

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:

CORNELIUS REED, JR.

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DOCKET NO. 88-58

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On November 4, 1989, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of Cornelius Reed, Jr. ("Grievant"). The grievance alleged that the State of Vermont, Department of Public Safety ("Employer") violated the alternate rate pay provisions of the collective bargaining agreements between the State and VSEA for the State Police Unit, effective for the periods July 1, 1984-June 30, 1986, July 1, 1986-June 30, 1988 and July 1, 1988-June 30, 1990 ("Contracts") by denying Grievant's request for alternate rate pay for a period when Grievant assumed the duties of a higher-level employee.

A hearing was held before Board members Louis Toepfer, Acting Chairman; William Kemaley, Sr., and Catherine Frank on April 13, 1989, in the Labor Relations Board hearing room in Montpelier. Michael Seibert, Assistant Attorney General, represented the Employer. Michael Zimmerman, VSEA Staff Attorney, represented Grievant. At the hearing, the State made a motion to dismiss the grievance as untimely filed. The Board denied the motion.

The parties filed briefs on April 20, 1989. In its brief, the State requested that the Board reconsider its ruling on the timeliness of the grievance.

## FINDINGS OF FACT

1. The Contracts each contained an article entitled "Alternate Rate Pay," which provided in pertinent part as follows:

1. Requiring employees to perform higher-level duties which are normally the duties of an employee assigned to a higher pay scale is to be held to a minimum consistent with sound management in State government.

2. From time to time, employees may be required by higher authority to take over the job of an employee assigned to a higher pay grade than their own when that higher-level employee is absent from duty. When time and circumstances permit, vacant higher-level positions will be filled through the merit system under the applicable Rules and Regulations for Personnel Administration. However, because of the absence of an employee for a short period of time, and in management's judgment job continuity must be maintained, eligible employees in this bargaining unit who are required to take over the higher-level job shall receive "alternate rate pay" provided all the following criteria are met:

- a. The employee takes over the job of the higher-level employee (see paragraph 7 below for definition);
- b. The higher-level work is performed with the authorization of appropriate supervisory personnel;
- c. The position is at least one pay grade higher than the employee's own pay grade; and
- d. The employee takes over the job of the higher-level employee for one full work shift per day.

3. The "alternate rate pay" rate shall be 108 percent of the employee's base rate...

7. For purposes of this Agreement, the term "to take over the job of an employee in a higher-level position," means that an employee is required by appropriate higher authority to perform a majority of those duties of the higher-level job which are substantially different from his own normal duties, and that the employee will be held accountable for poor performance in the same manner that a newly assigned permanent employee would be held accountable for poor performance in the higher-level job.

2. The Contracts each contained the following pertinent provisions concerning the filing of grievances:

...Section 4

a. Grievances may be initiated at Step II if the subject matter of the grievance is clearly beyond the

control of the immediate supervisor, or at Step III if the subject matter of the grievance is clearly beyond the control of the agency, department, or institution head.

b. Grievances initially filed at Step II or Step III shall be submitted within fifteen workdays of the date upon which the employee could reasonably have been aware of the occurrence of the matter which gave rise to his/her grievance.

...Section 8

In appropriate cases, the time limits for filing and processing a grievance may be waived in order to permit retroactive pay to correct a long-standing injustice provided in no case shall the retroactive pay predate the effective date of this Agreement.

3. Grievant was employed by the Vermont State Police for 26 years, until he retired in January 1989. His claim for alternate rate pay could affect his rate of retirement pay, so his claim has not been made moot by virtue of his retirement. At all times relevant herein, Grievant held the rank of Sergeant, and his pay grade was 20.

4. From October of 1979 or 1980 until December 13, 1987, Grievant's position title was Community Relations Officer, Community Relations Unit. From December 1984 until December 13, 1987, Sergeant John Krupp also was assigned to that unit as Community Relations Officer. Grievant had geographic responsibility for the northern part of Vermont, while Krupp had responsibility for the southern part of Vermont. Grievant's office was at State Police Headquarters in Waterbury.

5. As Community Relations Officers, Grievant and Krupp spent the majority of their time making public speeches and presentations on state police services to the general public, civic organizations, schools, private businesses and other groups (Joint Exhibit 1).

6. In January 1985, the chain of command between Grievant and Krupp and the Commissioner of Public Safety was as follows: Grievant

and Krupp reported to Lieutenant Dana Goodnow, Supervisor of Community Relations; Goodnow reported to Captain Edward Fish, Director of Training and Community Relations; Fish reported to Major George Patch, Commander, Support Services Division; Patch reported to Lieutenant Colonel Robert Horton, Director of the State Police; and Horton reported to Commissioner A. James Walton (Grievant's Exhibit 2, page 1).

7. Goodnow's position was at least one pay grade higher than Grievant's position. His primary duties were the coordination of the Community Relations Unit and the supervision of Krupp and Grievant (Joint Exhibit 2).

8. In late January or early February of 1985, Goodnow went on extended sick leave. A few days after Goodnow's absence commenced, Fish told Grievant that it appeared that Goodnow would not return to duty for some time. Fish told Grievant that he (Fish) did not have time to assume Goodnow's duties, and he asked Grievant to "pick up the slack" with respect to performing Goodnow's duties. Grievant indicated that he had no problem with assuming these duties.

9. From the date of that request until December 13, 1987, Grievant performed the majority of duties which were previously performed by Goodnow. During this period, Grievant also continued to perform the duties he always had performed as Community Relations Officer.

10. Grievant spoke to Fish concerning whether he was going to receive additional compensation for assuming duties Goodnow had performed within a few weeks after Goodnow commenced his leave. At that time, Grievant specifically discussed with Fish the possibility of getting alternate rate pay for these duties. Fish told Grievant

that he would discuss this with Major Patch. Fish subsequently told Grievant that Patch had indicated that they should "wait and see" how long Goodnow would be absent. Grievant was not told during this time that his request for additional compensation was denied, but he did not receive such pay.

11. Goodnow returned to duty in May 1985. Upon his return to duty, Goodnow and his position were transferred from the Community Relations Unit to the Criminal Prevention Division. Between that time and December 13, 1987, the only positions assigned to the Community Relations Unit were the two positions occupied by Grievant and Krupp.

12. Subsequent to Goodnow returning to duty, Grievant spoke with Fish several times during the period 1985-1987 concerning receiving additional compensation for performing duties previously performed by Goodnow. Grievant and Fish discussed merit pay increase, temporary reallocation of the position and creation of a specialist position as possible methods for Grievant to receive additional compensation. Fish spoke to Patch soon after Goodnow returned to duty, and Patch told Fish that the fact that Goodnow had been assigned to another division created problems with Grievant receiving additional compensation. In 1987, Fish recommended that Grievant receive a 8% merit pay increase based on evaluations Fish had done of Grievant's performance, and this was denied. The other methods were never approved.

13. Grievant spoke to Lieutenant Colonel Horton several times concerning receiving additional compensation. During 1986, a classification study was done of positions in state government. Grievant advised Horton during this period that he was going to ask that a desk audit of his position be done by a classification review

team. Horton encouraged Grievant to not pursue this until the classification study was complete. Horton informed Grievant that he was concerned that Grievant's position would be downgraded if Grievant pursued the desk audit. Grievant did not pursue a desk audit. At no time prior to December 1987 did Horton inform Grievant that he either supported or did not support Grievant's attempts at receiving additional compensation. Horton did not give Grievant a definitive answer during this period.

14. In performance evaluations covering the periods March 1, 1985-February 28, 1986 and March 1, 1986-March 31, 1987, Fish rated Grievant's overall performance as "consistently and substantially exceeds job requirements/standards." Fish noted on the evaluations that Grievant had acted as the "unofficial coordinator" of the Community Relations program during the rating periods. The evaluations were approved by Patch and Horton (Grievant's Exhibits 3 and 4).

15. In the performance evaluations and otherwise, Fish held Grievant accountable for his performance of the duties previously performed by Goodnow. Patch and Horton were aware that Grievant was performing at least some of the duties previously performed by Goodnow. They never instructed Fish to discontinue the practice of having Grievant perform those duties.

16. Effective December 13, 1987, the Department of Public Safety reorganized. As a result of the reorganization, the positions occupied by Grievant and Krupp were reallocated from Sergeant-Training and Community Relations to Sergeant-Crime Prevention/Public Information

Officer. As a result of the reorganization, Grievant no longer was responsible for performing duties previously performed by Goodnow (Grievant's Exhibit 2, pages 2-4).

17. On December 14, 1987, Grievant asked Horton whether, in light of the reorganization, the Employer had given any thought to his entitlement to additional compensation. Horton told Grievant that only Commissioner Walton had the authority to make that decision. After Grievant indicated that he may file a grievance, Horton suggested that Grievant first see Walton.

18. On December 21, 1987, Grievant, who had not been able to see Commissioner Walton yet, informed Horton that he was concerned because Walton had been unavailable to speak to Grievant and the 15 day limit to file grievances was approaching. Horton told Grievant not to worry about the timeframe for filing a grievance. Later that day, Grievant did speak to Walton. Grievant indicated that he was seeking compensation for the period he had performed work previously done by Goodnow. At the meeting, Walton stated, "If you're doing the work, you should get paid for it," or words to that effect.

19. On December 22, 1987, Grievant submitted a memorandum to Walton. Therein, Grievant requested additional compensation for the period February 1985-December 1987 when he was performing duties previously performed by Goodnow (Grievant's Exhibit 6).

20. By memorandum dated July 5, 1988, which followed a period during which Walton requested, and Grievant provided, additional information supporting Grievant's request, Walton denied Grievant's request. The memorandum provided as follows:

Upon review, it has been determined that your request for alternate rate pay for the period February, 1985--December 14, 1987 does not meet the criteria for alternate work pay. For a detailed analysis, I refer you to the Nelson/Walton memorandum of June 21, 1988, attached. I must, therefore, deny your request for alternate work pay for the above referenced period.

Please be advised that you may appeal this decision to the Office of the Commissioner of Personnel by submitting a letter to that effect within ten workdays following your receipt of this memorandum (Step III, Grievance Procedure).

(Grievant's Exhibit 11)

21. The attached "Nelson/Walton" memorandum, which was a June 21, 1988 memorandum from Administrative Officer Theodore Nelson to Walton, provided in pertinent part as follows:

(T)here does not appear to be any indication that (Grievant) was required to assume the supervisory duties of the Community Relations program or that (Grievant) was in any sense accountable for the performance as the program supervisor. Acting in the capacity of '...unofficial coordinator...' certainly does not imply that he was required by appropriate higher authority to do so. Absent the specific assignment of the higher-level position duties and, absent accountability for same, assumptions notwithstanding, (Grievant) is not entitled to alternate rate...It is also not demonstrated that he assumed a majority of the duties of Sergeant Goodnow's position.

(Grievant's Exhibit 12)

22. Grievant received the memorandum from Walton and the attached memorandum on July 11, 1988. On July 21, 1988, Grievant filed a Step III grievance from Walton's denial, which grievance was denied on October 5, 1988 (Grievant's Exhibits 13 and 14).



#### MAJORITY OPINION

At the hearing in this matter, after taking evidence on the timeliness of the grievance, the Board ruled that the grievance was timely filed. The Employer has requested that we reconsider this ruling. Upon further reflection and review, we conclude that this grievance is timely, but only for a very limited period.

The pertinent contract language provides that "grievances shall be submitted within fifteen workdays of the date upon which the employee could reasonably have been aware of the occurrence of the matter which gave rise to his/her grievance." Grievant is seeking alternate rate pay for the period February 1985 - December 1987, during which period he was performing duties previously performed by his immediate supervisor.

He was aware he was not receiving alternate rate pay within a few weeks of assuming those duties in February 1985 subsequent to his supervisor going on an extended sick leave. At that time, he discussed with his then-immediate supervisor whether he was to receive additional compensation for those duties, and specifically discussed with his supervisor the possibility of receiving alternate rate pay. Every time he received a pay check, subsequent to assuming the additional duties, which did not contain additional monies in the form of alternate rate pay was an "occurrence" which gave rise to a grievance. Failure by Grievant to institute a grievance within 15 days of receiving each pay check meant he waived his right to back pay for those payroll periods.

We recognize that Grievant informally was pursuing through his superiors alternative means by which he could receive additional

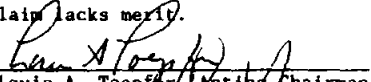
compensation during the period for which he seeks additional compensation, and that his superiors did not inform him definitively whether he was entitled to such compensation. However, his superiors' failure to provide him with a definitive answer did not relieve Grievant of the obligation to make them officially aware that he viewed failure to receive alternate rate pay as a grievable action. Failure of an employee to assert a right in such circumstances means the employee has waived the right. In Grievance of VSEA on Behalf of Meat Inspectors, 4 VLRB 144 (1981), wherein employees were aware in 1973 that they were not receiving overtime pay for travel time yet did not grieve such failure until 1976, the Board stated:

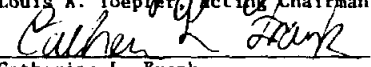
By not filing the grievance until August 25, 1976 ... Grievants waived their rights to backpay for all periods prior to the pay period immediately preceding the filing of the grievance. The purpose of a grievance is to officially bring to the employer's attention a grievable action. An employer cannot be held financially liable for an action of theirs of which they were never made officially aware was a source of employee dissatisfaction. For us to find otherwise would be to encourage employees to delay in filing grievances involving remuneration in the hopes that they can eventually walk away with a sizable sum of money. Promptness is one of the most important aspects of grievance settlement. Bringing a problem into the open expeditiously fosters better labor-management relations. Sitting on a grievable action in the hopes of obtaining "the pot at the end of the rainbow" certainly does nothing to promote productive labor relations. We, then, cannot support the three-year period sought by Grievants as the appropriate period for this grievance. We find this grievance timely, but for a limited period. Id., at 154.

Similarly here, failure of Grievant to officially make the Employer aware of his dissatisfaction with not receiving alternate rate pay until he made a written request for compensation on December 22, 1987, means he has waived his right to backpay for all periods prior to the pay period immediately proceeding the written request.

The lack of timeliness can be excused under the Contract if we conclude that a "long-standing injustice" is involved here. Any long-standing injustice which may have occurred is due largely to Grievant failing to assert known rights, since he knew as early as February 1985 that he may be entitled to alternate rate pay. Under such circumstances, and given our ultimate conclusion hereinafter discussed that any alternate rate pay due Grievant would have terminated prior to the effective date of the Contract under which he grieved, we are not inclined to invoke this contractual provision.

We have concluded that this grievance is timely filed for the limited period of the payroll period immediately preceding the December 22, 1988, request by Grievant seeking alternate rate pay. However, we conclude that there is no violation of the alternate rate pay article of the Contract. One of the requirements for receiving alternate rate pay under this article is that the employee "take over the job of an employee assigned to a higher pay grade than their own when that higher-level employee is absent from duty." When Lieutenant Goodnow returned from sick leave in May 1985, he and his position were transferred from the Community Relations Unit to another division in the Department of Public Safety. From that point on, Grievant was no longer taking over a higher-level employee's job in the employee's absence. The employee was no longer absent and the employee's higher-level position had been removed from Grievant's work unit. Thus, we conclude that Grievant's claim lacks merit.

  
Louis A. Toepfer, Acting Chairman

  
Catherine L. Frank

#### DISSENTING OPINION

Although Grievant did not formally submit a grievance when he realized that he was not being remunerated for taking over a large part of Goodnow's duties, he did quite consistently request that additional pay. At no time did any of his superiors actually refuse to grant the pay or to discuss that matter. Quite the opposite occurred. Grievant's supervisors continually indicated to Grievant that his complaint would be considered and that there existed the possibility that it could be worked out. When Grievant finally was told that he would not receive alternate rate pay for performing extra duties, he began to process a grievance.

I believe that this situation existed because of the informal, friendly manner in which this unit operated - a condition that might well be encouraged given the dangerous atmosphere in which the unit often finds itself. A friendly atmosphere often strengthens loyalty.

To deny this grievance is to place the blame on Grievant and not to share it with management representatives who also dealt with the problem in the same informal manner. Any blame that exists richly deserves sharing. While Grievant can be considered remiss in not submitting his grievance earlier, the supervisors also exhibited very poor management practices by not giving Grievant a definitive answer in the early stages of the problem. Such poor management practices can only result in unnecessarily poor labor relations.

  
William G. Kemsley, Sr.

ORDER

Now therefore, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED that the Grievance of Cornelius Reed, Jr., is DISMISSED.

Dated this 22<sup>nd</sup> day of June, 1989, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

  
Louis A. Toepfer, Acting Chairman

  
Catherine L. Frank