VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 90-49
SUSAN RAY	)	
	)	
GRIEVANCE OF:	)	
	)	DOCKET NO. 90-76
VERMONT STATE EMPLOYEES' ASSOCIATION	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On August 10, 1990, the Vermont State Employees' Association ("VSEA") filed a grievance with the Vermont Labor Relations Board on behalf of Susan Ray ("Grievant"), Docket Number 90-49, alleging that the State of Vermont, Department of Health ("Employer"), violated the collective bargaining agreements between the State and VSEA for the Non-Management Unit, effective for the periods July 1, 1988 to June 30, 1990, and from July 1, 1990 to June 30, 1992 ("Contract"). Specifically, the grievance alleges that in August, 1989, Grievant was advised she could no longer charge mileage from home to her work assignments. Grievant alleged this was a violation of the mileage reimbursement article of the Contract in that it represented an effort to re-establish the constructive travel doctrine, which was abolished by the Contract.

On December 5, 1991, VSEA filed a grievance with the Vermont Labor Relations Board, Docket Number 90-76, alleging that the Employer violated the management rights and mileage reimbursement provisions of the Contract by instituting a policy, by memorandum dated July 25, 1990, which re-established the "constructive travel" limitation on mileage reimbursement for employees. The parties agreed to consolidate Docket Numbers 90-49 and 90-76.

A hearing on both grievances was held on December 6, 1990, before Vermont Labor Relations Board Members Charles H. McHugh, Chairman; Louis A. Toepfer and Leslie G. Seaver. Michael Seibert, Assistant Attorney General, represented the Employer. Michael Zimmerman, VSEA Staff Attorney, represented Grievants. Briefs were filed by both parties on January 3, 1991.

FINDINGS OF FACT

1. 32 V.S.A. §1261 provides, in pertinent part:

> (a) Unless otherwise provided, all persons in the employ of the state when away from home and office on official duties shall be reimbursed for expenses necessarily incurred for travel....Nothing contained herein shall authorize payment to an...employee...for travel between his place of residence and office....Compensation for...travel...occurring while conducting business for the state shall be the subject of collective bargaining....When an employee works out of his or her home in the usual course of employment rather than out of an office, he or she shall be reimbursed for expenses in the same manner as though he or she were working out of an office...
>
> (b) The secretary of administration shall prescribe standards to limit reimbursement for personal expenses and to require approval of specific exceptions prior to the date of travel. These standards shall apply equally to all categories of state employees, subject to the collective bargaining agreement (Grievant's Exhibit 1).

2. Prior to July 1, 1987, the "constructive travel doctrine" was in effect in State government. Agency of Administration Bulletin 3.4, effective July 1, 1985, provided in pertinent part:

> 2. TRANSPORTATION - GENERAL PROVISIONS
>
> ...
>
> b. Reimbursement for Commuting Prohibited
> The payment to a state employee for travel between his place of residence and office (official duty station) is not authorized....See Constructive Travel - Section No. 9.
>
> ...

f. Reimbursable Mileage
Mileage may be reimbursed for the distance actually and necessarily traveled in the performance of official duties as adjusted by the Constructive Travel Limitations (Section 9).

...

10. APPLYING CONSTRUCTIVE TRAVEL LIMITATIONS TO MILES TRAVELED
Employees are not eligible for mileage reimbursement for travel between residence and official duty station except for the following circumstances: (1) On a scheduled workday when an employee is authorized to travel from residence to a temporary location(s) before reporting to his his/her official duty station. In this case, mileage may be reimbursed from the first temporary location of the workday to the official duty station, plus miles, if any, driven between residence and the initial duty station in excess of the normal commute. (2) When an employee is authorized to travel to a temporary location(s) from his/her official duty station, without returning to the official duty station, mileage from official duty station to the last temporary duty station may be reimbursed plus any mileage in excess of the normal commute between the last temporary location and residence.

On a scheduled workday when an employee travels directly from his/her residence to a temporary location(s) and returns to his/her residence at the end of the workday without reporting to the official duty station (office), mileage is reimbursed at: (a) the lesser of mileage between residence to first temporary location or official duty station to first temporary location and (b) the lessor [sic] of mileage between last temporary location to residence or last temporary location to official duty station. All mileage incurred between first and last temporary location is also eligible for reimbursement

Normal commute in this section is the distance between residence and official duty station. Temporary location means temporarily performing official duties at a location other than the official duty station. (Grievant's Exhibit 2).

3. In the collective bargaining agreement between the VSEA and the State effective for the period July 1, 1986-June 30, 1988, the parties abolished the above-referenced constructive travel doctrine. The following provision was agreed to, and has appeared in each collective bargaining agreement between the VSEA and the State since then:

> Beginning July 1, 1987, the "constructive travel doctrine" (i.e., where the normal commutation distance between an employee's home and his/her official duty station is deducted from mileage incurred in the course of business under certain circumstances) shall be abolished. Administrative rules and policies regarding mileage reimbursement shall be modified in accordance with this Article. (Grievant's Exhibit 3)

4. On September 14, 1987, Secretary of Administration Thomas Menson revised Agency of Administration 3.4, which revision has remained in effect at all times since then, to provide in pertinent part as follows:

> ...
>
> 2(b) Reimbursement for Mileage
> All state employees are entitled to be reimbursed for the use of a privately owned vehicle at a rate per mile as set by the State Employees Bargaining Agreement ... Reimbursement shall be based on all miles actually and necessarily travelled in the performance of official duties, except that miles travelled between an employee's home and office (duty station) shall not be reimbursed unless an employee is called in under the "Call-in" provision of the State Employees Bargaining Agreement or is required to make multiple trips from home to office on the same day for work beyond the normal work schedule. (Grievant's Exhibit 2A).

5. During negotiations for the collective bargaining agreement for the Non-Management Unit which is now effective (i.e., the contract in effect from July 1, 1990 to June 30, 1992), the State submitted a proposal to reinstitute the constructive travel doctrine. The VSEA opposed this proposal, and the parties ultimately agreed to retain the article providing for the abolition of the constructive travel doctrine.

6. In addition to the above-cited provision relating to the abolition of the constructive travel doctrine, the collective bargaining agreements between the parties for the Non-Management Unit

in effect from July 1, 1998-June 30, 1990, and July 1, 1990-June 30, 1992, contained the following pertinent provisions:

EXPENSES REIMBURSEMENT

1. All State employees, when away from home and office on official duties shall be reimbursed for actual expenses incurred for travel accommodations...

...

5. *General Principles of Reimbursement*
a. Excepting the reimbursement of mileage under Article 31, "Call-in, and those instances cited by Administrative Bulletin 3.4, employees shall not be paid for travel between home and duty station, or subsistence thereof.

...

8. Work locations shall not be changed for the purpose of avoiding reimbursement of expenses. (Grievant's Exhibit 3)

7. Grievant has been employed by the Vermont Department of Health since July, 1987 as a Health Outreach Specialist. Grievant is a permanent part-time employee who works 40 hours every two weeks, or *five eight hour days every two weeks. There are two major components* to Grievant's job: she conducts health clinics and she makes home visits for both the State's WIC(i.e., Women, Infants and Children) and Medicaid Programs. In a two week period, Grievant generally works in the "field" every day but one. She is in the office on that one day. Grievant's work hours are from 7:45 a.m.- 4:30 p.m.

8. Grievant works out of the Springfield District Office, which is her official duty station. The Springfield District is one of twelve District Offices of the Health Department. There are two other Health Outreach Specialists and eight additional employees in the Springfield District Office, including Grievant's supervisor, Leslie Dowling.

9. At all times relevant, Grievant has lived in the town of Shrewsbury. It is approximately 30 miles from Grievant's Shrewsbury home to the Springfield office. Grievant is assigned a geographical territory, which includes the towns of Plymouth, Reading, West Windsor, Windsor, Weathersfield, Cavendish, and Ludlow. The distances between those towns and Springfield, and those towns and Ray's Shrewsbury home are as follows:

TOWN	DISTANCE TO SPRINGFIELD	DISTANCE TO HOME
Plymouth	25 miles	8 (summer) miles 15 (winter) miles
West Windsor	20-22 miles	35 miles
Windsor	22 miles	40 miles
Ludlow	15 miles	15 miles
Cavendish	18 miles	22 miles

10. Grievant receives her health clinic assignments (i.e., dates, locations, and clinic hours) from her District Manager in advance of their assigned dates. Grievant schedules home visits in the same vicinity as the health clinics she is visiting on a particular day to make the most efficient use of her time and to consolidate her travel.

11. Prior to August, 1989, if Grievant was working all day in the "field", she would set her odometer when she left her Shrewsbury home in the morning and record the number of miles traveled when she reached home at the end of her work day. She was always reimbursed for all miles traveled. If Grievant did go to the Springfield office at the end of a "field" day, she would only claim and be reimbursed for mileage from Shrewsbury to the field worksite(s), and then to the Springfield District Office (but not back home). Similarly, if

Grievant left the office for a "field" visit(s) and then went home, she would only claim and be reimbursed for mileage from the office to the "field", and then to home.

12. On or about August 9, 1989, Grievant found a note attached to her expense account for the preceding month. The note was from a clerk in the District Office and it read:

> We need to discuss this exp. acct. Leslie was told by Fran de F we could no longer chg. from home to work place and ret. home if it's less mileage from office (Grievant's Exhibit 4).

"Leslie" refers to Springfield office District Manager Leslie Dowling, Grievant's immediate supervisor. "Fran de F" refers to Fran DeFlorio, the Chief of Field Operations, who works out of the Brattleboro District office, and is Dowling's immediate supervisor. DeFlorio reports to Patricia Berry, Director of the Local Health Division. Berry reports directly to the Commissioner of the Department of Health.

13. Dowling explained to Grievant that her superiors had informed her that the Springfield District Office was not in compliance with the rest of the Health Department in its handling of mileage reimbursement. Dowling told Grievant that she could no longer claim the mileage between home and her "field" worksite(s). She would instead have to record the distance between home and wherever she was working in the "field", and then calculate the mileage between the office and the same location(s). She would then claim reimbursement only for the lesser distance. Grievant was still allowed to claim the mileage between temporary work locations while in the field (i.e., between a clinic and a client's house, or between client's homes).

14. Grievant followed this new policy of only claiming the lesser distance. Grievant kept records of her actual mileage, as well

as the reimbursable mileage. She determined she was not reimbursed for miles for which she was previously reimbursed for 90 miles in August, 38 miles in September, 54 miles in October, 92 miles in November, and 84 miles in December, 1989 (Grievant's Exhibit 5).

15. Grievant filed a Step II grievance on January 26, 1990, claiming that, by instituting a policy providing for reimbursement of the lesser distance between home or office and worksite, the Department had violated the Contract provision concerning the abolishment of the constructive mileage doctrine. Lee Marasco, Personnel Administrator for the Department of Health, responded to the grievance by requesting that Grievant resubmit her grievance at Step III of the grievance procedure (Grievant's Exhibit 6, 7).

16. Grievant filed a Step III grievance on February 14, 1990. Thomas Ball, Director of Employee Relations for the Vermont Department of Personnel, decided the grievance on June 12, 1990, and stated in pertinent part:

> ...As I understand the representations of the parties at the hearing, the Springfield District Office mileage reimbursement practice is that employees can choose to: 1) report to the office at the start and end of each workday, in which case mileage would be computed from the office to any subsequent worksite(s), and return; or 2) submit mileage reimbursement requests from home to worksite, or office to worksite, whichever is less, and worksite to home or office to home, whichever is less, at the end of the day....
>
> I believe that option 2), above, constitutes "constructive travel", and as such, is in violation of the contract. The supervisor has the contractual right to require an employee to report to the office at the start and end of each workday. The supervisor also has the ability to authorize an employee to travel from his/her home directly to a worksite (and/or return) without first (and/or last) reporting to the office. In this latter instance, the employee is entitled to be reimbursed for all miles actually travelled. The supervisor may authorize either, or both, of these "methods" on a case-by-case and/or day-to-day basis, depending on the operating needs of the department.

> ... In remediation of any contract violation that may have occurred in this case, the Department shall reimburse Grievant for all miles actually traveled after January 4, 1990, less any "normal commute" miles travelled between the Grievant's home and the Springfield District office, or return. (Grievant's Exhibit 9)

17. Subsequent to this decision, Chief of Local Health Division Patricia Berry, Chief of Field Operations Fran DeFlorio, and Personnel Administrator Lee Marasco sent a memorandum dated July 25, 1990, to all Department of Health District Directors. The memorandum attached Ball's above-referenced decision, and stated in pertinent part:

> SUBJECT: Mileage Reimbursement
>
> Contract provisions specify that mileage is reimbursed for "mileage actually and necessarily traveled in the performance of official duties." Policy states that the supervisor has the contractual right to require an employee to report to the office at the start and end of each workday. The supervisor also has the ability to authorize an employee to travel from his/her home directly to a worksite (and/or return) without first (and/or last) reporting to the office and then the employee is entitled to be reimbursed for all miles actually traveled. (See attached grievance finding.)
>
> To insure uniformity, consistency and impartiality, the following Division policy is promulgated and is effective immediately:
>
> Workdays for all personnel will start and end at your office duty station. All mileage will therefore be from the office to the field site and return.
>
> Since it may often be more convenient for individual employees to begin and end workdays at locations other than your duty station, permission from the District Manager may be requested to do so. In District Manager's absence, permission can be granted by Community Health Nursing Supervisor.
>
> Requests shall be made on the attached form "Request for Alternative Point of Origin/Termination Travel." Approval determination will be based on the best interest of the Department/Division and client/clinic/office needs.
>
> This policy will become effective September 1, 1990 (Grievant's Exhibit 10).

18. By this memorandum, if a Health Department employee wishes to travel directly between the "field" and home and claim reimbursement for all miles traveled, she or he must obtain pre-approval on a form prepared by the Employer. If approval is granted, Grievant and other similarly situated employees are reimbursed for actual miles traveled, just as Grievant was prior to August, 1989. If pre-approval for travel directly between the home and "field" is not granted, an employee would be expected to come into the office at the beginning of the work day and then travel to the "field" and/or travel from the "field" back to the office and end the work day at the office.

19. To date, Grievant's requests to travel directly between home and the "field" either at the beginning and/or end of a workday have all been for economic reasons: 1) the proposed route to or from home and "field" location would be the shorter distance, or 2) the proposed route to or from home and "field" location would reflect a savings to the State because it would be cheaper to pay Grievant the extra mileage (i.e., the difference between the mileage between office and worksite, and home and worksite) than to pay Grievant the overtime that would be necessitated if she were to drive from home to office, and then to the worksite to assure arrival at the assigned hour.

20. Grievant's requests to travel directly between home and the "field" have all been approved. In the Department of Health as a whole, requests by some employees pursuant to the July 25, 1990, memorandum have been denied, but most requests have been approved.

21. VSEA filed a grievance, claiming that the July 25, 1990, memorandum reinstituted the abolished constructive travel doctrine and

was inconsistent with management rights, which grievance is now before the Board as Docket No. 90-76.

22. The Management Rights provison of the Contract, Article 2, provides in pertinent part as follows:

> 1. Subject to law, rules and regulations . . and subject to 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 . . .

OPINION

Grievants contend that the Step III decision in the Ray matter, Docket No. 90-49, and the July 25, 1990, Health Department memorandum, grieved in Docket No. 90-76, violate the contractual abolition of the constructive travel doctrine and the management rights provision of the Contract.

At the outset, we note that we are without jurisdiction to decide one of the claims made by Grievant in Docket No. 90-49. Grievant contended in the grievance filed with the Board that the Employer violated the mileage reimbursement provision of the Contract in August, 1989, by instructing Grievant that she could no longer charge mileage from her home to her "field" work assignment. Grievant contends that this instruction represented an effort to re-establish the "constructive travel" limitation which was abolished by the Contract.

The jurisdiction of the Board in grievance proceedings is limited by the requirement that there be an "actual controversy" between the parties. In re Friel, 141 Vt. 505, 506 (1982). To satisfy the actual controversy requirement, there must be an injury in fact to a protected legal interest or the threat of an injury in fact. Id. Grievance of Boocock, 150 Vt. 422, 425 (1988). When an employer, through the grievance procedure, has provided as a remedy the most that the Board could award as a remedy, the Board has determined that the "actual controversy" requirement has not been met. Grievance of Sherbrook, 13 VLRB 359 (1990).

Here, at Step III of the grievance procedure, the Step III hearing officer held that the Employer did violate the Contract provision concerning abolishment of the "constructive travel"

limitation by instructing Grievant that she could no longer charge mileage from her home to her "field" work assignment. The hearing officer required the Employer to reimburse Grievant for all miles actually travelled, less any "normal commute" miles actually traveled between Grievant's home and the Springfield district office, which were timely grieved. Thus, any injury to Grievant with respect to the August, 1989, instructions has been remedied by the hearing officer, and we are without authority to order any further remedy on this issue.

Nonetheless, Grievant contends that the relief granted by the hearing officer in Docket No. 90-49 is incomplete in that it allows the Employer to again reinstate the abolished "constructive travel" limitation in violation of the mileage reimbursement provision of the Contract. In Docket No. 90-76, Grievant contends that the Employer, in purpose and/or effect, re-established the "constructive travel" limitation in violation of the mileage reimbursement provision and the management rights provision of the Contract by its July 25, 1990, memorandum. Grievants allege that the Step III decision in Docket No. 90-49 and the July 25, 1990, memorandum violate the Contract because each asserts that management can require employees to begin and end their work days at their official duty stations without any real business reason and for no reason other than to reduce the amount of mileage reimbursement paid to such employees.

We conclude that no violation of the Contract provision abolishing the "constructive travel" doctrine occurred in these grievances. The "constructive travel" doctrine refers to commuting distance between an employee's home and his or her official station

being deducted from reimbursable mileage in certain circumstances where the employee is traveling between home and a "field" work location.

Upon review of the Step III hearing officer's decision and the July 25, 1990, memorandum, it is clear that neither the decision nor the memorandum reinstitute the "constructive travel" doctrine. The fact that they both recognize managment's right to require employees to begin and end workdays at their official station in no way results in the conclusion that the "constructive travel" doctrine is being re-established. The "constructive travel" doctrine operated only in those instances when employees were authorized to begin and/or end their work days away from their official station, and did not affect management's ability to direct employees to begin and/or end their work day at their official station.

The remaining question before the Board is whether the Employer is in violation of the management rights provisions of the Contract by requiring an employee to report to the office at the beginning and/or end of the work day and only permit exceptions to this by formal requests made in advance. We can find no violation of the management rights provisions of the Contract by this policy. It provides management with the opportunity to ensure that employee travel arrangements are efficient, economical and otherwise in the best interests of the Employer. The evidence before us indicates no instance where the Employer refused any requests of employees to begin and/or end their work day away from the office, and travel directly between home and "field" location, where the requests resulted in appropriate use of an employee's time and were economical. Also, there

is no evidence that the Employer's policy has resulted in the reimposition of the "constructive travel" doctrine in any instance where the employee is authorized to travel directly between home and "field" location.

Although we do not support Grievants' allegations of any Contract violations, we note that the July 25, 1990 memorandum is not internally consistent. The memorandum states "(w)orkdays for all personnel will start and end at your office duty station" and "(a)ll mileage will be... from the office to the field site and return." These statements are qualified elsewhere in the memorandum, and the memorandum does not, in fact, prohibit beginning and ending work days at locations other than the official duty station and does not prohibit mileage reimbursement for authorized travel between home and a "field" location. We suggest that the memorandum be redrafted to be made clearer.

ORDER

Now therefore, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED that the Grievance of Susan Ray in Docket No. 90-49 and the Grievance of the Vermont State Employees' Association in Docket No. 90-76 are DISMISSED.

Dated this 8th day of April, 1991 at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Charles H. McHugh, Chairman

/s/ Louis A. Toepfer
Louis A. Toepfer

Leslie G. Seaver