VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 04-18
RONALD BERWANGER	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On May 7, 2004, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of Ronald Berwanger ("Grievant"). Therein, VSEA contended that the Vermont State Colleges ("Employer") violated Article 36, Section 2, of the collective bargaining agreement between VSEA and the Employer effective July 1, 2001, to June 30, 2005 ("Contract"), by failing to continue to pay Grievant all benefits listed in the Contract when he became permanently disabled as a result of his employment as a maintenance technician at Johnson State College.

A hearing was held on October 21, 2004, in the Labor Relations Board hearing room in Montpelier before Board Members Richard Park, Chairperson; Carroll Comstock and John Zampieri. VSEA Staff Attorney Jes Kraus represented Grievant. Attorney Joseph McConnell represented the Employer. Grievant and the Employer filed post-hearing briefs on November 10 and 16, 2004.

FINDINGS OF FACT

1. Article 36, Section 2, of the Contract provides: "In the event of disability of an employee, the College shall continue to pay the benefits listed in this Agreement." The term "disability" is not defined in the Contract. The provisions of Article 36, Section 2, have been included in all collective bargaining agreements negotiated since 1979 (Joint Exhibit 1, Grievant's Exhibit 1).

2. Since at least 1984, the practice at the Vermont State Colleges has been that employees must apply and qualify for long-term disability benefits provided by the Employer through the Employer's insurance carrier to be eligible for continued benefits under Article 36, Section 2, of the Contract. No employee has received continued benefits pursuant to this contractual provision unless they have applied for long-term disability benefits. Approximately ten employees have received continued benefits during the past several years through applying for long-term disability benefits.

3. To apply for long-term disability benefits, the employee and his or her doctor must submit the required paperwork and medical information to the insurance carrier. The insurance carrier, in consultation with the employee's doctor, determines whether the employee qualifies for long-term benefits. If the insurance carrier so qualifies the employee, the Employer provides continued benefits to the employee under Article 36, Section 2, of the Contract. An employee is not eligible to receive long-term disability benefits until they have been continuously disabled for a period of 180 days (Grievant's Exhibit 11).

4. The Employer provides newly hired employees with information on benefits provided by the Employer, including long-term disability information. The Employer also provides a total compensation summary each year to employees which lists benefits available to the employee. Listed benefits include medical insurance, dental insurance, life insurance, death/dismemberment insurance, survivors insurance, long-term disability and retirement (Grievant's Exhibit 9).

5. The Employer hired Grievant in 1989 as a Maintenance Mechanic II to do carpentry work at Johnson State College. Grievant was promoted to Maintenance

Mechanic III in 1991. At the time of his hire, Grievant received information from the Employer explaining his benefits. Each year that Grievant was employed, he received a compensation summary, listing benefits provided him including long-term disability benefits (Grievant's Exhibit 9).

6. On August 8, 2002, Grievant injured his back at work while lifting a bag of cement. Grievant filled out an injury report. He also submitted a doctor's note to the Employer from Dr. Paul Rogers stating that Grievant "is on total disability" due to the work injury. Grievant submitted another doctor's note on August 30, 2002, indicating that Grievant was unable to return to work. Grievant received worker's compensation benefits due to his injury (Grievant's Exhibits 3 and 4; Employer Exhibit 1).

7. On February 14, 2003, Barbara Murphy, Johnson State College President, sent Grievant a letter inquiring whether there was any indication when he would expect to return to work. Grievant's attorney, Joseph O'Hara, sent President Murphy a letter dated February 21, 2003, stating: "there is no definitive indication when Ron may be able to return to work at the College" (Employer Exhibits 3, 4; Grievant's Exhibit 2, p.5-6).

8. On March 24, 2003, President Murphy sent O'Hara a letter providing in pertinent part:

> . . . As you know, Ron's last date at work was August 8, 2002 – nearly eight months ago. During this time, we have not heard with any certainty about the likelihood of Ron's return to work at the College. Your letter of February 21, 2003 indicates that there continues to be "no definitive indication when Ron may be able to return to work at the College."
>
> Without this determination "as to, or when, whether" Ron can return to employment, it is difficult for me to prepare my staffing and budget plans for next year – a fiscal year that begins on July 1.

> It is necessary for me to have a resolution on Ron's employment abilities as soon as possible. Please provide documentation or information to me by May 1, 2003, as to Ron's status.
> (Employer Exhibit 5; Grievant's Exhibit 2, p.9)

9. In April 2003, the Employer received a Functional Restoration Program Discharge Note dated April 11, 2003, concerning Grievant from the Work Enhancement Rehabilitation Center. The note reported the results of Grievant's 15-day treatment program at the Center. The note indicated that Grievant was working with Jay Spiegel, Vocational Rehabilitation Specialist, to determine a return to work plan, and stated: "It has been advised . . . that Mr. Berwanger return to work in a graduated return to work plan to continue to improve his functional strength and endurance and promote a successful return to work." Accompanying the note was a Release to Work and Discharge Plan dated April 11, 2003 from the Work Enhancement and Rehabilitation Center. The Plan stated that Grievant "is clear to return to work within a medium heavy work level safely, and without predictable consequence" (Employer Exhibits 6 - 8).

10. In April of 2003, Grievant, Spiegel, Johnson State College Director of Physical Plant Woody Dionne, and Johnson Dean of Administration Daniel Seitz met to discuss a plan for Grievant to return to work. The Employer agreed to allow Grievant to return to work on a modified schedule that progressively increased to full-time (Employer Exhibit 9; Grievant's Exhibit 7, pages 24 and 28).

11. In late May 2003, Grievant returned to work on a modified schedule. The Employer provided Grievant with a radio to communicate with his supervisor. On his fourth day of work, Grievant experienced back problems. He left work immediately. He did not contact anyone at the college to inform them he had left work. Grievant never returned to work thereafter.

12. The Employer received a June 5, 2003, doctor's note from Dr. Rogers, stating that Grievant "has re-injured his back. He is unable to work through 6/27/03" (Employer Exhibit 10; Grievant's Exhibit 4, p.17).

13. Dean Seitz sent Grievant a letter dated June 19, 2003, that stated in its entirety:

> We appreciated your attempt this past May to return to work at Johnson State College in your former capacity as Maintenance Technician II. Although we structured your return to work in accordance with the "Release to Work and Discharge Plan" (dated 4/11/03) issued by the Work Enhancement Rehabilitation Center at Fletcher Allen Health Care, we understand from your physician that your physical condition necessitated stopping work at the end of May. It is our current understanding that you cannot resume work before 6/27/03, and there is a reasonable possibility that your physical condition will not allow you to resume work at Johnson State College in the near future.
>
> Since filling your maintenance position is essential to maintaining the campus facilities in good order and anticipating that you may well not be able to return to your position at JSC, we have decided to post your position. At the same time, should you recover sufficiently to consider returning to work before the Maintenance Technician III position is filled, we are willing to discuss a possible return to work with you. Should you recover sufficiently to return to work after we fill the position, we would, similarly, be willing to discuss a possible return to work if a suitable vacancy arises in the future.
>
> Please feel free to contact me if you have any questions. Thank you again for your recent attempt to return to work.
> (Employer Exhibit 11; Grievant's Exhibit 2, p.10)

14. Following this letter, the Employer did not receive any communication from Grievant or his attorney. Dean Seitz sent Grievant a letter dated July 14, 2003, that stated in its entirety:

> We have not received any communication from you since the time we met on May 16, 2003, when you provided a note from your physician stating that you would not be able to return to work before 6/27/03. In particular, we have not received any follow-up communication from you regarding your intention to return to work, or any follow-up reports on your medical condition from your physician or other medical practitioners.

> Based on this lack of information, it is our assumption that you have permanently left your position at Johnson State College and do not intend to return to work. We have, therefore, officially terminated your employment status with the college as of the date of this letter.
>
> I have informed Nancy Hutchins, Director of Payroll and Benefits, that JSC will no longer be providing any employment benefits. Note, however, that your health and dental insurance coverage will continue through July 31, 2003. Please contact Nancy, at 802-635-1212, for information on any money we owe you based on benefits you have accrued to date, or on your options for continuing health insurance coverage under the COBRA law.
>
> Please feel free to contact me if you have any questions.
> (Employer Exhibit 12; Grievant's Exhibit 2, p.11)

15. President Murphy decided to terminate Grievant's employment on the recommendation of Dean Seitz.

16. Grievant never made inquiries of the Employer concerning applying for, or his eligibility for, long-term disability benefits. The Employer never approached Grievant to discuss his applying for, or receiving, long-term disability benefits. Nancy Shaw, Director of Human Resources for the Employer, waits for employees to contact her about long-term disability, rather than initiating the contact, on the grounds that the employee's medical condition is personal and confidential.

17. Grievant never applied for long-term disability benefits.

OPINION

At issue is whether the Employer violated Article 36, Section 2, of the Contract by failing to continue to pay Grievant all benefits listed in the Contract when he was no longer able to work as a result of an injury he sustained while employed as a maintenance technician at Johnson State College.

Grievant contends that Article 36, Section 2, is clear and unambiguous in providing that a disabled employee is entitled to continued benefits, and that he was

entitled to such benefits because he was a disabled employee. Even if the Board concluded that the meaning of the term "disability" is ambiguous, Grievant contends that bargaining history establishes the intent of the parties that continued benefits would be provided to an employee such as Grievant who could no longer do his of her job due to illness or injury.

The Employer contends that Grievant is not entitled to continued benefits under Article 36, Section 2, of the Contract for two reasons. First, the Employer contends that the Contract contemplates that the Employer is only required to provide continued benefits to employees who are disabled and, since Grievant was no longer an employee when he separated from employment, he was not entitled to the contractual benefits. Second, the Employer contends that Grievant was not "disabled" within the meaning of that term under Article 36, Section 2, because an employee must apply for and receive long-term disability benefits to receive continuation of benefits and Grievant neither applied for nor received such benefits.

In interpreting the provisions of collective bargaining agreements in resolving grievances, we follow the rules of contract construction developed by the Vermont Supreme Court. A contract will be interpreted by the common meaning of its words where the language is clear. In re Stacey, 138 Vt. 68, 71 (1980). 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).

However, resort to extraneous circumstances such as custom or usage to explain or interpret the meaning of contractual language is appropriate if sufficient ambiguity exists in the contract. Nzomo, et al. v. Vermont State Colleges, 136 Vt. 97, 101-102 (1978). Where the disputed language is sufficiently ambiguous, it is the duty of judicial or quasi-judicial bodies to construe a contract so as to ascertain the true intention of the parties. Grievance of Gorruso, 150 Vt. 139, 143 (1988). The Board must endeavor to avoid what is unequal, unreasonable and improbable, if this can be done consistently with the words of the contract. Id. at 143-44. If contract language is ambiguous, it is appropriate to look to the extrinsic evidence of past practice and bargaining history to ascertain whether such evidence provides any guidance in interpreting the meaning of the contract. Grievance of Majors, 11 VLRB 30, 35 (1988). Interpretation of an agreement may involve interpolating from a written text solutions not expressly spelled out in the text. Burlington Area Public Employees Union, Local 1343, AFSCME, AFL-CIO v. Champlain Water District, 156 Vt. 516, 520 (1991). This may require blending textual interpretations and the "contracts implied in fact" in the form of established past practices. Id. at 521.

In applying these standards here, we conclude that Grievant has not established that the Employer violated the Contract by not granting him continued benefits pursuant to Article 36, Section 2, of the Contract. Article 36, Section 2, provides: “In the event of disability of an employee, the College shall continue to pay the benefits listed in this Agreement.”

We disagree with Grievant that the meaning of the term “disability” is clear and unambiguous as used in this contractual provision. “Disability” is not defined in the

Contract. Webster's New World Dictionary (3rd College Ed., 1988) defines "disability" as follows: "a disabled condition; that which disables, as an injury, illness or physical handicap; a legal qualification or incapacity; something that restricts; limitation; disadvantage." The breadth of this definition indicates that it is susceptible to many meanings in common usage. It is evident that the parties did not intend that every restriction, limitation and disadvantage of an employee resulted in extension of continued benefits. Such a conclusion would be unreasonable and improbable.

Also, the meaning of "disability" is complex in law. There are various statutes with varying purposes dealing with disability issues such as worker's compensation statues, social security disability law and the American With Disabilities Act. Given the complex meanings of disability in common usage and law, it is unclear what the parties meant by use of the term "disability" in Article 36, Section 2. Thus, the meaning of "disability" is ambiguous and it is necessary that we examine extrinsic evidence to interpret the meaning of Article 36, Section 2, of the Contract.

Grievant relies on bargaining history to establish the intent of the parties that continued benefits would be provided to an employee such as Grievant who could no longer do his or her job due to illness or injury. However, the evidence on bargaining history is insufficient to support this contention of Grievant. At the hearing, Grievant's attorney asked Jean Geremia, a member of the union bargaining team when the contract language was negotiated, the following question: "What did you mean by disability with that language?" Geremia responded: "not being able to continue with their job". Such evidence is too general and self-serving to provide much guidance. It would have been

more persuasive to have evidence on specific understandings communicated between the parties.

The evidence on past practice provides much more guidance in interpreting Article 36, Section 2. The practice at the Vermont State Colleges for at least the last two decades has been that employees must apply and qualify for long-term disability benefits provided by the Employer through the Employer's insurance carrier to be eligible for continued benefits under Article 36, Section 2. No employee has received continued benefits pursuant to this contractual provision unless they have applied for long-term disability benefits. Approximately ten employees have received continued benefits during the past several years through applying for long-term disability benefits.

Such a consistent practice for a lengthy period leads us to interpret Article 36, Section 2, to provide that an employee must apply for and receive long-term disability benefits to receive continuation of benefits. This interpretation leads to the reasonable result of the Employer's insurance carrier effectively determining entitlement to continuing benefits through deciding eligibility for long-term disability benefits. A third party that regularly evaluates long-term disability applications should protect the employee and the employer from both inconsistent criteria and inconsistent application of those criteria in disability determinations. Since Grievant neither applied for nor received long-term disability benefits, the Employer did not violate the Contract by failing to provide continued benefits to Grievant.

The circumstances of this case are disturbing. A general failure of communication and inaction resulted in a situation where Grievant never applied for disability benefits when he may have been entitled to them. Nonetheless, there is no remedy that we can

grant Grievant. Our jurisdiction is limited to determining whether the Employer violated the Contract. Since there was no violation, we must dismiss this grievance.

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered that the Grievance of Ronald Berwanger is dismissed.

Dated this 28th day of December, 2004, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

_____
Richard W. Park, Chairperson

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Carroll P. Comstock

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John J. Zampieri