VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	DOCKET NO. 88-25
	)	
VERMONT STATE EMPLOYEES' ASSOCIATION (re: Compensatory Time Credit)	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On May 5, 1988, the Vermont State Employees' Association ("VSEA") filed a grievance in its capacity as sole collective bargaining agent for classified employees. VSEA alleged that the State of Vermont ("State") violated Section 3 of Article 48, Emergency Closing, of the collective bargaining agreement between the State and VSEA for the Non-Management, Supervisory, State Police, Corrections, and Liquor Units, effective for the period July 1, 1986 to June 30, 1988 (collectively referred to as the "Contract"), by refusing to credit employees with compensatory time in an emergency closing situation.

A hearing was held on June 16, 1988, in the Labor Relations Board hearing room before Board members Dinah Yessne, Acting Chair, William Kemsley, Sr., and Louis Toepfer. Michael Seibert, Assistant Attorney General, represented the State. Michael Zimmerman, VSEA Staff Attorney, represented VSEA.

Grievant filed a Memorandum of Law on June 23, 1988. The State filed a Memorandum of Law on June 24, 1988. Grievant filed a reply memorandum on July 5, 1988.

FINDINGS OF FACT

1. At all times relevant, Article 48, entitled Emergency Closing, provided in pertinent part as follows:

> Section 1 Management shall decide when, if, and to what extent State facilities shall remain open or closed during emergencies, such as adverse weather conditions, acts of God, equipment breakdown, inoperational bathroom facilities, extreme office temperatures, etc.
>
> ...
>
> Section 3 In facilities that must remain operational despite emergency conditions, continual operations with a reduced work force may be authorized. In such instances, employees who are authorized to leave work early may do so without loss of pay or benefits. Employees who are required to remain at work shall receive compensatory time at straight time rates.

2. Due to a snowstorm, the State ordered a reduced work force situation on Friday, February 12, 1988. The reduced work force situation was in effect from 3:00 p.m. to 12:00 a.m.

3. Jay Wisner, Acting Commissioner of Personnel, sent a memorandum to State personnel officers on February 16, 1988 regarding the February 12, 1988 reduced work force situation. The memorandum, citing the Emergency Closing article of the Contract, stated that "those employees who were required to remain at work should receive compensatory time off at straight time rates for any regularly scheduled hours between 3:00 p.m. and midnight." (Grievant's Exhibit 2).

4. The State did not grant such compensatory time for those hours worked by employees between 3:00 p.m. to 12:00 a.m., on February 12 which were overtime hours beyond their regularly scheduled hours. Employees did receive overtime pay for those hours.

5. At some time prior to March 8, 1988, Gail Rushford, VSEA Field Representative, received a telephone call from a VSEA Steward at the Vermont State Hospital regarding employees who had worked overtime during the emergency closing situation on February 12 and who had not received compensatory time credit.

6. A VSEA Steward from the Brandon Training Center also contacted Rushford. The steward complained about the fact that no compensatory time credit was given to employees who worked past their regularly scheduled hours on February 12, 1988.

7. VSEA also received a letter on March 2, 1988 from David Tetrault, the VSEA Steward at the Rockingham State Police Station. Tetrault provided a list of employees who had worked during the emergency closing. Tetrault requested that VSEA look into the emergency closing situation (Grievant's Exhibit 3).

8. On March 8, 1988, VSEA, in its own name, brought a Step III grievance against the State. VSEA contended that all classified employees who worked between 3:00 p.m. and midnight on February 12, 1988 were entitled to compensatory time at straight time rates regardless of any overtime benefits due them as a matter of course. VSEA requested that the State identify and properly compensate all classified employees who worked during the reduced work force situation (Grievant's Exhibit 4).

9. VSEA brought this grievance in its own name upon concluding that it seemed to be the most sensible way to file the grievance since it probably affected employees in all bargaining units and more employees were affected than had stepped forward or could be identified by VSEA.

10. Thomas Ball, Director of Employee Relations for the Department of Personnel, denied the grievance. He concluded that the matter could not be considered a legitimate grievance absent actual appeals by named and identified aggrieved employees. Ball also stated that

this matter was not the type of institutional issue whereby VSEA would have standing to grieve on its own behalf. (Grievant's Exhibit 5).

11. On March 28, 1988, Rushford wrote Ball requesting reconsideration of his decision. Rushford argued that VSEA was not prevented from being the moving party in this grievance. Rushford included with the letter a list of employees from Rockingham State Police Station, Vermont State Hospital and Brandon Training Center whom she indicated were "certain of the aggrieved employees." She indicated that VSEA could not identify all "similarly situated" employees; that only the State had the wherewithal to provide the information as to all employees affected. (Grievant's Exhibit 6).

12. By letter of April 7, 1988, Ball denied the request to reverse his Step III decision. Ball held that the law prohibits class action grievances. He also stated that lists of specific aggrieved employees was not provided in a timely manner, and that this is not the type of situation where VSEA can grieve an action on its own. (Grievant's Exhibit 7).

13. Generally, the State has one or two emergency closing situations per year. The question of whether to award compensatory time for overtime hours worked in such situations has not arisen for at least ten years before this grievance, and the State has not granted such compensation prior to this action.

MAJORITY OPINION

The first issue we address is whether VSEA has standing to bring this grievance in its capacity as exclusive bargaining representative of employees in all bargaining units. We think it is clear from the meaning of "grievance" defined in 3 VSA §902(14) that VSEA has such standing and that the Board has jurisdiction to hear this matter.

By specifically defining grievance in pertinent part as "an employee's, group of employees', or the employees' collective bargaining representative's expressed dissatisfaction... with aspects of employment of working conditions under a collective bargaining agreement", §902(14) grants VSEA the ability to grieve in its capacity as the State employees' collective bargaining representative.

Given that the VSEA has the standing to bring this grievance, we turn to the merits of the case: specifically, whether the State has violated the emergency closing provision of the Contract by its refusal to credit compensatory time to employees for overtime hours worked on February 12, 1988.

It is the State's contention that since the Contract does not speak to the narrow issue as to whether an employee, working overtime outside his/her normal shift in an emergency situation is entitled to compensatory time on top of applicable overtime, then such credit cannot be provided in this matter. The State's position is that compensatory time should be credited only for regularly scheduled hours overlapping the emergency closing hours. VSEA contends that to give such a construction to the Contract amounts to a rewriting, rather than an interpretation, of the Contract. VSEA maintains that the parties, in negotiating the Contract, intended that employees

would receive compensatory time for all hours worked (including overtime) given the contractual entitlement of employees who "remain at work."

A contract will be interpreted by the common meaning of its words where the language is clear. In re Stacey, 138 Vt. 68, 71 (1980). We will not read terms into a contract unless they arise by necessary implication. Id. at 71. It is our duty to interpret the provisions of a disputed contract, not remake it or ignore it. In re Grievance of VSEA on Behalf of Certain Phase-Down Employees, 139 Vt. 63, 65 (1980).

Article 48, Section 3 of the governing Contract provides in pertinent part:

> In facilities that must remain operational despite emergency conditions, continued operations with a reduced workforce may be authorized... (E)mployees who are required to remain at work shall receive compensatory time at straight time rates.

Here, to add a qualifier of "regularly scheduled hours" to the contract language would be a remaking of the Contract, not an interpretation, and thus a violation of the rules of contract construction. The language of the Contract indicates that those employees who remain at work should receive compensatory time credit. There is no mention of "regularly scheduled hours", nor is there a specific exclusion of compensatory time credit for employees working overtime hours during the reduced work force situation. We decline to read these terms into the emergency closing provision of the Contract.

The State contends that since compensatory time has not been credited in the past for overtime hours worked in reduced work force situations, there is a binding past practice which is not inconsistent

with the specific provisions of the Contract. However, In Grievance of Cronan, et al., 6 VLRB 347, 355 (1983), the Board stated:

> The Board cannot find that a mistaken interpretation by the employer of a provision of a contract justifies granting grievants rights to which they are not entitled by a correct interpretation of the Contract. Grievance of Cantarra, 1 VLRB 305, 309 (1978).

By the same logic, a mistaken interpretation by the State of a provision of the Contract cannot justify denying employees rights to which they are entitled under a correct interpretation of the Contract. A contractual provision which is incorrectly interpreted for a period of time does not render the provision invalid.

We next turn to discussing the appropriate remedy for the State's violation of the Contract. VSEA requests that the Board order the State to provide VSEA with the names of all employees affected by the contractual violation and credit all such employees with compensatory time. The State contends that the decision of the Board in Grievance of Beyor, et al., 5 VLRB 222 (1982), controls this matter, and precludes granting the remedy which VSEA requests.

In Beyor, a named grievant brought an action on behalf of himself and "other similarly-situated employees". The Board agreed to grant a remedy to the named grievant, but not to the "other similarly-situated employees". In reference to 3 VSA §1002(d), which provides in pertinent part that "(a)ny number of employees who are aggrieved by the same action of the employer may join in an appeal with the consent of the board"; the Board stated:

> We think this statute prevents us from including similarly-situated employees in the grievance absent actual appeals by named and identified employees. The statute appears designed to avoid the complexities of class actions, allowing the Board to act only when specific employees are aggrieved by the same action of the employer. Id, at 232.

While we concur with the result reached on the facts presented in Beyor, we believe that Beyor must be limited to those facts. As previously discussed, the definition of grievance under the State Employees Labor Relations Act expressly contemplates representative grievances being brought by the employees' collective bargaining representative. 3 VSA §902(14). We agree with the legislature that there are circumstances where it is appropriate for a collective bargaining representative to pursue a grievance which seeks a remedy on behalf of a class of employees who are not specifically identified.

We conclude that the circumstances existing in this case are one such instance. Here, affected individuals are a potentially large number of employees scattered throughout the State. Their identity could not be easily ascertained by VSEA within the time allowed to grieve. They were affected by a common question of contract interpretation by the State's failure to credit compensatory time during the emergency closing and all would benefit from the requested relief. VSEA's decision to file a grievance in its own name on behalf of the class, and to request that the State identify and properly compensate all members of the class who were affected, permits a fair and efficient adjudication of the alleged Contract violation.

We agree with Member Toepfer that VSEA in the alternative could have sought the names of all the affected employees from the State under Article 6, Section 5 of the Contract. We see nothing in the Contract to suggest, however, that the access to information procedure was intended for this particular purpose, or that it was meant to be an exclusive means of affording relief in this kind of situation.

Dinah Yessne, Acting Chair

William G. Kemsley, Sr.

DISSENTING OPINION

I concur with the views of Members Yessne and Kemsley concerning the interpretation of the applicable Contract language but disagree with respect to the remedy. VSEA asks the Board to order the State to provide VSEA with the names of all employees affected by the contractual violation and accredit all such employees with compensatory time. Given the manner in which this grievance has been brought, to order the State to credit all affected employees with compensatory time for overtime hours worked on February 12, 1988, violates the holding of the Board in Grievance of Beyor, et al., 5 VLRB 222 (1982). In Beyor, the Board refused to grant a remedy to those who had not sought any remedy. The named grievant Beyor brought an action on behalf of himself and "other similary-situated employees". The Board agreed to grant a remedy to the named grievant, but not to the "other similarly-situated employees". In reference to 3 VSA §1002(d), which provides in pertinent part that "(a)ny number of employees who are aggrieved by the same action of the employer may join in an appeal with the consent of the board"; the Board stated:

> We think this statute prevents us from including similarly-situated employees in the grievance absent actual appeals by named and identified employees. The statute appears designed to avoid the complexities of class actions, allowing the Board to act only when specific employees are aggrieved by the same action of the employer. Id, at 232.

This reasoning from Beyor should control here. To allow class-action grievances is not a sensible direction for this Board to follow. To do so would invite a variety of pitfalls, including giving remedies to those who have sought none. Here, VSEA asks us to order a

broad remedy for a group of employees who have not grieved. This Board should only grant a remedy when there has been an actual appeal by named and identified employees. Accordingly, I conclude that it is inappropriate to order the State to provide VSEA with the names of all affected employees and credit them with compensatory time.

I further conclude that no employees are entitled to compensatory time credit due to the State's violation because, in filing a grievance at Step III, VSEA did not identify any aggrieved employees despite a contractual requirement that the grievance contain "the full name and address of the party or parties submitting the grievance". To first identify aggrieved employees in a request for reconsideration of a grievance denial is simply untimely.

The only appropriate remedy for the Board to grant is to order the State to cease and desist from future violations of the emergency closing provision of the Contract.

While such a result does not help the aggrieved employees who improperly have been denied their compensatory time credit, VSEA, as exclusive bargaining representative, could have followed a different procedure to achieve its desired result. The Contract allows for an exchange of information between VSEA and the State. Article 6, Section 5, provides in pertinent part:

> ...the State will provide such additional information as is reasonably necessary to serve the needs of the VSEA as exclusive bargaining agent and which is neither confidential nor privileged under law. Access to such additional information shall not be unreasonably denied. Failure to provide information as required under this Article may be grieved through the grievance procedure to the Vermont Labor Relations Board.

Under this Article, VSEA had the ability to request from the State the names of potential aggrieved employees in this matter and, if the State refused to provide such information, then grieve that matter to the Board. This would have been the proper avenue for VSEA to follow, rather than proceeding as it did.

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 the Vermont State Employees' Association is GRANTED;

2) The State of Vermont within 15 days of this Order shall provide to the Vermont State Employees' Association a list of all employees covered by the collective bargaining contracts between the State and VSEA whom worked beyond their regularly scheduled hours during the time 3:00 p.m. to 12:00 a.m., on February 12, 1988, including the number of overtime hours worked by each employee during that time period;

3) The Vermont State Employees' Association within 15 days of receiving such list shall notify the Labor Relations Board and the State Department of Personnel of any specific disputes concerning such list;

4) Any evidentiary hearing needed to resove such disputes shall be held before the Labor Relations Board in the Board hearing room on December 15, 1988, at 9:30 a.m.; and

5) The State shall credit compensatory time to all employees covered by the collective bargaining contracts between the State and VSEA for hours worked by employees during the time 3:00 p.m. to 12:00 a.m. on February 12, 1988, which were overtime hours beyond their regularly scheduled hours, within 15 days of the resolution of any and all disputes.

Dated this 3rd day of November, 1988, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Dinah Yessne, Acting Chair

William G. Kemsley, Sr.