VERMONT LABOR RELATIONS BOARD

| | | |
|---|---|---|
| GRIEVANCE OF: | ) | |
| | ) | DOCKET NO. 83-19 |
| DAVID WILSON | ) | |

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On March 25, 1983, the Vermont State Employees' Assocation ("VSEA") filed a grievance on behalf of David Wilson ("Grievant"), alleging that the denial of Grievant's request for delayed reporting time premium pay for the period January 28, 1983 to February 3, 1983, by the State of Vermont, Department of Public Safety, constituted a violation of Article 8, Section 4(k) of the collective bargaining agreement between the State of Vermont and VSEA for the State Police Unit, effective for the period July 1, 1982 to June 30, 1984 ("Agreement").

On December 28, 1983, VSEA filed a Motion for Leave to amend the grievance to allege that a past practice of the Department prevented a change in the monthly work schedule, once posted, unless the change was made with the concurrence of the affected employees. Upon consideration of the Motion, memoranda and material filed by the parties, the Board, on January 24, 1984, denied the Motion since the past practice issue was not raised at the earlier steps of the grievance procedure and thus, cannot be raised at the Board level. On January 24, 1984, VSEA requested the Board reconsider its ruling. At the March 15, 1984, hearing in this matter, the Board decided it would not change its ruling.

A hearing was held before the full Board on March 15, 1984. Michael Zimmerman, VSEA Staff Attorney, represented Grievant. Assistant Attorney

General Michael Seibert represented the State. At the conclusion of the hearing, the record was left open to take the deposition of Department Commissioner Paul Philbrook. The Board ruled that if there was no objection to a question asked Commissioner Philbrook during the deposition, the objection would be placed on the record, the Commissioner would answer the question and the Board would subsequently rule on the objection.

On March 29, 1984, a deposition was taken of Commissioner Philbrook. Attorney Seibert objected on relevancy grounds to Attorney Zimmerman questioning Commissioner Philbrook in regard to the Commissioner's January 16, 1984, Step II Answer to a grievance filed by Trooper First Class Thomas Noble. Any reference to the grievance filed by Thomas Noble is irrelevant to the disposition of this matter, and thus we sustain the objection.

The State filed a Memorandum of Law on April 20, 1984. Grievant filed Requested Findings of Fact and Conclusions of Law on April 20, 1984, and a Memorandum of Law on April 23, 1984. Grievant filed a Reply Memorandum on April 25, 1984. The State filed no reply brief.

## FINDINGS OF FACT

1. Grievant is a Vermont State Police Officer. At all times relevant herein, he held the rank of Senior Trooper, Pay Scale 13, and his work station was the Bethel station, located in Bethel, Vermont. At all times relevant, Grievant was a member of the State Police bargaining unit and was covered by the Agreement.

2. The Agreement provides, in pertinent part, as follows:

ARTICLE 8
REGULAR HOURS AND OVERTIME

1. The regular work shifts shall be as follows:

a. A day shift commencing between 6 a.m. and 8 a.m. on a staggered or non-staggered basis as the Department may determine;

b. An evening shift commencing between 4 p.m. and 6 p.m. on a staggered or non-staggered basis as the Department may determine;

c. A night shift as may be established by the Department, commencing between 10 p.m. and midnight on a staggered or non-staggered basis as the Department may determine.

...

4. Overtime

... k. Delayed Reporting Time: An employee who is ordered to report for a full tour of duty later than his regular shift starting time and who works a full tour of duty (9.5 hours) or part thereof which terminates later than his normal shift quitting time shall be paid an extra half-time premium for such time worked outside his regularly scheduled workday. Work in excess of 9.5 hours on such day shall be considered as overtime under the provisions of this Article and shall be compensated according to Section 4.a. or 4.b., above, and other provisions of this Article.

(Grievant's Exhibit 2)

3. From June 1982 to May 1983, Sergeant James Patten was assigned to the Bethel station as Station Commander. During that period, the chain of command, beginning with the Commissioner of the Department down to the the most junior Trooper, was as follows: Commissioner Paul Philbrook, Major James Ryan, Captain John Heffernan (Commander, Field Forces), Lieutenant Mooney (Troop Commander), Sergeant Patten (Station Commander), Patrol Commanders (who all held the rank of Corporal), and Troopers. That same chain of command exists at every State Police barracks throughout the State.

4. Work schedules at the Bethel station are regularly prepared each month, and cover a month's time. The procedure for the preparation of monthly work schedules is as follows: 1) the Patrol Commanders prepare a rough draft of a monthly work schedule; 2) the Station Commander approves the draft; 3) the approved draft is typed; and 4) the typed (and approved) monthly schedule is posted on a bulletin board, and is distributed to all station personnel a few days prior to the beginning of the month it covers.

5. For some years, stations physically located near Interstate highways have established midnight shifts starting at some time between 10:00 p.m. and 12:00 midnight, in addition to the normal day and night shifts, during the winter months.

6. Prior to November 25, 1982, Sergeant Patten decided that the midnight shift for the upcoming winter months would, for Bethel personnel, be two-man patrols each night. He did not seek approval from higher authority to establish two-man patrols.

7. By memorandum dated November 25, 1982, Corporal John Palmer, Patrol Commander, announced to all Bethel personnel that the midnight shift would begin on December 10, 1982 and would end on approximately March 10, 1983. The starting time for the shift was set as 10:00 p.m. (Grievant's Exhibit 5).

8. The midnight shift for the month of December 1982 was staffed by two officers each night.

9. Officers at the Bethel station are assigned to work the following "weekly" schedules in rotation: they each work a "6-2" schedule for four consecutive weeks; that is six days on duty followed by two days

off duty. In Week 5, they are on duty for seven days, followed by being off duty for three days. In Week 6, they work five days, followed by three off days. Then, the rotation starts over again and the officers go back to the "6-2" schedule for four consecutive weeks. An officer is assigned to only one regular shift per consecutive days worked; that is either the day shift, the night shift, or the evening shift. The officer is not assigned to work more than one regular shift per weekly period.

10. The schedule for the month of January 1983 was prepared by Corporal Palmer, Patrol Commander, and approved by Sergeant Patten. During the last week of December 1982, the January 1983 schedule was posted in three locations at the station and was distributed to all personnel. Two officers were assigned to the midnight shift during the entire month of January. Grievant was scheduled to work the midnight shift as follows:

> Friday, January 28, 1983 (beginning at 10:00 p.m. on Thursday, January 27, 1983);
> Saturday, January 29, 1983 (beginning at 10:00 p.m. on Friday, January 28, 1983);
> Sunday, January 30, 1983 (beginning at 10:00 p.m. on Saturday, January 29, 1983);
> Monday, January 31, 1983 (beginning at 10:00 p.m. on Sunday, January 30, 1983).
>
> (Grievant's Exhibit 6)

11. On or before January 5, 1983, Captain Heffernan ordered Lieutenant Mooney to eliminate the two-man midnight shift at the Bethel station. Lieutenant Mooney ordered Sergeant Patten to eliminate the two-man midnight shift, and Sergeant Patten directed Corporal Palmer to do so. Accordingly, Corporal Palmer changed the already-posted January work

schedule so as to remove one officer from each midnight shift. He posted the changed January schedule on either January 5 or January 6, 1983 (Grievant's Exhibit 7).

12. It is unclear precisely when Grievant saw the changed January schedule. However, he worked the evening shift (commencing at 5:00 p.m.) on January 6, 7, 8 and 9, 1983. He knew he had the responsibility to know what the work schedule was, and we conclude he knew or should have known of the changed work schedule at some point between January 6, 1983 and January 9, 1983.

13. By virtue of the changes to the January 1983 schedule, Grievant's schedule was modified as follows:

<u>Friday, January 28, 1983</u>

> Grievant was scheduled for the day shift, with a reporting time of 8:00 a.m. on January 28, 1983, rather than 10:00 p.m. on Thursday, January 27, 1983.

<u>Saturday, January 29, 1983</u>

> Grievant was scheduled for the day shift, with a reporting time of 8:00 a.m. on January 29, 1983, rather than at 10:00 p.m. on Friday, January 28, 1983.

<u>Sunday, January 30, 1983</u>

> Grievant was scheduled for the day shift, with a reporting time of 8:00 a.m. on January 30, 1983, rather than at 10:00 p.m. Saturday, January 29, 1983.

<u>Monday, January 31, 1983</u>

> Grievant was scheduled for the day shift, with a reporting time of 8:00 a.m. on January 31, 1983, rather than at 10:00 p.m. on Sunday, January 30, 1983.

(Grievant's Exhibit 7)

14. Grievant, in accordance with the changed January 1983 schedule, worked the day shift (with a beginning time of 8:00 a.m.) on January 28, 29, 30 and 31, 1983.

15. On his time sheet covering the period January 16, 1983 through January 29, 1983, Grievant claimed delayed reporting time premium pay for January 28 and 29. Corporal LeClair, Grievant's Patrol Commander (and immediate supervisor) approved that time sheet, but it was disapproved at higher levels, and Grievant was not paid delayed reporting time premium pay for those dates (Grievant's Exhibit 8).

16. On his time sheet covering the period January 30, 1983 through February 12, 1983, Grievant claimed delayed reporting time premium pay for January 30 and 31. That time sheet was not approved by Grievant's immediate supervisor, not approved at higher levels, and Grievant was not paid delayed reporting time premium pay for those dates either (Grievant's Exhibit 9).

17. Grievant timely filed a grievance from the denial of his claim for delayed reporting time premium pay. Sergeant Patten denied the grievance at Step I and Commissioner Philbrook denied the grievance at Step II (Grievant's Exhibits 10 through 13).

18. Commissioner Philbrook interprets the delayed reporting time provision of the Agreement to provide that a change to a posted monthly work schedule does not, without looking at the facts of the particular case, in and of itself make one eligible for delayed reporting time premium pay. Commissioner Philbrook interprets that provision to provide that an officer is entitled to delayed reporting time pay if the officer's posted schedule is changed so that s/he is scheduled to work

a delayed shift for one day or more of a week, but less than a full week, but is not entitled to such pay if his/her schedule is changed so that s/he is scheduled to work the delayed shift the entire week.

OPINION

At issue is whether the Department violated Article 8, Section 4(k) of the Agreement by failure to pay Grievant delayed reporting time premium pay for the last four days of January, 1983.

Grievant contends he is entitled to delayed reporting time premium pay by virtue of his work schedule having been changed for the last four days of January, 1983, which change resulted in later shift starting and quitting times than his previous schedule. Grievant's work schedule was posted for the month of January, 1983, in late December, 1982, and he was scheduled to work the midnight shift the last four days of the month. That schedule was changed with respect to the last four days of January on January 5 or 6, 1983; with Grievant being required to report later than the midnight shift for those days, namely the day shift. Grievant contends the originally-posted schedule contained, for each day of the month, "his regular shift starting time", "his normal shift quitting time" and "his regularly-scheduled workday" as those terms are used in Article 8, Section 4(k), of the Agreement, and thus it follows that any involuntary change to that schedule, being a change to his regular shift, brings into play the delayed reporting time provision of the Agreement. It is Grievant's position that "his regular shift(s)" for the month of January became fixed once the schedule for that month was posted.

The State contends that the Board's decision in Grievance of Schilling, 5 VLRB 74 (1982), stands for the proposition that the Department must pay delayed reporting time premium if it interrupts the uniformity of a workweek by requiring employees to work more than one shift during the week. Therefore, the State maintains, so long as a Trooper works the same shift for his entire workweek, Schilling would suggest a delayed reporting time premium is not contractually required. Since Grievant, under the changed schedule, worked a full week on the same shift, it is the State's position that Schilling does not entitle him to receive delayed reporting time premium pay for that work.

The task before us is one of contract interpretation. A contract will be interpreted by the common meaning of its words where the language is clear. In re Stacey, 138 Vt. 68, 71 (1980). We will not read terms into a contract unless they arise by necessary implication. Id, at 71. In construing a contract, the contract provisions must be viewed in their entirety and read together. Id, at 72. It is our duty to interpret the provisions of a disputed contract, not remake it, or ignore it. In re Grievance of VSEA on Behalf of Certain Phase-Down Employees, 139 Vt. 63, 65 (1980).

We are required to determine what "regular shift" means as used in Article 8, Section 4(k). We note that the terms "regular shift", "normal shift" and "regularly-scheduled workday" contained in that section are used interchangeably, and thus it is evident those terms are synonomous.

Little evidence was introduced on the meaning of "regular shift", but we think it means at least what it did in Grievance of Schilling, supra.

In interpreting virtually identical pertinent contract language in Schilling,[1] we determined that the evident purpose of the contract language on regular shifts, taken together with the delayed reporting time premium provision, is to stabilize the working conditions of troopers by making their daily work schedule uniform for a weekly period. If that uniformity is disturbed, the Trooper is entitled to receive extra compensation. Thus, under Schilling, "regular shift" means the consecutive days during a weekly period one is assigned to either the day shift, the night shift or the evening shift.

Here, the change in Grievant's work schedule did not disrupt the uniformity of his work schedule for the last week in January. For each day during the week he claims premium pay, he worked the same shift, which shift falls within the contractual definition of a "regular work shift" as a "day shift". That distinguishes this case from Schilling, supra, where we found the employee was entitled to delayed reporting time premium pay because he was required to work a shift on one day which started and ended four hours later than other shifts he worked that week and that shift did not fall within the contractual definition of a "regular work shift".

By asking us to rule that "his regular shift" for the last four days of January became fixed within the meaning of Article 8, Section 4(k), once the schedule for that month was posted, Grievant requests

---

[1] Schilling was decided under the 1981-82 Agreement, the contract preceding the pertinent Agreement here. The delayed reporting time provision in both agreements are identical. Article 8, Section 1, of the Agreement in effect here differs from the similar provision in the 1981-82 Agreement in that it adds a night shift as a regular work shift and condenses the time period during which the day shift and evening shift may commence.

that we "read terms into the (Agreement)" which do not "arise by necessary implication" and "remake" the Agreement. We decline to accept the notion that a monthly schedule is frozen once posted. The Agreement does not say how much in advance the Department is required to post schedules or schedule changes. While there is no evidence on the point, the term "regular shift" may mean there is a customary notice period for shift changes; that there may be situations where changing an employee from one regular shift to another regular shift may pose inadequate notice problems, thus bringing into play the delayed reporting time premium pay provisions. However, we need not reach that issue here. There is no inadequate notice problem present in this case. Grievant was notified of the schedule change approximately three weeks before the change was effective. Certainly, any disruption of orderly private pursuits the language of the Agreement appears designed to prevent, Schilling, supra, at 81, could have been avoided by Grievant with the advance notice he received here. Thus, we conclude the Department did not violate Article 8, Section 4(k) of the Agreement.

Grievant contends that even if the Board determines his interpretation of the Agreement is incorrect, the application of the Board's ruling in Grievance of Gray, 6 VLRB 370, 409 (1983), to the facts of this case results in his entitlement to delayed reporting time premium pay. Grievant maintains that the Department's disapproval of Sergeant Patten's having assigned two men, rather than one, to the midnight patrol, like the Department's disapproval of the action of the employee's supervisor in Gray, has resulted in Grievant being "penalized because he relied on his

supervisor's action". Gray, supra, at 412. Likewise, Grievant argues, disapproval of Grievant's Patrol Commander's authorization of delayed reporting time pay for January 28 and 29 compounded the penalty imposed on Grievant. We do not believe our ruling in Gray entitles Grievant to his requested relief. Gray rests on principles of estoppel and reliance, factors not present here.

## ORDER

Now, therefore, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED:

The Grievance of David Wilson is DISMISSED.

Dated this 25th day of May, 1984, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney, Chairman

William G. Kemsley, Sr.

James S. Gilson