

VERMONT LABOR RELATIONS BOARD

Grievance of:)	
VERMONT STATE EMPLOYEES)	
ASSOCIATION, on behalf of HUGH)	DOCKET NO. 79-47S
BRADY, ET AL)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of the Case

On June 27, 1979, the Vermont State Employees Association (hereinafter "VSEA") filed a petition with the Vermont Labor Relations Board (hereinafter "Board") appealing a June 1, 1979, Step III grievance decision of the Director of Employee Relations. (Grievant's Exhibit #5) This petition was filed on behalf a Hugh Brady, a social worker employed with the State of Vermont Department of Social and Rehabilitation Services (hereinafter "SRS"), and all other similarly situated employees (hereinafter "Grievants"). Grievants charge the State's denial of overtime pay for time in which employees are designated "available" for certain SRS services outside the normal workday constitutes violations of Article XXI, ON CALL, and Article XVIII, OVERTIME, of the Agreement between the State of Vermont and VSEA for Non-Management employees.

On July 17, 1979, the State filed an answer to the allegations contained in the VSEA petition denying that Grievants were "on call" within the meaning of the term as contemplated by the Non-Management contract.

A hearing on this matter was held before Board members Kimberly B. Cheney, William G. Kemsley, Sr., and Robert H. Brown on November 8, 1979.

Michael R. Zimmerman, counsel for VSEA, represented the Grievants. Bennett E. Greene, Assistant Attorney General, represented the State.

Memoranda and requested findings of fact were filed by VSEA and the State on November 26 and November 27, 1979, respectively.

FINDINGS OF FACT

1. Grievants are, at all times material herein, permanent status, full-time employees of the State of Vermont, as social workers in the Department of Social and Rehabilitation Services.
2. As such, Grievants are governed by the terms and conditions of employment set forth in the Agreement between the State of Vermont and VSEA, Non-Management Unit, effective July 1, 1979, through June 30, 1981.
3. SRS, as an agency of the State of Vermont, assumes certain responsibilities, (for example, under 33 V.S.A. §639 and 642, and 13 V.S.A. §1355) which require protective services in relation to child abuse, child neglect, unmanageable children and delinquents on an on-going, "round-the-clock" basis.
4. Early in 1979, in response to off-duty coverage problems posed by those emergency child care service requirements, SRS developed a Department policy for providing those services. The result of that undertaking was a document entitled "Draft Policy" (Grievants' Exhibit #10, which, while dated February 27, 1979, was not implemented until April 1979.) The actual drafter of that policy was Lee Marasco, whose title, at all times relevant, was Personnel and Training Officer.
5. The "Draft Policy" requires that employees, either voluntarily or involuntary, be "available", on a rotating basis, for a week at a time, to provide certain emergency services during non-working hours.

6. In setting forth the conditions expected of employees while "available", the "Draft Policy" does not place any express geographic limits on the employees' movements during periods of "availability". It does provide, however, that an "available" social worker must respond "in a manner and in a time-frame considered appropriate for services rendered during duty hours."

7. The "Draft Policy" provides that social workers who were assigned to or volunteered for a one week period of "availability", will be compensated as follows: (1) For each full week of "availability", the "available" employee will receive one compensatory day off, to be taken on the Friday following the week of "availability", unless the employee requests that the compensatory day off be on a day other than Friday; and (2) for any time actually worked by an "available" employee, the employee will be paid at overtime and call-in rates under the contract between the Vermont State Employees' Association and the State of Vermont for the Non-Management Unit. Conversion of compensatory time to cash or to other forms of leave is not allowed under the "Draft Policy" compensation provisions.

8. SRS is divided into twelve geographic areas in Vermont, each area having a District Office headed by a District Director.

9. Prior to April, 1979, each District Office handled non-duty-hour coverage in its own way. In general, however, District Offices did not have a requirement that specific employees respond to SRS related telephone calls during non-duty hours. The most common solution to the non-duty-hours coverage problem was a commercial answering service in the District which would be given a random list of all social workers in the District Office, and would be instructed to start calling all of the workers, one at a time, until one of them could be reached at home who would agree to assume

responsibility to handle the incoming telephone call. No District Office had, prior to April 1979, a system of involuntary assignment to handle incoming telephone calls.

10. The "Draft Policy" concerning "availability" was implemented in all twelve SPS District Offices in April of 1979. Almost immediately after its implementation, questions regarding how "availability" differed from the contractual term "on call" were directed to Mr. Marasco from at least two District Offices, the Rutland Office and the Burlington Office (Grievants' Exhibit #12).

11. In a memorandum dated May 9, 1979, (Grievants' Exhibit #13) Mr. Marasco responded to both inquiries, distinguishing the terms on the basis of expected service response times. He explained,

"an employee who is on call' is expected to respond in the same way and in the same time frame as (s)he does during normal working hours",

while on the other hand, the concept of "availability" requires that an employee only be reachable for consultation within a reasonable, but non-designated period of time. "On call" status, he explained, requires an immediate response to work requirements.

12. In addition to written questions being directed to Mr. Marasco regarding the precise implications of the "Draft Policy" after its implementation, employees of the various District Offices were able to direct questions to Mr. Marasco on that issue during visits he made to various District Offices. In the Rutland and Burlington District Office visits, questions from employees to Mr. Marasco concerned the issue of the time within which they were expected to respond to telephone calls during "availability" duty. In particular, their questions went to what geographic limitations

the "Draft Policy" placed on their movements during "availability" by virtue of the expected response time to a call. While Mr. Marasco, in response to these kinds of questions, did not give definitive answers in every case, he did tell employees in both District Offices that, under the "Draft Policy", an employee could not, during his assigned "availability" status, go fishing in the middle of a lake and still be in compliance with the "Draft Policy".

13. While the method by which the "Draft Policy" has been implemented in each District Office varies, in general, the following procedures are characteristic of each District Office insofar as the mechanics of the policy's implementation are concerned:

(A) Some sort of answering service initially receives an in-coming telephone call for assistance during non-working hours. The degree of screening (i.e. weeding out non-emergency calls from true "emergency" calls) done by the answering services varies from District to District, and also varies from time to time with individual Districts;

(B) The answering service has a current "availability" list, and, from that list, determines the appropriate "available" employee (or employees) to call at the telephone number provided (or, at least in the Burlington District Office, to use the "beeper" when appropriate);

(C) The list of "available" employees is prepared in advance of the periods of "availability" by the District Director. Employees volunteering for "availability" are assigned for the period selected by them. All other one week periods of "availability" are randomly assigned to other employees. Any changes in the assigned schedule of "availability" must be arranged by the employees affected, and reported to the District Director.

14. Three SRS employees named as co-grievants in this matter gave testimony regarding the affects of "availability" duty on their ability to use off-duty time for their purposes.

15. Ms. Sue LaGasse of the Burlington District Office testified that although "available" social workers are provided with "beepers" (portable electronic devices that receive radio signals for the answering service, indicating to the carrier of the beeper that there is an incoming telephone call at the answering service) which have a normal receiving radius of 35 miles from the answering service, she felt it necessary to stay at home whenever she was assigned the duty.

16. Mr. Hugh Brady of the Rutland District Office also testified to perceived restrictions of his off-duty activities while assigned "availability" duty. Of particular concern to Mr. Brady was SRS expectations of response time to calls while "available" and perceived geographic limits placed on the "available" employee's movements, especially where the Rutland District Office did not use "beepers".

17. Mr. Brady testified that during the two periods he was assigned "availability" duty, he felt he could not sleep away from a room with a telephone nearby, travel out of State (to Connecticut, California and Montreal, he gave for example) or fish in the middle of Lake Bomoseen, near his home. However, he did leave his home for short periods of time in order to grocery shop and attend church.

18. Mrs. Delikat finds that being assigned "availability" does affect her use of her own time. During periods of "availability" she arranges her private appointments around periods of "availability," rescheduling plans so that she can remain at home during "available" periods. She cited one specific example of such rescheduling. On one occasion, while preparing

to go to church, she received a telephone call. Because of the potential for more incoming calls about the same matter, Mrs. Delikat decided that she should stay at home in order to answer, immediately, any more calls on the same matter. As it developed, however, she did not receive any more telephone calls.

19. Following his first day of "availability", Mr. Brady submitted a request for overtime pay for the period 4:30 p.m., April 2, 1979 to 7:45 a.m., April 3, 1979 (Grievants' Exhibit #3). That request was denied, and Mr. Brady filed Step II and Step III grievances (Grievants' Exhibit #4 and 6, respectively) concerning the denial. Both the Step II and Step III grievances were denied (Exhibits #5 and 9, respectively).

20. Ms. LaGasse and Mrs. Delikat have also submitted overtime requests for being "available", and were denied overtime pay.

21. Other similarly situated SRS employees were named as co-grievants in the Step IV level of this grievance on June 27, 1979.

OPINION

This grievance raises only one major issue of fact: are the Grievants "on call" within the meaning of the collective bargaining contract, and therefore, entitled to time and one-half cash overtime pay whenever they are assigned "availability" duty?

The starting point of our analysis is Article XXI of the contract, which provides:

"ON CALL"

- a. 'On call' is defined as a requirement that an employee remain on or so close to either the employer's 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 work where they may be reached and must be within any specific distance or time of their employer's premises.

"Availability" is not defined in the contract, but instead is a status created by the Department's "Draft Policy" (Grievants' Exhibit #1), and in inter-office memoranda (Grievants' Exhibit #13). "Availability" under these policy directives appears to be an attempt to create an employee status under Article XXI(b).

Two statements included in part 2 of the "Draft Policy" briefly address managerial expectations of employees assigned "availability" duty:

"An employee may be designated by a supervisor, with the commissioner's approval, to be 'available' to take emergency calls and/or to provide service responses during non-duty hours.

'Available' employees will deliver child abuse or other services during off-duty hours in a manner and in a time-frame considered appropriate for services rendered during duty hours."

Regarding compensation, that document states in pertinent part:

"(a) Employees shall be eligible for one day of compensatory time off with pay for each full week of 'availability'. The compensatory day off shall be taken on Friday the week after the duty is served, unless requested otherwise by the employee and by the supervisor.

(b) Compensatory time off earned shall not be convertible to cash or other forms of leave (See Article XXX, Section 6 of Non-Management Unit Contract¹)

¹References to the contract are to the "old" agreement which expired June 30, 1979. Comparable cites to the agreement now in effect are as follows:

1. Article XXX of the "old" contract became Article XXXII, "Off Payroll and Administrative Leaves of Absences";
2. Article XIV of the "old" contract became Article XVIII, "Overtime"; and
3. Article XVI of the "old" contract became Article XXI, "Call-In Pay".

(c) Any hours actually worked by an 'available' employee, (i.e., time spent by that employee in the actual performance of assigned, job-related duties) will be compensated for as required under Articles XIV (Overtime) and XVI (Call-in) of the Non-Management Unit Contract."

In response to employee requests for further explanation of the policy's meaning and implementation, insofar as it differed from being "on call", Grievants' Exhibit #13 states:

"An employee who is 'on call' is expected to respond in the same way and in the same time frame as (s)he does during normal working hours to work related matters.

The concept of 'availability' differs from 'on call' in that the employee must only be reachable, or 'available' to be consulted in a reasonable period of time... During the period in which an employee is 'available', (s)he is free to use the time [except when responding to calls] for non-work related purposes of his/her own."

It is apparent 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. However, it is also apparent from the attempted definitions of "on call" and "availability" in the contract and "Draft Policy", that these terms defy precise verbal formulation. What is needed, instead, in determining an employee's status with respect to these terms, is a factual analysis regarding the extent to which an employee may use his off-duty time effectively for his own purposes. Each party takes a rather absolutist view of this issue. Specifically, the State maintains there are no substantial limitations imposed on the employee's use of off-duty time while he is "available", and thus this status does not meet the primary requirement of being "on call". VSEA, on the other hand, contends that the employer's response time expectations of "available" employees act to prohibit the employee's any effective use of off-duty time for his own purposes.

We view the status of being "on call" or "available" as falling somewhere on the continuum between being "at work" during normal duty hours and "at rest", free to engage in non-work related, personal activities during off-duty hours. On the facts found here, it is clear that being "available" does impinge upon an employee's use of off-duty hours for his own purposes to some extent. But, on the whole, the evidence convinces us that "available" employees are free to engage in non-work related matters during a sufficient portion of their off-duty time to avoid "on call" status. Nothing on the record has persuaded us to find the policy of "availability" requires an immediate or near instantaneous service response. Rather, the personal liberty of off-duty time was restricted only insofar as an "available" employee had access to a telephone.

Can an "available" employee fish in Lake Bomoseen? Evidently in Chittenden County (s)he could fish Lake Champlain because the "beeper" would alert her to go to a telephone. In Rutland County where no "beeper" is available a different signal might be required. But in either case the nature of the duties required of an "available" employee allows a reasonable time to respond to a call. Generally, the evidence shows "emergencies" are the result of long term family disintegrations taking years to evolve into crisis so that intervention by telephone or even personal contact can be done responsibly within two hours after the event. While there may be rare instances where an employee may be required to give immediate medical consent for emergency surgery on state wards, these occasions must be infrequent. We are not inclined to award a dramatic increase in economic benefits based on worst case analysis rather than on normal expectations. This is especially true where the evidence shows that if the "available" employee isn't able

to give timely consent, someone else with authority could easily be found. The evidence simply does not convince us the employer intended that "available" employees constantly sit by the telephone in expectation that emergency surgery would be required. We believe these employees have a significant degree of freedom to go shopping, or to church, or engage in outdoor sports or the like, so long as they can fulfill their normal duties within a reasonable time, perhaps by calling in to the answering service if they have been away from a telephone for a while.

This degree of freedom significantly differs from the responsibilities of being "on call", where an employee, because of his proximity to his normal duty station or home, can, and is expected, to respond immediately to a need for service normally delivered immediately in regular duty hours.

When an "available" employee does provide a service in the same manner that service would be rendered during normal duty hours, he is compensated at "call-in pay" overtime rates for a guaranteed three hours, minimum (pursuant to the compensation provisions of the "Draft Policy" and the contract discussed infra). This cash compensation is in addition to the compensatory day off given for each full week of "availability" duty (which, we note, could be used to fish Lake Bomoseen). While we do not mean to pass judgment on the adequacy of the compensation for employees under the "availability" system, we do note that the contract does not establish such rates but merely "urges" appointing authorities "to work out alternative compensation methods". The "Draft Policy", however vague its language regarding SRS response-time expectations and employee distance requirements, does clearly set forth the method of compensation for the inconvenience of "availability". We think the Article XXI(b) status, here defined as "availability" was contracted for, and

that the employer has not breached its obligations.

ORDER

Therefore, for all the foregoing reasons, it is hereby ORDERED that the grievance of Hugh Brady, et al be DISMISSED, and is DISMISSED this 10th day of January, 1980, at Montpelier, Vermont.

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

*Suppt affirmed
decision 4/24/81*