

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:

LAWRENCE COLE

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DOCKET NO. 83-12

MEMORANDUM AND ORDER
DENYING STATE'S MOTION TO DISMISS

On February 23, 1983, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of Lawrence Cole, Correctional Officer B at the Woodstock Community Correctional Center ("Grievant"). The grievance alleges the State of Vermont violated Article 28 of the collective bargaining agreements between the State 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") by refusing to pay Grievant, for the entire periods of his absence from work due to an on-the-job injury, the difference between his weekly Worker's Compensation benefits and what he would have earned had he not been injured on the job. On May 9, 1983, the State filed a Motion to Dismiss the grievance because Grievant was ineligible, as a matter of law, for the relief requested, and also because the grievance was untimely filed. VSEA, on behalf of Grievant, filed a memorandum in Opposition to State's Motion to Dismiss on June 14, 1983.¹

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In its Memorandum, VSEA contends the State's Motion to Dismiss is defective in that it is not in compliance with VRCP 12 and for that reason alone should be denied. VSEA's contention is without merit because the Board has not adopted VRCP 12. See Section 11.1, Board's Rules of Practice.

The operative facts for purposes of ruling on this Motion to Dismiss are as follows: For the period April 25, 1981, to January 16, 1982, Grievant was in his original probationary period. On August 3, 1981, Grievant suffered a myocardial infarction at work. Grievant maintains he suffered the myocardial infarction as a direct result of being assaulted by inmates or an inmate. From August 3, 1981, to November 2, 1981, Grievant was absent from duty due to the myocardial infarction, and for the period from August 7, 1981, to November 2, 1981, received payments for temporary total disability under Worker's Compensation statutes. Grievant worked during the period November 3, 1981, to March 21, 1982, and completed his original probationary period on January 16, 1982. From March 22, 1982, to February 12, 1983, Grievant was absent from duty due to the myocardial infarction and complications therefrom, and for the period received payments for temporary total disability under Worker's Compensation statutes. By letter of Michael Zimmerman, VSEA Staff Attorney, to Michael Chater, Personnel Administrator for the Agency of Human Services, dated October 29, 1982, VSEA requested that the State extend to Grievant the benefits of Article 28 of the 1981-82 Contract and the 1982-84 Contract.² On

²Article 28 of the 1981-82 Contract provides in pertinent part:
1. For a job-related injury under the special circumstances described below an employee will be paid the difference between his basic weekly salary and workmen's compensation without charge to sick or annual leave:
a. The injury results from an assault by a person not employed by the State...

, Article 28 of the 1982-84 Contract provides in pertinent part:
1. For an injury relating to the performance of a State job under the special circumstances described below, an employee will be paid the difference between his basic weekly salary and workmen's compensation without charge to sick or annual leave:
a. The injury results from an assault by a person not employed by the State ...

November 24, 1982, Chater informed Zimmerman the State was denying Grievant's request. Grievant has exhausted the grievance procedure, having received the Step III denial on January 26, 1983.

The first issue to be addressed is whether Grievant was entitled to the contractual protection of Article 28 of the 1981-82 Contract at the time the alleged assault occurred on August 3, 1981, and whether the Board has jurisdiction to review that portion of the grievance claiming contractual protection for Grievant while he was in an official probationary period. On that date, and until January 16, 1982, Grievant was serving in his original probationary period in a permanent classified position. Grievant maintains he was covered by the Contract when he was assaulted. The State contends Grievant was not entitled to contractual benefits because he was a probationary employee.

A review of the provisions of the 1981-82 Contract, the applicable contract on August 3, 1981, indicates Grievant was not entitled to the contractual protection of Article 28. The benefits of Article 28 extend only to an "employee". Article 28, 1981-82 Contract. "Employee" is defined under the Contract as "any individual employed by the State on a permanent or limited status basis". Definitions, 1981-82 Contract. An individual does not attain either permanent or limited status until an original probationary period is completed. Definitions, ("Permanent Status", "Limited Status"), 1981-82 Contract. Accordingly, since Grievant had not completed an original probationary period at the time he was allegedly assaulted, he was not an "employee" as the term is used in Article 28 and thus not entitled to the protection of that article.

The Contract is consistent with the obvious intent of the legislature when enacting the State Employees Labor Relations Act (SELRA) to provide probationary employees with only limited rights. SELRA defines a "State employee" as "any individual employed on a permanent or limited status basis by the State", 3 VSA §902(4), (5), and "classified employees in their initial probationary period" are entitled to appeal grievances to the Board only if they believe themselves discriminated against on account of their race, color, creed, sex, age or national origin. 3 VSA §1001(a). Grievance of Karen Peplowski, 6 VLRB 16 (1983). Grievance of Val Austin, 5 VLRB 345 (1982). Grievance of Kim Lyon, 3 VLRB 131 (1980). Accordingly, the Board is without authority to grant Grievant redress for that period when he was still serving his original probationary period since no discrimination pursuant to 3 VSA §1001(a) has been alleged and Grievant is not entitled to the protection of Article 28 of the 1981-82 Contract.

The second issue is whether Grievant is entitled to the protection of Article 28 of the 1981-82 Contract and the 1982-84 Contract during the period he was absent from duty due to the myocardial infarction subsequent to completing his original probationary period and attaining permanent status. The State contends Grievant is not entitled to contractual protection for this period of absence of duty because the alleged assault which caused the absence from duty occurred during the original probationary period, and the Board lacks the authority to consider events which transpired during a probationary period.

We disagree. Once Grievant attained permanent status, his rights were measured as a permanent status employee and he did not continue to be bound by his limited rights while a probationary employee. Thus, once he became covered under the Contract upon achieving permanent status, Grievant was entitled to the full protection of Article 28 without reference to when the alleged assault occurred. This is particularly so since the State knew Grievant's physical condition when they granted him permanent status.

If we accepted the State's position and concluded we could not consider the alleged assault which occurred during the probationary period, we would essentially be holding that the satisfactory completion of probation began a new hire and that any event which occurred during probation was not relevant to Grievant's tenure. We believe this would be an unwise rule to adopt. It is apparent the intent of Article 28 is to ensure that covered employees who risk themselves for the public should be compensated for the risk, regardless of whether the precipitating incident dates back to when the employee was on probationary status. To interpret the contract language any other way would mean Grievant would not be permitted to establish whether he was assaulted within the meaning of Article 28. This would be contrary to Grievant's statutory and contractual rights to file a grievance concerning an "expressed dissatisfaction...with aspects of employment or working conditions under a collective bargaining agreement". 3 VSA §902(14), 903(a), 926, 928(b)(1), 941(i). Article 16, Grievance Procedure, 1981-82 Contract and 1982-84 Contract. We conclude we have authority to consider the events which

transpired concerning the alleged August 3, 1981, assault in determining whether the State violated Article 28.

The third and final issue is whether this grievance was timely filed. The issue grieved here is whether the failure of the State to pay Grievant the difference between his weekly Worker's Compensation benefits and what he would have earned had he not been absent from duty due to a myocardial infarction violated Article 28 of the 1981-82 Contract and 1982-84 Contract. Grievant should have been aware the State was not paying him the difference between his regular pay and his Worker's Compensation benefits soon after beginning his second period of absence from duty on March 22, 1982. However, he did not grieve the issue until some point, exactly when is unclear by the grievance, subsequent to November 24, 1982. Both applicable Contracts here provide that grievances shall be initially filed within 15 workdays of the date upon which the employee could have been reasonably aware of the occurrence of the matter which gave rise to the grievance. Article 16, Grievance Procedure, 1981-82 Contract. Article 16, Grievance Procedure, 1982-84 Contract.

Our analysis of the timeliness issue is governed by our decisions in Grievance of VSEA on Behalf of Meat Inspectors, 4 VLRB 144 (1981). Grievance of Byrne, et al., 6 VLRB 1 (1983). Grievance of Goupee (Docket No. 83-2, Memorandum and Order Denying State's Motion to Dismiss in Part for Untimely Filing, March 25, 1983). In those cases, like here, pay practices were involved and employees did not grieve the alleged pay

violations within 15 workdays of the date they initially became aware of them, but grieved the alleged violations during the period they were still occurring. The Board held the grievants were permitted to institute grievances over the matter at any time during the period in which the alleged violations were occurring, since there was a new "occurrence" of the alleged violation every time a paycheck was issued, with the restriction that the grievants waived their right to back-pay for all periods prior to the pay period immediately preceding the filing of the grievances.

By not grieving until some point subsequent to November 24, 1982, Grievant waived his right to back pay for all periods prior to the pay period immediately preceding the filing of the grievance. Thus, this grievance is timely, but for a limited time period.

We note that the Board's Meat Inspectors decision was issued April 16, 1981. The present contract was negotiated in the Fall of 1981. The parties could have changed the timeliness rule through negotiations. The issue was not addressed by the Supreme Court and, from all indications, was not raised there by the State. See In re Grievance of VSEA on Behalf of the Meat Inspectors, 141 Vt 616 (1982). Under these circumstances we think VSEA is entitled to act in reliance on that rule. Thus, whatever the wisdom of the rule, the parties have relied on it and we believe it appropriate to give it effect as a past practice. Goupee, supra.

For the foregoing reasons, the State's Motion to Dismiss is DENIED.

Dated this 11th day of August, 1983, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney
Kimberly B. Cheney, Chairman

William C. Kemsley, Sr.
William C. Kemsley, Sr.

James S. Gilson
James S. Gilson