

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:

THOMAS MCFARLAND

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DOCKET NO. 86-78

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On December 12, 1986, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of Thomas McFarland ("Grievant"). The grievance alleged that the State of Vermont, Department of Social Welfare ("Employer") violated the overtime provision of the Agreements between the State and VSEA for the Non-Management Unit, effective for the periods July 1, 1984 to June 30, 1986 and July 1, 1986 to June 30, 1988 ("Contracts"), by refusing to pay Grievant overtime for travel between work locations.

A hearing was held on June 25, 1987, before Board Members Charles H. McHugh, Chairman; Louis A. Toepfer and Dinah Yessne. Michael Seibert, Assistant Attorney General, represented the Employer. Michael Zimmerman, VSEA Staff Attorney, represented Grievant.

Requested Findings of Fact and Memoranda of Law were filed by Grievant and the Employer on July 2, 1987.

FINDINGS OF FACT

1. Grievant has been employed by the Department of Social Welfare since March of 1984, when he was hired as a Social Welfare Review Specialist (Pay Scale 11). He held that position until October 1985, when he was promoted to Social Welfare Intake Specialist (Pay Scale 13), which position he has held since then (Grievant's Exhibits 4, 5).

2. For the entire period he has been employed by the Department of Social Welfare, Grievant's official duty station has been St. Johnsbury, Vermont (Grievant's Exhibit 3, Pages 1-2; Grievant's Exhibit 4, Grievant's Exhibit 5).

3. Grievant, at all times relevant herein, has resided in Lyndonville, Vermont. Grievant's home is about eight miles from St. Johnsbury, and the driving time between the two locations is 10-15 minutes.

4. In the Department of Social Welfare, there are 12 District Offices, each headed by a District Director. Each District Office is staffed by a contingent of employees, including Social Welfare Review Specialists and Social Welfare Intake Specialists.

5. In the Department, there were, in October 1985, four "floaters", who occupied the class of Social Welfare Intake Specialists. In May of 1986, their number was increased to six. The term "floater" is an internal (i.e., Department of Social Welfare) term, and officially, the incumbents of those positions are designated as Social Welfare Intake Specialists (Grievant's Exhibits 1 and 13).

6. A floater works in those district offices which are in need of additional personnel because of employee absences, position vacancies or a temporarily high caseload. Floaters are expected to be able to perform the work of review specialists or intake specialists. In 1985, the Department's practice was to assign floaters to three district offices designated as that employee's "primary" assignment. Floaters rotated within their primary assignment area according to the needs of the three district offices. Floaters less frequently were assigned to work temporarily in district offices outside their primary

work area. Such assignments could conceivably encompass travel to Bennington, among other locations, a trip more than 150 miles from St. Johnsbury.

7. When a floater position became vacant in 1985, Grievant applied for the position. He was interviewed for the position by Cynthia Price and Paul Hennessey, both Field Operations Chiefs. They informed Grievant that the position would require him to do both review and intake work, and that he would be primarily responsible for three district offices; St. Johnsbury (his official duty station), St. Albans and Newport; but that he could be called upon to go to any district office. Grievant was also told that when he traveled to a temporary work location, one way would be "on State time, and one way on your time". Price and Hennessey did not explain further, and Grievant did not ask what they meant.

8. Grievant assumed that "on your time" meant that one leg of each trip would be made after (or before) working hours, and that he would receive overtime pay for time spent on this travel.

9. Grievant was hired and began working as a floater in October 1985.

10. In early January of 1986, Grievant learned from Price that he was to be temporarily assigned to the St. Albans District Office for a period beginning January 13, 1986. Grievant and Price discussed whether Grievant should commute each day, or whether he should find living accommodations in St. Albans during the workweek. Price indicated to Grievant that the answer depended on which was cheapest for the State. Price asked Grievant to gather information on the cost of accommodations in St. Albans, and also to figure commuting costs to

make a cost comparison. Grievant did so, and with respect to the cost of commuting, used a figure that included one overtime drive between St. Albans and St. Johnsbury (about one and one-half hours) per day. Under that method of calculation, it would have been cheaper for Grievant to stay in St. Albans.

11. When Grievant discussed his comparative figures with Price, she defined for him, for the first time, that "on your time" meant that the State would compensate him for only one way of travel between St. Johnsbury and the temporary work location in St. Albans. Based on that method of calculation, the cost of traveling each day between St. Albans and St. Johnsbury was roughly equivalent to the cost of staying overnight in St. Albans. Price gave Grievant the option of staying overnight in St. Albans or commuting. Grievant decided to commute between St. Johnsbury and St. Albans with the approval of Price.

12. As a result of the conversations between Grievant and Price regarding St. Albans, Price agreed, at Grievant's request, to check with the Department's personnel officer to determine if not compensating Grievant for one trip per day between official station and a work location was in compliance with the Contract. Grievant also told Price that he might grieve the issue (Grievant's Exhibits 8, 9).

13. From January 13, 1986 to February 7, 1986, Grievant's temporary work location was the district office in St. Albans. Each day Grievant would leave his home in Lyndonville at 6:00 a.m. to be in the St. Albans office at 7:45 a.m., the beginning of the normal workday. He would leave the St. Albans office at 3:00 p.m. each day so that he could reach home by the end of the normal workday (i.e.,

4:30 p.m.). Grievant did not receive overtime pay for the morning trip (Grievant's Exhibit 7, Pages 1-4; Grievant's Exhibit 8).

14. During his assignment to St. Albans, Grievant received mileage reimbursement for the entire round trip between St. Albans and St. Johnsbury each day (154 miles per day), and reimbursement for lunch expenses each day (Grievant's Exhibit 7, Pages 1-4).

15. On February 12, Price informed Grievant by letter that "State Personnel" had approved the Department's practice of only compensating floaters for one trip per day between their official station and their temporary work location (Grievant's Exhibit 9).

16. Immediately after his temporary assignment to the St. Albans District Office, Grievant was temporarily assigned to the Newport District Office for a period of about six weeks. The trip between Lyndonville and Newport took about 45 minutes, and was about 39 miles one way. Grievant would leave home early enough to commence his workday at 7:45 a.m., then would leave the Newport office at 3:30 p.m. to reach home by the end of the workday. Grievant did not receive overtime pay for the morning trip (Grievant's Exhibit 7, pages 5-10).

17. During his assignment to Newport, Grievant received mileage reimbursement for the entire roundtrip between Lyndonville and Newport each day (78 miles per day) and reimbursement for lunch expenses each day (Grievant's Exhibit 7, pages 5-10).

18. Beginning in May, 1986, floaters were assigned two district offices as their primary assignment. At that time, St. Albans was dropped as one of Grievant's primary assignments.

19. At all times relevant herein, Bulletin 3.4, promulgated by the State Secretary of Administration and concerning expense reimbursement for State employees, provided in pertinent part as follows:

... 2. TRANSPORTATION - GENERAL PROVISIONS

A. Assignment of Official Duty Station

Official duty stations shall be set by the appointing authority for all state employees. That station should be where the employee performs most of his/her official duties. Official duty stations should not be changed unless the change is for a period of 30 days or more (refer to State Employees Bargaining Agreement). Change of station should be made only to facilitate better performance of official duties by employees and not for their personal convenience or solely to avoid reimbursement of expenses.

... D. Reimbursement for Commuting Prohibited

The payment to a state employee for travel between his place of residence and office (official duty station) is not authorized except for mileage reimbursement when an employee is called in under the "call-in" provision of the State Employees Bargaining Agreement...

(Grievant's Exhibit 3)

20. At all times relevant herein, the Contracts have provided, in pertinent part, as follows:

OVERTIME

SECTION 1. Introduction

a. The State and the VSEA 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 should schedule and assign regular work in a manner which will minimize the need for overtime work...

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 5. Computation of Overtime

... c. It is expected that travel between work locations shall be conducted during normal working hours. Travel time between work location and work location ...shall be considered as time worked for purposes of computing overtime... The term "work location" for purposes of this section does not include the employee's home...

EXPENSES REIMBURSEMENT

1. All State employees, when away from home or office on official duties, shall be reimbursed for actual expenses incurred...

5. General Principles of Reimbursement

a. Excepting the reimbursement of mileage under Article 33, "call-in", employees shall not be paid for travel between home and duty station, or subsistence thereat...

MILEAGE REIMBURSEMENT

1. (F)or authorized mileage actually and necessarily traveled in the performance of official duties, a State employee shall be reimbursed ...

(Grievant's Exhibit 2)

MAJORITY OPINION

At issue is whether the Employer violated the overtime provision of the Contracts by not paying Grievant overtime for travel from his official station in St. Johnsbury to work locations in St. Albans and Newport.

Grievant contends that since the Contracts require that travel between work locations be compensable, and since Grievant's travel at issue here was clearly travel between work locations, and since the travel at issue took place during non-working hours, Grievant is entitled to compensation in the form of overtime for all hours spent traveling between work locations before or after normal working hours.

The Employer contends that its policy of compensating floaters for time spent on only one leg of a round-trip travel between official station and work location was a past practice which was long-standing, mutually accepted, not inconsistent with the Contracts and, thus, binding.

We agree with Grievant. The overtime provisions of the Contracts require that any travel time between official work station and another work location should be considered as time worked for purposes of computing overtime. Grievance of Bevor, 5 VLRB 222, 236 (1982). Grievant's claim here involves time spent commuting between his official station in St. Johnsbury and work locations in St. Albans and Newport which occurred outside of normal working hours. Thus, Grievant is entitled to overtime compensation for all time spent traveling between his official station or home, whichever is less, and other work locations outside of normal working hours.

We address in more detail various contentions made by the Employer. First, the Employer contends, as a matter of contract law, that this grievance must fail because it is inconsistent with the terms and conditions of employment explained to Grievant in his job interview and agreed to when he accepted the job. Given our views on the applicability of the Contracts, however, we cannot accept such a position. As we said in Grievance of Austin, 6 VLRB 150, 160 (1983), in rejecting a similar claim:

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).

The Employer further contends that its policy constituted a binding past practice since it was long-standing, mutually accepted and not inconsistent with the Contracts. The Board has previously recognized that day-to-day practices mutually accepted by the parties may attain the status of contractual rights and duties, particularly

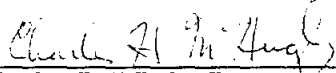
where they are long-standing and not at variance with contract provisions. Grievance of Cronan, 6 VLRB 347, 354 (1983). Grievance of Allen, 5 VLRB 411, 417 (1982), Grievance of Beyor, 5 VLRB 222, 238-239 (1982). Here, however, as discussed above, the Employer's policy was at variance with the overtime provisions of the Contracts, and must yield to the Contracts. Moreover, the Employer presented no evidence to indicate that VSEA or Grievant had consented to, or otherwise accepted, the policy.

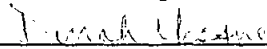
An additional argument made by the Employer is that the express terms of the Contract do not apply to this situation since only travel between "work locations" is compensable under the Contract and the travel time at issue here was spent by Grievant between his home and work locations.

We do not believe the Contracts require an employee to go physically out of their way in order to leave from or return to their official station, before or after their normal workday, to be eligible for overtime compensation. Obviously, such a requirement would be impractical and an inefficient use of time in many instances. Instead, the Contracts practically are intended to ensure that employees are not reimbursed for travel time in excess of what it would take to travel between their official station or home, whichever is less, and their temporary work location. In this case, for instance, Grievant should be reimbursed for the time it takes to travel between St. Johnsbury and St. Albans, but should not be paid for the additional time it takes him to travel between his Lyndonville home and St. Johnsbury. Similarly, Grievant should be reimbursed for the time it takes to travel between his Lyndonville home and Newport, but should not be paid for the additional time it would take to travel between St. Johnsbury and Lyndonville.

The Employer further contends that the designation of St. Johnsbury as Grievant's official duty station should not carry unwarranted significance. The Employer contends that the designation of an official station is a concept contemplated for typical State employees who have one location where they spend the vast majority of their time, and does not neatly fit the employment situation of floaters whose duties require that they have more than one primary duty station. Regardless, the Contract requires that travel time between work locations shall be considered as time worked for purposes of computing overtime, and Grievant's official station in St. Johnsbury was clearly a work location.

Finally, we address one remaining contention made by the Employer concerning Grievant's travel time between St. Johnsbury and St. Albans. The Employer contends that since Grievant had the option of accepting lodging in St. Albans rather than commuting between St. Johnsbury and St. Albans, and understood that the Employer limited his reimbursement to the cost of the cheaper alternative, then Grievant cannot claim entitlement to travel time which makes commuting a more expensive alternative than lodging. We disagree. Grievant's supervisor approved of Grievant commuting rather than obtaining lodging, and at the time was as aware as Grievant of the potential cost consequences of commuting versus lodging. The Employer cannot claim failure to approve overtime under such circumstances where the Board has ultimately disagreed with the Employer's interpretation of the Contract.



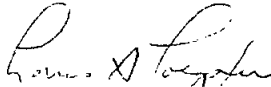
Charles H. McHugh, Chairman


Dinah Yessne

DISSENTING OPINION

I dissent from the majority view that Grievant is entitled to overtime compensation under the facts of this case. In my view, the unique employment situation of floaters having two or three primary work stations was not addressed in the overtime provision of the Contract. Unlike the case involving other State employees whose situation the Contract language was intended to cover, floaters are not hired to work in or out of one worksite. The travel of floaters from their homes to their primary assignments - in this case Grievant's travel to St. Johnsbury, St. Albans and Newport - is part of their normal commute. It is not travel between "work locations" pursuant to the overtime provisions of the Contracts.

Under these circumstances, the policy of the Employer to pay for travel time one-way of a round-trip commute between home and the primary assignment offices attained the status of a binding past practice. I view the policy as mutually accepted by the parties, particularly where it is long-standing, not at variance with any provisions of the Contracts and no evidence was presented to indicate VSEA sought to change the policy through negotiation. Grievance of Beyor, supra, at 238-239. Grievant was informed of this policy in his job interview for the floater position, should have understood the consequences and accepted the position. He has no standing now, contractual or otherwise, to claim entitlement to overtime pay for travel time.



Louis A. Toepfer

ORDER

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

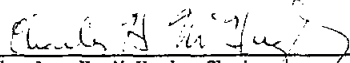
1. The Grievance of Thomas McFarland is SUSTAINED and the State of Vermont, Department of Social Welfare shall pay Grievant overtime compensation (plus interest) pursuant to the overtime provisions of the Contract for all travel time outside of normal working hours between his official station in St. Johnsbury or home, whichever is less, and other work locations since January 13, 1986, for which he has not previously been paid;

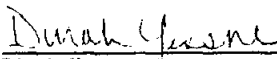
2. The interest due Grievant on overtime pay shall be at the rate of 12 percent per annum and, in each instance, shall run from the date the paycheck was due for the time he performed the overtime work to the date he receives overtime pay; and

3. The parties shall submit to the Board by October 1, 1987, a proposed order indicating the specific amount of overtime compensation due Grievant; and if they are unable to agree on an amount, they shall notify the Board in writing that date of specific facts agreed to by the parties, specific areas of factual disagreement and a statement of issues which need to be decided by the Board. Any evidentiary hearing necessary on these issues shall be held on October 15, 1987, at 9:30 a.m. in the Labor Relations Board hearing room.

Dated this 17th day of September, 1987, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Charles H. McHugh, Chairman


Dinah Yessne