

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	DOCKET NO. 94-72
ROBERT BRIMBLECOME)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On December 1, 1994, Robert Brimblecome ("Grievant") filed a grievance against the State of Vermont, Agency of Transportation ("Employer"). Therein, Grievant alleged that the Employer had violated Articles 5, 6, 14, 15 and 20 of the collective bargaining agreement between the Employer and the Vermont State Employees' Association for the Supervisory Unit, effective for the period July 1, 1994 to June 30, 1996 ("Contract"), by wrongfully reassigning Grievant to a different worksite and reassigning him based on a non-conclusive investigative report. As a remedy, Grievant requested that he be reassigned to his previous duty station.

A hearing was held on May 25, 1995, in the Labor Relations Board hearing room in Montpelier, before Labor Relations Board Members Catherine Frank, Acting Chairperson; Leslie Seaver and Carroll Comstock. Attorney Alan Rome represented Grievant. Assistant Attorney General Michael Seibert represented the Employer. The parties filed briefs on June 8, 1995.

FINDINGS OF FACT

1. Article 20, Section 3, of the Contract provides in pertinent part as follows:
 - a. Subject to the operating needs of a Department, as determined by the appointing authority, which may require the assignment (for thirty days or more) of any employee to a different or

new shift, workweek, or geographic area, the State will select qualified volunteers first, after which selection shall be in reverse order of (continuous State service) seniority, i.e., the most junior employee will be selected. This provision shall not apply to historic types of temporary seasonal assignments.

b. Subject to the operating needs of a Department, as determined by the appointing authority, which may require the assignment (thirty days or more) of an employee(s) with a special skill or experience, to a different or new work shift, workweek or geographic area, the State will select qualified volunteers first, after which selection shall be in reverse order of (continuous State service) seniority, i.e., the most junior employee(s) possessing the special skill or experience which fulfills the Department's needs, will be selected.

...

d. The State will give good faith consideration to seniority as a significant element in the reassignment of an employee from one building to another for more than 15 miles within a geographic area.

2. The Definitions section of the Contract defines "geographic area" as "the area within a 35-mile radius of an employee's regular duty station".

3. At all times relevant, Grievant has resided in Marshfield, Vermont. He began work with the Employer in 1965, and has worked for the Employer continuously since that time. In 1984, Grievant became a supervisor at the State Garage in Montpelier, and remained there until 1987. In 1986, Grievant was selected as Employee of the Year for the Maintenance Division. In 1987, Grievant became area foreman in the North Montpelier Garage in District 6. Grievant remained as supervisor there until September, 1994. He supervised between nine and twelve employees, who were responsible for the general maintenance of 88 miles of state highways within the jurisdiction of the North Montpelier Garage.

4. There are four main garages within District 6. They are located in Middlesex, North Montpelier, Williamstown, and Morrisville. In addition, there is a satellite garage in Orange associated with the North Montpelier garage, and a satellite garage in Waitsfield associated with the Middlesex garage.

5. As area foreman, Grievant was supervised by Raymond Cyr, General Maintenance Supervisor for District 6. Cyr reported to Joseph Landry, District Transportation Administrator.

6. During his tenure with the Employer, Grievant has never received an unsatisfactory performance evaluation. During the time Grievant was North Montpelier area foreman, Cyr and Landry considered Grievant their best area foreman.

7. In mid-1993, Joan Cahill, a maintenance worker in her original probationary period, was assigned to the North Montpelier garage to work under Grievant's supervision. Upon observation of Cahill's work over time, Grievant concluded that Cahill had not been properly trained in operating a 10-speed truck, which resulted in her having problems with sanding, salting and plowing. At the end of Cahill's probationary period in early 1994, Grievant rated Cahill's overall performance as satisfactory, but recommended that her probationary period be extended. Cyr concurred in Grievant's recommendation. However, due to Cahill's overall satisfactory performance evaluation, Landry ultimately overruled their recommendation. Cahill thus successfully completed her probationary period and became a permanent status employee.

8. In April, 1994, Cahill filed a sexual harassment complaint against Grievant. Deborah Mongeon, Equal Employment Opportunity Officer for the Employer, was assigned to investigate the complaint. At the conclusion of her investigation, Mongeon, in a July 1, 1994, written report, stated that the "supervisor's conduct and actions have served to create a working environment that is intimidating", and that the "complainant's concern that the supervisor's attitude towards her is due to her sex appears to be verified by two of the witnesses". Among other recommendations, Mongeon recommended that Grievant be trained on discrimination issues and that the Employer "consider what if any disciplinary action is appropriate" (Grievant Exhibits 1-3, 5).

9. During the time of the investigation of Cahill's complaint against Grievant, a female maintenance worker at the Middlesex Garage made a sex discrimination complaint against Mr. Coates, the area foreman in Middlesex. The investigation into this complaint was ongoing in July of 1994.

10. Landry has never reviewed Mongeon's investigation report on Cahill's complaint against Grievant. Landry never contemplated disciplining Grievant as a result of Cahill's complaint.

11. As of July, 1994, the various District 6 garages had the following area foremen: Grievant was in North Montpelier, Coates was in Middlesex, Robert Ross was the bridge foreman in Middlesex, Frank Hall was in Williamstown, and Shane Benoit was in Morrisville. At all times relevant, the bridge foreman in Middlesex supervised two maintenance workers who maintained the roads at the airport in Berlin.

12. In July of 1994, Landry decided there was a need to reassign Coates out of Middlesex. He based this on the pending sex discrimination complaint against Coates, and his conclusion that Coates was not adequately maintaining control of the Middlesex garage. Landry also considered the discrimination complaint against Grievant in considering reassignments of area foremen. Ultimately, Landry decided to reassign four of the District 6 area foremen to different garages in District 6.

13. Landry reassigned Coates from area foreman in Middlesex to area foreman in North Montpelier. He reassigned Ross from bridge foreman in Middlesex to area foreman in Morrisville. He reassigned Benoit from area foreman in Morrisville to area foreman of the Middlesex Garage. Landry reassigned Grievant from area foreman in North Montpelier to Middlesex to become the bridge foreman replacing Ross. Hall remained area foremen in Williamstown.

14. In a July 25, 1994, memorandum, Landry officially informed Grievant of the transfer. The memorandum provided in pertinent part:

Following our meeting of July 14, 1994, this is to formally inform you that, under the State/VSEA Contract, effective 7:00 a.m. September 6, 1994 you will assume the responsibilities of Area Foreman in charge of the Bridge crew, which is stationed at the Middlesex facility (Grievant Exhibit 4).

15. In conjunction with the reassignment of area foremen, Landry also transferred Cahill to Williamstown to work under Hall's supervision. Landry did not want Coates to supervise women at that time, and had heard that Cahill was interested in transferring to Williamstown to work under the supervision of Hall. Landry viewed Hall, of all the District 6 area foremen, as having the best rapport with

women. Landry decided to keep Hall as the Williamstown area foreman, and offer Cahill a voluntary transfer to Williamstown. Cahill accepted the transfer.

16. Grievant has the greatest seniority of the District 6 area foremen. Hall has less seniority than Grievant, a fact of which Landry was aware when he made his reassignment decisions. Landry decided to not reassign Hall because he considered him to have good rapport with women, and concluded that he was the best foreman to supervise Cahill. Landry did not consider reassigning Hall and Cahill to Middlesex.

17. Grievant had a 24 mile roundtrip commute between his Marshfield home and the North Montpelier Garage. Due to his reassignment, Grievant has a 62 mile round-trip commute between his Marshfield home and the Middlesex Garage.

18. The Middlesex Gargage is more than 15 miles from the North Montpelier Garage. As a result of the reassignment, Grievant has the longest commute of any of the District 6 area foremen.

19. Grievant averaged 250 hours of overtime work during the winters he was area foreman in North Montpelier. During the 1994-95 Winter, when he was bridge foreman in Middlesex, Grievant worked 38 hours of overtime. During the 1994-95 Winter, Cyr offered Grievant the opportunity to work overtime as a substitute foremen in the absence of the regular foreman in other garages. Grievant informed Cyr that he did not want to work as a substitute foreman. Grievant mentioned to Cyr that he would work overtime helping one of the night workers who was having problems. Grievant was not offered the opportunity to work such overtime.

OPINION

Grievant contends that the Employer violated Articles 5, 6, 14, 15 and 20 of the Contract by wrongfully reassigning Grievant to a different worksite and reassigning him based on a non-conclusive investigative report.

The provisions of Article 20, Section(a) and (b) are not applicable to this situation. Such provisions apply if an employee is reassigned outside of his or her geographic area. As defined in the Definitions section of the Contract, a geographic area is "the area within a 35 mile radius of an employee's regular duty station". The evidence indicates that Grievant's reassignment from North Montpelier to Middlesex constituted a reassignment of less than 35 miles. Thus, Grievant was not reassigned outside of his geographic area.

In deciding this grievance, Article 30, Section 3(d) is the controlling Contract provision. It provides:

The State will give good faith consideration to seniority as a significant element in the reassignment of an employee from one building to another for more than 15 miles within a geographic area.

The evidence indicates that the Middlesex garage is more than 15 miles from the North Montpelier garage, and thus we need determine whether the Employer violated this language of the Contract in reassigning Grievant. This contractual provision requires the Employer to weigh the respective seniority of employees before making reassignment decisions, and keep an open mind until seniority is consciously factored in as a significant element of the ultimate reassignment decisions.

The Employer did not meet this contractual requirement. Joseph Landry, the District 6 Transportation Administrator, made the decision to reassign four of the

area foremen in District 6. The Employer has presented no evidence by which we can conclude that the respective seniority of Grievant and the other area foremen was weighed as a significant element of the reassignment decision. The evidence indicates that Landry concluded that there were significant problems in the Middlesex Garage and North Montpelier Garage stemming largely from discrimination complaints filed against the area foremen there, and that these considerations caused the need in his mind to reassign area foremen.

In deciding which area foremen would be reassigned to which garage, there is no evidence that Landry considered the respective seniority of the various area foremen as a significant element in the ultimate decision. An indication of this is that Landry never considered transferring Frank Hall, the area foreman in Williamstown, even though he was junior in seniority to Grievant. Also, although Grievant was the most senior area foremen, he ended up with the longest commute as the result of the reassignments. Further, we had no other evidence presented at the hearing demonstrating that Landry considered the area foremen's respective seniority before making his decision. We recognize that Landry was attempting to resolve difficult issues which had arisen in his district concerning sex discrimination complaints, but this did not justify his failure to adhere to contractual standards in reassigning employees.

Thus, we conclude that the Employer violated Article 20, Section 3(d), of the Contract in reassigning Grievant from North Montpelier to Middlesex. In the grievance filed with the Board, Grievant requested as a remedy that he be reassigned to his previous duty station in North Montpelier. We conclude that this is the most

appropriate remedy to redress the Employer's failure to adhere to contractual requirements in reassigning employees and place Grievant in the position he would have been in had the Contract not been violated.

At the hearing, Grievant sought to amend his grievance to seek as a further remedy that he be paid for his additional commute and be compensated for the difference between the overtime which he would have worked if he had remained assigned to North Montpelier and the overtime which he actually worked in Middlesex. The Employer objects to the amendment as untimely filed. Section 12.7 of the Board Rules of Practice permits amendment of grievances as the Board "deems proper". In deciding whether to permit amendment of grievances, the Board examines whether amendment would prejudice the employer or be disruptive to the orderly and efficient processing of cases by the Board. Grievance of Barnard, et al, 17 VLRB 203, 225 (1994).

We decline to permit amendment to this grievance. Although it is true, as Grievant contends, that the difference in overtime between North Montpelier and Middlesex was not known to Grievant at the time he first filed his grievance, the overtime difference clearly was known to Grievant well before the hearing in this matter. Grievant should have amended his grievance before the hearing to put the Employer on notice of the need to prepare to present evidence on this issue. The same is true with respect to Grievant seeking pay for his additional commute. Grievant's failure to timely amend his grievance was prejudicial to the Employer.

ORDER

NOW THEREFORE, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED that the Grievance of Robert Brimblecome is SUSTAINED, and the State of Vermont, Agency of Transportation, forthwith shall reassign Grievant to his previous duty station as area foreman of the North Montpelier Garage.

Dated this 14th day of July, 1995, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Catherine L. Frank

Catherine L. Frank, Acting Chairperson

/s/ Leslie G. Seaver

Leslie G. Seaver

/s/ Carroll P. Comstock

Carroll P. Comstock