

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 96-86
TIM WILSON	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On November 12, 1996, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of Tim Wilson ("Grievant") against the Agency of Transportation ("Employer"). Grievant alleged that the Employer violated the Personnel Rules and Regulations and Article 19 of the collective bargaining agreement between the State of Vermont and VSEA for the Non-Management Unit, effective for the period July 1, 1994 - June 30, 1996 ("Contract") by not selecting Grievant for three positions which would have been promotions for him.

On February 6, 1997, the Employer filed a motion to dismiss the grievance as untimely filed at earlier steps of the grievance procedure. On February 20, 1997, Grievant filed a memorandum in opposition to the motion.

A hearing was held on May 1, 1997, in the Labor Relations Board hearing room in Montpelier, before Board members Catherine Frank, Chairperson; Carroll Comstock and Richard Park. Assistant Attorney General David Herlihy represented the Employer. VSEA Legal Counsel Samuel Palmisano represented Grievant. The hearing was limited to evidence on the Employer's motion to dismiss the grievance on timeliness grounds. The parties filed briefs on the motion to dismiss on May 15, 1997. The decision herein is limited to the timeliness issue.

## **FINDINGS OF FACT**

1. The Contract provides in pertinent part as follows:

### **ARTICLE 15 GRIEVANCE PROCEDURE**

#### **SECTION 1. PURPOSE**

... It is expected that employees and supervisors will make a sincere effort to reconcile their differences as quickly as possible at the lowest possible organization level.

#### **SECTION 2. DEFINITION**

a. "Complaint" is an employee's or group of employees' informal expression to the immediate supervisor of dissatisfaction with aspects of employment or working conditions under a collective bargaining agreement.

b. "Grievance" is an employee's, group of employees' or the employee's collective bargaining representative's expressed dissatisfaction, presented in writing, with aspects of employment or working conditions under a collective bargaining agreement or the discriminatory application of a rule or regulation, which has not been resolved to a satisfactory result through informal discussion with immediate supervisors.

#### **SECTION 3.**

The following procedures are established for settlement of complaints and grievances.

##### **a. Step I (Immediate Supervisor Level)**

1. The employee, or his or her representative, or both, shall notify his or her immediate supervisor of a complaint within fifteen (15) workdays of the date upon which the employee could have reasonably been aware of the occurrence of the matter which gave rise to the complaint.
2. The complaint shall be discussed informally by the aggrieved employee, or his or her representative, or both, and the immediate supervisor. The supervisor shall notify the employee and the representative of his or her decision within two (2) workdays after discussion of the complaint.

b. Step II (Department Level)

1. If no satisfactory settlement is reached at Step I, the complaint shall be reduced to writing. The complaint shall be submitted for action by the aggrieved party or representative to the administrative head of the department in which the aggrieved is employed within ten (10) workdays after receiving the Step I decision, otherwise the matter shall be considered closed . . .

2. Grievant has been employed by the Employer in District 8, the northwest corner of the State, for the past ten years. Grievant has been a Transportation Worker B for the past seven years.

3. During the Fall of 1995, Grievant applied for three positions within District 8 which would have constituted promotions for him: Senior Maintenance Worker in the Enosburg garage, Senior Maintenance Worker in the Cambridge garage, and Bridge Maintenance Mechanic in the St. Albans garage.

4. Grievant was one of three applicants interviewed for the Enosburg Senior Maintenance Worker position on or about September 7, 1995. Dwight Robtoy ultimately was selected for the position. Robtoy began working in that position on September 21, 1995. Grievant never received written notice indicating who had been selected for the Enosburg position. On September 20, 1995, Grievant asked John Bushey, District 8 Transportation Administrator, who had received the position. Bushey informed Grievant that Robtoy had been chosen. This was the first notice Grievant had that he had not been selected for the position (Grievant's Exhibits 1, 2 and 16).

5. Grievant and four other applicants were interviewed for the Cambridge Senior Maintenance Worker position on or about September 26, 1995.

By written notice received in early October, 1995, Grievant learned for the first time that another applicant, James Spaulding, had been selected for the Cambridge promotion (Grievant's Exhibits 3, 4).

6. Grievant was interviewed for the Bridge Maintenance Mechanic position on October 6, 1995. Another applicant was selected for the position.

7. On October 10, 1995, Grievant called Bushey to complain about the promotional process in District 8. Grievant told Bushey that he believed the process was unfair and that he had been wrongly denied the previous six promotions for which he had applied. Bushey agreed to meet with Grievant to discuss his complaint. Grievant complained to Bushey within fifteen work days of when Grievant first learned that he had been denied the Enosburg, Cambridge and St. Johnsbury positions.

8. Mike Maskell, a VSEA Steward in District 8; Joan Wilson, a Secretary in District 8; Bushey and Grievant met to discuss Grievant's complaint on October 11 or 12. At the meeting, Grievant told Bushey that he was being discriminated against and he thought the promotional process was unfair.

9. Grievant subsequently contacted VSEA Senior Field Representative Gail Rushford for assistance with his complaint. By letter dated November 9, 1995, to Bushey, Rushford informed Bushey that she was representing Grievant and requested a "Step I meeting . . . to discuss issues pertaining to a recent promotion selection" (Grievant's Exhibit 7).

10. Grievant, Rushford, Bushey and Employer Personnel Administrator Pamela Ankuda met in late November or early December to discuss Grievant's

complaint. During the meeting, Grievant and Rushford discussed their dissatisfaction with the promotional process. Bushey maintained that good hiring decisions had been made. Grievant and Rushford requested copies of the interviewers' notes, total scores of applicants and applicant rating sheets for the three promotional decisions at issue. Ankuda indicated that she would provide hiring certificates and rating sheets; she agreed that more information was needed to review the promotional process. Bushey did not state during that meeting whether he had decided to grant or deny the grievance. At the end of the meeting, Grievant and Rushford understood that the Step I complaint process had not been completed; Ankuda considered the Step I complaint denied and the Step I process to be completed. Rushford considered the complaint as a "case in progress" pending the receipt of the materials which she and Grievant had requested.

11. At no time subsequent to the Step I meeting did Bushey notify Grievant or Rushford that the Step I complaint was denied.

12. By memorandum dated November 27, 1995, Rushford requested that Richard Boulanger, Employer Human Resources Chief, provide her with "all notes, scores and related documents pertaining to the interviews of applicants for the Senior Maintenance Worker position recently filled in the Cambridge Highway Garage" (Grievant's Exhibit 9).

13. Between the date of the Step I meeting and mid-February, 1996, Ankuda provided to Rushford some of the materials which Grievant and Rushford had requested. There were delays by the Employer in providing materials, some errors in the materials provided, and the materials were incomplete. At some point

in the latter half of February, Rushford had a conversation with Ankuda in which she requested copies of materials in Grievant's personnel file. Rushford requested an extension of time to file the Step II grievance until she received these materials. Ankuda told Rushford that she would hear the grievance. During, or prior to, this conversation, Ankuda indicated to Rushford that Grievant was not going to receive a favorable Step I response and the process needed to move forward.

14. On March 8, 1996, Rushford sent Ankuda a memorandum which provided in pertinent part:

... (P)lease send me a copy of Tim Wilson's personnel file ... Also, thanks for agreeing to grant us an extension on filing the grievance, I'll have it over to you in short order after I receive his file.

We still need copies of the interview documentation from the first two positions for which Tim applied -- those were Senior Maintenance Worker positions in Enosburg and Eden ...

(Grievant's Exhibit 13)

15. On March 22, 1996, Rushford filed a Step II grievance on behalf of Grievant concerning the promotional process in District 8. On July 26, 1996, Ankuda denied the grievance on the basis that it was untimely filed. Rushford subsequently filed a Step III grievance on behalf of Grievant. Ileen McGurran, Human Resources Specialist for the Department of Personnel, denied the grievance because it "was not filed in a timely manner" (Grievant's Exhibit 14, Employer's Exhibits 7, 8).

### OPINION

At issue is whether we should grant the Employer's motion to dismiss this grievance as untimely filed at earlier steps of the grievance procedure. The Employer contends that this grievance was untimely filed in part at the first step of the grievance procedure, and was untimely filed in its entirety at the second grievance step.

The Board will resolve an issue on the merits if at all possible unless the collective bargaining agreement requires it to be dismissed on procedural grounds. Grievance of Kimble, 7 VLRB 96, 108 (1984). Grievance of Amidon, 6 VLRB 83, 85 (1983). Article 15 of the Contract provides that complaints and grievances must be filed within specified times at earlier steps of the grievance procedure. The Board, with the approval of the Vermont Supreme Court, has refused to consider grievances under this contract language which were untimely filed at earlier steps of the grievance procedure. Grievance of Boyde, 18 VLRB 518 (1995); *Affirmed*, \_\_\_ Vt. \_\_\_ (1996). Grievance of Giffin, 10 VLRB 204 (1987). Grievance of Dyer, 4 VLRB 306 (1981).

In applying these standards to the facts of this case, we conclude that the facts do not warrant dismissal of this grievance on timeliness grounds. Grievant alleges that the Employer violated the Personnel Rules and Regulations and the Contract by not selecting Grievant for three positions which would have been promotions for him. The Employer first contends that Grievant is precluded from challenging two of the three contested promotional decisions - i.e., the Senior Maintenance Worker in the Enosburg garage and the Senior Maintenance Worker in the Cambridge garage

- because he did not timely file a complaint at Step I of the grievance procedure. We disagree. Article 15 of the Contract defines a Step I complaint as an employee's "informal expression to the immediate supervisor of dissatisfaction with aspects of employment or working conditions under a collective bargaining agreement". Step I complaints need to be filed under Article 15 within fifteen work days of when the employee reasonably could have been aware of the occurrence of the matter giving rise to the complaint. Grievant met these requirements by complaining to his supervisor that the District 8 promotional process was unfair, and that he had been wrongly denied the promotions for which he had applied, within fifteen work days of when he first learned that he had been denied the Enosburg and Cambridge positions.

The Employer next contends that the grievance was untimely filed at Step II of the grievance procedure because it was not filed within 10 work days of the Step I meeting at which Grievant received an unfavorable decision on his grievance. The Employer has not established the facts necessary to support this contention. At the Step I meeting, Grievant and his VSEA representative requested copies of the interviewers' notes, total scores of applicants and applicant rating sheets for the three promotional decisions at issue. The Employer's personnel administrator indicated at the meeting that she would provide hiring certificates and rating sheets; she agreed that more information was needed to review the promotional process. Grievant's supervisor did not state during that meeting whether he had decided to grant or deny the grievance. Under these circumstances, Grievant and his VSEA representative



reasonably understood at the conclusion of the meeting that the Step I complaint process had not been completed.

Further, at no time subsequent to the Step I meeting did Grievant's supervisor notify Grievant or his VSEA representative that the Step I complaint was denied. Grievant was not obligated to consider the Step I process complete until the latter half of February 1996 when the Employer's personnel administrator informed Grievant's VSEA representative that Grievant was not going to receive a favorable Step I response and the process needed to move forward. The Employer's personnel administrator then provided Grievant's representative with additional time to review Grievant's personnel file.

Under these circumstances, we cannot conclude that Grievant acted untimely by subsequently filing a Step II grievance on March 22, 1996. Our inclination to resolve an issue on the merits if at all possible unless the collective bargaining agreement requires it to be dismissed on procedural grounds leads to this conclusion. The circumstances here simply are too ambiguous for us to conclude that Grievant waived his right to pursue his grievance. It would be unfair to allow the Employer to benefit through dismissal of this case on timeliness grounds when the reason for delay was the Employer's own failure to timely provide information to Grievant and respond to his grievance.

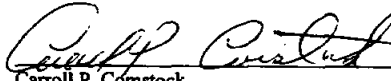
NOW THEREFORE, based on the foregoing reasons, it is hereby ORDERED  
that the Motion to Dismiss filed by the State of Vermont Agency of Transportation  
is DENIED.

Dated this 19~~th~~ day of June, 1997, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD



Catherine L. Frank, Chairperson



Carroll P. Comstock



Richard W. Park