

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:

RENNIE FIX

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DOCKET NO. 88-11

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On February 26, 1988, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of Rennie Fix. The grievance alleged that the State of Vermont, Department of Mental Health ("Employer") violated Article 29 of the collective bargaining agreement between the State and the VSEA for the Non-Management Unit, effective for the period July 1, 1986 to June 30, 1988 ("Contract") by failing to pay Grievant at overtime rates for two previously-scheduled shifts of overtime.

The parties agreed that this matter may be submitted to the Labor Relations Board for decision without a hearing based upon the facts admitted in the pleadings, a stipulation of facts (including the exhibits attached thereto), and upon the parties' respective memoranda. The parties filed the stipulation of facts and attached exhibits on April 14, 1988. Grievant filed a Memorandum of Law on April 19, 1988. The Employer filed a Memorandum of Law on April 21, 1988.

FINDINGS OF FACT

1. At all times relevant, Grievant's position title was Psychiatric Technician B, his pay grade was 17, and his work place was the Vermont State Hospital, Waterbury, Vermont.

2. At all times relevant, Grievant's hourly base salary was \$8.89.

3. The pay period at issue in this matter began on Sunday, November 1, 1987, and ended on Saturday, November 14, 1987.

4. At all times relevant, Grievant worked the third (or night) shift (i.e., from 10:45 p.m. to 6:45 a.m.).

5. On Friday, October 30, 1987, Grievant was scheduled to work the third shift (i.e., from 10:45 p.m. to 6:45 a.m.). At about 3:10 p.m., Sue Ocker, the Vermont State Hospital Personnel Officer, telephoned Grievant at his home and informed Grievant that, effective that day, he was placed on temporary relief from duty with pay pending an investigation into allegations that he had abused a patient. Ocker told Grievant that he was required to be available to answer the telephone during the day, and that he was not allowed on the hospital grounds (Joint Exhibit E).

6. Also on Friday, October 30, 1987, Claudia Stone, Hospital Executive Director, signed a letter, addressed to Grievant at his home address, which advised him of his temporary relief from duty with pay. Notwithstanding that it was sent by certified mail, return receipt requested, Grievant never received the October 30 letter from Stone. Therefore, his understanding of the condition of his temporary relief from duty was based on Ocker's telephone call (Joint Exhibit D).

7. On one previous occasion, Grievant had been in a temporary relief from duty status.

8. As a result of his temporary relief from duty with pay, Grievant did not work the third shift (or any other shift) on Friday, October 30, 1987.

9. Also, as a result of his temporary relief status, Grievant did not work Sunday, November 1, 1987 (a normal workday), or Monday, November 2, 1987 (a normal workday).

10. During the entire period of his temporary relief from duty status (i.e., from October 30 to November 2), Grievant did not leave his home, as he was awaiting a telephone call from his employer.

11. On Monday, November 2, 1987, Marsha Kincheloe, Hospital Psychiatric Nursing Administrator, telephoned Grievant at his home in order to advise him of the status of the investigation and to arrange a meeting the following day, Tuesday, November 3, 1987.

12. On Tuesday, November 3, 1987, in accordance with Kincheloe's telephone call the day before, Grievant reported to the Vermont State Hospital in the morning for a meeting. At the meeting, Grievant was advised that the investigation into patient abuse had exonerated him of the charges against him, and that his temporary relief status was at an end. Thus, as a result of the Employer placing Grievant on temporary relief from duty, Grievant did not work two regularly scheduled work days, i.e., November 1 and 2, 1987, during the applicable pay period.

13. Grievant worked the third shift on Tuesday, November 3, 1987 (his normally scheduled day off), because he had agreed to substitute for another Hospital employee for that shift.

14. Grievant worked the third shift on Wednesday, November 4, Thursday, November 5, and Friday, November 6.

15. Saturday, November 7, and Sunday, November 8, were Grievant's normally scheduled days off, but Grievant worked the third shift each day because he had agreed to substitute for another Hospital employee for those shifts.

16. Grievant took annual leave on Monday, November 9.

17. Grievant worked the third shift on Tuesday, November 10, Wednesday, November 11 (Veterans Day), and Thursday, November 12.

18. Friday, November 13, was a normally scheduled day off for Grievant, but he worked the third shift on that date, again as a substitute for another Hospital employee by agreement.

19. Grievant worked the third shift on Saturday, November 14 (a normally scheduled workday)

20. On the time sheet for the pay period of November 1 to November 14, Grievant requested payment of wages for overtime for eight hours worked on Tuesday, November 3, Saturday and Sunday, November 7 and 8, and Friday, November 13. That time sheet was signed by Grievant, and approved by Kincheloe (Joint Exhibit B).

21. When Grievant received his paycheck for the period November 1-14, it reflected that he was not paid at overtime rates (i.e., time-and-one-half) for the first two of the four days he worked overtime (i.e., Tuesday, November 3, 1987, and Saturday, November 7, 1987) (Joint Exhibit C).

22. The basis for the State's denial of overtime was that the two days spent on temporary relief were not considered under the Contract to be time spent working for the purposes of computing hours worked during the pay period.

23. There is no claim herein that the State acted in bad faith, in violation of the contract, or in any other manner acted improperly in the manner it placed and kept Grievant on temporary relief from duty.

24. The Contract provides in pertinent part as follows:

## ARTICLE 17

### DISCIPLINARY ACTION

... 8. An appointing authority may relieve employees from duty temporarily with pay for a period of up to 30 workdays to permit the appointing authority to investigate or make inquiries into charges and allegations made by or concerning the employee, or if in the judgment of the appointing authority the employee's continued presence at work during the period of investigation is detrimental to the best interests of the State, the public, the ability of the office to perform its work in the most efficient manner possible, or well being or morale of persons under his care.

## ARTICLE 29

### OVERTIME

#### SECTION 1. Introduction

... 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 the employer's rights.

#### ... SECTION 3. Authorization of Overtime

... c. All overtime work which has been assigned to an employee, by the appropriate authority and is actually worked by the employee, shall be authorized and compensated for.

#### ... SECTION 4. Eligibility for Overtime Compensation

... A. It is agreed that:

... ii. Overtime Category 12. Employees in classes assigned to pay scales 1 through 13 (pay grades 5 through 17 effective December 28, 1986) shall receive overtime compensation at the rate of one and one-half times their regular hourly rate for all hours worked in excess of eight in any workday or eighty in any bi-weekly pay period.

#### ... SECTION 5. Computation of Overtime

... e. Hours actually worked, hours on annual leave, compensatory time off, unworked holidays, paid VSEA leave time, time spent traveling to and from paid training (after deduction of normal commuting time, when appropriate, and time spent eating during the travel time), and personal leave shall be considered as time actually worked for the purpose of determining eligibility for overtime compensation.

### DEFINITIONS

#### HOURS ACTUALLY WORKED - (SEE TIME ACTUALLY WORKED)

TIME ACTUALLY WORKED - authorized time spent by an employee in the actual performance of assigned job-related duties, or on annual leave, compensatory time off, at a grievance hearing at the request of the State, unworked holidays, paid Association leave time and personal leave. "Hours Actually Worked" is defined the same as "Time Actually Worked."

### OPINION

At issue is whether the Employer violated Article 29 of the Contract in not treating the two days of temporary relief status during the pay period at issue as time actually worked in the calculation of Grievant's entitlement to overtime. By excluding those two days from time actually worked, the Employer paid Grievant at straight time rates for two days of time worked in addition to his normal work schedule, rather than the time and one-half rate Grievant would have been paid had the two days been considered as time actually worked.

Our determination is governed by Article 29, Section 5(e) of the Contract, which provides:

Hours actually worked, hours on annual leave, compensatory time off, unworked holidays, paid VSEA leave time, time spent traveling to and from paid training (after deduction of normal commuting time, when appropriate, and time spent eating during travel time), and personal leave shall be considered as time actually worked for the purpose of determining eligibility for overtime compensation.

We agree with the Employer that this Contract provision is properly interpreted as providing an exclusive list of those circumstances which qualify as "time actually worked" for the purpose of determining eligibility for overtime compensation. Grievant contends that temporary relief from duty status is included in the category "hours actually worked."

The Contract defines "hours actually worked" in pertinent part as "authorized time spent by an employee in the actual performance of assigned job-related duties." We conclude that Grievant's temporary relief from duty with pay status falls within this definition. Grievant was ordered by the Employer to perform a task (i.e., remain available by telephone during the day) during his normally-scheduled work hours, for which he was paid. While obviously Grievant was not performing his normal work duties at his normal work location, and the task assigned was not all-consuming and allowed him to attend to personal matters, he nonetheless was performing duties as assigned by management.

The Employer contends that a logical extension of the Supreme Court's decision in Grievance of VSEA on Behalf of Brady, et al., 139 Vt. 501 (1981), is the conclusion that temporary relief from duty status would not be considered as time actually worked for the purpose of determining overtime compensation. We conclude that the Court's holding in Brady does not govern this matter. At issue in Brady was whether social workers were entitled to "on-call" pay under the Contract when they were on "availability" status outside of their normal workday and were required to be reachable by telephone and able to respond to work needs within a reasonable period of time. Therein, the Court concluded:

If the employee is so limited in his activities that his time cannot effectively be used as his own, then his availability is more beneficial to the employer than the employee, and he should be compensated, for he is then "on call." He is engaged to wait. On the other hand, if the employee, while making himself available, may still carry out functions of his own and is only limited to a telephone number where he can be reached and a location from which he can respond to the call within a

reasonable time, then he is not on call. He is waiting to be engaged. Id, at 139 Vt. 506-507.

The circumstances in Brady simply are not comparable to this case. First, the definition of "on-call" applied in the Brady case (i.e., a requirement that an employee remain on or so close to either the employer's or employee's premises that he cannot use the time effectively for his own purposes) differs from the definition of "hours actually worked." Second, the issue in determining whether an employee is "on-call" is whether an employee should be compensated at all. Here, Grievant clearly was entitled to compensation while on temporary relief from duty status; the only issue is whether time spent on such status should be considered as "good time" for purposes of eligibility compensation. Finally, "on-call" disputes involve examining time spent outside of normally-scheduled work hours, while here we are examining time spent during the normally-scheduled workday.

#### ORDER

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

1. The Grievance of Rennie Fix is GRANTED and the State of Vermont, Department of Mental Health, shall pay Grievant overtime compensation, plus interest, pursuant to the overtime provisions of the Contract for the 16 hours of overtime he worked during the pay period November 1, 1987 - November 14, 1987, for which he was improperly paid at straight time rates;

2. The interest due Grievant on overtime shall be at the rate of 12 percent per annum and shall run from the date the paycheck was

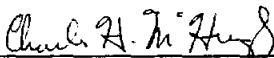


due for the time he performed the overtime work to the date he receives overtime pay; and


3. The parties shall submit to the Board by June 2, 1988, 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 June 9, 1988, at 9:30 a.m. in the Labor Relations Board hearing room.

Dated the 20<sup>th</sup> day of May, 1988, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

  
Charles H. McHugh, Chairman

  
William G. Kemsley, Sr.

  
Louis A. Toepfer