VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	DOCKET NO. 86-67
	)	
KEITH ULRICH	)	

FINDINGS OF FACT, OPINION AND ORDER

On December 8, 1986, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of Keith Ulrich ("Grievant"). The grievance alleged that the State of Vermont, Department of Social Welfare ("Employer") violated the collective bargaining contract between the State and the VSEA for the Non-Management Unit, effective for the period July 1, 1984, to June 30, 1986 ("Contract") by not granting Grievant a 4.5% pay increase to which he was entitled by reason of his rating on his annual performance evaluation.

A hearing was held before Board Members Louis A. Toepfer, Acting Chairman, William G. Kemsley, Sr., and Catherine L. Frank on May 21, 1987. Assistant Attorney General Michael Seibert represented the Employer. VSEA Staff Attorney Michael Zimmerman represented Grievant. At the hearing, the parties agreed that the Board may consider as evidence the telephone depositions of Grievant, and his supervisors, Kay Nesky and Mary Lou Ward. The deposition of Grievant was filed on May 28. The deposition of Nesky and Ward was filed on June 5.

Briefs were filed by the parties on June 5.

FINDINGS OF FACT

1. In annual performance evaluations, employees are given an overall rating between "1" and "5." The meaning of the numerical ratings are as follows:

1. Unsatisfactory.

2. Inconsistently meets job requirements/standards.

3. Consistently meets job requirements/standards.

4. Frequently exceeds job requirements/standards.

5. Consistently and substantially exceeds job requirements/standards. (Grievant's Exhibit 3).

2. Article 15 of the Contract, entitled "Performance Evaluation," provided in pertinent part as follows:

> 1. Annual performance evaluations shall normally take place near the anniversary date of completion of original probation...The Personnel Department will attempt to secure agency cooperation in conducting the evaluation process in reasonable relationship to the above schedule. In the event the meeting to review the annual evaluation has not been scheduled (i.e., a date set for review) within thirty (30) days, or held within forty-five (45) days, after such anniversary date or after the end of any warning period, whichever later occurs, the employee shall be granted a presumptive overall rating equal to his last annual overall rating, but not less than a "3" rating ("Consistently meets job requirements/standards"). Failure to conduct a timely annual rating shall not be grievable..." (Grievant's Exhibit 1, page 1).

3. Article 50 of the Contract, entitled "Salaries and Wages," provided in pertinent part as follows:

> 12. Implementation of this compensation plan shall be in accordance with procedures developed by the Secretary of Administration subject to this collective bargaining agreement and shall not be subject to the provisions of Chapter 25 of Title 3. VSEA retains the right to grieve any violation of this Agreement resulting from such implementation or procedures."
>
> ... 15. New Pay Plan
>
> a. Effective on and after June 30, 1986, a gridless pay plan shall become effective with a job rate calculated as 85% of the maximum for each pay grade.
>
> b. Effective on or after July 1, 1986, and at the beginning of the first full bi-weekly pay period in July of any subsequent year, employees below the job rate will advance annually, in July, horizontally as follows:
>
> with a "3" annual rating: 3.5% up to job rate
>
> with a "4" or "5" annual rating: 4.5% up to or through job rate (Grievant's Exhibit 1, page 9).

4. The guidelines referred to in Article 50, Section 12 of the Contract were promulgated in the form of a memorandum, dated April 23, 1986, from Scott Cameron, Commissioner of Personnel, to agency heads and personnel officers. That memorandum provided, in pertinent part, as follows:

> SUBJECT: Annual Evaluations and the July Merit Increases
>
> There has been much speculation regarding the exact procedures that will be followed in determining eligibility for merit increases and the amount of those increases in July, 1986. In order to prevent misunderstandings, the following information is being provided to you and may be shared with your employees:
>
> 1. In the most common case, employees whose current salaries are less than 85% of the maximum for their pay scale (the "job rate") will be granted increases as follows:
>
> no merit increase if the last annual evaluation was a "1" or a "2."
>
> 3.5% merit increase, up to, but not beyond, the job rate if the last annual evaluation was a "3."
>
> 4.5% merit increase, not limited by the job rate, if the last annual evaluation was a "4" or "5."
>
> ....4. The merit increase will be based on each employee's most recent annual evaluation...Annual evaluations which are prepared near the end of the fiscal year will have to be accelerated slightly since the results of those evaluations must be filed with this department no later than July 1, 1986, in order to determine the merit raise component of the salary adjustment in a timely manner. If you have not filed the evaluation with this office by July 1, 1986, the merit increase will be based on the last annual evaluation on file, according to our records. There will be no exceptions to this policy". (State's Exhibit A).

5. VSEA had some input on the subject matter of the April 23 memorandum prior to its issuance. Steven Janson and Anne Noonan, VSEA Senior Field Representatives, met with Thomas Ball, State Director of Employee Relations, about the guidelines set forth in the memorandum. It is unclear whether this meeting occurred before or after the issuance of the April 23 memorandum. VSEA representatives expressed

their concern about using the last evaluations on file for those employees whose last annual evaluations of record were overall "3's", but whose most recent performance during an annual rating period was "4" or "5" and whose supervisors had failed to complete an evaluation by the deadline fixed in the memorandum. VSEA representatives left this meeting with the impression that their concerns would be considered by the Department of Personnel. Ball left this meeting with the impression that a consensus had been reached on the guidelines set forth in the April 23 memorandum .

6. At all times relevant herein, Grievant's position title was Social Welfare Review Specialist and he worked in the Morrisville District Social Welfare office. His immediate supervisor was Mary Lou Ward and his District Director was Kay Nesky. The anniversary date for purposes of annual performance evaluations of Grievant is June 2. For the period July 3, 1984, to June 2, 1985, Grievant received an overall "3" rating.

7. From October 1985 to March 1986, Sharon Wilson, Agency of Human Services Personnel Administrator, conducted supervisors' training in each of the 12 Department of Social Welfare District offices, including the Morrisville office. Ward and Nesky attended the training sessions in the Morrisville office. The training in the Morrisville office occurred before the issuance of Cameron's April 23 memorandum and Wilson did not tell the supervisors during that training about a July 1, 1986, cutoff date for the completion of performance evaluations in connection with merit pay.

8. Ward and Nesky did not see a copy of Cameron's April 23 memorandum and were not otherwise made aware of the July 1, 1986, cutoff date

for the completion of performance evaluations in connection with merit pay.

9. As of July 1, 1986, Grievant's supervisors had not completed his performance evaluation for the June 3, 1985 - June 2, 1986, period.

10. In July, 1986, Grievant received a 3.5% merit increase based on his latest performance evaluation on file as of July 1, 1986, which was his overall "3" evaluation covering the period June 3, 1984 to June 2, 1985.

11. Ward began working on Grievant's evaluation for the rating period June 3, 1985, to June 2, 1986, shortly after the end of that period. That evaluation, which rated Grievant's performance as an overall "4," was signed by Ward on July 8, 1986, by Nesky on July 9, 1986, by the Deputy Commissioner of Social Welfare, Jane Kitchell, on July 25, 1986, and by Wilson on August 4, 1986. Grievant received the evaluation on September 4, 1986.

12. While they were processing Grievant's evaluation, both Ward and Nesky were under the impression that Grievant would be entitled to a 4.5% merit increase, and that the increase would be made retroactive to July 1, 1986, notwithstanding the date the evaluation was given to Grievant.

13. Within the Agency of Human Services, it is not unusual for evaluations to be completed and given to employees several months after the completion of the rating period.

14. Shortly after receiving the evaluation on September 4, 1986, Grievant was informed that he would not receive the additional 1% merit pay increase based on the "4" evaluation. Grievant timely grieved that denial.

15. On December 28, 1986, when a new step pay plan went into effect, Grievant, because of his 3.5% July merit increase, was placed at an hourly rate 39 cents less (i.e., $7.92 versus $8.31) than the hourly rate at which he would have been placed had he received a 4.5% July merit increase (Grievant Exhibit 2, page 5).

OPINION

At issue is whether the grievance filed herein is barred by the Contract and, if not, whether the Employer violated Article 50, Section 15(b) of the Contract by not granting Grievant a 4.5% merit pay increase as a result of the "4" rating he received on his annual performance evaluation.

The Employer contends that since Grievant is grieving the Employer's failure to issue him a timely annual performance evaluation, the Board is without jurisdiction given the Contract language barring such grievances. We disagree. The Contract language at issue provides that "(f)ailure to conduct a timely annual rating shall not be grievable." Grievant is not grieving the timeliness of the evaluation he received herein, which evaluation is accepted as valid by Grievant and the Employer. Rather, Grievant is grieving the consequences which he claims should flow from that evaluation (i.e., the 4.5% merit increase in salary provided for in Article 50 of the contract), notwithstanding the date he received the performance evaluation. The grievable situation occurred here when he was informed he would not be granted the merit increase based on the evaluation and he timely grieved that denial.

Nonetheless, the Employer contends that it did not violate Article 50, Section 15(b), of the Contract by granting Grievant a 3.5 percent merit increase, rather than 4.5 percent. In dispute is which

annual performance evaluation of Grievant governs the operation of that Contract section. The Employer contends it is the latest evaluation which was completed and on file as of July 1, 1986 - i.e., the evaluation covering the period July 3, 1984 - June 2, 1985. Grievant contends it is the evaluation covering the latest rating period prior to July 1, 1986, even though the evaluation was not completed prior to July 1, 1986 - i.e., the evaluation covering the period July 3, 1985 - June 2, 1986. Under the circumstances herein - where the performance evaluation was completed after July 1 through no fault of Grievant, where Grievant's supervisors completing the evaluation were not made aware either through their own oversight or the State's lack of adequate notification that they had to complete the evaluation by July 1, 1986, for Grievant to be granted the higher increase pursuant to Article 50, Section 15(b), where Grievant's supervisors did not intend to deny him the performance-related salary increase, where it was the apparent intent of the implementation guidelines to require supervisors to timely file evaluations and not to deny employees their justly-earned wages, where it was not unusual in Grievant's employing agency for evaluations not to be completed until several months after the conclusion of the rating period and where the Contract language itself does not explicitly provide that evaluations had to be on file by July 1, 1986, to come under Article 50, Section 15(b) - we conclude that the Employer violated Article 50, Section 15(b) of the Contract by not retroactively providing Grievant with a 4.5 percent merit increase effective July 1, 1986. To rule otherwise would be inconsistent with the Contract's intent that employees be granted monetary compensation for above-average performance.

ORDER

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

The Grievance of Keith Ulrich is SUSTAINED and the State of Vermont, Department of Social Welfare shall grant Grievant a retroactive 4.5 percent increase pursuant to Article 50, Section 15(b) of the Contract, rather than 3.5 percent, effective July 1, 1986.

Dated the 19th day of June, 1987, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Louis A. Toepfer, Acting Chairman

William G. Kemsley, Sr.

Catherine L. Frank