

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	
PETER SKRZYNIARZ, MARK HYNES))	
DAVID GERARD, WILLIAM)	
HARKNESS, RICHARD HOPKINS III,))	DOCKET NO. 97-1
DAVID LAY, CHRISTOPHER)	
MACALUSO, ROBERT MCCARTHY,))	
DAVID MAGDYCZ, THOMAS)	
REVENE)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On January 8, 1997, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of Peter Skrzyniarz, Mark Hynes, David Gerard, William Harkness, Richard Hopkins III, David Lay, Christopher Macaluso, Robert McCarthy, David Magdycz, and Thomas Revene ("Grievants"). Grievants alleged that the State of Vermont Department of Public Safety ("Employer") violated Articles 20 and 21 of the collective bargaining agreement between VSEA and the State effective for the period July 1, 1994 to June 30, 1996 ("Contract") by failing to provide Grievants with standby compensation for restrictions placed on their off-duty time, or failing to remove such restrictions.

A hearing was held on May 8, 1997, in the Labor Relations Board hearing room in Montpelier before Board Members Richard Park, Acting Chairperson; Louis Toepfer and Leslie Seaver. VSEA Legal Counsel Samuel Palmisano represented Grievants. Assistant Attorney General David Herlihy represented the Employer. Grievants and the Employer filed post-hearing briefs on May 21 and 22, 1997, respectively.

FINDINGS OF FACT

1. Article 21, Regular Hours and Overtime, of the Contract provides in pertinent part as follows:

1. The REGULAR WORK SHIFTS shall be as follows:

a. A day shift commencing between 6 a.m. and 8 a.m. on a staggered or non-staggered basis as the Department may determine.

b. An evening shift commencing between 4 p.m. and 6 p.m. on a staggered or non-staggered basis as the Department may determine.

c. A night shift as may be established by the Department, commencing between 10 p.m. and midnight on a staggered or non-staggered basis as the Department may determine.

d. Nothing hereunder shall prevent the Department from establishing additional or overlapping work shifts. Staggering of the basic day and evening shift shall not be used to provide 24-hour coverage.

...

7. STANDBY AND PAGER PAY

An employee who is specifically required by the Department to carry a pager during off-duty hours and who is also required to remain within paging range shall be paid one-eighth (1/8) of his or her regular straight time hourly rate of pay, up to a maximum of \$2,500 (\$3,000 effective July 1, 1995) per employee per fiscal year, for those hours during which he or she is in such status, excluding any hours actually worked.

A bargaining unit member who works a duty week or duty weekend, as previously scheduled, shall receive an additional \$50 for each such week of immediate availability.

8. CALL-IN PAY

a. NON-COURT CALL-IN

An employee who is called in to work at any time other than continuously into his normal scheduled shift shall be considered as working overtime during all such hours worked and shall be guaranteed a minimum of four hours' pay at the overtime rate of pay in cash or, if the employee so requests and the request is granted, in compensatory time off. Such guarantee will cover any additional call-ins within the 24-hour period commencing with the first call-in.

(Joint Exhibit 1)

2. The Vermont State Police Code of Conduct provides in pertinent part:

20.0 OFF DUTY RESPONSIBILITIES

- 20.1 *Members are subject to being called to duty at all times. A member has both the authority and responsibility to take all necessary action with regard to serious matters brought to his/her attention while off duty. Whenever off duty, a member must leave notice with his/her Commanding Officer of where and how he/she may reasonably be reached, unless this requirement is waived by the Commanding Officer. A member shall immediately notify the Commissioner of any change in his/her permanent address or telephone number.*
(State's Exhibit 1)

3. Each Grievant is a member of the Vermont State Police Field Force assigned to the Brattleboro Barracks. The ranks of the Grievants range from Trooper to Sergeant.

4. Normal work days in the Brattleboro Barracks consist of two shifts. There are minor variances in schedules but generally the day shift begins around 7:00 a.m. and ends around 5:00 p.m. The evening shift begins between 4:30 and 5:00 p.m. and ends between 2:00 and 2:30 a.m.

5. Between the end of the evening shift and the beginning of the day shift, there is a four and one-half to five hour gap in coverage since there are no officers on duty between 2:00 - 2:30 a.m. and 7:00 a.m. For at least the last 23 years, the Field Force has covered the hours between the end of the evening shift and the beginning of the day shift by having off-duty officers just finishing their evening shift, or about to begin their day shift, handle calls and call-outs. The officers have not been compensated for such coverage unless they have been called out. The practice in the Brattleboro Barracks has been to have all officers just completing the

evening shift take calls and be subject to call-outs until 4:00 a.m. Day shift officers then take calls and are subject to call-outs from 4:00 a.m. until the beginning of their shift.

6. All Grievants are assigned a cruiser. They commute between their homes and the barracks in the cruiser. They sign on and off duty at their homes, and are paid for their commuting time. Grievants are expected to be in their homes, and are required to answer their telephones, during the off-duty hours described above in Finding of Fact No. 4. Employees in the Brattleboro Barracks are not given beepers, so they do not have the option of carrying a beeper instead of remaining at home during the off-duty hours they are required to respond to calls and be subject to call-outs. Any time Grievants are called out during these hours, they must respond in a timely manner in their uniforms and with their cruisers. If Grievants are called out, and return home prior to the commencement of their shift, they receive a minimum of four hours pay at the overtime rate pursuant to the call-in pay provision of Article 21, Section 8, of the Contract. If Grievants are called out and work into the beginning of their shifts, they receive overtime for the hours worked outside of their normal shifts, but are not entitled to a minimum of four hours overtime. If Grievants are not called out during these hours, they do not receive any compensation.

7. Senior Trooper Christopher Maculuso is assigned to the day shift at the Brattleboro Barracks. Maculuso's father is a disabled veteran who lives with Maculuso and his family. Maculuso's father is unable to drive a car. Due to the restrictions placed on Maculuso prior to the beginning of his shift that he is required to respond to calls and be subject to call-outs, Maculuso does not walk, run or drive

his father to pick up a newspaper during the three hours before the beginning of his shift.

8. Trooper David Magdycz works both the day and evening shifts at the Brattleboro Barracks. Due to the restrictions placed on him after an evening shift and before a day shift when he is required to respond to calls and be subject to call-outs, Magdycz refrains from staying over at this girlfriend's house. He also has not run in the morning before working the day shift because of the restrictions, and is unable to visit his family in Massachusetts during those off-duty hours. On one occasion, Magdycz requested permission to be excused from the restrictions so that he could stay over at his girlfriend's house. His request was denied because of lack of coverage.

9. Sergeants Skrzyniarz and Hynes, as supervisors of their shifts, need to screen call-outs during the hours they are required to respond to calls and be subject to call-outs. When a dispatcher contacts one of the sergeants during these hours, the sergeant needs to determine whether an immediate response is required or if someone can be dispatched at the beginning of the day shift. The sergeant decides which troopers to call and whether the situation requires the presence of a sergeant on the scene.

10. Based on the 4:00 a.m. to 7:00 a.m. restrictions, Sergeant Skrzyniarz in the past did not drive his children to school prior to the beginning of his day shift. Also, he has refrained from running or walking during those hours. During the past year, Skrzyniarz has assisted his elderly parents at their home. There have been occasions where he would have preferred to stay over at their home, and leave

directly for work the next morning. However, due to the 4:00 a.m. to 7:00 a.m. restrictions, he drove home late at night on those occasions.

11. On April 23, 1996, Lieutenant James Baker, Station Commander of the Brattleboro Barracks, wrote a memorandum to Sergeant Skrzyniarz providing in pertinent part:

It has been brought to my attention that in the past several weeks, members of the Vermont State Police at Brattleboro have been unavailable when called for after hours call-outs. It has been brought to my attention that several individuals on the day shift have not been available when called at home. This issue existed prior to my arrival in Brattleboro in December 1994. At my first office meeting in Brattleboro in December 1994, I stated to the office that it was my expectation that people would answer their telephone and be available for call-outs. It is my expectation that the night shift is available from 2:30 a.m. until 4:00 a.m. and the day shift is available from 4:00 a.m. until 7:00 a.m. or 8:00 a.m. depending on shift coverage.

My expectation is based upon the fact that the past practice of the Vermont State Police has been that individuals working the night shift are available for call-outs from 0230 hours to 0400 hours. It has been past practice that the day shift be available for call-outs from 0400 hours on . . .

In order for me to be very clear on this issue, I am advising you, as the permanent day shift supervisor, that it is my expectation that you be available for telephone calls to screen call-outs starting at 0400 hours on days that you are scheduled to work days. It is my expectation that you be available to answer your telephone to make decisions about the necessary response to incidents that occur after 0400 hours. It is also my expectation that subordinates under your supervision will be available for call-outs starting at 0400 hours, unless prior arrangements are made with you or myself.

Failure to answer telephones will result in documentation in an individual's performance logs that they were unavailable for call-outs. Progressive disciplinary action can and will be taken against individuals who consistently are not available to respond to call-outs. As stated in the office meeting of December 1994, I believe that the failure to be available for call-outs falls under the category of dependability on the performance evaluation. If you have any questions concerning this issue, please do not hesitate to contact me for further discussion . . .

(State's Exhibit 2)

12. After receiving this memorandum, Sergeant Skrzyniarz sent a memorandum to day shift troopers in the Brattleboro Barracks which provided in pertinent part:

Per Lieutenant James Baker's Memorandum to me dated April 23, 1996, (attached), the following protocol will be followed:

1) When you are scheduled to work your day shift, you will be available for call-outs, starting at 0400 hours, unless prior arrangements have been made with me. This will pertain to every day that you work.

2) Failure to answer your telephone to be available for call-outs after 0400 hours will result in documentation in your performance logs. This will subsequently lead to progressive disciplinary action against you.

3) Be advised that the hours you are to be available for call-outs will be reflected on your individual time report.

(Grievants' Exhibit 1, page 1)

13. There have been occasions where troopers have requested on particular days to be excused from the responsibility to respond to calls and be subject to call-outs during the off-duty hours after, or prior to, their shift. Some of these requests have been granted, and some have been denied for lack of coverage reasons.

14. No one in the Brattleboro Barracks has been disciplined for failure to be available during the off-duty hours after, or prior to, a shift that they are required to respond to calls and be subject to call-outs. Troopers have received supervisory feedback after failing to answer their telephones during such hours.

15. There have been occasions where State Police members have received standby or pager pay for off-duty hours they have been required to respond to calls

and be subject to call-outs. These occasions generally have involved situations where employees either were required to carry a pager, or were required to be available for coverage to substitute for employees who normally provide such coverage, but were ill, injured or otherwise unavailable. There was one occasion, contrary to normal practice, where an employee received standby compensation for a pay period during the off-duty hours after a shift that he was required to respond to calls and be subject to call-outs (Grievants' Exhibits 3 - 8).

16. On several occasions, including the most recent round of negotiations for a collective bargaining contract, the State Police Bargaining Unit negotiations team has raised the issue of compensation being provided for the off-duty hours State Police members are required to respond to calls and be subject to call-outs. The State has not agreed to provide such compensation.

OPINION

Grievants contend that the Employer violated Article 21 of the Contract by failing to provide them with standby compensation for restrictions placed on them during their off-duty hours immediately following, or immediately preceding, their shifts. Grievants are required to respond to calls and be subject to call-outs during such hours.

In determining whether the Employer violated Article 21, the Board follows the rules of contract construction developed by the Vermont Supreme Court. A contract will be interpreted by the common meaning of its words where the language is clear. In re Stacey, 138 Vt. 68, 71 (1980). If clear and unambiguous, the

provisions of a contract must be given force and effect and be taken in their plain, ordinary and popular sense. Swett v. Vermont State Colleges, 141 Vt. 275 (1982). The Board will not read terms into a contract unless they arise by necessary implication. Stacey, 138 Vt. at 71. 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, not to make or remake them for the parties, or ignore their provisions. Vermont State Colleges Faculty Federation v. Vermont State Colleges, 141 Vt. 138, 144 (1982).

In applying these standards to this case, it is clear that Grievants are not entitled to standby compensation under the provisions of Article 21. Section 7 of that article specifies only one situation in which standby and pager pay is required: when “an employee . . . is specifically required by the Department to carry a pager during off-duty hours and . . . is also required to remain within paging range”. Grievants are not entitled to compensation under this provision since they are not required to carry a pager during the off-duty hours at issue.

Grievants invite us to conclude that the “intent of the contract language is to compensate members during times when they are placed in a restricted status, regardless of whether they are actually required to carry a pager”. For us to so conclude would be to inappropriately read terms into the Contract which do not arise by necessary implication, and to improperly remake the Contract agreed upon by VSEA and the State.

In support of their contention that they are entitled to standby compensation, Grievants rely upon two previous Board decisions involving standby compensation:

Grievance of VSEA, Whitney, et al, 19 VLRB 210 (1996); and Grievance of VSEA (Re: Refusal to Pay Standby Pay), 15 VLRB 71 (1992), 15 VLRB 443 (1992), *Affirmed*, 162 Vt. 277 (1994). Grievants' reliance on these decisions is misplaced.

The issue in the Whitney case was not whether employees covered by the State Police Unit Contract were entitled to standby compensation. Instead, the issue was whether the employer violated the contract by changing the employees' work schedule from one in which worked weekends and holidays to one in which they were placed on standby status for weekends and holidays. In the latter case, the Board decided employees were entitled to standby compensation under the Non-Management Unit and Supervisory Unit contracts, which contained provisions much different from the "standby and pager pay" provisions of the State Police Unit Contract before us in this case.

Grievants also rely on other instances in which State Police members have received standby compensation to support their entitlement to it. The examples cited by Grievants do not support their claims since they generally involve much different circumstances. These occasions generally have involved situations where employees either were required to carry a pager, or were required to be available for coverage to substitute for employees who normally provide such coverage, but were ill, injured or otherwise unavailable. These circumstances differ substantially from Grievants being required to respond to call and be subject to call-outs during their off-duty hours immediately following, or immediately preceding, their shifts.

We recognize evidence was presented of one occasion in which an employee received standby compensation, for one pay period, for the off-duty hours after a shift

that he was required to respond to calls and be subject to call-outs. Certainly, on such occasion, contrary to normal practice, does not rise to the level of creating a *contractual entitlement for Grievants. This is particularly so given the language of the Contract and the Department practice over at least the last 23 years of covering the hours between the end of the evening shift and the beginning of the day shift by having off-duty officers just finishing their evening shift, or about to begin their day shift, handle calls and call-outs. Under this longstanding practice, employees have not been compensated for such coverage unless they have been called out.*

Grievants are requesting that we grant them compensation for which they have not negotiated and to which they are not entitled by the Contract. Their redress is not through the grievance procedure, but lies in negotiating different contract provisions.

Although we deny the grievance, we believe it would be beneficial if more consideration be given to providing the necessary coverage during off-duty hours without requiring all employees ending their shift, or beginning their shift, to be restricted to responding to calls and being subject to call-outs. During the hearing, management representatives expressed a willingness to make reasonable accommodations for employees requesting to be excused from such restrictions. It seems that many of the concerns expressed by employees with respect to infringements on their personal lives could be addressed with more communication and planning.

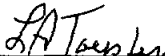
ORDER

NOW THEREFORE, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED that the Grievance of Peter Skrzyniarz , Mark Hynes, David Gerard, William Harkness, Richard Hopkins III, David Lay, Christopher Macaluso, Robert McCarthy, David Magdycz, and Thomas Revene is DISMISSED.

Dated this 26th day of June, 1997, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Richard W. Park, Acting Chairperson


Louis A. Toepfer


Leslie G. Seaver