VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 12-19
CHRISTOPHER SPEAR	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On April 19, 2012, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of Christopher Spear ("Grievant"), Fire Fighter with the State of Vermont Military Department. The grievance contended that the State of Vermont ("Employer") violated Articles 45 and 47 of the collective bargaining agreement between VSEA and the Employer for the Non-Management Unit, effective July 1, 2010 to June 30, 2012 ("2010 – 2012 Contract"), by failing to slot Grievant into the appropriate step on the higher pay grade for times he was entitled to higher assignment pay for higher assignment hours worked.

The parties agreed to the testimony of witnesses and the admission of exhibits in lieu of an evidentiary hearing before the Board. They filed the stipulated testimony and exhibits on November 7, 2012. The parties filed Proposed Findings of Fact and Conclusions of Law on December 7, 2012.

FINDINGS OF FACT

1. The collective bargaining agreement between the State and VSEA for the Non-Management Unit effective July 1, 1986 – June 30, 1988, provided for the payment of "alternate rate pay" to an employee for performing work of an absent employee at a higher pay grade than his or her own position. Article 51, Section 3, of the agreement provided that the alternate rate pay "shall be 108 percent of the employee's base rate".

The rate of pay for alternate rate pay in the succeeding contract, covering the period July 1, 1988 to June 30, 1990, remained the same as it was in the 1986-1988 contract – 108 percent of the employee's base rate (Exhibits 2, 3).

2. In the Non-Management Unit collective bargaining contract in effect from July 1, 1990 to June 30, 1992, the term "alternate rate pay" was changed to "higher assignment pay". The parties agreed that when an employee was entitled to higher assignment pay, "the amount paid shall be an 8 percent differential in addition to the regular hourly rate" (Exhibit 4).

3. Prior to the 1992-1994 collective bargaining contract for the Non-Management Unit, previous contracts had provided for an 8 percent increase for employees when they were promoted. Beginning with the 1992-1994 contract, the parties changed the percentage increases associated with promotions. The applicable provision, which has remained the same since it was first included in the 1992-1994 contract, is contained in Article 45, Section 9, "Salaries and Wages", of the 2010-2012 Contract. It provides as follows:

> Effective July 5, 1992, upon promotion, upward reallocation or reassignment of a position to a higher pay grade, an employee covered by this Agreement shall receive a salary increase by being slotted onto that step of the new pay grade which would reflect an increase of at least five percent (5%) over the salary rate prior to promotion (i.e., 5 percent is the lowest amount an employee will receive, and the maximum amount would be governed according to placement on a step which might be higher than, but nearest to, the 5% minimum specified.) The rate of 5% as outlined above shall be 8% if the employee is moving upwards three or more pay grades. . . (Exhibits 5, 6).

4. The statement in this provision on "being slotted onto that step of the new pay grade" refers to the "time on step" pay plan which has existed under the Non-Management Unit collective bargaining contracts since the 1986-1988 contract. Each pay

grade includes a certain amount of steps providing for progressively higher pay rates within the pay grade. “Slotting” or “slotting up” means placement onto a specific step in the pay plan when an employee is moved to a different pay grade (Exhibit 2).

5. The parties also negotiated a change in the 1992-1994 collective bargaining contract for the Non-Management Unit in the amount to be paid for higher assignment pay, providing:

> Effective July 5, 1992, the amount paid shall be a differential rate equal to the same rate as the “rate on promotion” in the Salary article. In no case shall it exceed the maximum or be less than the minimum of the paygrade of the higher level position. (Exhibit 5)

6. This provision has remained the same since it was first included in the 1992-1994 contract. It is contained in Article 47, Section 2, of the 2010-2012 Contract (Exhibit 6)

7. During bargaining for the 1992-1994 contract, there was no discussion between the VSEA and the Employer concerning whether the calculation of higher assignment pay should be changed from a flat percentage increase to include “slotting up” to a higher step in the applicable pay grade.

8. The Employer has consistently calculated higher assignment pay, both before and since the 1992-1994 contract, as a flat dollar amount differential, based on the applicable 5 or 8 percent increase applied to the employee’s base rate of pay, without “slotting up”. Anne Noonan, chief negotiator for VSEA in contract negotiations from 1986 to 2008 and VSEA Director from 1994 to 2008, was aware that the Employer always calculated higher assignment pay as a flat percent, without “slotting up” to the next highest step in the pay plan.

9. Grievant is a Fire Fighter for the Vermont Military Department. He is in a pay grade 20 position. He was entitled to higher assignment pay at pay grade 22 for August 5, 8, 11 and 14, 2011. In connection with his higher assignment work, Grievant requested that he be slotted into the closest hourly pay rate at pay grade 22 in the pay chart that would give him at least a 5 percent increase. Instead, the Employer provided Grievant with a straight 5 percent increase for his higher assignment pay, without slotting (Exhibit 1).

10. Grievant had received higher assignment pay on a number of occasions prior to August 2011 where the higher assignment pay he received was calculated at a straight five percent rate without slotting.

MAJORITY OPINIION

Grievant contends that the Employer violated Article 47 of the Contract by providing him with higher assignment pay of five percent more than his regular pay rather than slotting him into the step on the pay grade in which he performed his higher assignment duties that resulted in at least a five percent increase. Article 47 provides that the higher assignment "amount paid shall be a differential rate equal to the same rate as the 'rate on promotion' in the Salary article." Section 9 of the Salary article provides in pertinent part:

> " . . . upon promotion . . . an employee . . . shall receive a salary increase by being slotted onto that step of the new pay grade which would reflect an increase of at least five percent (5%) over the salary rate prior to promotion (i.e., 5 percent is the lowest amount an employee will receive, and the maximum amount would be governed according to placement on a step which might be higher than, but nearest to, the 5% minimum specified.) The rate of 5% as outlined above shall be 8% if the employee is moving upwards three or more pay grades. . .

In interpreting the provisions of collective bargaining agreements in resolving grievances, we follow the rules of contract construction developed by the Vermont Supreme Court. The cardinal principle in the construction of any contract is to give effect to the true intention of the parties.[1] A contract must be construed, if possible, so as to give effect to every part, and from the parts to form a harmonious whole.[2] The contract provisions must be viewed in their entirety and read together.[3]

A contract will be interpreted by the common meaning of its words where the language is clear.[4] 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.[5] Ambiguity exists where the disputed language will allow more than one reasonable interpretation.[6] The threshold question of whether a contract is ambiguous is a question of law.[7] In making this determination, we may consider evidence as to the circumstances surrounding the making of the agreement as well as well as the object, nature and subject matter of the writing.[8] Ambiguity will be found where a writing in and of itself supports a different interpretation from that which appears when it is read in light of the surrounding circumstances, and both interpretations are reasonable.[9] If a contract is ambiguous, extrinsic evidence may be relied upon to construe it.[10]

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[1] *Grievance of Cronan, et al*, 151 Vt. 576, 579 (1989).
[2] *In re Grievance of VSEA on Behalf of "Phase Down" Employees*, 139 Vt. 63, 65 (1980).
[3] *In re Stacey*, 138 Vt. 68, 72 (1980).
[4] Id. at 71.
[5] *Swett v. Vermont State Colleges*, 141 Vt. 275 (1982).
[6] *In re Grievance of Vermont State Employees' Association and Dargie*, 179 Vt. 228, 234 (2005).
[7] *Isbrandtsen v. North Branch Corp.*, 150 Vt. 575, 577 (1988). *Breslauer v. Fayston School District*, 163 Vt. 416, 425 (1995).
[8] *Isbrandtsen*, 150 Vt. at 578. *Breslauer*, 163 Vt. at 425. *Grievance of Verderber and Vermont State Colleges Faculty Federation*, 173 Vt. 612, 616 (2002).
[9] *Isbrandtsen*, 150 Vt. at 579. *Breslauer*, 163 Vt. at 425.
[10] *Breslauer*, 163 Vt. at 425.

If this analysis concerning whether contract language is ambiguous results in a determination that the language is clear and unambiguous, extrinsic evidence under such circumstances should not be considered as it would alter the understanding of the parties embodied in the language they chose to best express their intent.[11] 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.[12]

If the analysis instead leads to a conclusion that the contract language is ambiguous because the disputed language allows more than one reasonable interpretation, it is appropriate to look to the extrinsic evidence of bargaining history and past practice to ascertain whether such evidence provides any guidance in interpreting the meaning of the contract.[13] Bargaining history is relevant to the extent that it reveals the result contemplated by the parties and their true intentions when they negotiated the contract language.[14]

Interpretation of an agreement may involve interpolating from a written text solutions not expressly spelled out in the text.[15] This may require blending textual interpretations and the "contracts implied in fact" in the form of established past practices.[16] The Supreme Court has held that, “to the extent that contract provisions are ambiguous, the practical construction placed upon an instrument by the parties is

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[11] *Hackel v. Vermont State Colleges*, 140 Vt. 446, 452 (1981).
[12] *Vermont State Colleges Faculty Federation v. Vermont State Colleges*, 141 Vt. 138, 144 (1982).
[13] *Nzomo, et al. v. Vermont State Colleges*, 136 Vt. 97, 101-102 (1978). *Grievance of Majors*, 11 VLRB 30, 35 (1988).
[14] *Grievance of Candon*, 31 VLRB 398, 407 (2011).
[15] *Burlington Area Public Employees Union, Local 1343, AFSCME, AFL-CIO v. Champlain Water District*, 156 Vt. 516, 520 (1991).
[16] Id. at 521.

controlling".[17] In addition, based on its evaluation of the contract language, the Board can look at the "situation and motive of the parties," and the result "contemplated by the parties when they executed the . . . agreement."[18]

Grievant contends that the applicable contract language is clear and unambiguous in expressing the parties' intent that employees entitled to higher assignment pay shall receive pay equal to the same rate as the rate on promotion in the Salary article, and that the plain language of the Salary article provides that the rate on promotion is the pay rate resulting when the employee is slotted into the step on the new pay grade that results in at least a five percent or eight percent increase over the employee's prior rate of pay. Thus, Grievant contends that higher assignment pay is not a straight five percent or eight percent increase as asserted by the Employer but is meant to be at least five percent or eight percent after being slotted into the appropriate step.

The Employer likewise contends that the language of Article 47, Section 2, of the Contract is clear, but reaches a different conclusion than Grievant. The Employer submits that the phrase "rate on promotion" refers directly, and only, to the five percent or eight percent baseline rate of increase applicable upon promotion. The Employer asserts that if the parties intended that higher assignment pay shall be the same rate as if the employee had been promoted to a higher pay grade – i.e., five percent or eight percent increase plus slotting onto that step of the new pay grade – they would have said so.

In addressing the threshold question of whether the contract language is ambiguous, we need to determine whether one or both of these interpretations are reasonable. In making this determination, we consider evidence as to the circumstances

[17] *In re Grievance of Cole and Cross*, 184 Vt. 64, 73 (2008) citing *In re Cronan*, 151 Vt. at 579.
[18] *In re Gorruso*, 150 Vt. 139, at 143, 145 (1988). See also *Grievance of Cole and Cross*, 28 VLRB 345, 371-372 (2006).

surrounding the making of the agreement as well as the object, nature and subject matter of the writing.

The subject matter of the disputed contract language is higher assignment pay – i.e., the pay an employee receives when performing a higher level job for a limited period of time. The object of the disputed contract language is to establish the specific higher assignment pay to which an employee is entitled for performing such duties.

The pertinent surrounding circumstances concern the evolution of contract language concerning higher assignment pay. Prior to the 1992-1994 collective bargaining contract, higher assignment pay provisions were contained in one article dealing specifically with higher assignment pay (or its antecedent "alternate rate pay"), and there was only one higher assignment pay rate of eight percent higher than the employee's regular hourly rate. The eight percent pay rate was identical to the increase employees received when they were promoted, but there was no linking of the higher assignment and promotion rate in the contracts.

Two significant changes occurred beginning with the 1992-1994 collective bargaining contract and continuing to the present contract: 1) the higher assignment pay rate, as well as promotional increases, varied for the first time depending on how many pay grades an employee moved upwards; and 2) higher assignment pay was tied specifically to promotional pay for the first time, requiring reference to the article on promotion to determine the amount of higher assignment pay.

We consider this evidence in reviewing the interpretations of the disputed contract set forth by Grievant and the Employer. Grievant's interpretation is reasonable in viewing the Contract provisions as expressing the intent of the parties that the "rate on promotion"

which an employee receiving higher assignment pay is entitled to receive refers to the same process to determine pay as that which a promoted employee would receive – i.e., being slotted into the next step of the pay grade for the higher level job that results in at least a five percent or eight percent increase over the employee's prior rate of pay.

The interpretation advanced by the Employer also is reasonable in concluding that the parties meant that the "rate on promotion" which an employee receiving higher assignment pay is entitled to receive refers to the five percent or eight percent baseline rate of increase applicable upon promotion without slotting into a step on the higher level pay grade. The meaning of the "rate on promotion" phrase used by the parties is not clearly meant to refer to the whole process applied to a promoted employee. Given the change from a single rate to two different baseline rates, it also reasonably could mean the baseline rate of promotion – five percent or eight percent.

The intent of the parties as to the meaning of the disputed contract language is clouded by having to read together two contract articles with different subjects and objects, one article on higher assignment pay and the other on promotional pay increases. It is unclear by reading the two articles whether the parties intended the meaning proffered by Grievant or the one put forward by the Employer.

Thus, we conclude that the interpretations advanced by Grievant and the Employer both are reasonable constructions of the disputed contract language. The contract language is sufficiently ambiguous so that it is appropriate to look to the extrinsic evidence of bargaining history and past practice to ascertain whether such evidence provides any guidance in interpreting the meaning of the contract.

Bargaining history is not particularly helpful. There was no discussion between the VSEA and the Employer concerning whether, in calculating higher assignment pay based on the "rate of promotion", there would be a change from a flat percentage increase to include "slotting up" to a higher step in the applicable pay grade. This bargaining history does not reveal the result contemplated by the parties and their true intentions when they negotiated the contract language.[19]

The evidence on past practice is more helpful to guide us in interpreting the meaning of the contract language. The Employer has consistently calculated higher assignment pay, both before and since the 1992-1994 contract, as a flat dollar amount differential, based on the applicable five percent or eight percent increase applied to the employee's base rate of pay, without "slotting up". It is significant that the chief negotiator for VSEA in contract negotiations from 1986 to 2008, who also was the VSEA Director from 1994 to 2008, was aware that the Employer always calculated higher assignment pay as a flat percent, without "slotting up" to the next highest step in the pay plan. If VSEA considered the Employer's practice to be contrary to the contract language, we would expect that this would have been voiced through a grievance or in contract negotiations much earlier than the two decades which elapsed before the grievance was filed in this case. There is no evidence that this occurred.

This practical construction of the ambiguous contract language by the parties demonstrates to us that the Employer and VSEA both intended that the higher assignment pay differential was calculated by applying a flat five percent or eight percent increase without slotting. Thus, the Employer did not violate the Contract by providing Grievant

[19] *Grievance of Stocker*, 31 VLRB 20, 29 (2011). *In re Gorruso*, 150 Vt. at 143, 145. *Grievance of Cole and Cross*, 28 VLRB at 371-372.

with higher assignment pay of five percent more than his regular pay rather than slotting him into the step on the pay grade of the higher level job that resulted in at least a five percent increase.

/s/ Richard W. Park
_____
Richard W. Park, Chairperson

/s/ James C. Kiehle
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James C. Kiehle

DISSENTING OPINION

I respectfully dissent from the Majority. To the point, "at least five percent" means "at least five percent", not five percent.

The Majority is correct that the traditional principles of contract law do apply to the construction of collective bargaining agreements.[20] However the Majority then fails to properly apply those contract principles. The reason that parties write down their agreements in the first place is to be certainly bound by the written word without resort to questions about oral side bargains. The words of a contract are sacrosanct. The parties' intent is presumed to be reflected in the contract's language.[21] When that language is clear, we must interpret the intention of the parties as declared by the parties in the agreement.[22] We must presume that the intent of the parties is embedded in its terms.[23] The law will presume that the parties meant, and intended to be bound by, the plain and

[20] *Grievance of Murray and Vermont State Colleges Faculty Federation*, 166 Vt. 198, 202 (1997).
[21] *State v. Phillip Morris USA, Inc.*, 183 Vt. 176, 183; 945 A.2d 887 (2008).
[22] *Downtown Barre Development, GU Markets of Barre, LLC*, 189 Vt. 637, 639; 22 A.3d 1174 (2011).
[23] *O'Connnell-Starkey v. Starkey*, 183 Vt. 10, 15 (2007).

express language of their undertakings.[24] It is the duty of the Board to construe contracts; not to make or remake them for the parties, or ignore their provisions.[25]

Ambiguity exists only where the disputed language will allow for more than one reasonable interpretation.[26] If the disputed language does not support each of the alternative proffered meanings, the inquiry is at an end. This threshold question of whether a contract is ambiguous is a question of law.[27]

In making this determination, courts consider evidence of the circumstances surrounding the making of the agreement.[28] Ambiguity will be found only where *a writing in and of itself* supports a different interpretation from that which appears when it is read in light of the surrounding circumstances, and both interpretations are reasonable.[29] However, if contract language is clear and unambiguous, extrinsic evidence under such circumstances should not be considered as it would alter the understanding of the parties embodied in the language they chose to best express their intent.[30] Thus, construction of a contract considering extrinsic evidence such as established past practices may not proceed without first finding ambiguity in the contract.[31]

In determining whether one or both of the interpretations advanced by Grievant and the Employer are reasonable, I have considered evidence as to the circumstances surrounding the making of the agreement as well as the object, nature and subject matter

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[24] *In re Stacey*, 138 Vt. 68, 71 (1980).
[25] *Vermont State Colleges Faculty Federation v. Vermont State Colleges*, 141 Vt. 138, 144 (1982).
[26] *In re Grievance of Vermont State Employees' Association and Dargie*, 179 Vt. 228, 234 (2005).
[27] *Isbrandtsen v. North Branch Corp.*, 150 Vt. 575, 577 (1988). *Breslauer v. Fayston School District*, 163 Vt. 416, 425 (1995).
[28] *Isbrandtsen*, 150 Vt. at 578. Breslauer, 163 Vt. at 425. *In re Grievance of Verderber and Vermont State Colleges Faculty Federation*, 173 Vt. 612, 616 (2002).
[29] *Isbrandtsen*, 150 Vt. at 579. *Breslauer*, 163 Vt. at 425.
[30] *Hackel v. Vermont State Colleges*, 140 Vt. 446, 452 (1981).
[31] *In re Grievance of Rosenberg and Vermont State Colleges Faculty Federation*, 188 Vt. 598, 601 (2010). *Verderber*, 173 Vt. at 616.

of the writing. Specifically, I have considered Findings of Fact Nos. 1 through 6 as evidence of surrounding circumstances. These findings provide the evolution of the contract language relating to higher assignment pay.

My review of the disputed contract language in light of those surrounding circumstances leads me to conclude that the only reasonable interpretation of the applicable provisions is that advanced by Grievant. The applicable contract language is clear and unambiguous in expressing the parties' intent that employees entitled to higher assignment pay shall receive pay equal to the same rate as the rate on promotion in the Salary article. The plain language of the Salary article provides that the rate on promotion is the pay rate resulting when the employee is slotted into the step on the new pay grade that results in *at least* a five percent or eight percent increase over the employee's prior rate of pay. The common meaning of the words "at least" could not be any clearer in expressing the intent of the parties.

The Employer has not offered a reasonable interpretation arising from express contract language. Its contention that the "rate on promotion" which an employee receiving higher assignment pay is entitled to receive refers to the five percent or eight percent baseline rate of increase applicable upon promotion, without slotting into a step on the higher level pay grade, is not a reasonable construction of the contract language. The plain meaning of the statement "the amount paid shall be a differential rate equal to the same rate as the 'rate on promotion' in the Salary article" is the pay rate actually received by an employee upon promotion, and this rate includes slotting into a step on the pay grade of the position to which the employee is promoted.

Higher assignment pay is not expressed as a straight five percent or eight percent increase as asserted by the Employer. It is expressed as *at least* five percent or eight percent after being slotted into the appropriate step. This is made clear by the contract language providing that the increase will be "at least" five or eight percent, and that the amount the employee will receive will "be governed according to placement on a step which might be higher than, but nearest to, the . . . minimum specified." The flat rate interpretation by the Employer is simply not a reasonable interpretation tied to the express language of the Contract.

I do not agree with the Majority's consideration of the Employer's extrinsic evidence of how the parties have dealt with each other over two decades since 1992, and how employees have in fact been paid for higher assignments. The State would have the Board give a wink and a nod to the clear and unambiguous "at least", by considering proffered affidavits (from both sides of the bargaining table) to adopt what it claims has been the real deal. I am constrained by Vermont contract law to follow what the express language requires, and simply cannot consider that extrinsic evidence. We must enforce contracts as they are written.[32] If the real deal was as the State contends, the parties could and should have expressed that deal in the contract.

A mistaken interpretation by an employer of a provision of the collective bargaining contract for many years does not justify denying employees rights to which they are entitled under a correct interpretation of the contract.[33] A contractual provision

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[32] *Vermont State Colleges Faculty Federation, VFT, AFT, Local No. 3180, AFL-CIO v. Vermont State Colleges*, 141 Vt. 138 (1982).

[33] *Grievance of VSEA (Re: Compensatory Time Credit)*, 11 VLRB 300, 306 (1988). *Grievance of Nottingham*, 25 VLRB 185, 192 (2002).

which is incorrectly interpreted for a period of time does not render the provision invalid.[34]

The Majority opinion's view that "(t)he intent of the parties as to the meaning of the disputed contract language is clouded by having to read together two contract articles with different subjects and objects" is not persuasive. It is true that the disputed contract language specifically linked higher assignment pay to promotional pay for the first time, requiring reference to the article setting forth the promotional increase to determine the amount of higher assignment pay.

Nonetheless, this does not cloud the meaning of the contract language. The surrounding circumstances make clear that the higher assignment pay had always been identical to promotional pay increases in past contracts, and the disputed contract language continues this pattern. Previously, the two types of increases consistently had been the same eight percent increases. The changed language continued the identical treatment by converting straight percentage increases in both cases to the pay rate resulting in at least a five percent or eight percent increase after being slotted into the appropriate step. This conclusion is clear when the two contract provisions are viewed in their entirety and read together.

Thus, I conclude that the only reasonable interpretation of the applicable provisions is that advanced by Grievant and that the contract language is not ambiguous. Given the clear and unambiguous contract language, the inquiry is ended as a matter of law and it is not appropriate to look to the extrinsic evidence of bargaining history and past practice. Thus, I have not considered the extrinsic information contained in Finding of Fact Nos. 7, 8 and 10.

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[34] *Id.*

In sum, I would hold that the Employer violated the Contract by providing Grievant with higher assignment pay of five percent more than his regular pay rather than slotting him into the step on the pay grade of the higher level job that resulted in at least a five percent increase.

/s/ Gary F. Karnedy
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Gary F. Karnedy

ORDER

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

Dated this 31st day of December, 2012, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Richard W. Park
_____
Richard W. Park, Chairperson

/s/ James C. Kiehle
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James C. Kiehle