

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:

BERNIE AUSTIN

DOCKET NO. 82-67

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On November 10, 1982, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of Bernie Austin ("Grievant"). Two allegations were made: 1) the refusal of the Department of Corrections ("Department") to compensate Grievant for overtime worked at a training session constituted a violation of Article 19 of the collective bargaining agreement effective between the State of Vermont and VSEA for the period July 1, 1981 - June 30, 1982 ("Contract") and constituted an unilateral change in working conditions in violation of Article 5 of the Contract and 3 VSA §961(1) and (5); and 2) the requirement that Grievant sign a particular training request form constituted a violation of Article 5 of the Contract and 3 VSA §961(1) and (5).

A hearing was held before Board members Kimberly B. Cheney, Chairman and William G. Kemsley, Sr., on April 7, 1983; Member James S. Gilson was absent. An additional hearing was held May 26, 1983, before the full Board. Grievant was represented by VSEA Staff Attorney Susan Dole. Michael Seibert, Special Assistant Attorney General, represented the State. At the May 26, 1983, hearing, the parties stipulated that Member Gilson could participate in the decision if he reviewed that portion of the record he missed.

VSEA submitted Requested Findings of Fact and Memoranda of Law on June 9, 1983. The Department submitted Requested Findings of Fact and a Memorandum of Law on June 28, 1983, after the established deadline for submission of briefs of June 9, 1983, and after the Board had reached a decision and an opinion was being drafted. Accordingly, the Department's Memoranda were not considered by the Board in resolving this matter.

FINDINGS OF FACT

1. Grievant is 53 years old. He has been continuously employed by the Department as a Correctional Officer, Pay Scale 11, at the Rutland Community Correctional Center ("RCCC") since 1981. At all times relevant herein, Grievant was a permanent-status employee, and was entitled to all rights afforded to such employees by statute, by the Rules and Regulations for Personnel Administration and by the Contract.

2. Prior to his employment at RCCC, Grievant worked as a correctional officer in New York State for 25 years.

3. In early 1982, the Department began training employees in order to implement the Vanguard program. The Vanguard program was adopted in Vermont from a program in New York State correctional facilities, called Network. The program was implemented in Vermont by Deputy Commissioner Joseph Patrisi.

4. The Vanguard program is a therapeutic community within a correctional facility. Inmates in the program are segregated from the general inmate population and have their own living area. The attempt of the program is to effect rehabilitation of inmates through inmates

interacting with each other in a positive way. The individual inmate is confronted with his past behavior by the group.

5. The Vanguard program is valued highly by the Department, and the Department's goal is to eventually have approximately 20 percent of the inmate population in the State involved in the program. Presently, less than 10 percent of the inmate population are involved in the program.

6. Two Correctional facilities in the State have implemented Vanguard programs, with two-three more facilities intending to do so in the future. RCCC implemented the Vanguard program in September, 1982.

7. Approximately 25 percent of the RCCC inmate population of 106 are in the Vanguard program. Inmates involved in the Vanguard program at RCCC live in a self-contained living unit apart from the rest of the inmate population. A program administrator, program manager, caseworker and a Vanguard-trained correctional officer on each shift are assigned to the Vanguard unit. Approximately 8-10 RCCC employees are involved in the Vanguard program.

8. Participation in the Vanguard program is voluntary for both inmates and correctional officers. This is because the Department believes the program would not be successful if employees and inmates were required to participate in the program if they were not interested in it.

9. In order for the Vanguard program to operate effectively, it is necessary correctional officers working in a Vanguard unit be trained specifically in how to function in a Vanguard program. Different skills are required than what is normally needed in a traditional corrections

setting. The purpose of the Vanguard training offered by the Department is to allow correctional officers to experience what it is like to live in a therapeutic community and to teach the officers appropriate behavior in a Vanguard setting. The training sessions are designed to simulate a therapeutic community.

10. The Department offered Vanguard training sessions in January and March of 1982 in Albany, New York. Each training session lasted two weeks. Five to six Department employees participated in each of the training sessions, and worked overtime.

11. Stewart Robinson, a casework supervisor at RCCC, was trained at the January, 1982, training session and received cash payment for overtime worked. Robinson was appointed as Vanguard Program Administrator at RCCC in late January 1982, after completing his Vanguard training.

12. Anthony Graziano, a Correctional Officer C at RCCC, was trained at the January, 1982 Vanguard training. Graziano claimed 30 hours overtime and was paid in cash for that overtime. Graziano was appointed the Program Manager of Vanguard at RCCC after completing his Vanguard training (Grievant's Exhibit 11).

13. Robert Walleth, Shift Supervisor at RCCC attended the March, 1982, Vanguard training. Walleth claimed 29 and one-half hours overtime and was paid in cash for that overtime.

14. At the time of the January and March, 1982, Vanguard training sessions, the Department allowed the superintendent of each correctional facility to determine whether employees would be compensated for overtime worked at Vanguard training sessions. The result of that practice was

some employees were getting overtime pay for the training sessions while others were not compensated for the overtime worked. At some point subsequent to the March, 1982, training session but prior to May 7, 1982, the Department adopted a uniform policy which provided employees would not receive overtime compensation for the Vanguard training.

15. From May 17 - May 28, 1982, the Department offered Vanguard training at the Kendron Valley Inn in Woodstock, Vermont, which was virtually identical to the January and March, 1982, training sessions.

16. Grievant was selected by Robinson as eligible to attend this training session because Robinson believed the Vanguard program needed an "older, paternal" figure like Grievant, and because of Grievant's long experience in the field of corrections. At some time between May 7 and May 10, 1982, Grievant received a "Training Request" in his mailbox at RCCC which informed him he was selected as eligible to attend the training session and further provided:

...Travel to and from training sites will not be considered as time worked unless it occurs during scheduled work hours... All participants will be paid a regular eight hour pay schedule during this activity, although some days may actually exceed this time-frame.

Due to content and nature of this workshop, some evening sessions are expected.

If you wish to participate in this training opportunity, please sign, date and submit to your training officer by May 10, 1982 (Grievant's Exhibit 2).

17. This "Training Request" had not been used for the January and March, 1982, Vanguard training sessions. The May, 1982, training session was the first session where participants were required to sign such a form.

18. It was Grievant's understanding when he received the "Training Request" that if he did not sign the form, he would not be able to attend the training session and would be unable to participate in the Vanguard program. It is the understanding of John Gorczyk, Department Director of Program Services, that if an employee did not sign this form, then s/he would not be permitted to attend the training session. We conclude that if Grievant had not signed the form, he would not have been permitted to attend the training session.

19. Grievant signed the "Training Request" form on May 9, 1982, and attended the training session at Kendron Valley.

20. After returning from the training session, Grievant claimed 29 and one-half hours overtime for the training session, and sought compensation for that overtime (Grievant's Exhibit 5).

21. Among the hours claimed by Grievant to justify his overtime claims were those hours he was eating dinner the days of the training session. We conclude that time did constitute hours worked because Grievant was required to attend dinner; the group Grievant was part of was instructed by the trainers to meet and elect officers for the next session and prepare skits during meals; and because in a setting such as existed at the training session, where the participants were involved in intense and emotional group interaction, it is difficult to draw a distinction between work and non-work at a meal.

22. On Monday, May 17, 1982, Austin worked from 9:00 a.m. to 12:00 noon and from 1:00 p.m. to 8:30 p.m. Grievant claimed 2.5 hours overtime for that day (Grievant's Exhibit 5).

23. On Tuesday, May 18, 1982, Austin worked from 8:30 a.m. to 12:00 noon and from 1:00 p.m. to 8:30 p.m.. Grievant claimed three hours overtime for that day (Grievant's Exhibit 5).

24. On Wednesday, May 19, 1982, Austin worked from 8:30 a.m. to 12:00 noon and from 1:00 p.m. to 8:30 p.m. Grievant claimed three hours overtime for that day (Grievant's Exhibit 5).

25. On Thursday, May 20, 1982, Austin worked from 8:30 a.m. to 12:00 noon and from 1:00 p.m. to 8:30 p.m. Grievant claimed three hours overtime for that day (Grievant's Exhibit 5).

26. On Monday, May 24, 1982, Austin worked from 9:00 a.m. to 12:00 noon and from 1:00 p.m. to 8:30 p.m. Grievant claimed two and one-half hours overtime for that day (Grievant's Exhibit 5).

27. On Tuesday, May 25, 1982, Austin worked from 8:30 a.m. to 12:00 noon and from 1:00 p.m. to 4:30 a.m. the following morning. Grievant claimed 11 hours overtime for May 25 (Grievant's Exhibit 5).

28. Training held on Tuesday, May 25, 1982, included an intense marathon "interpersonal encounter session" which began after the evening meal and ran through the night into Wednesday morning.

29. On Wednesday, May 26, 1982, Austin worked from 10:00 a.m. to 12:00 noon and from 1:00 p.m. to 8:30 p.m. Grievant claimed one and one-half hours overtime for that day (Grievant's Exhibit 5).

30. On Thursday, May 27, 1982, Austin worked 8:30 a.m. to 12:00 noon and from 1:00 p.m. to 8:30 p.m. Grievant claimed three hours overtime for that day (Grievant's Exhibit 5).

31. All times worked by Grievant on May 17, 18, 19, 20, 24, 25, 26 and 27, 1982, were required as part of the Vanguard training session.

32. The Department credited Grievant with 120 training hours as a result of the Vanguard training session.

33. Grievant's claim of 29 and one-half hours overtime for the Vanguard training session was denied by Richard Wright, RCCC Acting Assistant Superintendent, on June 23, 1982. Wright informed Grievant:

Inasmuch as you signed a training request on May 9, 1982, your request for overtime pay was crossed off from your time report.

34. As a result of the Vanguard training, Austin has participated in the Vanguard program at RCCC since its implementation in September 1, 1982. He has helped with the programming of the whole group, attends weekly staff meetings, and works with inmates within the Vanguard living area.

35. At all times relevant herein, the Contract provided, in pertinent part:

ARTICLE 5 MANAGEMENT RIGHTS

1. Subject to law, rules and regulations, or terms set forth in this Agreement, nothing in this Agreement shall be construed to interfere with the right of the Employer to carry out the statutory mandate and goals of the agency, to restrict the State in its reserved and retained lawful and customary management rights, powers and prerogatives, including the right to utilize personnel, methods and means in the most appropriate manner possible...

5. The parties will negotiate to the extent required by law over any dispute arising under paragraph 1.

ARTICLE 19 OVERTIME

Section 1. Introduction

...c. It is understood and agreed that determining the need for overtime work, scheduling the hours overtime shall be worked, and requiring overtime work are exclusively employer's rights.

Section 3. Authorization of Overtime

a. Overtime work shall be assigned by the appointing authorities or their designated representatives either verbally or in writing.

b. Overtime work shall be authorized only by appointing authorities or their designated representatives in writing.

c. All overtime work which has been assigned to an employee, by the appropriate authority and is actually worked by the employee, shall be authorized and compensated for.

d. No employee may authorize overtime work who is eligible to receive overtime compensation at the rate of one and one-half times the regular hourly rate, except with permission of the appointing authority.

e. No employee may authorize overtime for himself.

Section 4. Eligibility for Overtime Compensation

a. It is agreed that:

..ii. Overtime Category 12. Employees in classes assigned to pay scales 1 through 12 shall receive overtime compensation at the rate of one and one-half times their regular hourly rate for all hours worked in excess of eight in any workday or 80 in any bi-weekly pay period...

OPINION

At issue is whether Grievant is entitled to overtime compensation for work performed as a trainee at the May 17-28, 1982, Vanguard training session.

Grievant claims Article 19, Section 3(c) of the Contract entitles him to be so compensated. Article 19, Section 3(c) provides: All overtime work which has been assigned to an employee, by the appointing authority and is actually worked by the employee, shall be authorized and compensated for".

Grievant is entitled to overtime compensation at the rate of one and one-half times his regular hourly rate "for all hours worked in excess of eight in any work day..." Article 19, Section 4(a)(ii). The facts indicate Grievant worked a total of 29 and one-half hours during the training session in excess of an eight-hour day. Also, the working of these overtime hours was required as part of the training session. Thus, at first glance it appears Grievant's claim he was entitled to overtime compensation is supported by the facts and the Contract language.

However, the Department apparently contends that because participation in the Vanguard training session by Grievant was voluntary and Grievant signed a waiver of his right to overtime during the training session, then the overtime worked by Grievant was not "assigned" by the Department and accordingly Grievant is not entitled to overtime compensation.

We are not persuaded Grievant's acceptance of the training is truly voluntary or that the nature of Grievant's participation relieves the State of an obligation to compensate him for overtime worked. It is evident the Vanguard program is highly valued by the Commissioner. He has implemented the program with the intent of having 20 percent of the State inmate population eventually involved in it. To meet such a goal, it is necessary sufficient staff be trained at a training session such as the one in which Grievant participated in order to effectively operate the program. Given this training necessity and the Department's commitment to Vanguard, we believe any required overtime worked at a Vanguard training session once an employee has volunteered to participate

in the Vanguard program constitutes work "assigned to an employee by the appointing authority" pursuant to Article 19, Section 3(c), Contract. "Assigned" need not be a literal directive in such a situation, because it is evident the Department considers such training as important for the advancement of its own goals as well as the advancement of the involved employee. By not compensating Grievant for overtime worked, the Department has attempted to achieve its goals without paying an employee for the additional time necessary to realize these goals. The employee then, in order to advance himself as well as the Commissioner's program, is required to subsidize the State with his labor.

We also are not persuaded the State is relieved of its contractual obligation to compensate Grievant for overtime worked because of the "Training Request" he signed for the Vanguard training which provided: "all participants will be paid a regular eight hour pay schedule...although some days may actually exceed this time-frame".

The Vermont Supreme Court has held it will not recognize an individual contract inconsistent with the collectively-bargained agreement, stating: "The very purpose of a collective bargaining agreement is to supersede individual contracts with terms which reflect the strength and bargaining power and serve the welfare of the group". Morton v. Essex Town School District, 140 Vt. 345 (1982).

Article 5 of the Contract provides management's rights are "subject to law... or terms set forth in this Agreement". Here, the "Training Request" the Department required Austin to sign was, in essence, an individual contract between Grievant and the Department, and it was inconsistent with the overtime provisions of the Contract. It is thus invalid.

The Department has essentially taken away a collectively-bargained condition of employment without negotiating with the employees' collective bargaining representative, the VSEA. This it is not permitted to do, neither by the Contract (Article 5, Section 5; Article 6, Section 1,) nor law [3 VSA §904, 981, 982(a)].

We realize the Department, in adopting a uniform policy denying overtime for the Vanguard training sessions, was seeking to correct a situation where some employees were being paid overtime for the training and others were not compensated for the overtime worked. Obviously, the prior policy was not just since it resulted in disparate treatment of employees under the same collective bargaining agreement. However, the Department's "solution" to the disparate treatment problem has created a further problem since it is inconsistent with the Contract.

We conclude the Department violated Articles 5 and 19 of the Contract by not compensating Grievant for overtime worked at the Vanguard training session.

ORDER

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

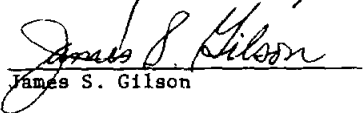
The Grievance of Bernie Austin is ALLOWED. The State of Vermont, Department of Corrections, shall pay Grievant for 29 and one-half hours worked at the rate of one and one-half times his regular hourly rate as of May 17-28, 1982. The parties shall, within 10 days of the date of this Order, attempt to determine the monies owed Grievant and submit a stipulation to the Board indicating monies owed him. Such stipulation will be incorporated into a final order of the Board. Failing agreement on the amount of monies owed Grievant, a hearing will be scheduled before the Board.

Dated this 14th day of July, 1983, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Kimberly B. Cheney, Chairman


William G. Jemsley, Sr.


James S. Gilson

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:

BERNIE AUSTIN

)
)
)

DOCKET NO. 82-67

ORDER

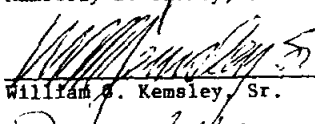
Based on the findings of fact and for the reasons given in the July 14, 1983, Findings of Fact, Opinion and Order, and based on an August 10, 1983, stipulation of the parties as to the monies owed Bernie Austin pursuant to the Board's order, it is hereby ORDERED:

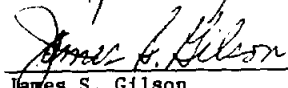
1. The Grievance of Bernie Austin is ALLOWED: and
2. The State of Vermont, Department of Corrections, shall pay Grievant \$245.15, which sum represents the amount Grievant was entitled to, but did not receive, as a result of working 29 1/2 hours overtime during the period May 17, 1982 to May 28, 1982.

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

VERMONT LABOR RELATIONS BOARD


Kimberly B. Cheney, Chairman


William B. Kemsley, Sr.


James S. Gilson