

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	
MICHAEL DAVIDSON,	)	DOCKET NO. 13-50
JASON ELMER, MATTHEW GONYO	)	
AND JAMIE CHASE	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

State of Vermont Department of Liquor Control Investigators Michael Davidson, Jason Elmer, Matthew Gonyo, Jay Clark, Jamie Chase, and Steven Waldo filed a grievance on December 20, 2013. Therein, Grievants contended that the State of Vermont (“State”) violated Article 24 of the collective bargaining agreement between the State and Vermont State Employees’ Association (“VSEA”) for the Non-Management Unit, effective July 1, 2012 to June 30, 2014 (“Contracts”), by inequitably distributing overtime among Department of Liquor Control Investigators. Steven Waldo and Jay Clark withdrew as grievants prior to the Labor Relations Board hearing in this matter.

The Labor Relations Board conducted a hearing on the merits in the Board hearing room in Montpelier on January 29, 2015, before Board Members Richard Park, Chairperson; Alan Willard and Edward Clark, Jr. Grievants Davidson and Gonyo represented themselves and the other grievants. Shayna Cavanaugh, Assistant Attorney General, represented the State. The parties filed post-hearing briefs on February 12, 2015.

FINDINGS OF FACT

1. Article 24, Overtime, of the Contract provides in pertinent part:

1. **INTRODUCTION**

- (a) The State and the VSEA agree that overtime work for all employees is to be held to a minimum consistent with efficient and sound management of State government.
- (b) Each appointing authority shall schedule and assign regular work in a manner which will minimize the need for overtime work, and shall require compliance with reasonable standards of performance before requiring employees to work overtime.
- (c) It is understood and agreed that determining the need for overtime work, scheduling the hours overtime shall be worked, and requiring overtime work are exclusively employer's rights.

2. **DISTRIBUTION OF OVERTIME**

- (a) Appointing authorities shall make a reasonable effort to distribute overtime as equitably as possible among classified employees. . .
- (b) Overtime shall be assigned whenever practicable to volunteers. Assignment of overtime work to volunteers shall not be considered contrary to the equitable distribution of overtime.
- ...
- (h) Institutions and other regular work units which routinely distribute overtime shall do so on a rotational basis, in a fair and equitable manner for both voluntary and involuntary distribution of overtime within each such unit. .

...  
(Grievants Exhibit 2, State Exhibit 2)

2. Vermont Personnel Policy 11.2 provides in part:

...  
**Applicable to:** All classified employees, as well as exempt and temporary, with the Executive Branch of the State of Vermont.

...  
**DISTRIBUTION AND AUTHORIZATION OF OVERTIME**

Appointing authorities shall make a reasonable effort to distribute overtime as equitably as possible among classified employees. . .

Overtime shall be assigned whenever practicable to volunteers. Assignment of overtime work to volunteers shall not be considered contrary to the equitable distribution of overtime.

...  
Institutions and other regular work units which routinely distribute overtime shall do so on a rotational basis, in a fair and equitable manner for both voluntary and involuntary distribution of overtime within each such unit. .

(Grievants Exhibit 13)

3. Each grievant at all times relevant was employed by the Department of Liquor Control Education, Licensing and Enforcement Division as a Liquor Control Investigator. They are each assigned to a specific geographic area of the state although at times they work in other parts of the state outside their geographic area. William Goggins is Director of the Education, Licensing and Enforcement Division. Goggins reports directly to Department of Liquor Control Commissioner Michael Hogan, the appointing authority for the Department.

4. Goggins is a classified employee. He is designated as a manager. As such, he is not covered by either the Non-Management Unit or Supervisory Unit collective bargaining agreements between the State and VSEA.

5. Commissioner Hogan does not get involved in assignment of overtime to Liquor Control Investigators. He only is involved in assignment of overtime decisions to persons who report directly to him. He has developed no process to monitor the distribution of overtime in his department. Commissioner Hogan approves overtime for Goggins. At all times relevant, he has authorized routine overtime for Goggins for the days he works. The overtime duties performed by Goggins include working with Commissioner Hogan on legislation, participation in meetings after hours with Commissioner Hogan, responding to emails and other communications that the Commissioner does not have time to address, and addressing legal questions which arise. These are not job duties performed by Liquor Control Investigators. Commissioner Hogan has authorized Goggins to work a few extra hours of overtime a day and no more than 10 hours a week. During the two year period from August 11, 2011 through August 8, 2013, Goggins worked a total of 1105 overtime hours (Grievants Exhibits 5, 6, 12).

6. Commissioner Hogan, Goggins, and supervisors of the Liquor Control Investigators have not developed a plan, process or procedures for the distribution and monitoring of overtime in the Department of Liquor Control.

7. Grievants worked the following total of overtime hours during the period August 11, 2011, through August 8, 2013:

Chase	49.5 hours
Davidson	57 hours
Elmer	107.5 hours
Gonyo	740 hours

(Grievants Exhibit 12)

8. Liquor Control Investigators work required departmental overtime on an occasional basis. This generally involves shift overage beyond their scheduled 9.25 work hours a day due to exigent circumstances such as effecting an arrest from beginning to end.

9. Liquor Control Investigators at times are assigned overtime for the enforcement of tobacco and alcohol compliance checks. The evidence does not indicate that there were inequities among liquor control investigators in the availability of this overtime.

10. The Department of Liquor Control receives funds from various grants administered by other law enforcement entities. These grants have provided voluntary overtime opportunities for liquor control investigators. Investigators are paid for this overtime by the Department of Liquor Control through the payroll process. The Department is then reimbursed for this overtime. The overtime pay received by Department employees is considered compensation for purposes of determining retirement compensation.

11. One of the grants is the SHARP grant, addressing driving under the influence of alcohol and speed enforcement. This is administered in Chittenden County by the Shelburne Police Department. Voluntary overtime opportunities under this grant are open to state and local

law enforcement officers. The announcement of availability of shifts under this grant comes directly from an employee of the Shelburne Police Department. Grievant Gonyo acts as a liaison and communicates this information to other Liquor Control Investigators. SHARP overtime generally is offered on a “first come, first served” basis. The Department of Liquor Control has no authority to award overtime under this grant. The evidence does not indicate that there were inequities among liquor control investigators in the availability of this overtime.

12. Also, up to July 1, 2013, there was a START (Stop Teen Alcohol Risk) grant from the Department of Health addressing underage drinking. This grant provided voluntary overtime opportunities. START overtime generally was offered on a “first come, first served” basis. The evidence does not indicate that there were inequities among liquor control investigators in the availability of this overtime.

13. The United States Department of Homeland Security at all times relevant has issued a grant through the Vermont Department of Public Safety (“DPS”) Homeland Security Unit referred to as “Stonegarden”. The purpose of the grant is to have law enforcement officers in Vermont with police powers work 8 to 10 hour overtime shifts to enhance the enforcement efforts of the United States Border Patrol at the United States/Canadian border. The DPS Homeland Security Unit has applied for this grant, and received it, since 2008 (Grievants Exhibit 9).

14. A planning committee was established to implement the Stonegarden grant. Representatives from the U.S. Border Patrol, DPS Homeland Security Unit, Vermont Sheriffs Association, and the Vermont Police Chiefs Association were on the planning committee. The planning committee agreed that it would solicit full-time certified law enforcement officers who work in the geographic area made up of the Department of Public Safety districts that are

adjacent to the Canadian border – i.e., Troop A and Troop B. The planning committee agreed that participation should be restricted to agencies near the border for reasons of risk management and cost efficiency. It was further agreed during the planning sessions that participating law enforcement officers would have a minimum of 8 hours off duty before and after the detail, no more than one hour of travel time at each end of the detail shift, and a detail shift of between 8 to 10 hours excluding travel time. The planning committee decided to reimburse participating law enforcement officers at the GSA mileage reimbursement rate per mile which would include travel from the home station to work assignment and return. Participating officers were required to receive training before working under the Stonegarden grant. The Department of Liquor Control was not asked to participate on the planning committee for the grant (Grievants Exhibits 9, 10).

15. The DPS Homeland Security Unit, in cooperation with the United States Border Patrol, is in charge of coordination of all local, county and state law enforcement officers that are involved with Stonegarden operations. All assigned law enforcement officers under the Stonegarden grant work under the general direction of the lieutenant of the DPS Homeland Security Unit. Prior to each detail shift, a commanding officer from the DPS Homeland Security Unit assigns a shift supervisor. The shift supervisor is responsible for the direction of each patrol. All law enforcement officers working the detail report to the shift supervisor. The shift supervisors report to the on duty DPS Homeland Security Unit member (Grievants Exhibit 10).

16. The Department of Liquor Control is a subgrantee for the Stonegarden grant. Only Liquor Control Investigators and supervisors who work in the geographic area included in DPS Troops A and B are allowed to serve as law enforcement officers under the grant. During the period July 2013 through June 2014, the Department of Liquor Control subgrant application

provided that investigators and supervisors would work 10 hour shifts, 16 shifts a month, 12 months a year. The Department of Liquor Control pays its employees working under the Stonegarden grant with department funds, and then gets reimbursed by the Homeland Security Unit (Grievants Exhibit 11).

17. The DPS Homeland Security Unit sends out an email to law enforcement officers eligible to work on the Stonegarden grant, including Department of Liquor Control investigators and supervisors, and requests that the officers apply for overtime opportunities. Officers apply for the shifts they are interested in working, and receive a confirming email from the DPS Homeland Security Unit if they are selected.

18. Grievant Gonyo lives and works in Chittenden County which is within the geographic area of DPS Troops A and B. This makes him eligible to work under the Stonegarden grant. Gonyo has regularly worked shifts under Stonegarden, and has not been denied opportunities to work under this grant. Gonyo has worked several hundred hours of overtime under this grant. Gonyo also has worked overtime hours under the START and SHARP grants.

19. Grievant Chase has lived and worked in the Burlington area since beginning employment as a Liquor Control Investigator in 2010. He is in the geographic area of DPS Troops A and B. However, he was not eligible to work overtime under the Stonegarden grant until he took the required training in December 2013. Chase became aware of the overtime opportunities under Stonegarden in his first year of employment as a Liquor Control Investigator but did not receive Stonegarden training at that time. He has volunteered to work some overtime hours under the SHARP grant. Chase was not rejected for any overtime that he requested.

20. Grievant Elmer has been a Liquor Control Investigator in southern Vermont for approximately 10 years. He has been outside the geographic area of DPS Troops A and B at all

times relevant, and has been informed that he was not eligible for overtime under the Stonegarden grant. Elmer had the equal ability with other Department of Liquor Control Investigators to work overtime under the START grant until the grant was discontinued in 2013. He has rarely worked SHARP overtime because of family obligations. He has not been denied overtime that he volunteered for under the SHARP grant.

21. Grievant Davidson has been a Liquor Control Investigator in south-central Vermont for many years. He has been outside the geographic area of DPS Troops A and B at all times relevant, and has been informed that he was not eligible for overtime under the Stonegarden grant. He has usually worked overtime details which have been available to him. The ineligibility of Davidson to work under the Stonegarden grant has potentially impacted his retirement compensation which is based on his highest two years of wages, including overtime compensation.

22. Martin Prevost has been a Liquor Control supervisor since approximately 2012. His primary duty is licensing. He has a heavy workload which has resulted in him working some overtime on licensing duties. The Investigators have the ability to do licensing and at times assist Prevost in licensing duties. Prevost works in the geographic area covered by DPS Troop A. He has worked overtime on the Stonegarden grant for a few years. Prevost also has worked overtime hours on the START and SHARP grants. Prevost worked 432.5 hours of overtime during the period August 11, 2011, through August 8, 2013 (Grievants Exhibit 12).

23. John Klauzenberg supervises four Liquor Control Investigators in the northwest area of Vermont. This is within the geographic area of DPS Troops A and B. This makes him eligible to work under the Stonegarden grant. Klauzenberg has regularly worked shifts under Stonegarden, and has worked hundreds of hours of overtime under this grant. He also has



performed overtime under the SHARP and START grants, and through enforcement of alcohol and tobacco compliance checks. He has worked departmental overtime on an occasional basis in shift overage situations. Klauzenberg worked 756.5 hours of overtime during the period August 11, 2011, through August 8, 2013 (Grievants Exhibit 12).

### OPINION

Grievants contend that the State has violated Article 24, Section 2(a), of the collective bargaining agreement. Article 24, Section 2(a), provides that “appointing authorities shall make a reasonable effort to distribute overtime as equitably as possible among classified employees”.

In interpreting the provisions of the collective bargaining agreement in resolving this grievance, the Board follows 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. Grievance of Cronan, et al, 151 Vt. 576, 579 (1989). 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). The contract provisions must be viewed in their entirety and read together. In re Stacey, 138 Vt. 68, 72 (1980).

A contract will be interpreted by the common meaning of its words where the language is clear. Id. 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). 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 v. Vermont State Colleges, 141 Vt. 138, 144 (1982). Ambiguity exists where the disputed language will allow more than one reasonable interpretation. In re Grievance of Vermont State Employees' Association and Dargie, 179 Vt. 228, 234 (2005). If a contract is ambiguous, extrinsic evidence may be relied upon to construe it. Breslauer v. Fayston School District, 163 Vt. 416, 425 (1995).

Much of the overtime at issue in this case was for work distributed by entities outside of the Department of Liquor Control. The State contends that this means the contract language was not violated because it refers to distribution of overtime by “appointing authorities”, and the involved overtime was outside the control of the “appointing authority” in this case – i.e., the Commissioner of the Department of Liquor Control.

Accordingly, it is necessary to understand the meaning of the words “appointing authority” contained in the applicable contract provision. The collective bargaining agreement defines “appointing authority” as “the person authorized by statute, or lawfully-delegated authority, to appoint and dismiss employees.” In a recent decision, the Board indicated that an appointing authority in state government is the head of the particular department or agency in which employees work. Grievance of Brian Smith, 33 VLRB 8 (2014). Thus, it is clear and unambiguous that the appointing authority in this case is the Commissioner of the Department of Liquor Control.

There was an uneven distribution of overtime in this case for Department of Liquor Control employees with respect to overtime opportunities under the Stonegarden grant. Department employees within the geographic area covered by Department of Public Safety (“DPS”) Troops A and B had available abundant opportunities under Stonegarden, while

Department employees outside Troops A and B were not eligible for such overtime. As a result, Grievants Davidson and Elmer were excluded from any of this overtime.

However, this does not indicate a violation of Article 24, Section 2, of the Contract since the appointing authority of the grievants did not distribute the overtime. The Department of Liquor Control had no authority to assign this overtime. Instead, the overtime was distributed through the DPS Homeland Security Unit without input from the Department of Liquor Control.

We recognize that this results in Grievants Davidson and Elmer having much less opportunity for overtime than other employees in the Department of Liquor Control given their inability based on their geographic location to work the abundant overtime offered through the Stonegarden grant. This uneven distribution of available overtime affects not only their current compensation but also potentially impacts their retirement pay. The Contract does not provide redress for this situation. If either VSEA or the State see this as a problem, its resolution lies through the collective bargaining process.

Nonetheless, Grievants contend that there was overtime distributed by the Department of Liquor Control that was inequitably distributed in violation of Article 24, Section 2. Grievants assert that this occurred through the overtime worked by William Goggins and Martin Prevost.

Grievants have not established their claim with respect to overtime worked by Goggins. The Contract covers employees in the Non-Management Bargaining Unit represented by VSEA. It does not extend to comparison of overtime worked by a manager such as Goggins who is not included in a bargaining unit represented by VSEA or any other union.

Moreover, even assuming for the sake of argument that overtime worked by Goggins is appropriate to examine pursuant to Article 24, Grievants have not established that the Department of Liquor Control inequitably distributed overtime to Grievants when such overtime

is considered. The overtime duties performed by Goggins include working with Commissioner Hogan on legislation, participation in meetings after hours with Commissioner Hogan, responding to emails and other communications that the Commissioner does not have time to address, and addressing legal questions which arise. These are not tasks within the job duties performed by Liquor Control Investigators. Inequitable distribution of overtime to Grievants would at the least require they were not receiving overtime for work within their job duties. That is not the case with respect to overtime worked by Goggins.

Grievants alleged for the first time at the hearing before the Board, and then in their post-hearing brief, that the State violated Personnel Policy 11.2 through inequitable distribution of overtime to Goggins compared to Grievants. Policy 11.2 is substantively identical to Article 24, Section 2, of the Contract. We reject this claim of Grievants on two grounds.

First, the Board has declined to resolve issues that were not raised in the grievance filed with the Board pursuant to Section 18.3 of the Board Rules of Practice. This requires that a grievance contain specific reference to the pertinent section of the rules and regulations alleged to be violated. Grievance of Regan, 8 VLRB 340, 364 (1985). Grievants did not allege a violation of Personnel Policy 11.2 in their grievance filed with the Board, and thus have not raised this issue in a timely fashion. Second, even if we were to consider the issue timely raised, our above conclusion that Grievants did not establish an inequitable distribution of overtime, pursuant to Article 24 of the Contract, concerning overtime worked by Goggins precludes a determination that the substantively identical provisions of Personnel Policy 11.2 were violated.

Further, Grievants have not established that Article 24, Section 2, of the Contract was violated with respect to overtime worked by supervisor Martin Prevost. His primary duties involve licensing. He has a heavy workload which has resulted in him working some overtime on

licensing duties. Although the Investigators have the ability to do licensing and at times assist Prevost in licensing duties, this general evidence falls well short of establishing that an inequitable distribution of overtime occurred when Prevost, rather than the investigators, received overtime for licensing duties. These constitute Prevost's primary duties whereas that is not the case with respect to the Investigators. Grievants would need to present much more specific evidence on the feasibility and appropriateness of the Investigators working the involved overtime than exists in the record before us to establish inequitable distribution of overtime in this regard.

#### ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered that the Grievance of Michael Davidson, Jason Elmer, Matthew Gonyo and Jamie Chase is dismissed.

Dated this 30th day of March, 2015, at Montpelier, Vermont.

#### VERMONT LABOR RELATIONS BOARD

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

/s/ Alan Willard  
Alan Willard

/s/ Edward W. Clark, Jr.  
Edward W. Clark, Jr.