

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	
ROCHELLE MOSS, CAROL THOMAS,	)	DOCKET NO. 84-23
MARTHA SULLIVAN AND SHEILA	)	
STANLEY	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On May 10, 1984, the Vermont State Employees Association ("VSEA") filed a grievance on behalf of Rochelle Moss, Carol Thomas, Martha Sullivan and Sheila Stanley ("Grievants"). The grievance alleged the State of Vermont, Department of Public Safety, violated Articles 19 and 24 of the collective bargaining agreement between the State and VSEA effective for the period July 1, 1982 to June 30, 1984 ("Contract") and improperly changed a past practice in violation of the Contract by filling vacant shifts with temporary employees before giving permanent classified employees the option of working overtime.

On January 3, 1985, the VSEA and State filed with the Board a stipulation and agreement which contained:

- 1) A stipulation to various facts and the joint admission of exhibits;
- 2) A withdrawal by Grievants of their allegations a past practice was changed and that Article 24 of the Contract was violated;
- 3) A stipulation that the only issue herein is whether the State violated Article 19 of the Contract by filling vacant shifts with non-classified temporary employees (in a non-overtime status) before giving permanent classified employees the option of working overtime; and
- 4) A stipulation that the Board may render its decision based on the pleadings, the stipulation, the joint exhibits, and proposed findings and memoranda of law.

The Board has considered the grievance and rendered its decision based on this stipulation of the parties. Board Member William G. Kemsley, Sr., has not participated in this decision. On January 17, 1985, the State filed a Memorandum of Law and Grievants filed Requested Findings of Fact and a Memorandum of Law. Both parties filed Reply Briefs on January 24, 1985. Grievants filed a response to the State's Reply Brief on February 5, 1985.

#### FINDINGS OF FACT

1. At all times relevant herein, Grievants were permanent-status employees and covered by the Contract.

2. At all times relevant herein, Grievants' position titles were Clerk Dispatcher, their pay grades were 10, and their work places were as follows:

Rochelle Moss	Derby Station
Carol Thomas	Middlebury Station
Martha Sullivan	Middlebury Station
Sheila Stanley	St. Albans Station

3. On June 4, 1981, Department of Public Safety ("Department") Captain John Heffernan, Field Force Commander, sent a memorandum to all troop and station commanders which provided in pertinent part:

Each Station Commander has the responsibility and authority to schedule clerk-dispatchers in such a manner as to provide efficient operation of his Station while being conscious of the health and welfare of the clerk-dispatchers working in this stressful position. The Station Commander may exercise the following options in filling a vacant shift:

1. When there are two clerk-dispatchers on another shift he may reassign one of them to fill the void if reasonable notice is given.

2. When there are three clerk-dispatchers on another shift, he shall reassign one of them to fill the void if reasonable notice is given.

3. He may call in a part-time clerk-dispatcher.  
a. They may not work for more than eight (8) hours in one day or more than forty (40) hours in

one week, unless the overtime has first been offered to and declined by permanent clerk-dispatchers.

- b. The periodical use of part-time clerk-dispatchers will keep them abreast of the position skills and goals.

4. He may permit a permanent clerk-dispatcher to fill the shift.

- a. They may not work more than twelve (12) consecutive hours.
- b. They must have at least eight (8) hours off before working another shift.
- c. They must have at least one twenty-four (24) hour day off per week.
- d. They should not be granted time and one-half compensatory time for overtime worked unless it can be taken without having to work someone else to cover that time.

5. He may require a permanent clerk-dispatcher to work overtime in emergency situations to fill a partial or full shift (with above limitations).

- a. This is covered in Article XVIII, Section 1.c and 2.c.
- b. Refusal, without just cause, is cause for discipline (Be sure to ask for the reasons, if they refuse).

(Joint Exhibit 2)

4. Heffernan's reference to "part-time dispatcher" in Paragraph 3 of the June 4, 1981, memorandum was intended as a reference to dispatchers who are non-classified temporary employees.

5. On December 16, 1983, Heffernan sent a memorandum to all troop and station commanders which provided in pertinent part:

...(W)henever you work a clerk-dispatcher on a shift other than his/her scheduled shift, he/she will be eligible for overtime compensation. You should bear in mind that this is the most expensive way to cover a vacant shift. Not only are you paying the overtime rate for that shift, but you are also losing the services of the clerk-dispatcher during his/her scheduled shift.

Whenever you have a shift vacancy which occurs after the clerk-dispatcher schedule has been posted, you should attempt to fill that shift in the following prioritized manner:

1. Call in a spare clerk-dispatcher. This is the least expensive way.

2. Extend the previous shift by four hours and have the subsequent shift start four hours early so that two clerk dispatchers work twelve hours each (the maximum permitted). This will cost us the overtime rate, but you will not lose their services during their scheduled shifts.

3. As a last resort, re-schedule a clerk-dispatcher from a two-person shift to cover the vacant shift. You will note that this is contrary to my old directive.

(Joint Exhibit 3)

6. Heffernan's reference to "spare clerk dispatcher" in Paragraph 3, Section 1, of his December 16, 1983, memo was intended as a reference to dispatchers who are non-classified temporary employees.

7. On December 30, 1983, Heffernan sent a further memorandum to all troop and station commanders regarding the December 16, 1983, memorandum. This memorandum provided in pertinent part:

As pointed out in the older policy of 4 June 1981, the position of clerk-dispatcher is often very stressful. We truly believe that they need their days off to maintain good health, not to mention their efficiency during a normal schedule week. For this reason, we did not mention the alternative of calling in a clerk-dispatcher from a day off.

If you have not been able to fill a vacant shift by using one of the three options given, you may add priority number "4" to your list as follows:

4. In the rare occasion that you do not have a double shift from which to draw an extra clerk-dispatcher (during times of vacation, sick leave or a position vacancy), you may call in a clerk-dispatcher from a day off, provided that:

- a. (S)he has had at least eight (8) hours off from the last shift worked.
- b. (S)he will have at least one (1) twenty-four (24) hour day off.

(Joint Exhibit 4)

8. On January 5, 1984, a list was posted at the Middlebury Station, which list solicited permanent classified clerk dispatchers who wished to volunteer for overtime during the day shift (i.e., 8:00 a.m. to 4:00 p.m.) during the month of February, 1984, a period during which the permanent classified clerk-dispatcher normally filling the shift was to take annual leave. Grievant Sullivan volunteered for two days of

overtime during February, and Grievant Thomas volunteered for three days of overtime during February.

9. On January 9, 1984, the Middlebury Station Commander informed Grievants Sullivan and Thomas that, in accordance with Heffernan's December 16, 1983, memorandum, he was required to fill the February vacancy with temporary employees, and that Grievants were not authorized to work overtime for the days for which they had volunteered.

10. On January 6, 1984, a temporary employee was authorized to work the 1600-2400 shift at the St. Albans Station because the permanent classified clerk dispatcher who normally worked the shift was on annual leave. Grievant Stanley was available to work the shift, and would have volunteered to work the shift had she been contacted, but was not contacted by reason of Heffernan's December 16, 1983, memorandum.

11. On January 17, 1984, a temporary employee was authorized to work the 0800-1600 shift at the Derby Station because the permanent classified clerk dispatcher who normally worked the shift was on annual leave. Grievant Moss was available to work the shift, and would have volunteered to work the shift had she been contacted, but she was not contacted by reason of Heffernan's December 16, 1983, memorandum.

12. In every circumstance referenced in Findings 8, 9, 10 and 11, the non-classified temporary dispatcher, who worked despite the fact that a permanent classified dispatcher wished to work overtime, had not previously worked eight hours in that day or 80 hours in that bi-weekly pay period, and thus was compensated at straight-time rates for the work done.

13. Article 19 of the Contract, entitled Overtime, provides in pertinent part as follows:

## Section 1. Introduction

a. The State and the Association agree that overtime work for all employees is to be held to a minimum consistent with efficient and sound management of State government.

b. Each appointing authority shall schedule and assign regular work in a manner which will minimize the need for overtime work, and shall require compliance with reasonable standards of performance before requiring employees to work overtime.

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 2. Distribution of Overtime

a. Appointing authorities shall make a reasonable effort to distribute overtime as equitably as possible among classified employees, and shall not change or alter the regular work week of an employee for the purpose of avoiding the payment of overtime or shift differential. Persistent schedule changes of individual employees are discouraged and will be subject for Labor-Management Committee discussion.

b. Overtime shall be assigned whenever practicable to volunteers. Assignment of overtime work to volunteers shall not be considered contrary to the concept of equitable distribution of overtime.

...

e. If classified employees are scheduled for overtime work or are unavailable for overtime work, non-classified employees may be authorized to work overtime.

f. The Agency of Human Services shall maintain a list of the names of its eligible employees, which names shall be arranged in alphabetical order under the proper class.

i. Non-classified employees shall be included in the list(f).

ii. The employees on the list shall be called to see if they are willing to work overtime. If after going through the list there are not enough volunteers, then employees will be required to come in and work.

iii. The eligible employee first on the list (f) will be the first required to work overtime if there are an insufficient number of volunteers.

iv. The list shall be followed in descending order when requiring employees to work overtime. When the entire list has been followed, the cycle shall be repeated and the names rotated.

v. This list shall be used on a trial basis to ease overtime scheduling and distribution.

14. The Contract defines "classified employees" as "an employee of the State of Vermont who is hired to fill a position in the classified service in accordance with merit principles as administered by the Department of Personnel".

15. 3 VSA §311(a)(11) excludes from the classified service "persons employed in a temporary capacity with the approval of the governor for a period not to exceed 190 workdays in any one calendar year".

16. Temporary employees are not covered by the provisions of the Contract.

#### OPINION

The only issue before us, as stipulated by the parties, is whether the State violated Article 19 of the Contract by filling vacant shifts with non-classified temporary clerk-dispatchers, who were not eligible for overtime pay at the time they worked the vacant shifts, before giving permanent classified clerk-dispatchers the option of working overtime.

Grievants, all permanent classified clerk-dispatchers, contend they were available and willing for overtime work that was assigned instead to non-classified temporary employees. They allege this action violated the plain meaning of Article 19, Section 2(e) which provides:

If classified employees are scheduled for overtime work or are unavailable for overtime work, non-classified employees may be authorized to work overtime.

This provision, Grievants maintain, required the Department to offer overtime to the available classified employees like themselves before bringing in temporary employees. Grievants point to Article

19, Section 2(f), which provides the Agency of Human Services shall maintain a list including non-classified employees from which names in descending alphabetical order are selected to perform overtime work, as an exception to the Section 2(e) requirement that the employer may not offer overtime work to temporaries if permanent employees are willing and available to do such work. As a remedy, Grievants request they be provided overtime pay for those shifts for which they were available for work, but to which the Department assigned temporary employees.

The task before us is one of contract interpretation. A contract will be interpreted by the common meaning of its words where the language is clear. In re Stacey, 138 Vt. 68, 71 (1980). A contract must be construed, if possible, so as to give effect to every part, and from the parts to form a harmonious whole. In re Grievance of VSEA on Behalf of Certain Phase-Down Employees, 139 Vt. 63, 65 (1980). It is our duty to interpret the provisions of a disputed contract, not remake it or ignore it. Id. We will not read terms into a contract unless they arise by necessary implication. Stacey, supra, at 71.

In construing the overtime article of the Contract in its entirety, we cannot accept Grievants' interpretation of it. The parties agreed in Article 19, Section 1 that "overtime work for all employees is to be held to a minimum"; that the employer "shall schedule and assign regular work in a manner which will minimize the need for overtime work", and that "determining the need for overtime work, scheduling the hours overtime shall be worked, and requiring overtime work are exclusively employer's rights".

Given the express contractual intent to hold overtime to a minimum and leave it to management's discretion when to require overtime, it is



evident that Article 19, Section 2(e)'s requirement that non-classified employees may be authorized to work overtime only "if classified employees are scheduled for overtime work or are unavailable for overtime work" comes into play only when management has made a determination that overtime work will be required. Also, the word "overtime" in the last phrase at the end of Section 2(e), refers to the status of the shift as it relates to the non-classified temporary employee. When management fills an uncovered shift with a non-classified temporary employee for whom that shift does not constitute overtime, it is making a decision, consistent with the requirements of the Contract, to minimize the need for overtime. That is what was done in each situation grieved here and thus the employer did not violate the Contract.

Grievants are arguing, in essence, they should have the right of first refusal with respect to any vacant shift which would constitute overtime work for them. Under this theory, management would be prohibited from working non-classified temporary employees at all if permanent classified clerk-dispatchers were willing and available to fill any vacant shift. Such a result is directly contrary to the Contract's intent to minimize overtime and leave it to management's discretion when to require overtime. Moreover, the Legislature specifically authorizes the employer to use temporary employees under appropriate circumstances. 3 VSA §311(a)(11). To accept Grievants' argument would be to ignore the Contract, and remake its provisions.

In sum, Article 19, Section 2(e) means management may not work non-classified temporary employees overtime unless its classified permanent employees are scheduled for overtime work or unavailable for overtime

work. However, Grievants maintain the conception of "overtime" has no meaning for temporary non-classified employees. The evidence before us does not support this contention. Captain Heffernan's June 4, 1981, memorandum indicates temporary employees are provided overtime pay if they work more than eight hours in one day or 40 hours in one week. Also, Finding of Fact #12, which was stipulated to by the parties, indicates by implication temporary employees receive overtime pay.

Grievants' reliance on Article 19, Section 2(f), concerning maintenance of an overtime list in the Agency of Human Services, is based on their incorrect interpretation of Article 19, Section 2(e). Section 2(f) applies only to overtime situations where all parties are entitled to overtime compensation. It is consistent with Section 2(e) in that there is no restriction therein which prohibits the employer from filling vacant shifts with temporary employees who would not be working overtime before resorting to the use of employees who would be entitled to overtime. The difference from Section 2(e) is that temporary employees may be given overtime work prior to permanent employees if their name comes up first on the overtime list.

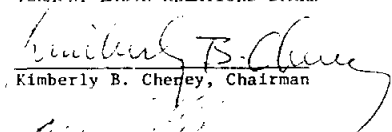
We conclude the State did not violate Article 19 by filling vacant shifts with non-classified temporary employees, who were in a non-overtime status, before giving permanent classified clerk-dispatchers the option of working overtime.

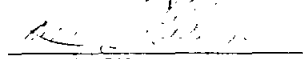
ORDER

Now therefore, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED the Grievance of Rochelle Moss, Carol Thomas, Martha Sullivan and Sheila Stanley is DISMISSED.

Dated this 12<sup>th</sup> day of March, 1985, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

  
Kimberly B. Cherney, Chairman

  
James S. Gilson