

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	DOCKET NO. 85-31
)	
LARRY MARCOTTE AND THE VERMONT)	
STATE COLLEGES STAFF FEDERATION,)	
VFT, AFT Local 4023, AFL-CIO)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On July 3, 1985, Peter Konkle, Staff Representative of the Vermont Federation of Teachers, AFT, AFL-CIO, filed a grievance on behalf of Larry Marcotte and the Vermont State Colleges Staff Federation, VFT, AFT Local 4023, AFL-CIO ("Grievants"). Grievants alleged the Vermont State Colleges ("Colleges") violated the collective bargaining agreement between the Colleges and Federation, effective July 6, 1983, to June 30, 1985 ("Contract"), by failing to notify the Federation and give them an opportunity to bargain the initial downgrading of a Security Worker II position to a Security Worker I position at Lyndon State College, by failing to bargain the job content and by assigning Larry Marcotte Security Worker II duties, while paying him Security Worker I salary.

A hearing was held before the full Board on May 23, 1986. Grievants were represented by Konkle. Attorney Nicholas DiGiovanni, Jr., represented the Colleges.

Grievants and the Colleges filed briefs on June 6 and 9, 1986, respectively. The Federation filed a reply brief on June 20, 1986. The Colleges filed no reply brief.

FINDINGS OF FACT

1. The Contract provides in pertinent part as follows:

Article 3 Management Rights

... 2. Management rights ... shall include, but not be limited to, the right ... to change job content and to classify and reclassify, after first giving the Federation notice and an opportunity to bargain...

Article 9 Grievance Procedure

... 2. Any employee or group of employees shall have the right to present written complaints to a College and to have such complaints considered in good faith with or without the intervention of the Federation. Such complaints must be registered within thirty (30) calendar days following the time at which the complainant(s) could have reasonably been aware of the existence of the situation created by the College which is the basis for the complaint. Adjustments shall not be inconsistent with the terms of this Agreement. All such complaints shall be considered and a decision formulated and the complainant and Federation informed thereof within ten (10) days of presentment.

3. If a complaint has not been resolved to a satisfactory result through informal discussion with the designated administrative official then the grievant may file a grievance.

4. The following steps will be followed for the processing of grievances:

STEP ONE

a) Within ten (10) calendar days of the College's answer to the complaint, the grievance must be presented in writing and receipted by the President of the College or his/her designee. The grievance

shall state the nature of the grievance including relevant facts, the provision(s) of the Agreement alleged to have been violated, where relevant, and the adjustment sought...

... 7. Failure of the grievant or grievants to comply with the time limitations of the complaint procedure or of Steps One or Two shall preclude any subsequent filing of the grievance by the Federation or grievant except in the case of a continuing grievance... The time limitations set forth in this Article may be extended by mutual agreement.

Article 26 Classification System

... 2. The position reclassification panel shall consist of three persons from within the Vermont State Colleges selected by the Chancellor and three employees selected by the President of the Staff Federation. Panel members shall normally serve from the date of their appointments to the expiration of this Agreement. However, the Chancellor and the President of the Staff Federation may fill vacancies or replace their representatives to promote effective operations of the Panel upon written notification to the other party.

... 4. Recommendations for the reclassification of a position shall be based on the following:

- (a) demonstrated changes in duties, responsibilities, and/or qualifications which result in a change in position point value as determined by the AADM evaluation system sufficient to justify a pay range change, and/or
- (b) evidence that a position at a VSC college encompasses the same duties and responsibilities and requires the same qualifications yet is classified differently at another college.

5. If a position is reclassified to a higher level, the incumbent shall receive a salary increase if his/her current salary is below the minimum salary for the new classification...

6. Recommendations of the Panel shall be forwarded to the Chancellor for final determination promptly

after consideration... This decision shall not be subject to the grievance and arbitration provisions of this Agreement.

7. If an employee covered by this Agreement should voluntarily assume the duties and responsibilities of a higher rated position in a classification in a higher pay range or not covered by the position he/she holds, then a) that employee shall receive the rate of the higher classification or b) either party may submit the position for possible reclassification, or c) the Vermont State Colleges shall modify the duties and responsibilities of that employee to conform with the requirements of the position classification.

2. Two of the positions covered within the bargaining unit of non-faculty employees of the Colleges represented by the Federation are Security Worker I and Security Worker II.

3. The job description for Security Worker I provides in pertinent part as follows:

DEFINITION:

Perform a variety of security duties to safeguard buildings and equipment against damage or loss. Works under the general supervision of an administrative supervisor in accordance with defined procedures.

EXAMPLES OF WORK PERFORMED:

Makes periodic inspection tours by motor vehicle or on foot through buildings, grounds, and other college facilities to guard against fire, theft, vandalism, or other sources of damage to property. Reports disturbances or suspicious individuals immediately. Checks doors and windows to see that they are locked. May perform incidental janitorial work such as: checking boilers for proper operation and reporting any malfunctions that are observed to a supervisor. May check parking lots and perform job related clerical work. Related work as required (Joint Exhibit 1).

4. The job description for Security Worker II provides in pertinent part as follows:

DEFINITION:

Assist, instruct, direct and check the work of assigned security personnel, safe-guards special buildings,

equipment, weapons and utility systems against damage or loss, handles infrequent situations that occur, working under the direction of an administrative superior.

EXAMPLES OF WORK PERFORMED:

Makes periodic inspection tours by motor vehicle or on foot through physical plant, including college residence halls, all buildings, ground and storage areas, in order to guard against fire, theft, vandalism, and unauthorized intrusions. May act as sentry at buildings to control entry and exit of students. Takes corrective action on fires, water, fuel, electrical and heating system failures, in order to prevent serious damage to college property. Notifies appropriate authorities promptly of any hazardous or unusual conditions. Takes appropriate action to prevent sabotage activities on college property. May detain individuals and vehicles until status and mission are cleared by higher authority. Performs related work as required (Joint Exhibit 2).

5. Prior to June of 1984, Lyndon State College employed Glenn Leach as Director of Security and employed Michael Dickerman as a Security Worker II. Dickerman left the College in the Spring of 1984 (Joint Exhibit 20).

6. Larry Marcotte was hired as a Security Worker I at Lyndon State College on June 4, 1984. At the time of his initial employment, the Director of Security was Leach. Marcotte remained employed until August 27, 1985 (Joint Exhibits 3, 20).

7. When hired, Marcotte received an appointment letter from Lyndon President Clive Vari which included a listing of responsibilities. The responsibilities listed were consistent with those contained in the job description for Security Worker I (Joint Exhibit 3).

8. An additional Security Worker I was hired in July, 1984. Throughout the pertinent period of Marcotte's employment, the College operated with two Security Workers I and a Director

of Security. The College employed no Security Worker II during this period.

9. The Colleges did not notify the Federation of Marcotte's employment as Security Worker I or of the Security Worker II position not being filled.

10. During his tenure of employment, Marcotte made periodic inspection tours through College buildings and grounds. He checked windows and doors to ensure they were locked. He checked gauges on boilers to ensure they were operating properly. He also completed a daily log on activities and submitted unusual incident reports.

11. Marcotte brought newly-hired student security workers on his inspection tours to show them which buildings and grounds had to be inspected and "secured." He discussed the various security procedures with them and instructed them what to do in an emergency.

12. In a September 7, 1984 letter, President Veri requested Caledonia District Court to release Marcotte from jury duty because he was "needed to train new student workers and to guarantee the safety of the students living on campus." (Joint Exhibit 21).

13. Shortly after Marcotte began his employment, Security Director Leach told Marcotte to approach trespassers on campus and ask them to leave the campus if they were not College students or staff. Leach told Marcotte to contact the State Police

first and then him if any serious incidents occurred. On several different occasions between June 1984 and January 1985, Marcotte confronted trespassers and asked them to leave campus (Joint Exhibit 11).

14. On or about January 15, 1985, following what Marcotte considered to be a sensitive confrontational incident on campus, Marcotte discussed the scope of his confrontation duties with Leach. Marcotte informed Leach he thought he was doing too much for what he was paid. At that time, Leach told Marcotte of the existence of the Security Worker II position within the Collegas' system. Marcotte had previously been unaware there was such a position. Leach told Marcotte to stop confronting trespassers but rather to observe suspicious individuals and report suspicious incidents to the State Police and to Leach. Leach told Marcotte confronting trespassers was not part of his job duties.

15. Despite being instructed by Leach to cease confronting trespassers, Marcotte voluntarily continued to confront trespassers after January 1985.

16. Shortly after Marcotte raised questions about the scope of his duties to Leach, the College suggested he apply for reclassification and gave him the appropriate forms to fill out. Marcotte did not apply for reclassification.

17. On February 14, 1985, Jean Garamis, Federation Grievance Officer, filed a complaint with Dick Boera, College

Business manager, concerning the placement of a letter in Marcotte's personnel file. In the complaint, Garamia referred to "other matters of concern that I wish to bring to your attention." Specifically, she stated that Marcotte was performing the duties of a Security Worker II position and he should be promoted to such a position (Joint Exhibit 7).

18. In a February 15, 1985, memorandum to Garamia responding to the complaint, Boera stated as follows concerning the classification of Grievant's position:

With regard to your other concerns, you are entitled to your opinion and perceptions but we cannot agree with your allegations or conclusions. Larry Marcotte has been given the opportunity to submit a request for reclassification and has declined (Joint Exhibit 8).

19. On March 28, 1985, Garamia, filed a complaint with President Vari. The complaint provided in pertinent part as follows:

In the absence of Dick Boera, I am addressing this letter to you.

Dick and I had discussed this complaint before and had agreed to waive the time limit, pending upon a decision of Mr. Marcotte concerning the Security Department. For your convenience, I am attaching all correspondence that is relevant to this complaint, and we will count this letter as the official complaint.

Larry Marcotte has been performing the duties of a Security II worker since June 4, 1984...

The Staff Federation, on behalf of Larry Marcotte is requesting that compensation be given to him for his work that was performed at the II level. A fair and equitable solution would be the following.

Min. pay for S.S. II	= \$12,105
Min. pay for S.S. I	= <u>\$10,575</u>

Difference \$ 1,530
Three Quarters of a Year = \$ 1,147.50

(Joint Exhibit 9)

20. President Veri denied the complaint on April 4, 1985. Geremia filed a Step One Grievance with President Veri on April 12, 1985. That grievance is at issue herein (Joint Exhibit 16).

21. Leach resigned as Security Director effective April, 1985. The College hired James Gallagher as his replacement. In a May, 1985, meeting, Marcotte asked Gallagher about confronting vehicles in the early morning hours. Gallagher instructed Marcotte to confront suspicious individuals and escort them off campus (Federation Exhibit 22).

OPINION

Grievants contend the Colleges violated Article 3, Section 2, of the Contract by changing the classification and job content of the Security Worker I position without first notifying the Federation and giving the Federation an opportunity to bargain the issue. Grievants also contend the Contract was violated by assigning Larry Marcotte Security Worker II duties, while paying him Security Worker I salary.

The guiding Contract language provides in Article 3, Section 2:

(M)anagement rights ... shall include, but not be limited to, the right ... to change job content and to

classify and reclassify, after first giving the Federation notice and an opportunity to bargain.

This provision gives the Colleges the right to leave a higher level position vacant and hire an employee into a lower level position, without bargaining, if no changes are made in the job content. A position is not being "reclassified" in such circumstances. One position (i.e., Security Worker II) is simply being left vacant when its incumbent resigns while another position (i.e., Security Worker I) is being filled by a new hire.

However, in the situation where the employee is required to perform duties not contained in the job description, then the "job content" of the position would be changed and the Colleges would be required under Article III, Section 2, to give the Federation notice and an opportunity to bargain concerning the change.

We have found as a fact that Marcotte performed some Security Worker II duties from his hire in June 1984 until January, 1985. He was required to confront trespassers on campus, an unpleasant and possibly dangerous duty. The Security Worker I job description provides the employee "reports disturbances or suspicious individuals immediately." On several different occasions, Marcotte did as directed and confronted trespassers. This was a significantly different and higher level responsibility than called for in his job description and more closely follows the duties of a Security Worker II, among which are to "detain individuals and vehicles."

It is apparent Marcotte's job duties left him somewhere between a Security Worker I and Security Worker II. While confronting individuals was consistent with what a Security Worker II was required to do, Marcotte was not required to perform other Security Worker II duties, such as taking corrective action on fires, water, fuel, electrical and heating system failures and directing other security personnel. The evidence indicates he did take newly-hired security workers on inspection tours and discussed various security procedures with them. His assisting the training of newly-hired security workers in this regard was somewhat below the more extensive authority granted a Security Worker II. His contact with student security workers was more in the nature of informal training than actually directing them as contemplated in the Security Worker II job description.

The fact Marcotte did not perform all of the duties of a Security Worker II and still performed many of the duties of a Security Worker I does not excuse the Colleges from notifying the Federation and giving them an opportunity to bargain over the change. The "job content" of the Security Worker I position occupied by Marcotte had changed such that he was performing duties above his job classification, sufficient by itself to trigger the obligation to notify the Federation and bargain.

Nonetheless, the Colleges contend that even if Marcotte performed some Security Worker II functions, such work was taken

away from him in January, 1985, two months before he filed his grievance. His claims relating to his first seven months of employment, the Colleges assert, are untimely.

We agree that at the time Marcotte filed his grievance he was no longer required to perform confrontational duties. The fact he continued to confront suspicious individuals and trespassers voluntarily does not entitle him to Security Worker II pay. Any informal training he did of student security workers was not substantial enough by itself to constitute working outside the Security Worker I classification.

However, we disagree claims relating to his first seven months of employment were untimely. Article 9 of the Contract provides that "complaints must be registered within 30 calendar days following the time at which the complainant could have reasonably been aware of the existence of the situation created by the College which is the basis for the complaint."

Under the circumstances of this case, the time at which Grievants "could have reasonably been aware" Marcotte was performing job duties outside his classification was when Marcotte spoke with Security Director Leach on or about January 15, 1985, about the scope of his confrontation duties. It was during this discussion that Marcotte, for the first time, became aware of the existence of the higher level Security Worker II position and that confronting trespassers was not part of his job duties.

The language of Article 3, Section 2, places the burden on the Colleges to notify the Federation when a job content change is contemplated. When the Colleges fail to meet their obligation, it is unreasonable to penalize the Federation or the involved employee for not earlier grieving a violation of which they were not made aware. This means that any remedy to be granted dates back to the time the violation began occurring. To hold otherwise would be to allow the Colleges to benefit from failure to meet their contractual duty of notification. This fact, as well as the fact that the continuing nature of the violation does not involve a paycheck with predictable amounts for overtime and the like, distinguishes this case from Grievance of Cole, 6 VLRB 204 (1983); Grievance of Byrne, 6 VLRB 1 (1983); Grievance of Dyer, 4 VLRB 306 (1981); Grievance of VSEA, on Behalf of the Meat Inspectors, 4 VLRB 144 (1981).

Thus, the grievance here is timely as long as it was timely grieved after the January 15 discussion between Marcotte and Leach. The record indicates the complaint herein was not filed within 30 days of January 15. However, the complaint filed on March 28 indicates Grievants and the Colleges agreed to waive the time limit for filing the complaint, an action authorized by Article 9, Section 7 of the Contract, which provides that grievance procedure time limitations "may be extended by mutual agreement." Thus, the grievance here is timely.

We reject the Colleges' remaining argument that any contention that Marcotte was improperly classified should have been directed to the Reclassification Panel under Article 26 of the Contract. While that is a route Grievants could have taken, we are not convinced upon a reading of the Contract in its entirety that the parties intended that to be the sole remedy for ensuring employees in situations like Marcotte were properly classified.

In sum, we conclude the Colleges violated Article 3, Section 2 of the Contract by failing to notify the Federation and giving it an opportunity to bargain concerning job content changes in the Security Worker I position. The Colleges are liable for the period Marcotte actually performed duties outside of his classification - June 4, 1984, to January 15, 1985. They are not liable after January 15 because Marcotte was not required to perform such duties from that date until after the time he filed his grievance. We recognize he again was required to perform such duties in May, 1985, more than a month after he filed his grievance. However, this was a new grievable matter for which Grievants were required to file an additional grievance. Failure to do so precludes the issue being raised here. Article 9, Section 7, Contract.

We turn to determining what remedy to apply. The failure to give notice to the Federation of job content changes resulted in denial of the right to negotiate concerning the changes.

Consequently, Marcotte performed duties outside his classification for those months.

It is difficult to measure damages precisely. It is a matter of speculation as to what Marcotte would have earned had the Contract been followed and had the College and Federation negotiated the matter of job content changes. However, there are two interests at issue: to make Marcotte whole and "to enforce compliance with all provisions of a collective bargaining agreement upon complaint of either party" pursuant to 3 VSA §982(g). Vermont State Colleges Faculty Federation and Peck v. Vermont State Colleges, 139 Vt. 329, 334 (1981). This latter interest is particularly important here because the Contract violation subverted not only the job classification system, but the right to bargain at the expense of one worker by a process which undermined the Federation's authority. If the Colleges' position were accepted, it would encourage the employer to attempt pay savings in hopes the error would not be discovered. For these reasons, we believe it appropriate to award Marcotte the difference between the minimum salaries for Security Worker I and Security Worker II for the period he was performing duties outside his classification.

The annual difference between the two salaries during the relevant period was \$1,530. Grievant worked duties outside his job classification for 62% of the year. 62% of \$1,530 equals \$949. Marcotte is entitled to that amount.

ORDER

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

1. The Grievance of Larry Marcotte and the Vermont State Colleges Staff Federation, VFT, AFT Local 4023, AFL-CIO, is SUSTAINED; and

2. The Vermont State Colleges shall pay Larry Marcotte the sum of \$949.

Dated the 31st day of July, 1986, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD



Kimberly B. Cheney, Chairman



William G. Kamsley, Sr.



Catherine L. Frank