VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	DOCKET NO. 80-52
JOHN DULING	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of the Case

On July 1, 1980, the Vermont State Employees' Association, Inc. ("VSEA") filed a grievance on behalf of Department of Corrections employee John Duling ("Grievant"). This grievance arises from a decision that Grievant, a member of the Non-Management Unit, was not "on call" under Article XXI of the current Agreement between the State of Vermont and the Vermont State Employees'Association for the Non-Management Unit (the "contract").

The State filed an answer on August 1, 1980.

A hearing was held on October 2, 1980, in the Board hearing room in Montpelier before Board members Kimberly B. Cheney, William G. Kemsley, Sr., and Robert H. Brown. Michael R. Zimmerman, counsel for VSEA, represented Grievant. Assistant Attorney General Bennett E. Greene represented the State. Requests for findings of fact and memoranda were filed by the parties on October 16, 1980.

FINDINGS OF FACT

1. At all times relevant herein, Grievant was a permanent status employee under the contract, employed by the State of Vermont Department of Corrections as a Correctional Counselor (pay scale 10) at the Residential Treatment Facility in Windsor, Vermont. The current contract between VSEA and the State for the Non-Management Unit has been admitted into evidence and is incorporated herein as a finding of fact.

2. At all times relevant herein, Grievant has resided in Windsor, within about five miles of the Facility. It normally takes Grievant about 20 minutes to drive from his home to the Facility.

3. Since about 1975, and at the time material to this case, Grievant's work schedule has consisted of ten days on — beginning on a Tuesday of one week and ending on a Thursday of the following week — and four days off — those days falling on Friday, Saturday, Sunday, and Monday.

4. Grievant normally is assigned the second shift at the Facility. The second shift consists of the hours of 2:00 p.m. to 10:00 p.m.

5. Grievant's immediate supervisor on the second shift is Richard C. Turner, Correctional Counselor Supervisor B. Mr. Turner, in turn, is responsible to Thomas M. Coxon, the Facility Superintendent.

6. During the week of March 24, 1980, Vermont State officials were making contingency plans concerning an expected weekend demonstration by opponents of nuclear power at the Vernon, Vermont Yankee nuclear power plant. Part of those contingency plans involved the possible arrest of demonstrators. Because of that possibility, and because of the potential number of arrestees, the Department of Corrections was involved in the planning, since employees of that Department would be required to staff make-shift holding facilities for the arrested demonstrators. One of those make-shift holding facilities was to be a National Guard Armory in Springfield, Vermont. Under the contingency plan, that Armory was to be Grievant's duty station.

7. Grievant's regular ten day work period at that time had begun on March 18, 1980, and ended on March 27, 1980. Grievant's scheduled

days off were Friday, March 28, 1980, through Monday, March 31, 1980. (See State's Exhibits 1 and 2.)

8. Prior to his scheduled days off and during the week of March 24, 1980, Grievant made plans to visit his brother in Esmond, Rhode Island, a travelling distance of approximately 250 miles from Windsor. It normally took Grievant approximately 4 1/2 hours to drive from Windsor to Esmond.

9. Grievant also during that time may have mentioned to Supervisor Turner in passing, his intent to travel to Rhode Island during his upcoming four day break. If so, Supervisor Turner did not at that time respond or react to Grievant's expressed plans in any manner which would indicate either approval or disapproval, even though he was then involved with Superintendent Coxon in planning for staff coverage of the Facility's responsibilities should protesters be arrested and detained the following weekend. It was not until Thursday, March 27, that Grievant and Supervisor Turner directly addressed Grievant's plans to travel to Rhode Island in view of the Facility's Springfield Armory contingency plan.

10. On Thursday, March 27, 1980, Supervisor Turner initiated a conversation with Grievant advising him of Grievant's responsibility to remain "reasonably available" during March 28 - 31, Grievant's scheduled days off, in the event the anticipated anti-nuclear demonstration at Vernon resulted in the arrest and detention of demonstrators at the Springfield Armory.

11. Later that day, during Grievant's shift but prior to 6:00 p.m., Grievant asked Supervisor Turner whether he (Grievant) could leave

work early in order to prepare for his trip to Rhode Island. At this time, Turner consented to Grievant's request to leave early, but told Grievant that he (Turner) would have to get back to him (Grievant) about any trip to Rhode Island in view of the Facility's contingency plan requirements should mass arrests at Vernon materialize.

12. Grievant left work at about 6:00 p.m.

13. State's Exhibit No. 3, the telephone log for the Facility for the period March 27, 1980, through April 19, 1980, evidences the fact that on March 27, 1980, Grievant made a call to Supervisor Turner at 9:10 p.m. (2110 hours) and that at 9:55 p.m. (2155 hours) Turner made a return call to Grievant in New Hampshire.

14. At 9:10 p.m. on March 27, 1980, Grievant called Supervisor Turner at the Facility to inquire further about his weekend status and its effect on his planned trip to Rhode Island. Turner informed Grievant that he (Grievant) was not "on call", that he had to remain "reasonably available", but he was unsure and would call Grievant back after he spoke to Superintendent Coxon.

15. Later, following a discussion of Grievant's planned trip to Rhode Island with Superintendent Coxon, Turner called Grievant in New Hampshire at 9:55 p.m. and informed Grievant that he could not go to Rhode Island because Rhode Island was "not a reasonably available point", but that he was free to leave his home (or his girlfriend's) as long as he left word with the Facility where he could be reached at all times.

16. Grievant, in fact, did not go to his brother's home in Rhode Island, but spent the entire weekend at his girlfriend's home in Charlestown, New Hampshire. The sole exception to Grievant's being "homebound"

during that weekend was one trip Grievant and his girlfriend took to Howard Johnson's Motel in Springfield, Vermont, a distance of about three miles from his girlfriend's home. That Howard Johnson's was the location where several Department of Corrections employees from other parts of the State were housed in an "on call" status for possible duty at the Vernon demonstration. Grievant and his girlfriend went there specifically to briefly socialize with those employees.

17. As events unfolded, no demonstrators were arrested at the Vernon demonstration site, and none of the Department of Corrections employees, (including Grievant), were pressed into active service as a result of that demonstration.

18. After he returned to work on Tuesday, April 1, 1980, Grievant submitted a request for overtime pay for the period he was required to be "reasonably available". Grievant's request was based on a claim that he was in fact "on call" during that period. Grievant's request for overtime pay was denied.

19. Grievant has timely submitted Grievances at Step II, Step III and Step IV herein.

20. The provisions of the contract pertinent to this grievance are as follows:

> Section 5d, Article XVIII Overtime
>
> An employee who is "on call" shall be considered as having worked for purposes of computing overtime except as might otherwise be required under paragraph b of Article XXI, On Call.

Article XXI, On Call:

a. "On Call" is defined as a requirement that an employee remain on or so close to either the employer's premises or employee's premises that he cannot use the time effectively for his own purposes.

b. An employee who is merely required to leave word at his home or with the appointing authority where he may be reached is not on call; however, appointing authorities in cooperation with the Department of Personnel are urged to work out alternative compensation methods, such as compensatory time off, for employees who are required to leave word where they may be reached and must be within any specific distance or time of their employer's premises.

OPINION

Here we are required to determine whether Grievant was "on call" as that term is used and defined in the contract, and thus entitled to overtime compensation for the duration of that status.

"On call" is defined in Article XXI(a) of the contract as:

> ... a requirement that an employee remain on or so close to either the employer's premises or employee's premises that he cannot use the time ["on call"] effectively for his own purposes.

The contract further provides:

> [a]n employee who is merely required to leave word at his home or with the appointing authority where he may be reached is not on call; ...

This Board is familiar with this issue. In the Grievance of VSEA on behalf of Hugh Brady et al., 3 VLRB 22, 30 (1980), we held that

> ...the major determinant as to whether an employee is "on call" or "available" is the degree to which the employee's time may be used effectively for his own purposes.

This analysis is consistent, as the parties suggest, with leading Federal case law on this same issue which interprets similar language in the Fair Labor Standards Act (29 USC §207, 29 CFR §785.17). Under that law, "standby" time, to be specially compensable, must be

> ...controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer. Armour and Co. v. Wantock, 323 US 126, 132 (1944).
>
> ...Whether time is spent predominantly for the employer's benefit or for the employee's is a question dependent upon all the circumstances of the case. Id at 134.

Those circumstances may show an employee has been "engaged to wait" or is "waiting to be engaged", Skidmore v. Swift and Co., 323 US 134, 137 (1944), the former situation conferring "on call" status while the latter merely requires an employee to be "available" for active duty. Citing the benefit tests of the Armour and Skidmore cases, a US District Court in Pilkenton v. Appalachian Regional Hospitals, 336 F. Supp. 334, 338 (W.D. Va., 1971), has more recently reiterated those determinants stating:

> The test is not whether an employee's leisure is curtailed at all, but rather whether it is so restricted that it is not spent primarily for the employee's benefit.

Under the standard set forth above, and under the contract here, we find Grievant was not "on call" but was "available". As in the Brady case, during the period in question he was required to leave word with the employer where he may be reached and was required to be within a specific distance or be able to respond within a certain time period to a call to emergency duty. Thus the grievants in Brady and Grievant

Duling met the requisite elements of "availability" status, but were still free to use their off duty time primarily for their own purposes. The fact that Grievant was able to leave his home for the weekend and spend that time with a friend in nearby New Hampshire clearly supports this conclusion.

However, the similarities between the grievants in Brady and Grievant Duling end abrubtly with our finding in both cases that these employees were not entitled to "on call" overtime compensation. In Brady, supra at 24, in evidence is the fact that the grievants did receive some alternative compensation pursuant to Article XXI(b) (See finding 20, infra) for compliance with their employer's "availability policy". They received one day of compensatory time off for every one week period they were required to be available during non-duty hours. Here, however, Grievant received no compensation of any kind for his four day period of availability.

We find this different result under the contract and within the same employee system a form of impermissable discrimination violative of important merit system principles. Under 3 V.S.A. §312,

> the term "merit system" means the system developed to maintain an efficient career service in state government under public rules, which, among other provisions, includes ... an equitable and adequate compensation plan ...
> (emphasis added)

The contract does provide that each appointing authority is "urged to work out" alternative methods of compensation, but that raises another question. Can the parties through collective bargaining negotiate a contractual provision contrary to the express requirements of a merit personnel system? We think not, where 3 V.S.A. §904 excludes from

collective bargaining any matter "prescribed or controlled by statute". The maintenance of an equitable compensation plan prescribed by statute cannot be bargained away with a basic compensation benefit under the contract which results in unequal treatment for factually similar employment responsibilities.

Accordingly, we find Grievant's claim for "on call" overtime pay is without merit, but feel he is entitled to some alternative compensation, if not as a remedy to the instant grievance, then as a remedy available under 3 V.S.A. §965 which gives this Board the authority to prevent and remedy unfair labor practices. For, it is possible on these facts, to find evidence of an employer unfair labor practice prohibited by 3 V.S.A. §961(1), where Grievant's right to equitable compensation guaranteed by 3 V.S.A. §312 may have been interfered with.

Thus, we withhold issuing a final order, pending the admission of additional evidence by the parties as to what plan or plans of alternative compensation for being "available" exist for all employees covered under the contract. If the parties decline to present evidence on this fact, we will presume the policy of the SRS in Brady to be adequate and will apply that method similarly by order of the Board to Grievant John Duling.

ORDER

Now therefore, based on these facts and for the foregoing reasons it is hereby ORDERED that:

1. VSEA, on behalf of Grievant, and the State, submit notice within ten days of the date of this order, indicating that they wish to produce further evidence on the issue of equitable compensation methods for employees required to be available

for work under Article XXI of the contract, at which time the Board will schedule a hearing date for that purpose; or alternatively, if the parties do not submit notice to the Board within the period prescribed above,

2. the Board shall make a final order which includes a remedy for Grievant premised on the method of compensation applied in the Grievance of Vermont State Employees' Association, Inc. on behalf of Hugh Brady et al, 3 VLRB 22 (1980).

Dated this 30th day of October, 1980, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney, Chairman

William G. Kemsley, Sr.

Robert H. Brown

Appealed to SC
Appeal dismissed
pursuant to Stip.
7/17/81

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)
) DOCKET NO. 80-52
JOHN DULING)

ORDER

By virtue of the authority vested in the Board to hear and make final determination on grievances under 3 V.S.A. §926, and the fact that neither party has requested any further evidentiary hearing on this matter in accordance with our order of October 30, 1980, it is hereby ORDERED that:

1. the grievance of JOHN DULING is ALLOWED and the State is ordered to grant John Duling two days paid leave as compensation for the period he was required to be reasonably available, March 28, 1980 through March 31, 1980; and

2. the Motion for Leave to Take Interlocutory Appeal, filed by Attorney Zimmerman on November 5, 1980, on behalf of the Grievant is DENIED: and

3. The State's Motion to Modify, filed on November 14, 1980, is also DENIED.

Dated this 24th day of November, 1980, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney, Chairman

William G. Kemsley, Sr.

Robert H. Brown

cc: Michael R. Zimmerman, Esq.
Bennett E. Greene, A.A.G.