

GRIEVANCE OF:)
) DOCKET NO. 78-50S
FRANCIS X. CANTARRA)

Statement of the Case

On February 9, 1978 the Vermont State Employees Association filed a grievance on behalf of Francis Cantarra with the Vermont Labor Relations Board from a Step III decision of the Director of Employee Relations, dated January 23, 1978. The State's answer to the grievance is dated February 27, 1978. The matter came for a hearing before the Board on July 7, 1978 in Montpelier, Vermont. The grievant was represented by Alan S. Rome, attorney for the Vermont State Employees Association and the State was represented by Earl Daniels, Assistant Attorney General, and Bennett Greene, Assistant Attorney General. At the close of the evidence, the Board ordered that memoranda and requests for findings be filed with the Board by July 27, 1978. Requests for finding and memorandum were filed with the Board by the VSEA on July 21, 1978. The State filed its memorandum and requests for findings on July 27, 1978.

FINDINGS OF FACT

1. Grievant was employed by the Department of Corrections as a Corrections Shop Instructor at the Windsor State Prison Farm. He has been employed by the Department for almost 22 years.
2. On December 9, 1977 grievant was notified by Corrections Commissioner Cornelius Hogan that his position, Number IN-467, would be transferred to the CDTF-St. Albans, effective December 31, 1977. He was further notified by the Commissioner that, since he had chosen not to accept a transfer to that location, he would be placed in Reduction In Force, "R.I.F.", status at that time. (Grievant's Exhibit "1")
3. On December 20, 1977 grievant received a letter from Joseph C. Kecskemethy, Director of Employee Relations, reversing the State's position pertaining to grievant's entitlement to "R.I.F." rights. Grievant was informed that a refusal to move with the position to St. Albans would be construed as a voluntary resignation from his employment with the State and, that, pursuant to 32 V.S.A. Sec. 1261(a), his moving expenses to St. Albans as a result of the transfer would be paid by the Department of Corrections. (Grievant's Exhibit "2")
4. On January 4, 1978 the VSEA appealed the decision by the Director of Employee Relations at the Step III level.
5. On January 24, 1978, the Director of Employee Relations issued his formal denial, at the Step III level, of the VSEA's request to reverse his previous position regarding grievant's "R.I.F." status. (Grievant's Exhibit "3")
6. St. Albans is 135 miles away from Windsor. In order to maintain his position with the Corrections Department in its new location, grievant travels 270 round-trip miles per week and

rents a room in St. Albans. His additional weekly expenses are \$65.00.

7. The parties stipulated at the hearing that there have been past instances allowing "R.I.F." rights to employees whose jobs were transferred more than 35 miles from the location of their previous employment. The last instance of this practice occurred in June of 1977.

8. The relocation of grievant's position from Windsor to St. Albans was the result of an effort on the part of the Department of Corrections to consolidate their facilities. While the location of the position was altered, the job description as far as duties and responsibilities are concerned, remained the same.

OPINION

The issue in this case is whether or not the grievant was entitled to "R.I.F." rights under Article XXXI of the Non-Management Unit Contract, when his position was relocated over 35 miles away from its original geographic area. For the reasons set forth below, the Board finds that the grievant was not entitled to "R.I.F." rights based on the present contractual agreement between the State and the VSEA.

Article XXXI, Section 2 of the Non-Management Unit Contract pertaining to reduction in force provides:

"The right to determine that a reduction in force is necessary and the time when it shall occur is the employer's prerogative. Nothing in this agreement shall be construed to imply otherwise. The employer may determine that a reduction in force is necessary only when a lack of work situation exists."

The Contract contains the following definitions:

"Lack of work" - when there are (1) insufficient funds to permit the continuation of

current staffing; or (2) there is not enough work to justify the continuation of current staffing.

"Geographic area" - the area within a 35 mile radius of an employee's regular duty station.

Grievant would have this Board add the words "geographic area" to the last sentence of the "lack of work" definition, and conclude that because there was insufficient work at Windsor, in the grievant's "geographic area", a "lack of work" situation existed in fact. However, under the provisions of Article XXXI, the term "geographic area" only comes into play in Section 6(c) as a basis for identifying and determining the order of separation of employees with permanent status by class and department. This is part of the "R.I.F." procedures which only become relevant once the employer has determined that a reduction in force situation exists.

Grievant argues that the Commissioner of the Department of Corrections, as the grievant's employer, did in fact determine that a "R.I.F." situation existed as a result of the transfer of grievant's position to a new location. The Commissioner's letter of December 9, 1978 is evidence of this. We are inclined to view that letter as an erroneous interpretation of the Contract, rather than a factual determination and exercise of management prerogative under Article XXXI. Under the provisions of the Contract, an employer can only activate a "R.I.F." if a lack of work situation exists. While the transfer of grievant's position may have been the result of a lack of work in the Windsor area, there was no lack of work for his position within the Department of Corrections as a whole. Since the explicit language of the Contract places no geographic limitation on the definition of a

lack of work situation, a lack of work situation as defined by the Contract did not exist as long as there was enough work within the Corrections Department to continue grievant's position, albeit 135 miles away from its original location.

Commissioner Hogan's decision to activate grievant's "R.I.F." status was erroneous because a lack of work situation as defined by the Contract did not in fact exist. This error in contractual construction was subsequently corrected by the Director of Employee Relations in his letter to grievant on December 20, 1977, only 11 days after Commissioner Hogan had advised the grievant of his "R.I.F." rights. The Board cannot find that a mistaken interpretation by an employer of the provisions of the Contract justifies granting the grievant rights to which he is not entitled by a correct interpretation of the Contract.

Grievant argues that he should be entitled to "R.I.F." rights on the grounds that there have been past instances allowing "R.I.F." rights to employees whose jobs were transferred more than 35 miles from the location of their previous employment. He argues this is evidence of proper interpretation of the Contract. While it has been held that proof of usage and custom is admissible to explain or interpret the meaning of contractual language, see Lambourne v. Manchester Country Properties ___ Vt ___, 374 A.2d 122, 123 (1977), it was also held in Nuzomo v. Vermont State Colleges ___ Vt ___, 385 A.2d 1099, 1102, (1978), that a modification based on custom and usage can only be established if "there is sufficient ambiguity in the contract to require resort to extraneous circumstances such as custom and usage".

No such ambiguity in the language of the Contract has been established in this case. The lack of geographical limitations on the definition of a lack of work situation indicates that the granting of "R.I.F." rights to employees whose positions are transferred to a different geographic location was not contemplated by the contractual agreement. While the fact that the State did grant "R.I.F." rights on previous occasions to employees whose positions were transferred may have caused a considerable degree of confusion for employees as well as the heads of various departments, it cannot be said that these instances were the result of ambiguous language within the Contract itself.

Moreover, under the provisions of 32 V.S.A., Section 1261(a), the State must pay the moving expenses of an employee whose position is transferred from one geographic area to another. This statute clearly implies that the State has the authority to transfer positions and the personnel who hold those positions to different geographic areas within the State.

The Board is sensitive to the hardship caused to the grievant by transferring his position such a great distance away from his home. In a pragmatic sense a job at St. Albans is simply not the same as a job at Windsor even if the identical work is performed. The VSEA and the State could undoubtedly contract to avoid this hardship in the future by granting an employee the election, at his option, to exercise "R.I.F." rights or take the "new" job. That type of election, however, is not provided for in the present contract. And, if this Board were to interpret the existing contract as grievant wishes, potential adverse effects to other State employees could occur. The employer could then

move a person's job situs 35 miles away, designate it a "new" position and terminate the incumbent - leaving him no job and only "R.I.F." rights. Such a possibility has the potential effect of transforming "R.I.F." status from a right and a benefit of state employees into a managerial tool to justify the arbitrary separation of employees from state service.

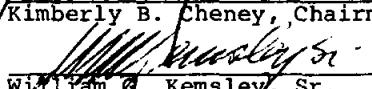
ORDER

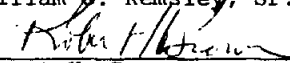
For the foregoing reasons it is hereby ORDERED that the grievance of Francis X. Cantarra be DISMISSED.

Dated this 7th day of September, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Kimberly B. Cheney, Chairman


William G. Kemsley, Sr.


Robert H. Brown