

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	DOCKET NO. 91-11
DAVID ROCQUE)	

FINDINGS OF FACT, OPINION, AND ORDER

Statement of Case

On February 1, 1991, the Vermont Employees' Association ("VSEA") filed a grievance on behalf of David Rocque ("Grievant") with the Vermont Labor Relations Board, alleging that the State of Vermont, Department of Public Safety ("Employer") violated the collective bargaining agreements between the State and VSEA for the Supervisory Unit in effect for the periods from July 1, 1988 to June 30, 1990, and July 1, 1990 to June 30, 1992 ("Contracts"), by no longer assigning Vermont State Police captains, including Grievant, to serve as duty officers.

A hearing was held on September 26, 1991, before Board members Charles H. McHugh, Chairman; Catherine L. Frank, and Carroll P. Comstock. Michael Seibert, Assistant Attorney General, represented the Employer. Jonathan Sokolow, VSEA Staff Attorney, represented Grievant. Grievant filed Proposed Findings of Fact and a Memorandum of Law on October 3, 1991. The State filed a Memorandum of Law on October 3, 1991.

FINDINGS OF FACT

1. Grievant started working for the Employer in 1963 as a trooper. He was later promoted to corporal, lieutenant, and finally to captain in 1986 or 1987. Upon his promotion to captain, Grievant was assigned to State Police headquarters in Waterbury, and at all times relevant to this grievance his

position was Staff Operations Officer. As of the date of the hearing in this matter, Grievant was scheduled to retire on October 31, 1991.

2. The Vermont State Police is within the Department of Public Safety. Lieutenant Colonel Robert Horton is the Director of the Vermont State Police and reports directly to the Commissioner of Public Safety. Three majors report directly to Horton. All three majors are stationed at headquarters in Waterbury. Twelve captains report to the majors. Seven of the twelve captains are stationed at headquarters in Waterbury.

3. At all times relevant, captains and lieutenants in the Vermont State Police have been covered by the Contracts for the Supervisory Unit between the State and VSEA. Majors in the Vermont State Police have not been included in any bargaining unit and have not been covered by any contract between the State and the VSEA.

4. Since at least 1977, the Employer has assigned officers to work as duty officers. A duty officer is responsible for reporting unusual events that occur on a shift during off-duty hours. Such events would include homicides, shootings, fires, department accidents or hazardous spills. There are two types of duty officers, state duty officers and zone duty officers.

5. State duty officers work out of headquarters in Waterbury and report directly to Lieutenant Colonel Horton. State duty officers have historically worked in that capacity from noon Wednesday until noon of the following Wednesday because

Lieutenant Colonel Horton must have have someone responsible for reporting unusual occurrences to him 24 hours a day, seven days a week. This is called a duty week. For many years, duty weeks have been assigned to captains and majors at headquarters. Grievant was assigned as a state duty officer on a rotating basis from the time he was assigned to headquarters in 1986 or 1987 until April, 1990.

6. Zone duty officers are officers that work in the field, not out of headquarters. An officer assigned to work as a zone duty officer reports unusual events to the state duty officer or to Lieutenant Colonel Horton. During weekday shifts, there are command personnel on duty in the various zones of the state who handle and report unusual events. Thus, the zone duty officer has been scheduled only from Friday at 5:00 p.m. until Monday at 8:00 a.m. This has become known as a duty weekend.

7. Prior to 1988, there was no compensation for officers serving as duty officers for duty weekends or duty weeks. This was changed as a result of negotiations for the Contract for the Supervisory Unit, effective July 1, 1988 - June 30, 1990. Article 26, Section 11 of the Contract provided in pertinent part:

Duty Week Pay

Effective July 10, 1988, a Captain or Lieutenant who serves as a troop duty officer, or a Captain who serves as headquarters' or zone duty officer shall receive extra pay for each such week of immediate availability as follows:

Captains	\$200 per week
Lieutenants	\$150 per week

The manner in which such duty weeks or duty weekends are scheduled or assigned under the predecessor agreement shall remain unchanged (Grievant's Exhibit 2).

8. The "predecessor agreement" referred to in the 1988-1990 Contract covered the period July 1, 1986-June 30, 1988. During that period, the manner in which duty weeks were scheduled and assigned was for the Director to assign captains and majors from a rotating list to work as state duty officers for a duty week, from Wednesday to Wednesday.

9. Article 23 of the successor Contract to the 1988-1990 Contract for the Supervisory Unit, effective from July 1, 1990 to June 30, 1992, contained identical provisions to Article 26 of the 1988 -1990 Contract (Grievant's Exhibit 1).

10. From July 10, 1988, until April 4, 1990, captains continued to be assigned to state duty officer on a Wednesday to Wednesday schedule. In approximately November, 1990, after unsuccessfully trying, through the Department of Personnel, to obtain pay for majors who performed the role of state duty officer, Lieutenant Colonel Horton removed the majors from the rotation for a period. Horton was subsequently successful in having the financial compensation for state duty officer extended to the majors. Horton then reassigned the majors to work as state duty officers and the three majors again rotated with the seven captains until April 4, 1990.

11. By March 7, 1990, Lieutenant Colonel Horton decided, due to problems of communications and operations, to no longer have captains assigned to duty weeks. On March 7, 1990, Lieutenant Colonel Horton sent the following memorandum to division heads regarding duty officer assignment:

Somehow the original intent of the "State Duty Officer["] has been lost. The State Duty Officer is to act in my behalf during ALL non-working hours.

Reporting procedures have become cumbersome with some people being notified who shouldn't be and some who should are not being called.

After continued failed negotiations with the Commissioner of Personnel, I have decided to change the assignments for State Duty Officer.

After 4 April 1990 the duty officer assignment will only be pulled by the three Division Heads who shall report all events of interest to me.

The attached is the rotation through 4 July 1990. Captains will no longer be required to pull this assignment unless it is on a fill-in basis when the Division Head is absent.

12. Lieutenant Colonel Horton has not routinely assigned any captains, including Grievant, to work as state duty officer since April 4, 1990. This has resulted in Grievant losing approximately \$2,000 in income which he would have received had he been assigned as state duty officer. Grievant's retirement pay also will be reduced as a result of this loss of income.

OPINION

Grievant contends that the Employer has violated the Duty Week Pay article of the Contracts since April 4, 1990, by failing to assign Vermont State Police captains as state duty officer. The Employer contends that the Management Rights article of the Contracts, the ambiguous language of the Duty Week Pay Contract article, the bargaining history on the Duty Week Pay article, and the practical construction of the Duty Week Pay article by the parties demonstrate that there has been no violation of the Contract by the Employer.

We first address the applicability of the Management Rights article of the Contracts to this grievance. At the hearing in this matter, the Employer did not introduce as an exhibit or ask the Board to take judicial notice of the Management Rights

article of the Contracts, and did not refer to such article until the brief filed subsequent to the hearing. Grievant contended in his brief filed subsequent to the hearing in this matter that, because the State failed to offer into the record at the hearing the Management Rights article of the Contracts, we should not consider any argument that relies on such article. The Employer filed a response to this contention of Grievant, taking the position that the Board was able to look to contract provisions not formally admitted into evidence. Alternatively, the Employer filed a motion to reopen the record in this matter to admit the Management Rights article of the Contracts. Grievant filed a letter in response, indicating that the State's response fit into the category of a reply brief, and the Board has made clear it does not accept reply briefs. Grievant also reiterated past arguments made in his post-hearing brief, and opposed the motion to reopen for substantive and procedural reasons.

We conclude that the failure of the Employer to not specifically refer to the Management Rights article until its brief filed subsequent to the hearing does not mean we should not consider its applicability to deciding this grievance. We take judicial notice of the entirety of the Contracts, including the Management Rights article. A contract must be construed, if possible, so as to give effect to every part, and from the parts to form a harmonious whole. In re Grievance of VSEA on Behalf of "Phase Down" Employees, 139 Vt. 63, 65 (1980). In construing a contract, the contract provisions must be viewed in their entirety and read together. In re Stacey, 138 Vt. 68, 72 (1980).

However, the Management Rights article does not aid the Employer's argument that there has been no contract violation here. The article provides in pertinent part that "subject to terms set forth in this Agreement, nothing in this agreement shall be construed to . . . restrict the State in its reserved and retained lawful and customary management rights . . . including the right to utilize personnel, methods and means in the most appropriate manner possible." In construing a similar management rights article, the Vermont Supreme Court interpreted the article as being made by the parties expressly subject to other provisions in the contract modifying particular management rights. Vermont State Colleges Faculty Federation, VFT, AFT, Local 3180, AFL-CIO v. Vermont State Colleges, 141 Vt. 138, 143-144 (1982). Here, the Duty Week Pay article of the Contracts clearly modified management's right to assign employees to particular duties, and thus supersedes the Management Rights article.

Before concluding on the applicability of the Management Rights article in this matter, we recognize that the arguments raised by Grievant, that the Management Rights article should not even be considered by the Board, set forth a dispute as to a significant procedural issue. In this case, under the circumstances, we believe it is appropriate to take judicial notice of the management rights provisions of the Contracts. In light of our consideration and conclusion concerning such provisions discussed above, we do not believe Grievant has been harmed. Accordingly, it is unnecessary to discuss the procedural issues raised by Grievant in detail. Any further actions on our

part such as ruling on whether the Employer improperly filed a reply brief in this matter, or ruling on the Employer's motion to reopen, are unwarranted.

We next consider the meaning of the Duty Week Pay article of the Contracts. Grievant contends that the article is clear and unambiguous in providing that the manner in which the state duty officer is scheduled or assigned must remain the same as it was during the 1986-1988 Contract. To the contrary, the Employer contends that the language of the article is ambiguous, and that we must look to bargaining history and the construction placed on the Contracts by the parties.

A contract will be interpreted by the common meaning of its words where the language is clear. In re Grievance of Cronan, 151 Vt. 576 (1989). In re Stacey, supra, at 71. If clear and unambiguous, the provisions of a contract must be given force and effect and be taken in their plain, ordinary and popular sense. Swett v. Vermont State Colleges, 141 Vt. 275 (1982). Extrinsic evidence under such circumstances is inadmissible as it would alter the understanding of the parties embodied in the language they chose to best express their intent. Hackel v. Vermont State Colleges, 140 Vt. 446, 452 (1981). Grievance of Majors, 11 VLRB 30, 35 (1988). The law will presume that the parties meant, and intended to be bound by, the plain and express language of their undertakings; it is the duty of the Board to construe contracts, not to make or remake them for the parties, or ignore their provisions. Vermont State Colleges Faculty Federation, 141 Vt. at 144.

We conclude that the Duty Week Pay article is clear and unambiguous. The language of the article provides that "the manner in which such duty weeks . . . are scheduled or assigned under the predecessor agreement shall remain unchanged." The common meaning of the word "manner" is a "way or method in which something is done or happens . . . (a) mode . . of procedure." Webster's New World Dictionary, 3rd College Edition (Simon & Schuster, 1988). The contract provision further defines manner by coupling it with the words "scheduled" and "assigned." "Schedule" clearly refers to the days worked (i.e., Wednesday to Wednesday). "Assigned" clearly refers to the persons assigned. Thus, since captains were assigned to duty weeks during the predecessor agreement, the contract provision required that this method or mode of procedure continue and that captains be assigned to such duties.

Ironically, Lieutenant Colonel Horton's memorandum of March 7, 1990, announcing that captains no longer would be assigned such duties, illustrates the lack of ambiguity of the contract language. He stated: "I have decided to change the assignments for State Duty Officer." He then went on to note that "captains will no longer be required to pull this assignment..." Thus, Lieutenant Colonel Horton demonstrated in this memorandum that the word "assignment" refers to the persons assigned the duty.

Thus, since the contract language is not ambiguous, the Board will not look to the extrinsic evidence of bargaining history. Hackel, 140 Vt. at 452. Majors, 11 VLRB at 35. Also, we reject the Employer's argument that VSEA, by not contending that the Duty Week Pay article had been violated during the period the

duty officer assignment was taken away from the majors, conceded by its silence that the Employer retained the authority to modify the duty officer assignment. This is because, the Employer argues, the effect of majors no longer performing these assignments was to increase the frequency that each captain was required to serve as the state duty officer. In essence, the Employer is contending that VSEA waived the right to contest a violation of the contract. A waiver is the intentional relinquishment of a known right. In re Grievance of Guttman and Minaert, 139 Vt. 574, 578 (1981). Clearly, failure to object to the frequency with which a duty is assigned does not constitute a waiver to objecting to the duty not being assigned at all.

In sum, the Employer violated the provisions of the Duty Week Pay article when Lieutenant Horton discontinued assigning captains, including Grievant, to the duty of state duty officer effective April 4, 1990. We now address what remedy to apply for this contract violation. Grievant requests that the Board order the Employer to henceforth assign captains to serve as duty officer in accordance with the existing Contract, and to order the Employer to make all captains, including Grievant, whole for any monetary losses suffered as a result of the Employer's actions.

We believe that to grant a remedy to all captains would not be appropriate since they have not joined in the grievance filed by Grievant. In Grievance of Bevor, 5 VLRB 222 (1982), the Board granted a remedy only to the named grievant, but not to "other similarly situated employees" for whom the grievant was seeking a

remedy. In reference to 3 VSA §1002(d), which provides in pertinent part that "(a)ny number of employees who are aggrieved by the same action of the employer may join in an appeal with the consent of the board", the Board stated:

We think this statute prevents us from including similarly-situated employees in the grievance absent actual appeals by named and identified employees. The statute appears designed to avoid the complexities of class actions, allowing the Board to act only when specific employees are aggrieved by the same action of the employer. Id., at 232.

There are exceptions to this rule set forth in the Beyor case, as the Board, in a split decision, recognized in Grievance of VSEA (re: Compensatory Time Credit), 11 VLRB 300 (1988). Therein, the Board concluded that it was appropriate under the circumstances for VSEA, the employees' collective bargaining representative, to pursue a representative grievance seeking a remedy on behalf of a class of employees whom were not specifically identified. The existing circumstances were that affected employees were a potentially large number of employees scattered throughout the state, whose identity could not be easily ascertained by the union within the time allowed to grieve.

The circumstances present therein are not present in the case before us. Here, a representative grievance filed by VSEA is not involved, but a grievance filed by an individual employee. Also, there are only seven captains affected by the state duty officer assignment and they could be readily identified. Thus, we conclude that it is more appropriate to follow the rule set forth in Beyor, and only make Grievant whole as a result of the Employer's violation of the Contract.

Since Grievant indicated at the hearing that he was retiring from the Vermont State Police effective October 31, 1991, we are presuming that he is now retired. Thus, the appropriate remedy is limited to making Grievant whole for any monetary losses suffered as a result of the Employer's violation of the Contract.

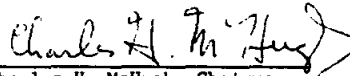
ORDER

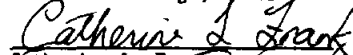
Now therefore, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED:

1. Grievant shall be awarded back pay, plus interest for the amount of pay he would have earned from April 4, 1990, until the time of his retirement from the Vermont State Police, had the Employer assigned Grievant to serve as state duty officer during that period in the same manner as it had during the predecessor collective bargaining agreement;
2. The interest due Grievant on back pay shall be computed on gross pay and shall be at the rate of 12 percent per annum and shall run from the date each paycheck was due that would have included pay for serving as state duty officer, and ending on the date he actually receives such back pay;
3. The parties shall submit to the Board by January 17, 1992, a proposed order indicating the specific amount of back pay due Grievant. If they are unable to come to an agreement on such proposed order, they shall notify the Board in writing on that date of the specific facts agreed to by the parties, specific areas of factual disagreement, and a statement of issues which need to be decided by the Board.
4. The back pay awarded Grievant shall be factored into his retirement income based on this additional earned income for 1990 and 1991.

Dated this 2nd day of January, 1992 at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Charles H. McHugh, Chairman


Catherine L. Frank


Carroll P. Comstock