

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF  
DAVID LaFLOWER

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DOCKET NO. 78-44S

FINDINGS OF FACT, OPINION AND ORDER

Statement of the Case

The grievance of the Vermont State Employees Association, Inc. on behalf of its member, David LaFlower, was filed on January 12, 1978, with the Vermont Labor Relations Board. The grievance arose from a Step III decision of the Director of Employee Relations, Department of Personnel, which was received by this Board on December 27, 1977. A hearing before the Board was held in Montpelier, Vermont on June 16, 1978. The Grievant was represented by Alan S. Rome, Attorney for the Vermont State Employees Association, and the State was represented by the Honorable Jeffrey L. Amestoy, Assistant Attorney General.

FINDINGS OF FACT

1. Grievant was employed as a correctional officer at the Chittenden County Community Correctional Center at South Burlington, Vermont at the time of the occurrences giving rise to this grievance.
2. During the period of May 1, 1977, through September 29, 1977, Grievant was assigned by the Department of Corrections to the position of alternate shift supervisor on the day shift (first shift) for two days a week, during which the regular shift supervisor was off duty. For those two days, Grievant

was paid at a higher rate of pay consistent with the duties and position of a shift supervisor.

3. On the remaining three days of Grievant's regular work week, he was not officially designated as a shift supervisor and was paid at the regular rate of pay for a correctional officer.

4. According to the testimony of George Africa, Superintendent of the Chittenden Correctional Facility, Grievant performed similar duties all five days of the week.

5. Based on a comparison of the job definition for a correctional officer (Grievant's Exhibit "B") and that of a shift supervisor (Grievant's Exhibit "C"), many of the duties which Grievant performed throughout his work week were supervisory in nature.

6. For the two days a week on which Grievant was designated as an alternate shift supervisor, he was in sole charge of the shift as the ranking officer at the institution. For the other three days, there was a regular shift supervisor on duty who was responsible for the overall supervision of Grievant's shift.

7. According to the testimony of Mr. Africa, the assignment of a correctional officer as alternate shift supervisor has been the standard practice of the Department of Corrections for a substantial period of time. The assignment is accepted on a voluntary basis by correctional officers who wish to develop supervisory skills beyond the level of a correctional officer.

8. Prior to May 1, 1978, Grievant had been a shift supervisor with the Department of Corrections on the night shift (third

shift). As a result of an incident involving negligence on the part of the Grievant, he was suspended without pay and his status was changed from shift supervisor to correctional officer. He was also transferred to the day shift in order to receive increased supervision from his superiors.

9. According to the testimony of Mr. Africa, Grievant's conduct during this incident would have been sufficient grounds to terminate his employment with the Corrections Department. His subsequent suspension and demotion were never appealed by him to this Board or to any other higher authority.

10. At the time of his suspension and demotion to correctional officer, Grievant voluntarily agreed to accept an arrangement whereby he would be an alternate shift supervisor for two days a week and a correctional officer for three days a week. At that time he understood that he would be compensated at the alternate rate of pay only for the two days a week on which he was designated as alternate shift supervisor.

11. On September 29, 1978 Grievant terminated his employment with the Department of Corrections.

12. In a letter dated November 2, 1977 to Grievant from Cornelius Hogan, Commissioner of the Department of Corrections, Commissioner Hogan denied relief to Grievant based on a Step II grievance hearing held on October 28, 1977. (Grievant's Exhibit "A").

13. In a letter from Joseph Kecskemethy, Director of Employee Relations, dated December 22, 1977, and filed with this Board on December 27, 1977, Grievant was again denied relief by the Department of Personnel, based on a Step III grievance meeting which took place on December 19, 1977.

14. The grievance of the Bermont State Employees Association on behalf of its member, David LaFlower, to the Labor Relations Board from the aforementioned Step III decision, was received on January 12, 1978, 16 days after the Step III decision had been received.

#### OPINION

It appears from the record that the grievance was not filed within the time provided by the Board's rules for filing appeals from a Step III grievance. According to Article III, Section 1, of the Vermont Labor Relations Board Rules and Regulations, grievances must be appealed within 15 days after receipt of notice of the final decision of the employer. The grievance is therefore dismissed for failure to file it within the time limit provided by the Board's Rules and Regulations.

However, even if the grievance had been filed in a timely fashion, it should be dismissed on substantive grounds.

The issue is whether or not Grievant should be retroactively compensated for the difference between his regular rate of pay and the higher rate of pay earned by shift supervisors for the three days a week on which he worked as a correctional officer but performed certain supervisory duties from the period of May 1, 1977 to September 29, 1977.

Article XLI, Section 2 of the Vermont State Employees Non-Management Unit Contract states in pertinent part that:

"Eligible employees in this bargaining unit who are required to take over a higher level job shall receive alternate rate pay."

During the three days a week on which Grievant was designated as a correctional officer, he did perform many

supervisory duties. The real question in this case is whether or not he was required to perform these duties within the meaning of Article XLI, Section 2, or whether he performed them voluntarily.

The Board finds that given the circumstances of Grievant's misconduct and his subsequent demotion from shift supervisor to correctional officer, that he did perform these supervisory duties as part of an understanding between himself and the Department of Corrections. The fact that Grievant could have been discharged for his misconduct was understood by both parties. The arrangement whereby Grievant continued to perform certain supervisory duties for which he was compensated at the alternate rate of pay only when the regular shift supervisor was off duty, and not when the shift supervisor was, himself, in charge, was in the nature of a probationary employment, entered into by Grievant on a wholly voluntary basis.

Had Grievant performed supervisory duties "out of class" under different circumstances, the Board might conclude that he had been "required" to do so within the meaning of Article XLI of the Non-Management Unit Contract and was entitled to the alternate rate of pay. The Board would scrutinize any such arrangement with particular care. However, from the special circumstances surrounding this case, it is clear that Grievant performed these duties as part of an understanding between himself and the Department of Corrections, into which he entered voluntarily at the time of his demotion from supervisor to correctional officer. The fact that he complained to his employers only after receiving the benefits of his understanding with them further indicates his willingness at the time to

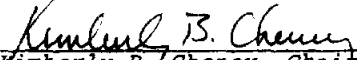
comply with the work arrangements which had been made at the time of his demotion, and is evidence that he was not "required" to work these hours.


ORDER

The Board grants the State's Motion to Dismiss the grievance of David LaFlower on the grounds that the appeal from Step III of the Grievance Procedure was not filed in a timely manner.

Now, THEREFORE, it is hereby ORDERED the grievance be, and it hereby is, DISMISSED.

Dated at Montpelier, Vermont, this 28<sup>th</sup> day of June, 1978.

  
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Kimberly B. Cheney, Chairman

  
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William G. Kemsley, Sr.,  
Commissioner

Chairman Cheney and Commissioner Kemsley were both present at the June 16, 1978 hearing. Commissioner Robert H. Brown was absent. The Reporter for the hearing was Beverlee Hill.