service in March 1982; and thus well beyond what Grievant and Pilette had agreed to. Grievant has no vested right to a higher pay rate because of the mistake. Just as a mistaken interpretation by the employer of a provision of a

contract does not justify granting employees rights to which they are not entitled by a correct interpretation of the contract, Grievance of Cronan, et al., 6 VLRB 347, 354 (1983), a mistaken implementation of an understanding between an employer and employee does not grant an employee any rights to which s/he is not entitled by a correct implementation of the understanding.

For us to rule in favor of Grievant would mean Grievant would be receiving a windfall because of a favor granted him by Pilette and CCCC Superintendent Richard Turner in offering Grievant an interim position at WCCC until the position at SJCCC opened up. We choose instead to carry out the expressed intention of Grievant and Pilette that Grievant would end up in the same financial position as if he had not left State service.

Accordingly, it was appropriate for the State to correct its mistake. The corrected restoration rate of pay arrived at was consistent with contractual provisions and applicable Personnel Rules. The applicable contract, the 1981-82 Contract, does not address restoration salary. Section 6.077 of the Personnel Rules and Regulations is the only Personnel Rule which addresses restoration salary. Section 6.077 provides:

an employee restored... to fill a position as provided in these rules shall be paid at any rate in the pay scale not in excess of the salary received in the previous position plus any increase which would have accrued to such rate in the interim because of adjustment to the pay scale or compensation plan.

Section 6.077 allows the appointing authority considerable discretion in setting the rate of compensation for restored employees, In re

Grievance of Graves, 2 VLRB 236, 241 (1979) and to a large extent, is left to negotiations between the appointing authority and the employee. The corrected restoration rate of \$7.38 per hour Grievant received was within the broad guidelines of Section 6.077 of the Personnel Rules since it was a rate in Pay Scale 9 not in excess of the salary received in the previous position plus an interim contractual increase.

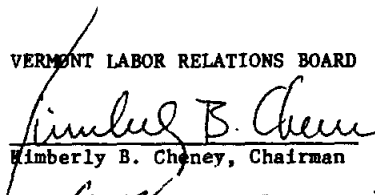
ORDER

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

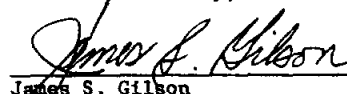
The Grievance of Gerald Goupee is DISMISSED.

Dated this 3rd day of November, 1983, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Kimberly B. Cheney, Chairman


William G. Kemsley, Sr.


James S. Gilson