

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	
EDWARD BYRNE, et al.	)	DOCKET NO. 82-23

FINDINGS OF FACT, OPINION AND ORDER

On April 14, 1982, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of Edward Byrne, Ray Flum, James MacArt, Ambrose Paquin, Laurence Snaith, and all other similarly situated State employees. VSEA claimed the State violated the collective bargaining agreement between the State and the VSEA effective for the period July 1, 1981, to June 30, 1982 ("Contract") by refusing to increase the pay of the grieving employees who were promoted, or whose positions were reallocated upward, because they had not yet completed their promotional probationary periods in their last positions.

On June 22, 1982, the State filed a Motion to Dismiss Grievants Ambrose Paquin, Lawrence Snaith, and the proposed class of unnamed Grievants who are similarly-situated State employees from the grievance. The State claimed Paquin and Snaith filed their Step III grievance in an untimely manner and the similarly-situated employees should be dismissed based on the Board's ruling in Grievance of Beyor, 5 VLRB 222 (1981). There the Board held 3 VSA §1002(d) prevented it "from including 'similarly-situated' employees in the grievance absent actual appeals by named and identified aggrieved employees".

On October 15, 1982, VSEA filed a Memorandum in Opposition to Motion to Dismiss regarding Grievants Snaith and Paquin. VSEA conceded

in light of the Board's holding in Beyor, supra, those Grievants who are unnamed, and are identified only as "similarly-situated", may be dismissed.

On October 15, 1982, the parties stipulated to the facts and admission of exhibits, and submitted the matter to the Labor Relations Board for decision without a hearing.

VSEA filed a Memorandum of Law on October 15, 1982. On October 19, 1982, the State filed a Memorandum of Law in Support of the Motion to Dismiss and a Memorandum of Law on the merits.

#### FINDINGS OF FACT

1. Edward Byrne, Ray Flum, James MacArt, Ambrose Paquin, and Lawrence Snaith, were, at all times relevant herein, permanent status employees of the State of Vermont, Department of Corrections, and their workplace was the St. Albans Correctional Facility, St. Albans, Vermont.

2. a) On October 10, 1981, Edward Byrne occupied the position of Correctional Officer (Pay Scale 8), and his base hourly rate of pay was \$5.73.

b) On October 11, 1981, Byrne's position was, pursuant to the reorganization of the Department of Corrections, reallocated from Correctional Officer (Pay Scale 8) to Correctional Officer B (Pay Scale 9). As a result of the reallocation of his position, Byrne received an 8 percent increase (see Exhibits C and D), resulting in a new base hourly rate of pay of \$6.19. Also as a result of the reallocation, Byrne was placed in a six-month promotional probationary period.

c) On December 20, 1981, Byrne received an anniversary increase of 10 cents in his base hourly rate of pay (see Article 35, Section 4 of the contract), which resulted in a new base hourly rate of pay of \$6.29.

d) On January 31, 1982, Byrne received a 2 percent salary adjustment under Article 35, Section 3, of the contract, resulting in a new base hourly rate of pay of \$6.40.

e) On January 31, 1982, Byrne's position was reallocated from Correctional Officer B (Pay Scale 9) to Correctional Officer C (Pay Scale 11), and Byrne received an increase in his base hourly rate of pay to \$6.42. That increase was arrived at by adding his October 10, 1981, base hourly rate of pay (\$5.73) to his anniversary increase (10 cents per hour), plus his January 31, 1982, 2 percent salary adjustment (resulting in a total figure of \$5.95), then calculating his 8 percent increase on that \$5.95 figure. The net result came to a base hourly rate of pay of \$6.42.

3. a) On October 10, 1981, Ray Flum occupied the position of Correctional Officer (Pay Scale 8), and his base hourly rate of pay was \$5.11.

b) On October 11, 1981, Flum's position was, pursuant to the reorganization of the Department of Corrections, reallocated from Correctional Officer (Pay Scale 8) to Correctional Officer B (Pay Scale 9). As a result of the reallocation of his position, Flum received an 8 percent increase (see Exhibits C and D), resulting in a new base hourly rate of pay of \$5.52. Also as a result of the reallocation, Flum was placed in a six-month probationary period.

c) On January 31, 1982, Flum received a 2 percent salary adjustment under Article 35, Section 3, of the contract, resulting in a new base hourly rate of pay of \$5.61.

d) On January 31, 1982, Flum's position was reallocated from Correctional Officer B (Pay Scale 9) to Correctional Officer C (Pay Scale 11), and Flum received an increase in his base hourly rate of pay to \$5.62. That increase was arrived at by adding his October 10, 1981, base hourly rate of pay (\$5.11) to his 2 percent salary adjustment (9 cents per hour), then calculating his 8 percent increase on that \$5.20. The net result came to a base hourly rate of pay of \$5.62.

4. a) On October 10, 1981, James MacArt occupied the position of Correctional Officer (Pay Scale 8), and his base hourly rate of pay was \$6.02.

b) On October 11, 1981, MacArt's position was, pursuant to the reorganization of the Department of Corrections, reallocated from Correctional Officer (Pay Scale 8) to Correctional Officer C (Pay Scale 11). As a result of the reallocation of his position, MacArt received an 8 percent increase (see Exhibits C and D), resulting in a new base hourly rate of pay of \$6.50. Also as a result of the reallocation, MacArt was placed in a six-month promotional probationary period.

c) On January 17, 1982, MacArt received an anniversary increase of 7 cents in his base hourly rate of pay (see Article 35, Section 4, of the contract), which resulted in a new base hourly rate of pay of \$6.57.

d) On January 31, 1982, MacArt received a 2 percent salary adjustment (11 cents per hour) under Article 35, Section 3, of the Contract, which resulted in a new base hourly rate of pay of \$6.68.

e) On January 31, 1982, MacArt was promoted from Correctional Officer C (Pay Scale 11) to Correctional Shift Supervisor (Pay Scale

14), and received a pay increase in his base hourly rate of pay to \$6.70. That increase was arrived at by adding his October 10, 1981, base hourly rate of pay (\$6.02) to his January 17, 1982, anniversary increase (7 cents per hour), plus his 2 percent salary adjustment (11 cents per hour), then calculating his 8 percent increase on that total (\$6.20 x 8%).

5. a) On June 20, 1981, Ambrose Paquin occupied the position of Correctional Officer (Pay Scale 8), and his base hourly rate of pay was \$4.80.

b) On June 21, 1981, Paquin was promoted from Correctional Officer (Pay Scale 8) to Correctional Foreman A (Pay Scale 10). As a result of the promotion, Paquin received an 8 percent increase, resulting in a new base hourly rate of pay of \$5.18. Also as a result of the promotion, Paquin was placed in a six-month promotional probationary period.

c) On July 5, 1981, Paquin received an 8.2 percent salary adjustment (see Article 35, Section 2, of the contract) of 44 cents per hour, resulting in a new base hourly rate of pay of \$5.62.

d) On October 11, 1981, Paquin's position was, pursuant to the reorganization of the Department of Corrections, reallocated from Correctional Foreman A (Pay Scale 10) to Correctional Officer C (Pay Scale 11), but Paquin did not receive a pay increase. That lack of increase was arrived at by adding his June 20, 1981, base hourly rate (\$4.80) to an 8.4 percent increase (see Article 35, Section 2), and calculating an 8 percent increase on that sum (ie. 8% x \$5.20). The net result was a base hourly rate of \$5.62.

6. a) On July 4, 1981, Lawrence Snaith occupied the position of Correctional Officer (Pay Scale 8), and his base hourly rate of pay was \$5.29.

b) On July 5, 1981, Snaith received an 8.4 percent salary adjustment (see Article 35, Section 2, of the contract) of 44 cents per hour, resulting in a new base hourly rate of pay of \$5.73.

c) Also on July 5, 1981 (after the salary adjustment had been made), Snaith was promoted from Correctional Officer (Pay Scale 8) to Correctional Foreman A (Pay Scale 10). As a result of the promotion, Snaith received an 8 percent increase (see Exhibits C and D), resulting in a new base hourly rate of pay of \$6.19. Also as a result of the promotion, Snaith was placed in a six-month promotional probationary period.

d) On October 11, 1981, Snaith's position was, pursuant to the reorganization of the Department of Corrections, reallocated from Correctional Foreman A (Pay Scale 10) to Correctional Officer C (Pay Scale 11), but Snaith did not receive a pay increase as a result. That lack of increase was arrived at by adding his July 5, 1981, post-pay-adjustment salary (\$5.73) to 8 percent of that salary (49 cents). The net result was a base hourly rate of pay of \$6.19.

7. On February 24, 1982, VSEA filed a Step III grievance on behalf of Flum, Byrne and "any and all other State employees who have been denied monetary compensation due to a contractual interpretation of Article 35, Section 6, by the Department of Personnel" (Exhibit E). On February 25, 1982, VSEA amended their grievance to include MacArt, Paquin and Snaith.

8. On March 15, 1982, in response to the Step III grievance, Thomas Ball, Director of Employee Relations, denied the request to include Paquin

and Snaith as parties to the grievance on the grounds the grievance was untimely filed. With regard to Flum, Bryne and MacArt, the grievance was denied on the merits.

#### OPINION

##### Motion to Dismiss

The State has filed a Motion to Dismiss Grievants Paquin, Snaith and the unnamed Grievants who are similarly-situated employees from this grievance. VSEA has conceded, and we agree, that in light of the Board's holding in Grievance of Beyor, 5 VLRB 222 (1981), the unnamed Grievants are not proper parties to this grievance because 3 VSA §1002(d) prevents us from including similarly-situated employees in the grievance absent actual appeals by named and identified aggrieved employees.

In regard to Snaith and Paquin, the State contends they filed their grievances in an untimely manner at Step III since Article 16, Section 4(b) of the Contract provides "grievances initially filed at... Step III shall be submitted within 15 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", and Snaith and Paquin's grievances were filed February 24, 1982, more than four months after their reallocations occurred on October 11, 1981.

VSEA opposes the State's Motion on two grounds. First, Article 16, Section 8, of the Contract provides "in appropriate cases, the time limits for filing and processing a grievance may be waived in order to permit retroactive pay to correct a long-standing injustice", and this is such an appropriate case. We disagree. No facts before us indicate a "long-standing injustice" done by the State. Instead, this case

appears to be one of honest differences in interpretation of ambiguous contract language, not one where management blatantly ignores clear and unequivocal contract provisions.

Regardless, VSEA advances its second argument that Snaith's and Paquin's claim cannot be dismissed entirely based on the Board's ruling in Grievance of VSEA on Behalf of Meat Inspectors, 4 VLRB 144 (1981). In Meat Inspectors, the grievants were aware of non-payment of overtime for travel time between home and assignment in 1973. However, they did not grieve it until August, 1976, at which time the non-payment of overtime was still on-going, but still sought back-pay for the period 1973 forward. The Board held the grievants were permitted to institute a grievance over the matter at any time during the period in which the alleged violation was 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 grievance.

We see no reason not to apply the Meat Inspectors rule here. Like the Meat Inspectors, a pay practice is involved, and we are reluctant to say that acceptance of one pay check without grieving waives the right of employees to grieve from that time forward. Here, there was an initial occurrence of the alleged violation - non-payment of salary increase due to reallocation - on October 11, 1981, and a new "occurrence" every time a check was issued to Paquin and Snaith subsequent to the reallocation. By not grieving until February 24, 1982, Paquin and Snaith waived their rights to back-pay for all periods prior to the pay period immediately preceding the filing of the grievance. Thus, Paquin's and Snaith's grievance is timely, but for a limited period.



### Merits

The parties agreed that the sole issue, on the merits, is whether the State has violated Article 35, Section 6, of the Contract, in its method of calculating pay increases for employees who are promoted or reallocated upward prior to the expiration of a promotional probationary period.

Article 35, Section 6, of the Contract provides:

The salary upon which any increase resulting from promotion, upward reallocation, 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.

In addition to this language, the parties negotiated Guidelines for the Implementation of the FY82 Economic Increases ("Implementation Guidelines"), which were developed in accordance with and subject to the Contract. Article 35, Section 8, of the Contract. The Implementation Guidelines contain the following compensation provisions relative to promotion and upward reallocation:

#### IV A Compensation Provisions

2. Upon promotion from one position to another, a permanent-status or limited-status employee will receive a salary increase of 8 percent or to the end-of-probation rate of the new pay scale, whichever is greater, subject to the maximum of that pay scale. No increase will be granted upon completion of the promotional probationary period.

3. Upon upward reallocation of his position, a permanent-status or limited-status employee will receive a salary increase of 8 percent or to the end-of-probation rate of the new pay scale, whichever is greater, subject to the maximum of that pay scale. No increase will be granted upon completion of any probationary period required as a result of upward reallocation. This provision does not apply to upward reallocation of a position from the class Secretary/Clerk Trainee.

Each Grievant was either promoted<sup>1</sup> or his position was reallocated<sup>2</sup> upward, received an 8 percent pay raise pursuant to the Guidelines for Implementation of FY82 Economic Increase, and was placed in a promotional probationary period. Then, before such probationary period had expired, each Grievant was again promoted or his position reallocated upward. The issue before us is what rate of pay were Grievants entitled to when the latter reallocations or promotions occurred.

It is clear and undisputed that Article 35, Section 6, requires the State to calculate an employee's hourly rate of pay upon upward reallocation or promotion by taking the appropriate percentage (here, 8 percent in all instances) of the hourly rate the employee was receiving in the last position at which s/he had completed any required probationary period. Thus, an incremental hourly increase is produced, which is added to an employee's previous rate of pay to produce the new base hourly rate of pay. To what previous rate of pay the incremental increase is added is where the parties diverge, and therein lies the crux of this dispute.

The State added the incremental increase to the hourly rates Grievants were receiving in the last position at which they had completed any required probationary period, plus any subsequent general salary adjustment. Grievants contend the State erred, and should have added the incremental increase to the hourly rates of pay of Grievants immediately prior to the promotion/reallocation irrespective of the fact that Grievants had not yet completed the promotional probationary periods for those positions.

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<sup>1</sup>The Contract, under Definitions, defines promotion as "a change of an employee from a position of one class to a different position of another class assigned to the higher pay scale".

<sup>2</sup>The Contract under Definitions, defines reallocation as "the change of a position from one class to another class".

The difference in the methods of implementation results in a substantial difference in hourly rates of pay for each employee. For instance, Grievant Byrne receives \$6.42 an hour upon the second reallocation of his position under the State's method, and \$6.88 an hour using VSEA's method. Under the State's implementation, Grievants received 8 percent pay increases upon their first promotion/reallocation but little, if any, hourly increase subsequent to the second promotion/reallocation. If VSEA's method was used, they would have received approximately 8 percent increases upon both promotions/reallocations, for a total increase of 16 percent.

It is for us to decide which contract interpretation is most plausible. The contract language here is clear so far as it goes. Article 35, Section 6, of the Contract, and the Implementation Guidelines, are clear as to the amount of the incremental hourly increase. However, each is silent as to what rate of pay this incremental increase is added.

For that reason, in an effort to construe the Contract as a whole, we look to other sections of the Contract and the Rules and Regulations for Personnel Administration relating to promotional probationary periods.

Parenthetically, we note that whatever the applicability of the Personnel Rules to other matters, Grievance of Muzzy, \_\_\_ Vt. \_\_\_ (July 15, 1982), Grievance of Allen, 5 VLRB 411 (1982), here the parties have specifically recognized their applicability. The parties have provided that the Implementation Guidelines "are intended to conform fully with the provisions of... the 'Rules and Regulations for Personnel Administration except those rules and regulations specifically modified herein". Implementation Guidelines, Section V(B).

The Contract, under Definitions, defines promotional probationary period as "that working test period which applies when an employee is promoted to a position assigned to a higher pay scale and in certain upward reallocation situations". All Grievants were in such periods prior to their second reallocation/promotion; at least there is no contrary contention. We assume, therefore, none of the Grievants whose positions were reallocated in the first upward movement here (i.e. Byrne, Flum, MacArt) had served satisfactorily in the position for the prior 18 months. If they had, Section 11.012 of the Personnel Rules provides they would have not been required to serve a probationary period. Under those circumstances, they clearly would have been entitled to an 8 percent salary increase upon both promotions/reallocations here, or a total 16 percent increase.

That promotional probationary periods are a "working test period" implies the permanent appointment to the position is necessarily contingent upon satisfactory completion of the probationary period. This is supported by the Personnel Rules. Section 10.02 provides a person selected for permanent appointment shall be given permanent status in the position occupied "after satisfactory completion of a probationary period". Section 10.064 requires a performance evaluation of at least "Adequate" for completion of probation. Section 6.0721 indicates an employee can be demoted to a position in a lower class during a promotional probationary period. Thus, Grievants here had no permanent claim to their positions when serving their promotional probationary periods. The Rules also make it clear Grievants had no permanent claims to the salary increases they received upon their first promotion/reallocation. Section 6.0721 provides:

An employee demoted to a position in a lower class during a promotional probationary period shall be paid the salary received before promotion provided such rate does not exceed the maximum of the lower class, in which event salary shall be the maximum of the lower class.

Thus, taking all these provisions together, Grievants did not have permanent status in their job, or permanent entitlement to their pay rate, until completion of the probationary period. The probationary nature of the salary increase, taken together with the clear contract language relating to probationary status, leads us to conclude the State did not violate the Contract by adding the incremental increase to the hourly rate of pay Grievants were receiving in the last position at which they had completed any required probationary period plus any subsequent salary adjustment, rather than adding it to their probationary rate of pay.

The issue here turns on prior incumbency in a position. If Grievants had served satisfactorily in a position for 18 months, and then the position had been reallocated, they would not have had to serve a probationary period upon reallocation; and would have received, roughly, a 16 percent increase as a result of the two reallocations/promotions. Since that is not the case, their total salary increase after the two promotions/reallocation was around 8 percent.

While the contract interpretation may not appear to be completely fair to Grievants, implementation of Grievants' approach appears even less fair. A comparison of Grievants Byrne and MacArt makes this clear. On October 10, 1981, both Byrne and MacArt were occupying Pay Scale 8 positions; Byrne making \$5.73 an hour and MacArt receiving \$6.02 an hour. On October 11, 1981, they were both reallocated; Byrne to Pay

Scale 9 and MacArt to Pay Scale 11. They both received 8 percent pay increases and subsequent general salary adjustments. This resulted, by January 31, 1982, in hourly pay rates of \$6.40 for Byrne and \$6.68 for MacArt. On January 31, 1982, Byrne's position was reallocated to a Pay Scale 11. If Grievant's method of calculation was used, Byrne would be entitled to a new hourly rate of \$6.88 upon this reallocation. If MacArt had not been promoted to a Pay Scale 14 position in January 31, 1982, he would have continued to receive a rate of \$6.68 an hour in his Pay Scale 11 position. This would mean that both employees would have been reallocated from a Pay Scale 8 position to a Pay Scale 11 position, but Byrne, because he made the jump in two steps to MacArt's one, would get a \$1.15 per hour pay increase, while MacArt's increase would only be \$.66 per hour. This would be unfair to MacArt who would get a smaller pay increase even though he was presumably the more qualified employee; having jumped to a higher pay scale quicker than Byrne.

We conclude that any apparent inequity resulting from our interpretation of the Contract results from the negotiated provisions relating to salary increases upon promotion or upward reallocation, when considered in conjunction with the Personnel Rules. The parties have evidently agreed that employees who are underpaid for 18 months because they do work which should be classified at a higher pay level, are entitled to an 8 percent raise without need to serve a probationary period, when the error is corrected, but not if they serve less than 18 months. If that is unfair, it is nonetheless the agreed-to bargain.

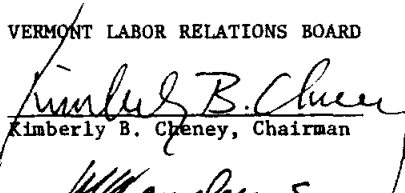
ORDER


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


The Grievance of Edward Byrne, Ray Flum, James MacArt, Ambrose Paquin, and Lawrence Smith on behalf of themselves and all other similarly-situated State employees is DISMISSED.

Dated this 30<sup>th</sup> day of January, 1983, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

  
Kimberly B. Cheney, Chairman

  
William G. Kemsley, Sr.

  
James S. Gilson