VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	
JAMES CRONAN, TERRANCE MARTIN, WILLIAM O'LEARY, CHARLES STOKES, LEO WILLEY, AND MICHAEL WOODWARD	)	DOCKET NO. 83-1

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 James Cronan, Terrance Martin, William O'Leary, Charles Stokes, Leo Willey and Michael Woodward ("Grievants"). The grievance alleged the failure of State of Vermont, Department of Public Safety, to pay Grievants' call-in pay for days they appeared as witnesses in court proceedings on their days off, or during other than their normally scheduled shifts, and spent less than three hours in court, violated Article 8, Section 6 of the Agreements between the State and VSEA for the State Police Bargaining Unit, effective for the period July 1, 1982 to June 30, 1984 ("Contract").

On July 7, 1983, VSEA and the State stipulated to the admission of exhibits into evidence, stipulated to facts and agreed that the matter would be submitted to the Board based upon the facts stipulated to and admitted in the pleadings, the exhibits and memoranda submitted by the parties.

VSEA submitted a Memorandum of Law on July 20, 1983. The State submitted a Memorandum of Law on July 21, 1983, and a Supplemental Memorandum on July 26, 1983. VSEA submitted a Reply Memorandum to the State's Memoranda on August 18, 1983.

FINDINGS OF FACT

1. At all times relevant herein, Grievants were permanent-status employees, as that term is used in the Contract. As such permanent status employees, Grievants were entitled to all rights afforded to such employees by statute and the Contract.

2. At all times relevant herein, Grievants have been members of the State Police Bargaining Unit. There are approximately 200 members of that bargaining unit.

3. Article 8, Section 6, of the Contract provides, in pertinent part, as follows:

> An employee who is called in to work at any time other than continuously into his normal scheduled shift shall be considered as working overtime during all such hours worked and shall be guaranteed a minimum of three hours' pay at the overtime rate of pay in cash or, if the employee so requests and the request is granted, in compensatory time off... (Exhibit D).

Identical language was contained in Article 8, Section 7, of the State Police Unit collective bargaining agreement in effect from July 1, 1981 to June 30, 1982, except that employees were "guaranteed a minimum of three hours' pay at the straight time rate of pay" for being called in, rather than paid at the overtime rate (Exhibit C, Page 2).

The 1981-82 agreement was the first collective bargaining agreement wherein members of the State Police Unit were given overtime compensation, rather than a flat percentage addition to salary.

4. The "master" collective bargaining agreement in effect for the period from July 1, 1979 to June 30, 1981, which covered State Police Unit members, contained the following relevant provisions:

> ARTICLE - XX
> CALL-IN PAY
>
> When an employee is called in and required to work at any time other than continuously into his normally scheduled shift, he shall receive compensation at his overtime rates for all hours worked. In no case shall he receive less than three hours of compensation at his applicable overtime rate, in cash or compensatory time, as appropriate.
>
> ARTICLE - XVIII
> OVERTIME
>
> Section 4. Eligibility for Overtime Compensation
>
> a. It is agreed that:
>
> iii. Overtime Category 13. Includes sworn employees of the Department of Public Safety other than State Police Lieutenants... who shall receive 18.75 percent of their basic weekly salary per week irrespective of the maximum of their pay scales as full compensation for all overtime hours. Notwithstanding the preceding sentence, the State reserves the right without prior negotiations to terminate this provision and pay all State Police covered by this agreement overtime compensation at the rate of one and one-half times their regular hourly rate for all hours worked in excess of forty in any workweek (Exhibit B).

5. For the period from July 1, 1981, through October 18, 1982, the Department of Public Safety interpreted the call-in provisions of the State Police Unit Agreements in effect (i.e., Article 8, Section 7

of the 1981-82 Contract, and Article 8, Section 6 of the 1982-84 Contract) as authorizing call-in pay for off-duty court appearances, even if the employee had been notified of such court appearance prior to the completion of his last regularly-scheduled shift.

6. The Vermont Department of Personnel has been designated by the Vermont governor, pursuant to 3 VSA §905(a), as the employer representative in collective bargaining negotiations and administration of the collective bargaining agreements between VSEA and the State.

7. Bargaining for the contract which took effect July 1, 1982, began in July of 1981. In late October or early November, the parties reached impasse. Mediation resolved the impasse on November 13, 1981. The Contract was ratified by the respective bargaining units during the period December 14 through 17, 1981. The Contract was funded during the legislative session which ended April, 1982, and was executed May 6, 1982. During bargaining, the Department of Personnel was unaware of the Department of Public Safety's interpretation of the call-in provision of the 1981-82 Agreement (See Finding #5).

8. On June 10, 1982, the Vermont Labor Relations Board issued its decision in Grievance of Dickerson, 5 VLRB 249, wherein it interpreted the term "called in" under the provisions of the "Master" agreement in effect from 1979-81 as follows:

> (A) situation where an employee has completed his regular work shift and subsequently is called to come in and work before the start of his next regular work shift and does not work continuously into his normally-scheduled shift.

9. The Board's interpretation of the meaning of the term "called in" was the same interpretation given to that term by the Department of Personnel since at least February of 1974 (Exhibit F).

10. In September of 1982, the Department of Personnel first became aware of the Department of Public Safety's practice of allowing call-in pay to State Police Unit members for off-duty court appearances where there was advance notice of the necessity of such appearances.

11. By memoranda dated October 18, 1982 and October 20, 1982, the Department of Public Safety notified all personnel that thenceforth the Department would interpret "called in" the same as the Department of Personnel (i.e., that employees would not be deemed to have been called in if they received notice before the end of the shift that they have court duty during off-duty hours)(Exhibit E).

12. Between October 26, 1982 and November 16, 1982, the named Grievants appeared as witnesses in court proceedings on their days off, or during other than their normally-scheduled shifts and spent less than three hours in court. Grievants requested payment for such time as call-in, but the Department of Public Safety refused to pay such call-in pay. Each Grievant received overtime compensation for the actual time spent in court (Exhibit G).

13. Each named Grievant had between two day's and one week's prior notice of court duty, and each Grievant received such notice before completing his regularly-scheduled work shift immedately preceding such court duty.

14. The circumstances surrounding the named Grievants' call-in pay claims are as follows:

James Cronan: On October 26, 1982, his scheduled day off, Grievant spent two hours on court duty;

Terrance Martin: On November 24, 1982, during his scheduled off-duty hours, Grievant had one hour and five minutes of court duty, then, on the same day, worked a full second shift;

William O'Leary: On October 27, 1982, during his scheduled off-duty hours, Grievant had two hours and 58 minutes of court duty, then, on the same day, worked a full second shift.

Charles Stokes: On October 26, 1982, his scheduled day off, Grievant spent two hours and 16 minutes on court duty;

Leo Willey: On November 16, 1982, his scheduled day off, Grievant spent 48 minutes on court duty;

Michael Woodward: On November 16, 1982, his scheduled day off, Grievant spent two hours and four minutes on court duty.

15. It has been agreed, by and between VSEA and the Department of Public Safety, that the Board's interpretation of the call-in pay provision of the State Police Bargaining Unit contract will be applied retroactively to October of 1982 to all members of that bargaining unit.

OPINION

The key issue herein is whether the Department of Public Safety, by revising its interpretation of the call-in provision of the Contract so as to deny call-in pay under the facts of this case, when it had allowed payment of call-in pay under the same circumstances for the period July 1, 1981 to October 18, 1982, has violated the Contract by impermissibly changing a past practice.

Assuming for the moment the non-existence of a past practice, our ruling in Grievance of Dickerson, 5 VLRB 249 (1982) would clearly apply to this case, and we would conclude Grievants were not entitled to call-in pay.

In Dickerson, the contract language regarding call-in pay was substantively the same as the relevant contract provision in this case. There we defined call-in as:

> (a) situation where an employee has completed his regular work shift and subsequently is called to come in and work before the start of his next regular work shift and does not work continuously into his normally-scheduled shift.

None of the Grievants in the case at hand were called in under this definition since in all cases where Grievants are claiming entitlement to call-in pay, where they appeared as witnesses in court proceedings on their days off or during other than their normally-scheduled shifts and spent less than three hours in court, each Grievant received notice of such court duty before completing their regularly-scheduled work shift immediately preceding such court duty.

Nonetheless, Grievants claim that since the Department of Public Safety had a practice from July 1, 1981, through October 11, 1982, of authorizing call-in pay for off-duty court appearances, even if the employee had been notified of such court appearances prior to the completion of his last regularly-scheduled shift, that practice became "implicitly embedded in the (c)ontract", Grievance of Cronin, 6 VLRB 37, 67 (1983) and could not be unilaterally changed by a party to the contract.

It is true that the Department of Public Safety had a practice from July 1981 to October 1982 of interpreting the call-in provision of the Contract differently than our interpretation of that provision in Dickerson, supra, and differently than the Department of Personnel which has interpreted the term "called-in" the same way the Board did in Dickerson since at least February of 1974.

However, this does not mean the Department of Public Safety practice became a binding practice which the Department could not unilaterally change. The Board cannot find that a mistaken interpretation by the employer of a provision of a contract justifies granting Grievants rights to which they are not entitled by a correct interpretation of the Contract. Grievance of Cantarra, 1 VLRB 305, 309 (1978).

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 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). Here, however, the Department of Public Safety's procedure was at variance with the call-in provision of the Contract.

Before a modification based on custom or usage can be established, it must appear that there is sufficient ambiguity in the contract to require resort to extraneous circumstances such as custom or usage. Nzomo, et al. v. Vermont State Colleges, 136 Vt. 97, 102 (1978). Here, sufficient ambiguity as to the meaning of the call-in provision of the Contract does not exist since, in Dickerson, supra, the Board, absent any modifying language, interpreted "called-in" by its literal meaning and issued a definitive ruling on the meaning of the language.

Our decision in this case is guided by our Supreme Court's decision in Hackel v. Vermont State Colleges, 140 Vt. 446 (1981). There, the Colleges contended that if the contract did not explicitly reserve the authority to make final determinations about tenure and promotion to the Colleges' Board of Trustees, the contract at best was ambiguous on the point, justifying recourse to evidence of past practice of the parties, which would demonstrate that both sides intended the Trustees to have final authority. In deciding this issue, the Supreme Court ruled:

> Our construction of the Agreement is based on its clear and unambiguous language. The parties are bound by the common meaning of their words where the language is clear, and extrinsic evidence under such circumstances is inadmissible as it would alter the understanding of the parties embodied in the language they chose to best express their intent (cites omitted). So we do not address VSC's contention that the parties' past practice indicate their belief that the Trusteees had the last say. Hackel, at 452.

Likewise, in this case, a procedure contrary to the express language of the Contract is not a binding past practice.

Furthermore, we cannot find the Department of Public Safety's past practice was a practice "mutually accepted" by the parties. 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). The Department of Public Safety's past practice was inconsistent with the practice of the Department of Personnel. The Department of Personnel is the employer's representative in collective bargaining negotiations and administration of the contract, and they were unaware during negotiations for the applicable contract here of the Department of Public Safety's "call-in pay" practices. We cannot find a practice "mutually accepted" when one of the parties' principal contract negotiators was not even aware of the practice when the applicable language was negotiated.

Accordingly, we find no binding past practice. Our decision in Dickerson, supra, controls here and we conclude Grievants are not entitled to call-in pay.

ORDER

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

The Grievance of James Cronan, Terrance Martin, William O'Leary, Charles Stokes, Leo Willey and Michael Woodward is DISMISSED.

Dated this 13th day of October, 1983, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney, Chairman

William G. Kemsley, Sr.

James S. Gilson