VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 90-31
VERMONT STATE EMPLOYEES'	)	
ASSOCIATION, INC.	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On May 9, 1990, the Vermont State Employees Association, Inc. ("VSEA") filed a grievance with the Vermont Labor Relations Board on its own behalf and on behalf of the class of Clerk Dispatcher in the State Department of Public Safety. The grievance alleges that the State of Vermont ("Employer") has violated Articles 2 and 19 of the Collective Bargaining Agreement between the State of Vermont and VSEA for the Non-Management Unit, effective for the period July 1, 1988 to June 30, 1990 ("Contract"), by failing to make a pay upgrade for the class of Clerk-Dispatcher retroactive to the date of filing of the request for classification review.

On June 21, 1990, a hearing was held before VLRB Board Members Charles McHugh, Chairman; Catherine Frank and Louis Toepfer. Michael Zimmerman, VSEA Staff Attorney, represented VSEA. Michael Seibert, Assistant Attorney General, represented the Employer. At the hearing, the Board took judicial notice of the prior collective bargaining agreements between the parties, covering the successive periods from July 1, 1981 to June 30, 1988.

Requested Findings of Fact and Memoranda of Law were filed by both parties on July 12, 1990.

Findings of Fact

1. Article 2 of the Contract provides, in relevant part:

MANAGEMENT RIGHTS

> 1. Subject to law, rules and regulations, or terms set forth in this Agreement, nothing in this Agreement shall be construed to interfere with the right of the Employer to carry out the statutory mandate and goals of the agency, to restrict the State in its reserved and retained lawful and customary management rights, powers and prerogatives, including the right to utilize personnel, methods and means in the most appropriate manner possible; and with the approval of the Governor, take whatever action may be necessary to carry out the mission of the agency in an emergency situation.
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> . . . .

2. Article 19 of the Contract provides, in relevant part:

CLASSIFICATION REVIEW AND CLASSIFICATION GRIEVANCE

> . . . .
>
> Section 3. Procedure for Review of Classification
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> . . . .
>
> e. In the event that corrective action results from either classification review or a classification grievance, any pay adjustment shall not be retroactive earlier than the date of filing of the request for classification review.
>
> . . . .

3. The subject matter of the provision, cited above, regarding the timing of the effective date for pay rate changes resulting from a classification review, was first introduced into the 1981-1982 collective bargaining agreement between the parties as part of a contract article entitled "Classification Grievances." The purpose of the Article was to establish a procedure whereby employees could grieve a dispute over the classification and/or pay assignment of their positions. The language of the 1981-1982 Contract provided, in relevant part:

> . . . . Pay adjustments may not be retroactive earlier than the date of filing of the grievance.
>
> (Article 17, Section 5 of the Contract between VSEA and the State of Vermont for the Non-Management Unit, effective for the period July 1, 1981 to June 30, 1982.)

4. For the two successive collective bargaining agreements, covering the periods 1982-1984 and 1984-1986, the language of this provision remained unchanged (See Article 17, Section 5 of the Contract between VSEA and the State of Vermont for the Non-Management Unit, effective for the period July 1, 1982 to June 30, 1984, and Article 19, Section 5 of the Contract between VSEA and the State of Vermont for the Non-Management Unit, effective for the period July 1, 1984 to June 30, 1986).

5. Negotiations for the 1986-1988 collective bargaining agreement between VSEA and the State of Vermont roughly coincided with the Willis Study, in which a system wide review and revision of the State's classification system was undertaken. At that time, changes were also made in the language of the classification grievance article of the Contract. In particular, the language regarding the timing of a pay adjustment resulting from a classification review was changed to read:

> In the event that corrective action results from either classification review or a classification grievance, any pay adjustment shall not be retroactive earlier than the date of filing of the request for classification review. . . .
>
> (Article 19, Section 3(e) of the Contract between VSEA and the State of Vermont for the Non-Management Unit, effective for the period July 1, 1986 to June 30, 1988.)

6. There was no change to this language for the subsequent Contract for the period July 1, 1988 to June 30, 1990, which is the Contract applicable to this grievance.

7. During the initial negotiations over this Contract provision, and during negotiations for the 1986-1988 revision, it was the State's understanding that the language established the earliest possible date to which a pay adjustment could be made retroactive.

The State understood that the negotiated provisions did not interfere with its power of discretion to determine the appropriate effective date of classifications, except that such effective date would not precede the date of filing of the classification review action.

8. During negotiations for the 1986-1988 Contract, it was VSEA's understanding that the pertinent negotiated provision reflected a compromise agreement between the following two competing principles: first, that an employee should be equitably compensated for the time spent performing certain duties; and second, that there must be some limit to the back pay liability for an employer if the employee does not bring the alleged classification inequity to the employer's attention for a period of time. VSEA understood that the pertinent provision in the 1986-1988 Contract specifically resolved these competing principles to the effect that the following rule obtained: the effective date for a pay increase resulting from a classification upgrade should be either (1) the date the employee assumed the higher level duties which ultimately led to the upgrade, or (2) the date upon which the employee submitted the request for classification review; whichever is later.

9. Since at least 1981, it has been the general practice of the State to set the effective date of pay increases as of the beginning of the next pay period following the decision on the classification review, with the exception that, if requested, an attempt will be made to make the pay increase retroactive if the date the employee began performing the higher level duties can be identified, although circumstances may result in a later date being established. Also, pay increases may be delayed to the benefit of the employee until step pay increases occur.

10. On August 26, 1988, the Department of Personnel issued written "Guidelines for Determining Effective Date of a Classification Action." The document confirmed in written form the prior practice and policy of the State in this regard. In pertinent part, that document states:

> The basic governing principle is that actions will be effective at the beginning of the payroll period following completion of Personnel action on the request.
>
> Other dates may apply and/or can be considered in such circumstances as the following:
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> 1) The action is the result of an employee review request or classification grievance. The contract specifies that the action cannot be effective earlier than the date of filing for classification review. The beginning of the next payroll date after date of filing will generally apply. Note however, that a later date is not prohibited; the particular circumstances of a case could suggest a later date as more appropriate.
>
> 2) A retroactive date based upon employee assumption and performance of higher lever duties which can be reasonably documented to a specific prior time. Such a situation may be appropriate when an employee has been given new higher level duties, possibly as part of a reorganization, but the classification request is not submitted until some time later when it is reasonably certain that the change/reorganization will endure. Any such delay in submitting the reclassification request should not exceed six months. In submitting such reclassification requests, the desired effective date and rationale for same should be included in the cover letter accompanying the classification request.
>
> 3) In instances where Classification Unit workload precludes timely completion of the classification review, an effective date will be selected by the Department of Personnel based upon a normal period for completion of the review under reasonable workload conditions.
>
> Other cautions relative to effective date:
>
> 1) Reallocations and reassignments do change the affected employee's anniversary step date. However, step dates have nothing to do with the classification review process as such, and are not an item which a job analyst checks when performing a classification review. Therefore, a requesting department or employee may wish to consider the possible effect of a

> classification action upon an upcoming step increase, and adjust the timing or requested effective date accordingly when submitting a classification request. We do not consider impact upon step increase by itself to be a sufficient cause for issuing an amended notice of classification effective date.
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> . . . .
>
> (State's Exhibit 1).

11. There is no evidence that the State has consistently established the effective date of pay increases retroactive to the date of employee filing of classification review requests. In some cases, the State has assigned a retroactive effective date prior to the date the employee submits a classification review request. In other cases, the State has assigned an effective date beginning around the period the employee submits a classification review request. In other cases, the State has assigned effective dates ranging from one to many pay periods after the date the employee submits a classification review request, including prospective dates after the classification decision is made (State's Exhibit 2).

12. On or before July 6, 1989, the Clerk-Dispatchers employed by the Department of Public Safety submitted, as a class, a request for classification review to the Department of Personnel. Based on duties performed, they sought an upgrade of the class from pay grade 15 to pay grade 16.

13. On December 28, 1989, the Department of Personnel approved the request, concluding that the classification Clerk-Dispatcher should be upgraded to pay grade 16.

14. In determining the appropriate effective date for the pay increase, the Department of Personnel sought the advice of management within the Department of Public Safety. The Department of Public Safety recommended that the pay increase become effective as of

January 7, 1990, based on the lack of available funds in its departmental budget. The Department of Public Safety estimated that a retroactive effective date back to the date of the filing would cost approximately $100,000 for the fiscal year 1989-1990. By comparison, an effective date beginning on January 7, 1990 which corresponded to the start of the next pay period, would cost the Department approximately $50,000. Due to a statewide revenue shortfall, Department budgets were cut throughout State government, and the Department of Public Safety had already sustained cuts to its approved 1989-90 budget in excess of $400,000.

15. The Department of Personnel accepted the recommendation of management in the Department of Public Safety, and set the effective date for the pay increase at January 7, 1990.

16. Subsequently, VSEA inquired of the Department of Personnel as to why the pay increase had not been made retroactive to the date of filing of the request. The Department of Personnel informed VSEA that the decision not to make the pay increase retroactive was due to lack of funds in the Department of Public Safety's budget.

17. As a result of this dispute, VSEA became aware, for the first time, that the State's interpretation of the Contract provision here at issue differed from its own interpretation. VSEA believed that the State had been in the practice of setting effective dates for pay increases retroactive to the date of filing classification review requests whenever it could be determined that the relevant employee duties were performed on or before the date of filing. Since 1986, VSEA has been receiving Notice of Action forms from the Department of Personnel, reporting the decision on employee requests for classification review. However, the Notice of Action forms do not

indicate the date on which the request for review was submitted, and VSEA has been unable to determine from the forms whether the effective date has been made retroactive. VSEA was not aware of the Department of Personnel's written "Guidelines for Determination of Effective Date of Classification Action", referred to above in Finding of Fact #9, until shortly before the date of the hearing in this action.

OPINION

The issue before us is whether the State violated Articles 2 and 19 of the 1988-1990 Contract by failing to make the pay increase for the class of Clerk-Dispatchers retroactive to the date of filing of the request for classification review.

Specifically, we are called upon to determine whether the relevant provision of Article 19 is clear on its face, and if not, whether its meaning can be determined by the mutual intent of the parties and/or past practice in interpreting that provision. The primary provision at issue, Article 19, Section 3(e), provides only that "any pay adjustment [resulting from a classification review or grievance] shall not be retroactive earlier than the date of filing of the request for classification review."

VSEA contends that, in light of the contract language at issue and in light of the purpose of that language, the following rule should govern: when a classification review is initiated by an employee, any pay increase resulting from an upgrade shall be effective upon the date of the employee's request for review or the date upon which the employee assumed those higher level duties, whichever is later.

The State contends that the language of Article 19, Section 3(e) is plain on its face, defining only the earliest possible effective

date for a classification action and thereby reserving to management the discretion to establish a later date. Alternatively, the State contends that should the Board find the contract language at issue to be unclear, the practical construction given that language by the State in the past should govern.

Our Vermont Supreme Court has directed that a collective bargaining agreement "will be interpreted by the common meaning of its words where the language is clear," In re Grievance of Cronan, ___ Vt. ___ (May 19, 1989), but where "the disputed language is sufficiently ambiguous . . . . it is the duty of judicial or quasi-judicial bodies to construe a contract so as to ascertain the true intention of the parties." Grievance of Gorruso, 150 Vt. 139, 143 (1988). Proof of custom or usage may be admissible to determine the appropriate construction, provided "first, there is sufficient ambiguity in the contract to require resort to extraneous circumstances such as custom or usage [citations omitted], and secondly, there is adequate notice of the custom or usage to the party against whom it is asserted." Nzomo et. al. v. Vermont State Colleges, 136 Vt. 97, 101-102 (1978).

The Board will not read terms into a contract unless they arise by necessary implication. In re Stacey, 138 Vt. 68, 71 (1980). The law will presume that the parties meant, and intended to be bound by, the plain and express language of their undertakings; it is the duty of the Board to construe contracts; we will neither make or remake them for the parties, nor will we ignore their provisions. Vermont State Colleges Faculty Federation v. Vermont State Colleges, 141 Vt. 138, 144 (1982).

In applying these rules, we conclude that the Contract language is clear on its face and is not ambiguous. Article 19, Section 3(e) of the Contract requires only that the State not establish any retroactive pay date earlier than the date of filing of the employee's request for classification review. The Contract does not make the employee filing date a "trigger" date for retroactive pay increases, as VSEA contends. The pertinent language does not require that reclassification pay increases be retroactive to the date of the employee's request for review unless the employee later assumed higher level duties resulting in the classification upgrade. The Contract language simply provides, as the State contends, that pay increases may not predate the date the employee submitted a classification review request, but the State retains the discretion to limit retroactivity or make pay increases prospective.

Also, we conclude that no action of the State herein violated Article 2 of the Contract. Given our interpretation of the Contract language, it is not appropriate for us to look to the extrinsic evidence of custom or usage (i.e past practice) and bargaining history to ascertain whether such evidence provides any guidance in interpreting the meaning of the Contract. Nzomo, Supra. Gorruso, supra. Grievance of Majors, 11 VLRB 30, 35 (1988).

The State also contends that, under various provisions of the Vermont Statutes, neither the State nor the Board has the power to grant a retroactive pay increase where adequate funds have not been appropriated by the legislature. Due to our holding herein, we do not reach this issue.

ORDER

Now therefore, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED that the grievance filed in this matter is DISMISSED.

Dated this 23rd day of August, 1990, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Charles H. McHugh, Chairman

Catherine L. Frank, Member

Louis A. Toepfer, Member