VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 86-41
DENNIS DEBEVEC	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On June 27, 1986, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of Charly Dickerson and Dennis Debevec. The grievance alleged that Dickerson and Debevec were improperly denied reimbursement for their mileage expenses as a result of a change in the policy regulating reimbursement for such expenses, which change was unlawful because it was made without first engaging in collective bargaining with VSEA. On March 18, 1987, Dickerson withdrew as a grievant in this matter.

A hearing was held before Board Members Louis A. Toepfer, Acting Chairman; William G. Kemsley, Sr.; and Catherine L. Frank on April 30, 1987. VSEA Staff Attorney Michael Zimmerman represented Grievant. Assistant Attorney General Michael Seibert represented the State. Briefs were filed by the parties on May 14, 1987.

FINDINGS OF FACT

1. In 1969, the Vermont General Assembly passed the State Employees Labor Relations Act ("SELRA"), 3 VSA §901 et seq. Since July 3, 1977, §904 of SELRA has provided in pertinent part as follows:

> a) All matters relating to the relationship between the employer and employees shall be the subject of collective bargaining except those matters which are prescribed or controlled by statute. Such matters appropriate for collective bargaining to the extent they are not prescribed or controlled by statute include but are not limited to:

1) Wages, salaries, benefits and reimbursement practices relating to necessary expenses and the limits of reimbursable expenses...

2. Since July 1, 1979, 32 VSA §1261 and §1267 have provided in pertinent part as follows:

§1261. Personal Expenses when away from home

a) Unless otherwise provided, all persons in the employ of the state when away from home and office on official duties shall be reimbursed for expenses necessarily incurred for travel... provided however; nothing contained herein shall authorize payment to an administrative official or employee, except the governor, for travel between his place of residence and office... Compensation for subsistence, travel and other expenses occurring while conducting business for the state shall be the subject of collective bargaining as defined in section 904(a) of Title 3...

b) The secretary of administration shall prescribe regulations to limit reimbursement for personal expenses and to require approval of specific exceptions prior to the date of travel. These regulations shall be adopted in accordance with the administrative procedures act and shall apply equally to all categories of state employees, subject to the collective bargaining agreement as defined in section 904(a) of Title 3.

§1267. Mileage, reimbursement

Reimbursement for mileage shall be a subject of collective bargaining as defined in section 904(a) of Title 3.

3. Effective July 1, 1979, the Secretary of Administration issued the third revision of Bulletin 3.4, the Executive Branch Policy for Reimbursement of Personal Expenses. That bulletin, which remained in effect until the change complained of herein, provided in pertinent part as follows:

10. Constructive Travel Computation

On a scheduled workday when the employee is authorized to travel directly from his home to a temporary location without first reporting to his official duty station, he is entitled to mileage from his home to the temporary point (and return, if applicable), or from his official duty

station to the temporary point whichever is the lesser. The lesser payment constitutes the "constructive travel limitation".

(Grievant's Exhibit 4)

4. The contracts between VSEA and the State in effect between July 1, 1979 and June 30, 1986, all contained similar expense reimbursement provisions. Each contact contained an article entitled "Mileage Reimbursement", which provided for a certain reimbursement rate per mile for "authorized automobile mileage actually and necessarily traveled in the performance of official duties". In addition, each contact contained a provision entitled "Expenses Reimbursement", which contained the following language, identical in each contract:

> 1. All State employees, when away from home or office on official duties, shall be reimbursed for actual expenses incurred... Mileage between his place of residence and his normal work station shall not be reimbursable, except when the employee is... required to travel from his home on official business.
>
> (Grievant's Exhibits 3, pages 3-5; 5, 6 and 7)

5. Bargaining between VSEA and the State for the contracts in effect from July 1, 1986, to June 30, 1988 began in August of 1985.

6. In June of 1985, unbeknownst to VSEA, discussions commenced among State officials, notably those in the Department of Finance, concerning changes in Bulletin 3.4. Changes discussed included changes in the area of mileage reimbursement, particularly the "constructive travel" rule. As a result of those discussions, the Secretary of Administration issued a revised Bulletin 3.4, which was effective on October 1, 1985. The revised bulletin provided in pertinent part as follows:

f. Reimbursable Mileage

Mileage may be reimbursed for the distance actually and necessarily traveled in the performance of official duties as adjusted by the Constructive Travel Limitations (Section 9).

10. APPLYING CONSTRUCTIVE TRAVEL LIMITATIONS TO MILES TRAVELED

Employees are not eligible for mileage reimbursement for travel between residence and official duty station except for the following circumstances: 1) on a scheduled workday when an employee is authorized to travel from residence to a temporary location(s) before reporting to his/her official duty station. In this case, mileage may be reimbursed from the first temporary location of the workday to the official duty station, plus miles, if any, driven between residence and the initial duty station in excess of the normal commute...

(Grievant's Exhibit 11).

7. VSEA was never officially informed by the State of the changes in Bulletin 3.4, and the State never requested mid-term bargaining on the issue. VSEA became aware of the changes in mid-September 1985, when members began to ask the union if it had seen the new bulletin. VSEA asked the State at the bargaining table what the changes were, and the State provided VSEA with a copy of the new bulletin.

8. Upon reviewing the changes in Bulletin 3.4, VSEA determined that there was a mixture of changes, resulting in some employees benefitting from the changes and other employees not benefitting from the changes. VSEA decided not to request bargaining over the changes but to grieve on behalf of any employee who suffers by virtue of the changes to Bulletin 3.4

9. On October 1, 1985, Thomas Whitney, VSEA Executive Director, wrote a letter to Robert Sherman, Press Secretary for the Governor, *which provided in pertinent part as follows:*

> ...we discovered two weeks ago that the Secretary of Administration has revised Administrative Bulletin 3.4 without providing us with either notice as required by our collective bargaining agreements, or the opportunity to collectively bargain over what we believe represents changes and enhancements in reimbursement practices. Changing terms and conditions of employment, even when enhancements are included, undermines the effectiveness and credibility of the union. If we now seek to assert our right to collectively bargain over these changes, we run the risk of enhancements being withdrawn and our members becoming confused and angry.
>
> (Grievant's Exhibit 13, page 2)

10. At all times relevant to this grievance, Grievant was employed by the Department of Corrections as a Clerk C. His official duty station was the Department's central office, located in Waterbury, Vermont, and his home was in Bakersfield, Vermont. The commuting distance between Grievant's home and office varied, being longer in the winter because of the need to travel a longer route. In the winter months, the distance was about 50 miles. In the non-winter months, the distance was about 40 miles.

11. Occasionally, Grievant was required to travel directly from his home to one of the correctional facilities before reporting to Waterbury. One of the facilities to which Grievant has been required to travel is the facility in St. Albans, Vermont. That facility is about 18 miles from Grievant's home, and more than 60 miles from Waterbury, Vermont.

12. Before the events herein grieved, when Grievant was required to travel directly from home to the St. Albans facility before reporting to his official duty station in Waterbury, Grievant would claim and be reimbursed for the entire mileage between Bakersfield, St. Albans and Waterbury. His Department interpreted the "constructive travel" provision of the 1979 version of Bulletin 3.4 to authorize such payment (Grievant's Exhibit 14).

13. On October 11 and 17, 1987, Grievant, on State business, drove from his home to the St. Albans facility and from there to the Waterbury office. He submitted a claim for reimbursement for those miles, for which miles he had been fully compensated in the past. However, he was informed that his claim for the mileage between Bakersfield and St. Albans was being denied, and that he would be reimbursed only for the last leg of each day's trip (i.e., from St. Albans to Waterbury). The cited reason for that denial was the revised Bulletin 3.4 (Grievant's Exhibit 15).

14. Grievant thereafter grieved the denial of his claim for mileage between Bakersfield and St. Albans.

15. During negotiations for the 1986-88 Contract, VSEA submitted a proposal to eliminate the "constructive travel" rule. The State and VSEA agreed that that doctrine would be eliminated on July 1, 1987. The provision ultimately inserted into the mileage reimbursement article of the Contract reads as follows:

> Beginning July 1, 1987, the "constructive travel doctrine" (i.e., where the normal commutation distance between an employee's home and his/her official duty station is deducted from mileage incurred in the course of business under certain circumstances) shall be abolished. Administrative rules and policies regarding mileage reimbursement shall be modified in accordance with this Article.
>
> (Grievant's Exhibit 8)

OPINION

The threshold issue herein is jurisdictional. The Employer contends that the essential claim in this matter is that the duty to bargain has been violated and that the proper forum for adjudicating that claim is through the filing of an unfair labor practice charge, not a grievance. Thus, the Employer contends the Board should decline to take jurisdiction over this matter because it does not meet the definition of grievance.

We agree. In the grievance filed herein, the central allegation is that the Employer unlawfully denied mileage reimbursement to Grievant by means of changing the existing Bulletin 3.4 "which has been incorporated into the contract...without first engaging in collective bargaining with VSEA." A claim that the Employer has violated its duty to bargain is a proper subject for an unfair labor practice charge pursuant to 3 VSA §961(5), which provides "(i)t shall be an unfair labor practice for an employer...to refuse to bargain collectively with representatives of his employees." The claim by VSEA involves an issue central to the system of collective bargaining set up by SELRA and an unfair labor practice charge alleging refusal to bargain is the appropriate vehicle for presentation of the issue to the Board. VSEA v. State, 7 VLRB 8, 33 (1984).

Nonetheless, Grievant contends that this matter could have been brought as either a grievance or as an unfair labor practice charge because it involves a unilateral change in a past practice which was embedded in the Contract. In the past, we have recognized that day-to-day practices may attain the status of contractual rights and duties and become "implicitly embedded in the Contract", and that

alleged violations of a binding past practice are resolved through the contractual grievance procedure just as are grievances over specific contractual provisions. Grievance of Cronan, 6 VLRB 347 (1983). Grievance of Cronin, 6 VLRB 37 (1983). Grievance of Allen, 5 VLRB 411 (1982). Grievance of Beyor, 5 VLRB 222 (1982). Bulletin 3.4 was such a binding past practice implicitly embedded in the Contract. Grievance of Crilly, 7 VLRB 233, 247 (1984).

However, VSEA's actions concerning this issue clearly indicate that it is not seeking to hold the Employer to a binding past practice. Claims of a violation of a binding past practice presume the complainant is seeking the enforcement of the past practice to apply uniformly to all affected employees. Such an understanding is implicit in the definition of grievance, which in pertinent part refers to expressed dissatisfaction with "the discriminatory application of a rule or regulation." 3 VSA §902(14). Discrimination in this instance means unequal treatment of individuals in the same circumstances under the applicable rule. Grievance of Nzomo, 136 Vt. 97, 102 (1978). Here, VSEA is seeking to bind the State to the "old" Bulletin 3.4 as it relates to Grievant but not as it relates to other employees. VSEA acquiesced in the changes to Bulletin 3.4 as it affects other employees by deciding not to contest the unilateral promulgation of the changed bulletin. By seeking such a selective application of the "old" Bulletin 3.4, VSEA is acting contrary to the very nature of a grievance as it is statutorily defined and, accordingly, the grievance herein is not an actionable grievance.

We turn to addressing whether VSEA waived its right to bargain concerning the changes in Bulletin 3.4. The Employer contends VSEA has waived bargaining rights.

In determining whether a party has waived its bargaining rights, the Board has required that it be demonstrated a party consciously and explicitly waived its rights. VSEA v. State of Vermont (re: Implementation of "6-2" Schedule at Vermont State Hospital), 5 VLRB 303, 326 (1982). In such matters, we are further guided by the Vermont Supreme Court, which defines a waiver as the "intentional relinquishment of a known right". In re Grievance of Guttman, 139 Vt. 574 (1981). A party can intentionally relinquish a known right by failing to assert it in a timely manner. VSEA v. State of Vermont, 6 VLRB 217 (1983).

VSEA has waived its bargaining right herein by failing to assert it in a timely manner. 3 VSA §965(a) provides no unfair labor practice shall be found based on any unfair labor practice occuring more than six months prior to the filing of the charge with the Board. VSEA knew of the bulletin change in mid-September 1985, and knowingly declined to request bargaining or file an unfair labor practice charge in the subsequent six months. Accordingly, VSEA has intentionally relinquished a known right and we do not reach the question whether the Employer violated a duty to bargain.

ORDER

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

The Grievance of Dennis Debevec is DISMISSED.

Dated the 10th day of June, 1987, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Louis A. Toepfer, Acting Chair

William G. Kemsley, Sr.

Catherine L. Frank