

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:

VERMONT STATE EMPLOYEES' ASSOCIATION,
INC., on behalf of the MEAT INSPECTORS
OF THE STATE OF VERMONT DEPARTMENT OF
AGRICULTURE

)
)
) DOCKET NO. 77-17S-1, on
) Remand from the Supreme
) Court, Docket No. 289-79,
) for final order

ADDITIONAL FINDINGS OF FACT, OPINION AND ORDER

Statement of the Case

This case comes to us on remand from an appeal to the Supreme Court of our decision in the Grievance of VSEA, Meat Inspectors, Department of Agriculture, 1 VLRB 321 (1978).* That grievance arose from the State's action changing the Meat Inspectors official duty station (for the purpose of determining travelling time and thus overtime compensation) from their homes to certain wholesale slaughtering plants, substantially diminishing overtime compensation.

In our initial decision, supra at 327, the Board ordered the parties to "accurately assess proper retroactive payments" for the payment of overtime to the Meat Inspectors for travelling time between their home based duty stations. Subsequent to that time, the Board did not issue a final order specifying the amount of retroactive payments due the Grievants.

*Although members Cheney and Brown were allowed by stipulation of the parties to sign the opinion of September 15, 1978, an identical decision was later issued by member Kemsley and former Chairman Burgess on July 30, 1979, to avoid procedural defects on appeal.

The State's appeal of the Board's decision was dismissed on February 13, 1980, because the decision did not include a final, appealable order as provided in V.R.A.P. 4.

Thereafter, the parties requested a hearing for the purpose of determining an appropriate backpay award and order pursuant to the Board's opinion in its initial decision, 1 VLRB 321 (1978).

A hearing was held on May 15, 1980, before Board members Kimberly B. Cheney, Chairman, William G. Kemsley, Sr., and Robert H. Brown. Assistant Attorney General Louis Peck represented the State. Counsel for the VSEA, Michael Zimmerman, represented the Grievants.

Requests for findings of fact and memoranda were filed by Attorneys Peck and Zimmerman on May 28 and 29, 1980, respectively. As a result of that hearing and counsels' briefs, we find the following, additional facts.

FINDINGS OF FACT

1. The State of Vermont, Department of Agriculture, meat inspection program has been in existence since 1973. The program receives 50% of its funding through a federal grant. The remaining 50% of the program costs are funded through the State of Vermont general fund. Specific funds for operating and personal services which include budget items such as salaries, overtime, fringe benefits, and travel reimbursements, are appropriated by the legislature.

2. State's Exhibit #2 accurately represents the amount of funds appropriated for the meat inspection program from both general and federal funds for the fiscal years 1972 - 1980.

3. The parties stipulated on the record that the total amount due Grievants under the Board's September 15, 1978, order is \$59,521.05, in

accordance with the computations shown in State's Exhibit #1, and if payable, is payable to the persons listed on State's Exhibit #1.

4. State's Exhibit #1 does not constitute an admission by the Department that it is responsible or liable to any and all of the Grievants for either the total amount shown or any of the component amounts, or any other conclusion against its interests which may be drawn therefrom.

5. The total amount claimed by Grievants as set forth in State's Exhibit #1 covers the period commencing January 1, 1973, to November 1, 1976.

6. The Department was not aware of Grievants' claim until this grievance was instituted at Step 2, in August of 1976, approximately three years (plus) after the commencement of the claim period.

7. Funds appropriated by the legislature for specific purposes which are unexpended, including appropriations to Department for the meat inspection program, revert to the State general fund at the end of each fiscal year.

8. For the fiscal years 1973 through 1979, the Department has reverted to the general fund a total amount of \$14,999.04, broken down as follows:

FY 1973	.25
FY 1974	2113.79
FY 1975	4571.00
FY 1976	1.00
FY 1977	0.00
FY 1978	2432.00
FY 1979	5881.00

It is projected there will be no unexpended funds from the meat inspection program appropriation at the end of fiscal year 1980 (June 30, 1980).

9. When funds are reverted, no distinction between initial funding sources (federal or state appropriations) is made.

10. There is no evidence regarding whether or not the State could have reorganized the program and utilized personnel in some manner each year so as to pay Grievants the overtime at issue.

11. The Department never sought additional funding with which to pay Grievants' claim at any time, because: 1. during the period 1973-1976, the Department was unaware of the claim; and 2. after it became aware of the claim, it was (and is) the Department's position that it had and has no obligation to pay overtime for travel time under the circumstances presented by the claim.

12. In the event appropriated funds are exhausted before the end of a fiscal year, State agencies may seek additional funding from the Emergency Board through a supplemental appropriation request. Alternatively, a program may be discontinued.

13. At no time in the operation of the program did the Department of Agriculture seek reserve funds from the State Department of Administration Emergency Board for any purpose.

OPINION

The presently constituted Board is required in this case to fashion an order to implement an order entered by its predecessors. That order was made on September 15, 1978 (and July 30, 1979), and contemplated backpay awards to certain employees from the period January 1, 1973, to November 1, 1976, in total amount of \$59,521.05.

At issue in this proceeding is the application of 3 V.S.A. §921(e) which provides:

"The board may not issue orders for the implementation of which the legislature has not appropriated adequate funds."

Our research has disclosed no legislative history relating to this 1971 amendment to the powers of this Board. It is clear from the evidence presented on this issue, however, that at no time has the legislature, by

separate appropriation, appropriated the specific sum of \$59,521.05, which would be required to implement the 1978 order of the Board had it been reduced to a sum certain. Nor has it appropriated any sums for the specific purpose of implementing backpay awards.

Equally clear, however, is the fact that the legislature over the years has appropriated in excess of \$59,521.05 for personal services to the Department of Agriculture annually.

We note that the current contract between the parties defines "Lack of Work" as a situation when "There are insufficient funds to permit the continuation of current staffing ...," and in that situation the employer may reduce the workforce in order to stay within appropriated fund limits. Article V. Consistent with these rights we assume the employer could terminate employees, if necessary, to make available adequate funds with which to pay the meat inspectors sums which the earlier Board order found were legally due them. While that result might not meet favor with either the VSEA or the individual grievants, it is a circumstance under which "adequate funds" would be available.

This case is distinguishable from the usual case where backpay is an issue both because of the long delay involved and because of the substantial sums at stake. There is no evidence before us on the point, but we assume a department which must comply with a backpay award for a single individual finds the necessary funds within its current budget brought about by savings in other areas without detriment to its program. A backpay award itself is not impermissible. C.f. Grievance of Yasko, Vt. Sup. Ct. Slip Op., Docket #102-79, June, 1980, and Grievance of Nzomo, Vt. Sup. Ct. Slip Op., Docket #51-79, February, 1980. Indeed, it is unlikely that the legislature intended this Board not have monetary remedial powers. The State

Labor Relations Act has a purpose "to prescribe the legitimate rights of both state employees and the state of Vermont ..." and prevent "the interference by either with the legitimate rights of the other." 3 V.S.A. §901. And we are given the right to "make final determination on the grievances of all employees ..." 3 V.S.A. §926. How this could be accomplished without money is not apparent. Accordingly, we perceive the distinguishing feature of this case to be, not that a backpay award is beyond our authority to enter as a general matter, but if we accept the State's position, that it may be beyond our authority whenever the State asserts and proves that no specific appropriation has been made to cover an award. In view of management's right to layoff in "lack of work" situations the critical issue appears to be whether a backpay award may be a nullity whenever an ongoing program might suffer if substantial amounts of backpay are awarded in an individual case.

We see the issue here as one of degree rather than kind. We must, then, decide whether the undoubted fact that a \$60,000 backpay award would alter the Agriculture Department's program for the year in which it is paid precludes our entering a remedial order. (We make this assumption based on the sum involved rather than specific evidence of the effect of a \$60,000 reduction in the department's budget.) We do not see how 3 V.S.A. §921(e) can be given that effect. To do so would require this Board to scrutinize each departmental program before making an award. It is a legislative and management function to define the mission of an agency. It is not something for us to be concerned with. We are solely concerned with whether employees are paid sums to which they are legally entitled. Management must determine how to comply with a monetary order.

In short, we think the limitation expressed in 3 V.S.A. §921(e) would prevent us, and ultimately the Supreme Court, from issuing a backpay award in excess of a departmental appropriation, but that it does not prevent us from issuing an order for which sufficient funds are actually appropriated, even if payment would require management to alter its program.

ORDER

For the foregoing reasons, it is hereby ORDERED: 1) The Vermont State Department of Agriculture shall pay to the individuals listed in Exhibit #1, the sums set opposite their names.

Dated this 8th day of July, 1980, at Montpelier, Vermont.

*Transcript misplaced -
to be remanded case to
Board for New hearing.*

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney

Kimberly B. Cheney, Chairman

William G. Kemsley, Sr.

William G. Kemsley, Sr.

Robert H. Brown

Robert H. Brown



State # 1
5/15/80

STATE OF VERMONT
DEPARTMENT OF AGRICULTURE
116 STATE STREET, STATE OFFICE BUILDING
MONTPELIER, VERMONT 05602

MEMORANDUM

TO: Louis Peck, Assistant Attorney General
FROM: Elsie W. LaFlamme, Business Manager
DATE: April 24, 1980
SUBJECT: Grievance #77-17 S-1, Meat Inspectors - Travel Time

The following is the list of meat inspectors that you requested indicating the amounts for travel time, computed as best we can, for the period January 1, 1973 to November 1, 1976. One inspector, Paul Heller, was also employed during this period, but was not included in the list you requested.

Walter Sylvester	\$ 647.62
Carl Cushing	\$ 872.19
Frank Leavitt	\$ 4,618.61
Theron Peck	\$ 3,731.84
David Haynes	\$ 7,812.16
Gene Hoyt	\$ 3,102.19
Frank Troyse	\$ 231.64
Albert Kittredge	\$ 8,937.44
Mansur Kerwin	\$ 5,923.38
Chester Nosek	\$ 8,111.81
Carley Newcity	\$ 6,776.91
Bruce Farnham	\$ 3,430.91
Clifton Barber	\$ 3,727.24
TOTAL	\$57,923.94
Heller	1,597.11
	\$59,521.05