VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 84-11
THOMAS NOBLE	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On February 17, 1984, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of Trooper First Class Thomas Noble ("Grievant"). The grievance alleged the State of Vermont, Department of Public Safety ("State") violated Article 8, Section 4(k) of the Agreement between the State and VSEA, for the State Police Unit, effective for the period July 1, 1982 to June 30, 1984 ("Contract"), by denying Grievant's request for delayed reporting time pay for the period December 1, 1983, through December 4, 1983. The grievance further alleged the State violated a past practice by involuntarily changing Grievant's work schedule after the posting of the December schedule.

A hearing was held before Board Members James S. Gilson and William G. Kemsley, Sr., on May 24, 1984. Board Chairman Kimberly B. Cheney was absent. VSEA Staff Attorney Michael R. Zimmerman represented Grievant. Assistant Attorney General Michael Seibert represented the State. At the hearing, the parties submitted a stipulation as to various facts and testimony was given by Grievant, Sergeant Edward Farmer and Corporal James Patten. At the conclusion of the hearing, the record was left open to take depositions of other employees.

The State filed a Motion for Summary Judgment on June 6, 1984. The Board denied the Motion on June 20, 1984.

Grievant filed Requested Findings of Fact and a Memorandum of Law on June 20, 1984. The State filed a Memorandum of Law on June 21, 1984. Neither party filed reply briefs.

On June 26, 1984, the parties agreed that the transcript of telephone conversations on June 6, 1984, wherein the parties' counsel jointly spoke with Sergeant David Reed, Lieutenant Jollota, Sergeant Ernest Strong and Sergeant Edwards of the Department of Public Safety, may be admitted into evidence and that the Board may consider it as testimony. On June 27, 1984, the parties stipulated that the deposition of Paul Philbrook, Commissioner of the Department of Public Safety, taken on March 29, 1984, in connection with the Grievance of David Wilson, Board Docket No. 83-19, may be admitted into evidence and the Board may consider it as testimony. The Board has reviewed this transcript and deposition and has considered them in resolving this matter.

FINDINGS OF FACT

1. Grievant has been employed by the Department of Public Safety since October 1977. He is a permanent-status employee covered by the Contract. He was promoted to the rank of Senior Trooper (Pay Scale 13), Vermont State Police, in October, 1980, and he has held that rank since then.

2. Since January 1, 1981, Grievant's work station has been the Bethel station.

3. Among uniformed members of the Vermont State Police, the chain of command at the various stations, from the lowest-ranking member to the Commissioner is as follows:

Troopers
Corporals (who are Patrol Commanders)
Sergeants (Who are Station Commanders)
Lieutenants (who are Troop Commanders)
Commander, Field Forces Division (Captain Heffernan)
Major Ryan
Commissioner

4. At the Bethel Station, Grievant has served under three Station Commanders: Sergeant Edward Farmer (from May 1983 to the present), Sergeant James Patten (from June 1982 to May 1983) and Sergeant Nickerson (preceding Sergeant Patten).

5. Under Article 8, Section 1, of the Contract, there are three "regular work shifts": a day shift (which begins between the hours of 6:00 a.m. and 8:00 a.m. and lasts 9.5 hours), an evening shift (which begins between the hours of 4:00 p.m. and 6:00 p.m. and lasts 9.5 hours), and a midnight shift (which begins between the hours of 10:00 p.m. and midnight and lasts 9.5 hours).

6. The day and evening shifts are in effect year-round. The midnight shift occurs only during the winter months.

7. There is a pattern to the work schedule of uniformed officers. For example, at the Bethel Station, an officer will normally work the following regular patterns during a six-week calendar period: six days on, two days off, for three consecutive weeks; then have seven days on, three days off; followed by five days on, three days off. There is also a normal cycle concerning shifts worked. These patterns make it possible for officers to predict what their workweek and shift will be in the future.

8. Monthly work schedules (showing days worked, days off, and shift assignments for each officer) are posted at each station. While the mechanics of posting vary from station to station, there are certain common elements involved in the posting of monthly schedules, as follows:

a. Schedules are posted in one particular location in each station (although the location varies from station to station);
b. Schedules are posted, generally, at the same time each month (although the time of the month varies from station to station); and
c. The Station Commander approves the schedule before posting.

9. It is the understanding of various station commanders that once a schedule is posted, it is not changed unless the change is voluntarily consented to by the concerned officer or overtime compensation is paid for mandatory changes.

10. Monthly schedules either confirm the "normal" cycle concerning workdays and shifts, or serve to give notice of the breaking of that cycle. Normally, if the cycle is to be disturbed, the affected officer is told of the change well in advance of the posting of the monthly schedule.

11. At all times relevant herein (specifically during the tenure of Sergeants Nickerson, Patten and Farmer), monthly work schedules at the Bethel station have been posted on the bulletin board in the troopers' room. Monthly schedules are generally posted during the last few days of the month. Occasionally, however, the monthly schedule is not posted until the 3rd or 4th day of the month it covers. When that occurs, affected officers work the days and shifts of their normal pattern for the first days of the month prior to the schedule being posted.

12. Under the regimes of Sergeants Nickerson and Patten, the mechanics of posting were as follows: A rough draft of the schedule was prepared by a patrol commander, then given to the Station Commander for his approval. Once the rough draft schedule was approved by the Station Commander, he gave it back to the Patrol Commander who had prepared it, who, in turn, gave it to a dispatcher for typing. When the approved schedule had been typed, it was not given to the Station Commander for his approval, since he had already approved it. The original of the typed schedule was posted on the bulletin board in the troopers' room and copies were given to the Station Commander, the Troop Commander, and to each of the Patrol Commanders. Neither Nickerson nor Patten initialled or dated the original of the approved schedule. Under their respective regimes, a schedule was considered to have been officially posted once it was typed and put on the bulletin board.

13. In early October of 1983, Lieutenant Mooney, Troop Commander for D Troop (which includes the Bethel Station), sent a telex to all Station Commanders in D Troop, instructing them to commence the midnight shift on December 1, 1983. Sergeant Farmer received a copy of that telex.

14. November 29, 1983 was the first of a six-day workweek for Grievant following his days off. The November schedule had him working the evening shift on November 29 and 30. Under the normal cycle, Grievant would have worked the same shift for the remainder of the workweek (i.e., from December 1 through 4). Prior to November 29, 1983, Grievant expected to work the evening shift December 1 through 4 based on the normal rotation.

15. The December 1983 schedule was typed during the night-time hours of November 28-29, 1983, and was placed on the bulletin board in the troopers' room. It is unclear who placed the schedule on the bulletin board. That schedule had Grievant working the following days and shifts for the period December 1 through 4, 1983:

> Thursday, December 1, 1983: evening shift, commencing at 5:00 p.m.;
> Friday, December 2, 1983: evening shift, commencing at 5:00 p.m.
> Saturday, December 3, 1983: evening shift, commencing at 5:00 p.m.
> Sunday, December 4, 1983: evening shift, commencing at 5:00 p.m.

The evening shift ends at 2:30 a.m.

(Grievant's Exhibit 3)

16. Sergeant Farmer did not approve the typed original of the December schedule before it was placed on the bulletin board.

17. At the time, Sergeant Farmer did not consider monthly schedules to be officially posted until he had seen and approved the typed original before it went up on the bulletin board. Prior to the events which gave rise to this matter, he did not inform his subordinates of his view (and the change it represented from the practice in effect under Nickerson and Patten).

18. It was Sergeant Farmer's practice to meet with Lieutenant Mooney (Troop Commander) on Tuesday mornings. In accordance with that practice, Sergeant Farmer met with Lieutenant Mooney at 7:00 a.m. on Tuesday, November 29, 1983, at the Bethel Station. During that meeting, Mooney, examining a copy of the typed December Schedule which was on Farmer's desk, noticed that the midnight shift was scheduled to begin on December 2, 1983, rather than December 1, as he had

required in his October telex to Station Commanders. Mooney reminded Farmer of the telex, and asked Farmer if the schedule had been posted, and whether there would be any problem changing it. Farmer told Mooney that the schedule had not been posted.

19. Later that morning, after Corporal Rydjeski arrived at the Bethel Station, Sergeant Farmer and he discussed whom to assign to the midnight shift for the first few days of December. They decided that Grievant would be the best choice. Farmer and Rydjeski then walked to the troopers' room, where Farmer, with Rydjeski and Trooper David Wilson watching, made ink and white-out changes to the posted schedule on the bulletin board. As a result, Grievant's schedule for the first four days of December was changed as follows:

> Thursday, December 1, 1983: midnight shift, commencing at 10:30 p.m. (as opposed to an originally-scheduled reporting time of 5:00 p.m.);
> Friday, December 2, 1983: midnight shift, commencing at 10:30 p.m. (as opposed to an originally-scheduled reporting time of 5:00 p.m.);
> Saturday, December 3, 1983: midnight shift, commencing at 10:30 p.m. (as opposed to an originally-scheduled reporting time of 5:00 p.m.);
> Sunday, December 4, 1983: midnight shift, commencing at 10:30 p.m. (as opposed to an originally-scheduled reporting time of 5:00 p.m.)
>
> (Grievant's Exhibit 3)

20. Also, because Mooney wanted the midnight shift to begin on December 1, Grievant's originally-scheduled (on the November schedule) shift for November 30, 1983, was changed from the evening shift (commencing at 5:00 p.m.) to the midnight shift (commencing at 10:30 p.m. and ending at 8:00 a.m. on December 1).

21. Grievant did not see the posted December schedule in its unaltered form.

22. On November 29, Grievant "signed on" at 5:00 p.m. , and reported to the Bethel Station at about 5:15 p.m. Someone advised Grievant that he'd "better look at the schedule". Grievant looked at the December schedule (as altered), then went into Farmer's office to discuss the change. At that time Farmer told Grievant that he was required to report for work the following day (November 30) at 10:30 p.m., rather than 5:00 p.m.

23. As a result of the changes in his schedule, Grievant worked the midnight shift on November 30, December 1, 2, 3 and 4. On each day, he commenced the shift at 10:30 p.m., and finished at about 8:00 a.m. the following day. The beginning and ending times of the midnight shift were both five and one-half hours later than the beginning and ending times of the evening shift.

24. Subsequently, Grievant submitted time reports in which he requested five and one-half hours per day of delayed reporting time pay for November 30, December 1, 2, 3 and 4. His total claim for delayed reporting time pay for those days was $113.30 (Grievant's Exhibit 4, Grievant's Exhibit 5).

25. Article 8, Section 4(k) of the Contract provides in pertinent part:

> 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 work day.

26. Sergeant Farmer approved Grievant's request for delayed reporting time pay for November 30, and denied his claim for delayed

reporting time pay for December 1 though 4. Farmer approved Grievant's request for delayed reporting time pay for November 30 because the November schedule had been posted, and there was clearly a change to it for November 30 (Grievant's Exhibit 4).

27. Grievant received delayed reporting time pay for November 30 ($22.66), and did not receive delayed reporting time pay for December 1 through 4.

28. On December 16, 1983, Grievant submitted a Step I grievance to Sergeant Farmer regarding the denial of his request for delayed reporting time pay for December 1 through 4. Farmer denied the grievance.

29. On December 30, 1983, VSEA, on behalf of Grievant, filed a Step III grievance with the Commissioner of the Department of Public Safety, Paul Philbrook. On January 19, 1984, Grievant received Commissioner Philbrook's response, which was dated January 16, 1984. The Commissioner denied the grievance on the following basis:

> Work schedules for the Vermont State Police are set on a monthly basis, and regular workweeks for a particular month are not established until the work schedule for that month is posted towards the end of the prior month. There is no language in the current State Police Unit Contract which establishes how far in advance a State Police Officer must be informed of what his work schedule is to be for a future period of time. Delayed reporting time becomes effective only when an officer's posted schedule is changed.
>
> You were granted delayed reporting time for 30 November because for you that was a schedule change on a posted schedule. The December schedule had not been posted prior to 29 November. Sergeant Farmer posted the December schedule the morning of the 29th. On that schedule you were assigned, *not reassigned, to work the midnight shift for 1 through 4* December; therefore, you were not eligible for delayed reporting time for those four shifts.

30. Commissioner Philbrook interprets the delayed reporting time provision of the Contract to provide that there is no issue of delayed reporting time pay until there is a change in an officer's posted schedule. Once there is a change in that posted schedule, there may or may not be a question of whether delayed reporting time comes into play in the Commissioner's view. He 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 failure of the Department of Public Safety ("Department") to pay Grievant delayed reporting time premium pay for the period December 1, 1983, through December 4, 1983, constituted a violation of Article 8, Section 4(k) of the Contract. In the grievance filed with the Board, Grievant also alleged that changing his work schedule after the posting of the December schedule constituted a violation of past practice. He has since modified that position to contend that while changes after posting do occur, if the change is involuntary, then it is the uniform understanding in the Department that some form of overtime compensation is required by the Contract.

Grievant contends the Department has a practice of posting monthly work schedules, and that once a schedule is posted, it establishes for each officer "his regular shift" for each day of the month. If a

mandatory change is made to that posted schedule, Grievant argues the officer is entitled to some form of overtime compensation. Grievant contends the December 1983 schedule was posted prior to Sergeant Farmer changing Grievant's shift for December 1 through 4 from the evening shift to the midnight shift, and thus he is entitled to delayed reporting time pay pursuant to Article 8, Section 4(k) of the Contract since he was required to report for duty later than "his regular shift" starting time.

The State's position is that the December work schedule was not posted prior to the time Grievant was placed on the midnight shift for December 1 through 4 and thus Grievant's regular shift for those days had not been established prior to that time. Since delayed reporting time pay is only triggered if an employee's regular shift is changed, the State argues Grievant is not eligible for such premium. Even if the Board finds the schedule was posted before changes were made to Grievant's schedule, the State contends Grievant is not entitled to delayed reporting time premium pay because he knew nothing of the posted schedule before the changes were made, and thus did not rely on the schedule as first established.

We must determine whether Grievant, by being ordered to work the midnight shift December 1 through 4, 1983, was required to work a shift later than "his regular shift". If he was, he is entitled to delayed reporting time premium pay pursuant to Article 8, Section 4(k) of the Contract.

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. Grievance of Schilling, 5 VLRB 74 (1982). Grievance of Wilson,

6 VLRB 215, 224 (1984). 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. Id. If that uniformity is disturbed, the Trooper is entitled to receive extra compensation. Id.

Here, under the rotating schedule which troopers work, Grievant's "weekly period" began November 29, 1983, the first of six consecutive days Grievant was required to work after his days off. It is clear Grievant's "regular shift" for the first two days of the weekly period was the evening shift since that is the shift he was assigned to work under the November schedule.

The parties disagree on what his regular shift was for the next four days of the weekly period, the first four days of December. In our view, Grievant's regular shift for those days remained the evening shift. We so conclude even though Grievant's work schedule had not been posted for the first four days of December at the beginning of the weekly period since he had a reasonable expectation at that time he would work the evening shift the entire week. Once a Trooper begins a weekly period working a particular scheduled shift under such circumstances, that is his/her regular shift for the week. For us to rule otherwise would be inconsistent with the evident purpose of the Contract to stabilize the working conditions of Troopers by making their daily work schedule uniform for a weekly period. Schilling, supra. Wilson, supra. Sergeant Farmer disrupted the uniformity of Grievant's work schedule by requiring him to work the evening shift the first two days of the week,

then scheduling him for the midnight shift the last four days of the week. Grievant is thus entitled to delayed reporting time premium pay.

We recognize the rationale for our decision is different than the arguments advanced by Grievant that the work schedule for December 1 through 4 had been posted prior to Sergeant Farmer changing Grievant's shifts for those days from the evening shift to the midnight shift, and that the change in the posted schedule entitled Grievant to delayed reporting time premium pay. The intent of the Contract language and our central concern is to inhibit the disruption of orderly private pursuits. Schilling, supra. The technical issue of when the December schedule was actually "posted" does not get to the heart of the matter under the facts of this case. Whether the December schedule was actually first posted prior to Sergeant Farmer meeting with Lieutenant Mooney or when Sergeant Farmer made changes to the schedule after the meeting with the Lieutenant had no effect on Grievant's personal life since he was not aware of the first schedule and took no action in reliance on it.

What is central to this case is that Grievant entered the week fully expecting to work the evening shift the entire week. Even though the work schedule for the last four days of the week had yet to be posted, this was a reasonable expectation based on the normal work rotation. In essence, Grievant's "regular shift" was de facto established for the week to be the evening shift. The change in Grievant's work schedule thus came with little advance notice and was bound to impact on his personal life. This is a situation where changing an employee from one regular shift to another regular shift during a weekly period poses

inadequate notice problems, thus bringing into play the delayed reporting time premium pay provision. Wilson, supra, at 225.

We reject the State's argument that delayed reporting time pay does not come into play until a posted schedule is changed. For us to adopt such an approach would be unfair to troopers who do not control when a monthly schedule is posted and contrary to the Contract's intent to minimize the disruption to a trooper's private life. Taken to its logical conclusion, the State's argument would mean the State could avoid the paying of delayed reporting time pay for a significant portion of the month by simply not posting a schedule for a month until it is well under way. Such a possibility is not far-fetched since the evidence indicates the monthly schedule at the Bethel Station is occasionally not posted until the 3rd or 4th day of the month it covers.

We do not believe we have gone beyond our authority by basing our decision on different reasons than those advanced by Grievant. First, the grievance alleges a violation of Article 8, Section 4(k) of the Contract and we have determined there was such a violation. We have thus not gone beyond the provisions of the Contract article alleged to have been violated in reaching our decision. Second, proceedings before the Board are de novo, and we are entitled to address those issues we believe are necessary to decide in order to finally resolve grievances. Grievance of Clinton Gray, 6 VLRB 409, 411 (1983).

ORDER

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

1) The grievance of Thomas Noble is ALLOWED: and

2) Grievant shall be paid $90.64, such amount representing the Delayed Reporting Time premium due him pursuant to Article 8, Section 4(k) of the Contract for the 22 hours he worked December 1 through 4, 1983, after the quitting time of his regular shift.

Dated this 9th day August, 1984, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

William G. Kemsley, Sr.

James S. Gilson