VERMONT LABOR RELATIONS BOARD

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

MEMORANDUM AND ORDER
ON GRIEVANT'S MOTION FOR
RECONSIDERATION

On November 7, 1983, the Vermont Labor Relations Board issued its decision in the above-entitled matter. 6 VLRB 370. On November 17, 1983, the Vermont State Employees' Association, on behalf of Clinton Gray ("Grievant"), filed a Motion for Reconsideration, in accordance with Section 11.1 of the Board's Rules of Practice and VRCP 52, and a supporting Memorandum. We treat this Motion as one to amend the judgment of the Board under VRCP 52(b).

Grievant's Motion is based on three grounds. Each will be discussed in turn.

First, Grievant contends the evidence does not support the Board's findings and conclusions on the issue of past practice. One of the stipulated issues presented to the Board was whether, prior to November 16, 1982, there was a past practice allowing bargaining unit members to exchange days off and days worked in order that travel to and from training would be workdays. On that issue, the Board found that "(o)utside of this instance (sic) grievance, no evidence before us indicates that any State Police member was allowed to... swap days off while traveling to training sessions after 1977", and concluded that since there was 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.

In so concluding, Grievant argues the Board erred by ignoring the contrary and uncontroverted testimony of Grievant that he was aware of situations, identical to his, where a unit member was allowed to exchange a day off for a day worked prior to the effectiveness of the present contract.

We agree with Grievant that this testimony was uncontroverted. However, we also find it unconvincing. Grievant testified such swaps "happened years back" prior to when the Contract the State Police "are governed by now" went into effect. That was the extent of his testimony. He offers no specific illustrations of such swaps occurring and did not place a date on when such swaps occurred. Given this vague testimony, we believe our conclusion, based on the more specific testimony of VSEA Chief Field Representative Richard Curtiss, placing 1977 as the last year such swaps occurred, is supported by the evidence.

As we stated in our original opinion, if contractual effect is to be granted to a past practice, that practice must be "significant", "long-standing", and "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". These standards require much stronger evidence of a "mutually accepted" practice than the vague, unspecific testimony of Grievant, particularly where, as here, the current Public Safety Commissioner has never approved of such swaps since he became Commissioner in February, 1980.

The second ground for objection raised by Grievant is that the Board abrogated its responsibility to decide the remaining issue before it (irrespective of the past practice issue) and transformed the issue stipulated to by the parties, which was whether Article 8 of the Contract precluded a bargaining unit member from receiving regular pay (as opposed to overtime pay) for travel to or from training.

We stand by our belief stated in our original opinion that the Board has the right to frame the issue if the parties stipulate to an issue which is outside the acceptable tenets of labor law. Proceedings before the Board are de novo, Grievance of Colleran and Britt, 6 VLRB 235, 261 (1983), Section 11.17, Board's Rules of Practice, and we are entitled to address those issues we believe are necessary to decide in order to finally resolve grievances. We have not changed our view stated in our original opinion that the issue as presented by the parties is outside the acceptable tenets of labor law.

However, we have decided to retract our decision and grant the grievance. Neither our basic beliefs and philosophies have changed, but what has changed is our thinking on the timing of the State's action here. We are retracting our original opinion on the limited basis of the factual circumstances present here.

When Grievant became aware he would be traveling to training sessions on his scheduled days off, he spoke to his supervisor prior to attending such training and requested he be allowed to swap days off and days worked in order that he would be on duty while traveling to the training session. Grievant's superior, Sergeant Reed, approved Grievant's request. Sergeant Reed presumably had authority to act on such requests since he

approved monthly work schedules at Grievant's barracks, (Finding of Fact #12) and presumably had authority to approve changes in that schedule. Sergeant Reed subsequently approved Grievant's time reports which reported such swaps. Given the fact the Sergeant approved his requests, Grievant had the right to believe the Sergeant was correct, and should not have been penalized by subsequently being required to work on two of his days off. If Sergeant Reed's supervisors believe he acted improperly in approving Grievant's request, they should train supervisors in Sergeant Reed's position to not approve such requests in the future, but it is unfair to Grievant to be penalized because he relied on his supervisor's action.

Our decision here should be distinguished from our recent decisions, Grievance of Cronan, 6 VLRB 347 (1983), and Grievance of Goupee, 6 VLRB 358 (1983). In Cronan, we determined that 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. In Goupee, we ruled that 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. Here, Sergeant Reed's approval of Grievant's request was not a mistaken interpretation of any contract provision since nowhere in the Contract is swapping days off for travel to and from training sessions addressed. Further, no mistaken implementation of an understanding between an employer and an employee was involved. Indeed, the evidence before us does not lead us to believe Sergeant Reed actually made a mistake. Instead, it is apparent that dissemination of Commissioner Philbrook's belief prohibiting swapping under the circumstances present

here had not moved down the chain of command. In addition, unlike Cronan and Goupee, where our decisions had long-term implications, (i.e., permanent increase in employee's pay rate, continual obligation to pay State Police members call-in pay for off-duty court appearances) what is involved here is a one-time only problem which will not bind management in the future.

We emphasize that our decision here does not bind the Department of Public Safety to approve swap requests in the future such as were approved here. As we stated in our original opinion, the prohibition of swapping days off for travel to and from training sessions does not violate the Contract and is not contrary to any binding past practice. There is nothing to limit management's discretion to either approve or prohibit such swaps as a result of this decision, but management should act consistently one way or the other.

We anticipate management's retort on the effect of our decision may possibly be that we are encouraging supervisors, who are members of the same union as their subordinates, to make deliberate mistakes to benefit their fellow union members. However, such a retort would assume dedicated employees such as Public Safety Department members would put their alliance to the union ahead of their responsibilities to carry out their duty to the best of their ability. This is an assumption we would reject. Management may also object to our decision on the ground that every single aspect of personnel administration, no matter how trivial, will have to be reduced to writing. In response, we would only note the Contract and the Personnel Rules and Regulations as they exist provide much guidance to supervisors, and proper training of supervisors on the provisions of the Contract, the Personnel Rules, and Department Policy will reduce the incidence of supervisory mistakes.

Although not necessary to the resolution of this matter, we would like to comment on the third contention raised by Grievant. Grievant's contention is that the Board's finding to the effect that Commissioner Philbrook believed the Department suffered a detriment by virtue of the loss of Grievant's services as a result of the schedule swap presumably colored the Board's thinking on this matter although not discussed in the opinion, and Grievant maintains there was no real detriment to the Department. Grievant's assumption that our ideas were colored by Commissioner Philbrook's beliefs is correct. We are influenced by the views of the Department's Chief Administrator. However, after due consideration, we have come to the conclusion the Department must live with any detriment which results because of a loss of Grievant's services even if the Department head disagrees with this action. If Commissioner Philbrook disagrees with the result reached here, he should take steps to ensure it does not happen again.

ORDER

Based on the foregoing reasons, and based on the findings of fact contained in the November 7, 1983, decision of the Board, and based on that portion of the Opinion in the November 7, 1983, decision not inconsistent with this memorandum, it is hereby ORDERED:

1. The Vermont Labor Relations Board order of November 7, 1983, dismissing the grievance of Clinton Gray is RETRACTED; and

2. The Grievance of Clinton Gray is ALLOWED, and Grievant shall be given two days off without loss of pay as a remedy for improperly being required to work on December 7 and 9, 1982.

Dated this 15th day of December, 1983, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

William G. Kemsley, Sr.

James S. Gilson