VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 90-25
CURTIS MAYO	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On April 12, 1990, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of Curtis Mayo ("Grievant"). The grievance alleged that the Vermont State Hospital, Department of Mental Health, State of Vermont ("Employer") violated Articles 5, 18 and 23 of the collective bargaining agreement in effect between the parties for the Non-Management Unit for the period July 1, 1988 to June 30, 1990 ("Contract"), by failing to grant Grievant's request of October 25, 1989 for a shift change.

On August 9, 1990, a hearing was held before Board Members Charles H. McHugh, Chairman; Louis A. Toepfer; and Leslie G. Seaver. Michael Zimmerman, VSEA Staff Attorney, represented Grievant. Michael Seibert, Assistant Attorney General, represented the Employer. At the hearing, Grievant withdrew his claim that Article 5 of the Contract was violated. The Board took judicial notice at the hearing of Agency of Administration Bulletin 4.10. Memoranda of Law were filed by both parties on August 15, 1990.

Findings of Fact

1. Article 23 of the Contract provides in pertinent part:

BIDDING FOR SHIFT VACANCIES

When a permanent shift vacancy arises on any shift, or when a permanent vacancy arises on a rotating shift during the term of that shift, all employees within the facility will be notified by posting the vacancy for seven calendar days. The selection shall be based on the operating needs of the facility; provided, however, that ability to perform the job and seniority shall be considered. At the request

of a VSEA representative, the appointing authority or his designee will explain why a senior applicant was bypassed for the vacancy.

2. Agency of Administration Bulletin No. 4.10 provides in pertinent part:

...B. Exempt Service Position

...3. Temporary Position

a. By statute, temporary employment may not exceed 190 days of work in any calendar year. Although this governs only the length of time a particular person may be employed in a temporary position (or positions), a position which is needed more than 190 days should be established in the classified service.

b. The duties of a vacant classified position cannot be performed by a temporary employee except during a period of active recruitment or unless it can be conclusively demonstrated that qualified applicants are not available to fill the classified position . . . .

3. Vermont State Hospital provides institutional care for the mentally ill. Vermont State Hospital is operated by the Department of Mental Health which is a division of the Vermont Agency of Human Services. Claudia Stone is the Executive Director of the Hospital.

4. The Hospital is staffed 24 hours a day, seven days a week, on a three shift per day basis. The first shift works from 6:30 AM to 3:00 PM. The second shift works from 2:30 PM to 11:00 PM. The third shift works from 10:30 PM to 7:00 AM.

5. Grievant is a permanent classified employee who has been employed by the Vermont State Hospital since 1971. Grievant's current job title is Psychiatric Technician B, which involves charge responsibility for all patients on a given ward for a particular shift. At the time of the events herein, Grievant worked the second shift.

6. On October 25, 1989, Grievant wrote a letter to Director Stone requesting a shift change from the second to the first shift. That letter states, in pertinent part:

> This is [to] request a shift change, from second shift to first, because of family considerations.
>
> As an 18 year employee I request that you do as much [as] possible to accommodate this schedule change, It is very important to me because my four year old daughter will be starting school next year. As you may know, my wife works second shift, also, so without a shift change for me child care will be difficult to arrange, and the amount of time we have to spend with her will be intolerably little... (Grievant's Exhibit 2).

7. At the time Grievant made this request for a shift change, there were no posted vacancies on the first shift.

8. On November 8, 1989, Stone denied Grievant's request by letter. In pertinent part, that letter states:

> . . . . I regret to inform you that we have decided against granting your request. We frequently get requests of this nature and have decided against them in the past in order to maintain the staffing balance between shifts to meet the needs of the hospital.
>
> We are, however, sympathetic to your problem and would urge you to apply for job openings on the day shift as they occur. . . . (Grievant's Exhibit 3).

9. Generally, when an employee of the Hospital makes a request for a change to a comparable vacant position on another shift, seniority of the various applicants is the determining factor if all other things are equal.

10. For the past three and one-half years, Vermont State Hospital has been undergoing a program known as "regionalization". Under this program, the treatment capabilities of the individual communities throughout Vermont have been enhanced so that, as far as possible, patients of the Vermont State Hospital are being released and treated in their home communities. As a result of this program, the population at Vermont State Hospital has dropped from approximately 200 patients three and one-half years ago to about 100 patients as of January, 1990.

11. Along with the decrease in patient population, staffing needs at the Hospital have dropped as well. During the time of the regionalization program, approximately 90 positions at the Hospital have been eliminated. At or about the time the regionalization program was instituted, the Employer developed a plan to prevent Hospital employees whose jobs were scheduled to be eliminated from being laid off or unemployed. The Employer notified each employee whose job was scheduled to be eliminated well in advance of the elimination date so that the employee could begin to look for other work, and the Employer actively assisted employees in securing other employment. As a result, of the approximately 90 employees whose positions were scheduled for elimination, only one employee has been laid off.

12. Due to the fact that Hospital employees have often found new employment before the time their positions were scheduled for elimination, the Employer decided to use temporary employees to fill the need left by the vacant position between the period an employee left a position and the date on which that position was due to be eliminated. The Employer believed that it would be impossible to hire permanent employees to fill a vacancy that would exist for only a short period. Also, the Employer did not have permission to hire permanent employees to fill any of the positions scheduled for elimination.

13. At some point early in the regionalization process, Claudia Stone spoke with Steve Janson, VSEA Director of Field Services, about the plan to use temporary employees. Stone and Janson reached an understanding that temporary employees would be used on an emergency basis to fill the temporary staffing shortage created by permanent employees leaving their positions prior to the positions being eliminated.

14. At all times relevant, the Employer has employed temporary employees at the Hospital. These temporary employees generally fall into one of four categories:

a. Five or six temporary employees are normally hired each year to fill in for permanent employees during their summer vacations.

b. Temporary employees have been hired to provide weekend coverage because permanent employees have schedules which grant them every other weekend off. These temporary employees work two eight-hour shifts every weekend, and also may be called upon to work shift vacancies or holidays during the week when needed.

c. A third group of temporary employees have been hired on occasion when patient population increases unexpectedly for a period of time. These temporaries are used to help tend to the increased number of patients until the population returns to projected levels. Such a situation occurred in June of 1990, when 16 patients were added to the Hospital population. As result, one ward was reopened and was scheduled to close shortly after the hearing in this matter.

d. Temporary employees have been used in conjunction with the regionalization program, as described above in Finding #12, to alleviate the temporary staffing shortage caused by permanent employees leaving their positions prior to the position being eliminated. There is no evidence that any temporary employees serving in such capacity were working working on the first shift at the time Grievant requested, and was denied, a change from the second shift to the first shift.

15. 3 VSA §311(a)(11) provides:

> (a) The classified service to which this chapter shall apply shall include all positions and categories of employment

by the state, except as otherwise provided by law, and except the following...

... (11) Persons employed in a temporary capacity with the approval of the governor for a period not to exceed 1,520 hours in any one calendar year. The secretary of administration may authorize exceptions to the 1,520 hour limit in cases of a bona fide emergency.

16. During 1989, several temporary employees at Vermont State Hospital exceeded the statutory limit of 1,520 hours of work per annum as established by 3 VSA §311(a). The Hospital had received permission of the Secretary of Administration to exceed this 1,520 hour limit. The evidence does not indicate on which shift these employees worked.

17. On or about March 15, 1990, two temporary employees were working approximately forty hours per week on the first shift. There is no evidence indicating that these employees worked more than 1,520 hours in any calendar year. One of those employees has subsequently left Hospital employment; the other has become a permanent employee working on the second shift (Grievant's Exhibit 8).

18. Most temporary employees at Vermont State Hospital are hired as Psychiatric Technician Trainees. They are not permitted to give medication and do not take "charge" of the patients on their shift. The pay grade and job responsibilities associated with the position of Psychiatric Technician Trainee are less than Grievant's position.

19. At the time of Grievant's request to transfer to the day shift, and currently, there was and is an imbalance in the number of permanent employees who work the first and second shift. The second shift is the most difficult to recruit employees for and also suffers the highest attrition rate. Many employees on the second shift would prefer to work the first shift. The Employer calculates that the optimum number of employees per shift is 42. At the time of the hearing in this matter, the

first shift had 46 regularly assigned employees and the second shift had 38 regularly assigned employees. To alleviate this imbalance, the Employer plans to move vacancies occurring on the first shift to the second shift until the number of regularly assigned employees on each shift is equal.

OPINION

In the grievance filed with the Labor Relations Board, Grievant contended that the Employer violated Articles 5, 18 and 23 of the Contract by denying Grievant's October 25, 1989, request for a shift change from the second shift to the first shift at Vermont State Hospital. At the hearing, Grievant withdrew his claim that Article 5 of the contract - relating to discrimination, harassment and affirmative action - was violated. Also, Grievant did not pursue his claim that Article 18 of the Contract, concerning the grievance procedure, was violated at either the hearing or in his memorandum of law. We thus presume Grievant is not pursuing that issue. Thus, the only remaining issue before us is whether the Employer violated Article 23 of the Contract by denying Grievant's request.

Grievant contends that if the Employer had not filled first shift positions through improper use of temporary employees, Grievant could have had an opportunity to bid for a first shift vacancy pursuant to Article 23 of the Contract. Article 23 provides, in pertinent part, that "(w)hen a permanent shift vacancy arises on any shift... all employees within the facility will be notified by posting the vacancy for seven calendar days". Grievant contends that the Employer's practice of hiring temporary employees to fill vacant classified positions violates Agency of Administration Bulletin 4.10. Grievant further contends that the Employer violated 3 VSA §311(a) because, during 1989, several employees worked in excess of the 1,520 hours a year statutory limit.

We need not decide the issue of whether the Employer's use of temporary employees has violated Bulletin 4.10 and/or 3 VSA §311(a) because Grievant has failed to establish any causal connection between these alleged misuses of temporary employees and the Employer's decision to deny his request for a shift change from the second shift to the first shift.

Grievant contends Bulletin 4.10 was violated because, in the case of positions scheduled to be eliminated and permanent employees leaving those positions before they actually were eliminated, the Employer had a practice of using temporary employees to fill the need left by the vacant position between the period an employee left a position and the date on which that position was due to be eliminated. However, Grievant has not demonstrated that any temporary employees were performing the duties of such a vacant position on the first shift at the time Grievant requested, and was denied, a change from the second shift to the first shift. Thus, Grievant has demonstrated no connection between the shift change denial and this use of temporary employees.

Similarly, Grievant has not demonstrated that any temporary employees on the first shift had been employed beyond the statutory time limitations of 3 VSA §311(a) at the time he requested and was denied the shift change. Grievant's failure to demonstrate any connection between the alleged improper use of temporary employees at the Hospital and his shift change denial leads us to the conclusion that the use of temporary employees has no bearing on our decision whether Article 23 of the Contract was violated.

This issue having been determined, and there being no evidence of any first shift vacancies occurring at the time Grievant's request for shift change was denied, there is no basis by which we can conclude that a

"permanent shift vacancy", within the meaning of Article 23, existed on the first shift at the time the Employer denied Grievant's request to move from the second shift to the first shift. Therefore, we deny this grievance.

ORDER

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

Dated this 15th day of November, 1990, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Charles H. McHugh, Chairman

Louis A. Toepfer

Leslie G. Seaver