

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	DOCKET NO. 85-51
WILLIAM SANDER)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On December 20, 1985, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of William Sander ("Grievant"). The grievance alleged the State of Vermont, Department of Social and Rehabilitation Services ("Employer") violated Article 31 of the Contract between the State of Vermont and VSEA for the Non-Management Unit effective for the period July 1, 1984 to June 30, 1986 ("Contract") by denying Grievant's request for cash payment for unused compensatory time although he was unable to use the balance of compensatory time through no fault of his own.

A hearing was held before Board Members Louis A. Toepfer, Acting Chairman; William G. Kemsley, Sr., and Catherine L. Frank on November 20, 1986. Assistant Attorney General Michael Seibert represented the Employer. VSEA Staff Attorney Michael Zimmerman represented Grievant.

The Employer filed a brief on December 9, 1986. Grievant filed a brief on December 10, 1986.

FINDINGS OF FACT

1. Article 31, Section 6(a) of the Contract provides as follows:

An employee who is entitled to be paid cash for overtime may request compensatory time off at the applicable overtime premium in lieu of cash. A supervisor may grant or deny such request and if the request is granted shall endeavor to schedule the time off within a reasonable time. For those employees eligible for cash

overtime compensation, unused compensatory time off earned during the accrual year, the first full bi-weekly payroll period in April through the last full bi-weekly payroll period in March ("Year A") may be carried over until the end of the last full bi-weekly payroll period in March of the next accrual year ("Year B"), but not thereafter. Unused Year A compensatory time off which has not been used by the end of Year B, through no fault of the employee, will be paid off in cash at the base hourly rate of pay then prevailing.

2. At all times relevant, Grievant was a Medical Evidence Specialist. His job involves gathering pertinent medical records for use by Disability Determination Unit Claims Specialists in determining medical eligibility for applicants for disability benefits. He is, and has been since 1981 when his position was created, the only full-time occupant of the class of Medical Evidence Specialist.

3. In 1982, Grievant trained another employee in his division as a backup to him to assume his duties in his absence. That employee remained a backup until 1984, when she started working one day a week assisting Grievant. During all applicable times herein, she remained available as a back-up for Grievant.

4. Grievant received overall "5" ratings ("consistently and substantially exceeds job requirements/standards") in the two annual performance evaluations during the pertinent period herein, one covering the period May 7, 1983 to May 6, 1984, and the other covering the period May 7, 1984 to May 6, 1985 (Grievant's Exhibit 3). Grievant's supervisor, Jane Osgathorp, considers him an outstanding employee.

5. During the period May 1983 to May 1984, the volume of Grievant's work doubled from what it was when his position was created in 1981, and it has remained at that level since (Grievant's Exhibit 1, Grievant's Exhibit 3, pages 3 and 7).

6. During the period April, 1983 to March 31, 1984, "Year A" under the contractual language for the purposes of this case, Grievant accrued 260.25 hours of compensatory time. 260.25 hours translates into 32.53 workdays or about six and one-half weeks. Grievant accrued all the compensatory time during the period April 1983 to November 1983. No compensatory time accrual was approved after November 1983.

7. At the time he accrued compensatory time, Grievant's supervisor, Jane Osgathorp, informed him overtime would not be approved unless he requested compensation in the form of compensatory time, not cash. Grievant agreed and the overtime was approved.

8. During the period April, 1984 to February 26, 1985, Grievant did not request to use any of his 260.25 hours of accrued compensatory time. Osgathorp encouraged him during this period to take off more time. Neither Osgathorp nor any of Grievant's supervisors indicated to Grievant during this period that his requests to use compensatory time would be denied. Grievant did not request use of compensatory time because of a heavy workload and his commitment to duty.

9. Grievant's pay stubs during the period April 1984 to February 1985 indicated the amount of compensatory time he had accrued. The pay stubs contained no warning relating to forfeiting compensatory time if it was not used by a certain period.

10. Since at least 1982, the State Payroll Division has sent to the Agency of Human Services Personnel Officer the compensatory time balance of all Agency employees who have to use the compensatory time balance by a certain period. The Agency Personnel Officer then sends notices to affected employees indicating they must use the accrued

time by a certain period. In 1982, 1983 and 1984, those notices were sent to Agency employees, including Grievant, at some point during January and informed employees they had to use the accrued leave by March 31 of that year (State's Exhibits 4, 6 and 7).

11. On February 26, 1985, Grievant received a notice from Sharon Wilson, Agency Personnel Administrator, wherein Grievant was advised that he would "be given the opportunity and would be expected to liquidate" his balance of 260.25 hours of compensatory time (which translates into 32.53 workdays) before March 31, 1985 (Grievant's Exhibit 4). Between February 26, 1985, and March 23, 1985 (the actual date pursuant to the Contract by which the balance had to be liquidated), there were 17 workdays.

12. By failing to request use of compensatory time prior to February 26, 1985, Grievant was not acting in reliance on receiving such notice.

13. On the same day he received that notice, Grievant requested 13 workdays (104 hours) off between March 7, 1985, and March 22, 1985, inclusive. Osgathorp granted permission for him to take five of the 13 days off, but denied permission for him to take the remaining eight days off. Her denial was based on the fact that she had previously approved leave for Grievant's "back-up" for that period, so there was no one who could perform Grievant's functions in his absence.

14. Of the approved 40 hours of time off, Grievant used only 32. He worked eight hours on March 11, 1986, even though that time off had already been approved. Grievant learned his supervisor had not found a substitute for him for that day and voluntarily decided he would work rather than break the appointments that he had scheduled.

Grievant's supervisor, Osgathorp, had no problem with him taking the day off under such circumstances.

15. Grievant's request that the balance of unused compensatory time (i.e., 212.25 hours) be paid in cash was denied. At Grievant's base hourly rate of pay in March 1985 (i.e., \$9.81), the value of those 212.25 hours was \$2,082.07. Included in the 212.25 hours were the 64 hours which Grievant's supervisor had not approved following Grievant's February 26, 1986, request for time off. The value of those 64 hours is \$627.84.

OPINION

At issue is whether Grievant is entitled to a cash payment for unused accrued compensatory time or whether he forfeited his entitlement to the use of such compensatory time.

Before we address the merits, we briefly discuss a preliminary matter raised by Grievant at the hearing. Grievant contends the Employer should have the burden of proof here since Grievant's forfeiture of over \$2,000 for allegedly being at fault is tantamount to a disciplinary measure. We disagree. It is presumed in a disciplinary action that management is dissatisfied with some aspect of an employee's behavior. The evidence herein indicates no such dissatisfaction. Indeed, Grievant's supervisor considered him an outstanding employee. It is evident the Employer was simply acting in conformity with its interpretation of the Contract and not as a result of any dissatisfaction with Grievant. Thus, we decline to place the burden of proof on the Employer.

We turn to the merits. This matter involves the interpretation of the following language of the Contract:

Unused...compensatory time off which has not been used..., through no fault of the employee will be paid off in cash at the base hourly rate of pay then prevailing.

The question is whether Grievant was at fault for failure to use 212.25 hours of accrued compensatory time. We conclude Grievant was at fault for the bulk of this time, for those hours which he did not request use of the compensatory time. During the period April, 1984, until February 26, 1985, Grievant did not request use of any of his accrued compensatory time even though his supervisor encouraged him to take time off and no indication was given him that he would be denied use of compensatory time. It was not until Grievant was expressly notified he would lose the time unless he used it that he requested compensatory time off.

Grievant contends that the Employer's failure to provide such notice until it was impossible for Grievant to use all of his accrued compensatory time means that the State, rather than Grievant, was at fault for his inability to exhaust the balance. We disagree. The Employer has no contractual duty to provide such notice.

Nonetheless, Grievant contends a past practice was violated given the fact that the Agency had a practice in place since at least 1982 of timely providing such notices. We find no past practice violation. First, the past practice issue was not raised in the grievance filed with the Board. Thus, the Employer was not on timely notice this was an issue and Grievant is precluded from raising it. Grievance of VSCSF, 9 VLRB 159, 164 (1986). Grievance of Shockley, 5 VLRB 192, 202-203 (1982). Even assuming the issue was timely raised, we find no past practice violation. If contractual effect is to be granted a past practice, that practice must be of sufficient import to the

parties that they can be presumed to have bargained in reference to it and reached a mutual agreement or understanding. Grievance of Cronin, 6 VLRB 37, 68-69 (1983). The evidence before us is insufficient for us to conclude such a mutual agreement was reached with respect to the involved notices.

It was not through lack of notice that Grievant failed to request use of compensatory time but because of his personal decision that a heavy workload and his commitment to duty precluded taking leave. However, he was at fault within the meaning of the Contract for not requesting such compensatory time since his supervisor encouraged him to take time off and a "back-up" was available to assume his workload in his absence. Thus, Grievant forfeited his entitlement to cash payment for those hours for which he did not request use of accrued compensatory time.

However, we conclude Grievant is entitled to cash payment for the 64 hours of compensatory time off he requested, and was denied, subsequent to receiving notice from the Agency Personnel Officer that he would "be given the opportunity" to use his accrued compensatory time. Once he was given that assurance and acted consistent with it by requesting compensatory time off, he was not at fault when such request was denied.

Finally, we note that Grievant is not entitled to cash payment for the eight hours on March 11, 1985, in which he worked despite being granted compensatory time off. He was at fault for not taking the time off since he worked by personal choice and was not required to by his supervisor.

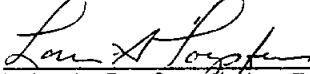
ORDER

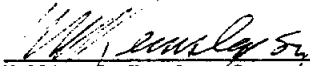
Now therefore, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED:

The Grievance of William Sander is SUSTAINED to the extent that he is entitled to and shall be paid by the State of Vermont, Department of Social and Rehabilitation Services, \$627.84, plus the legal rate of interest per annum which shall run from the denial of Grievant's request for a cash payment for the balance of his unused compensatory time until he receives such payment, which represents cash payment for compensatory time off he requested but was denied; and is DENIED in all other respects.

Dated this 20th day of January, 1987, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Louis A. Toepfer, Acting Chairman


William G. Kemsley, Sr.


Catherine L. Frank