

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	DOCKET NO. 79-76S
RICHARD FRIEL)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of the Case

On October 26, 1979, the Vermont State Employees' Association (hereinafter "VSEA") filed a petition with the Vermont Labor Relations Board (hereinafter "Board") on behalf of Grievant Richard Friel, appealing a September 27, 1979 Step III level grievance decision of the Director of Employee Relations. (Grievant's Exhibit D) In that petition, Grievant charges the State violated Article XVI (section 6), "Grievance Procedure," of the Agreement between the State of Vermont and the VSEA Non-Management Unit, in denying Grievant overtime pay for attending a Step III level grievance meeting during non-duty hours.

The State filed an answer to Grievant's allegations on November 15, 1979, admitting essentially all of the facts of the grievance as stated in the petition, but denying that Grievant was entitled to overtime compensation on those facts.

A hearing was held before Board members Kimberly B. Cheney, William G. Kemsley, Sr., and Robert H. Brown on January 31, 1980. At the hearing, Grievant represented himself, VSEA having withdrawn as Grievant's counsel by notification to the Board on November 26, 1979. Assistant Attorney General Bennett E. Greene represented the State.

Both parties briefly introduced evidence in order to make minor corrections or amendments to the initial pleadings filed with the Board. After presenting oral arguments, the parties then agreed to waive their right to submit Requests for Findings of Fact and Memoranda.

FINDINGS OF FACT

1. At all times relevant, Grievant was a permanent status employee of the State of Vermont, Department of Corrections, employed as a Correctional Treatment Services Coordinator at the Correctional Diagnostic Treatment Facility, St. Albans, Vermont.

2. As such, Grievant was a member of the Non-Management Unit of VSEA and was governed by the Agreement between the State of Vermont and VSEA for the Non-Management Unit effective July 1, 1979, through June 30, 1981 (hereinafter the "contract").

3. Grievant was scheduled to work at the St. Albans Facility, July 24, 1979, from 3 p.m. to 11 p.m.

4. Grievant also on July 24, 1979, was scheduled to attend a Step III level grievance meeting with the Director of Employee Relations in Montpelier, Vermont, at 9:30 a.m.

5. On July 19, 1979, Grievant inquired of Superintendent Bashaw, Grievant's supervisor, in writing, as to whether Grievant should change his work schedule on July 24, 1979, in order to attend the grievance meeting scheduled for that day during working hours, or whether he should work his previously scheduled shift and request overtime pay for attending the meeting during non-duty hours. (Grievant's Exhibit A)

6. Sometime between July 19, 1979, and July 24, 1979, Superintendent Bashaw replied to Grievant's request, instructing Grievant to work his July 24 shift as previously scheduled, 3 p.m. to 11 p.m. (Grievant's Exhibit A)

7. On July 24, 1979, Grievant attended the Step III level grievance meeting as previously scheduled in Montpelier, which meeting started at 9:30 a.m. and ended shortly after 11 a.m.

8. Thereafter, Grievant formally requested overtime pay (Grievant's Exhibit B) for attending the grievance meeting during his non-duty hours. Grievant's request was denied by Assistant Superintendent Scripture. (Grievant's Exhibit B)

9. On August 21, 1979, VSEA, on behalf of Grievant, filed a Step II grievance concerning the denial of overtime pay, which grievance was denied by Acting Commissioner Fitzgerald by letter dated September 4, 1979. (Grievant's Exhibit C)

10. On September 19, 1979, VSEA, on behalf of Grievant, then filed a Step III grievance concerning the denial of overtime pay, which grievance was also denied by letter dated September 27, 1979, from Director of Employee Relations, Joseph Kecskemethy. (Grievant's Exhibit D)

OPINION

Where all the facts in this grievance are admitted, the only issue before us is whether under the contract, the Grievant is entitled to overtime compensation for attending a grievance meeting during Grievant's non-duty hours. We concur with the parties in concluding that the answer to that question is a matter of contract interpretation.

Our analysis begins with Article XVI of the contract, which provides for an employee grievance procedure. The section of the article pertinent in this case, section 6, states:

"Employees submitting complaints or grievances, employees involved in complaint and grievance investigations, and employees participating in complaint and grievance meetings and proceedings may do so during working hours without loss of pay and without charge to accumulated leave, after requesting

permission from the supervisor to do so, which permission shall not be unreasonably withheld."

At the hearing, Grievant charged the State not only with the contract violation of Article XVI, but also with discriminatory application of that provision as it applied to him as an employee of an institution maintaining twenty-four hour operations. Grievant contends that as an employee of a correctional facility with a variable work schedule, unlike other state employees whose normal workday coincides with that of the Director of Employee Relations, he was denied the opportunity to schedule a grievance meeting during his working hours. While we can agree Grievant may have been treated differently than another employee might have been under this provision, we do not find the State's actions constitute either a violation of the contract or the types of discrimination violative of the State Employees Labor Relations Act. In this case, Grievant charges discriminatory treatment resulting from unequal protection of a contractual right, the right to attend grievance meetings during working hours. His claim of discrimination does not involve either a suspect classification, such as race, sex or age, or the denial of a fundamental right, such as the right of due process in disciplinary action. The traditional guideline in assessing a charge of this nature is to find apparent discriminatory treatment justifiable if the respondent acted reasonably under the circumstances. See e.g. Betts v. Weinberger, 351 F. Supp. 1122 (1975, Vt.) and In re: Barcomb, 132 Vt. 225 (1974). (Claims of discriminatory treatment under state social welfare and unemployment compensation regulations not sustained where state's classifications and determinations were reasonable under the facts.)

We find the differential treatment applied in Grievant's case was not unreasonable; and while we could not require the Department of Personnel to schedule grievance meetings 'round the clock, we presume the parties could

bargain an arrangement suitable to all members of the bargaining unit if they so desired.

The contract language before us here does allow employees to attend grievance meetings during their normal working hours, but it also contemplates instances where an employee will not be able to do so. By requiring the employee to first obtain his supervisor's permission, "which permission shall not be unreasonably withheld" (*infra* at 4), the parties clearly intended the operation of this provision to be at the discretion of the employer. Even more indicative of the parties' intent in negotiating this particular language is the use of the word "may."

"Employees submitting complaints or grievances ... may do so during working hours ... " (*infra* at 3, *emphasis added*)

We hold here, as in previous decisions requiring matters of contract interpretation, that the use of the word "may" renders the application of the provision permissive, while the word "shall" infers mandatory application of the provisions's language, without exception. See e.g. Vermont State Colleges Faculty Federation v. Vermont State Colleges, 1 VLRB 302 (1978) *contra*, Vermont State Colleges Faculty Federation v. Vermont State Colleges, 2 VLRB 195 (1978). As before, we presume the language as it is stated in the contract is the result of "hard bargaining," and not to be disturbed if its meaning is clear and unambiguous.

ORDER

Therefore, for all the foregoing reasons, the grievance of Richard Friel is hereby ORDERED DISMISSED and is DISMISSED.

Dated this 12th day of February 1980, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney
Kimberly B. Cheney, Chairman

William G. Kemsley, Jr.
William G. Kemsley, Jr.

Robert H. Brown
Robert H. Brown