VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 15-20
MICHELE EYNON	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On May 12, 2015, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of Michele Eynon ("Grievant"). Therein, VSEA contended that the State of Vermont Department of Fish and Wildlife ("Employer") violated Article 24 of the collective bargaining agreement between the State of Vermont and VSEA for the Non-Management Bargaining Unit ("Contract") by providing Grievant with compensatory time, instead of cash, for overtime she worked on October 18 and 19, 2014.

The parties agreed to stipulate to facts in this case and present oral argument to the Board pursuant to Section 18.7 of Board *Rules of Practice*. Section 18.7 provides: "After the filing of an answer, the parties may submit to the Board a signed stipulation of facts and a request for decision by the Board without an evidentiary hearing. The request shall state whether the parties desire to present oral argument and/or file briefs."

The parties filed Stipulated Facts on July 7, 2015. On August 12, 2015, the parties notified the Labor Relations Board that they agreed to the Board deciding this grievance based on the Stipulated Facts and oral argument. They also informed the Board then that the two questions presented to the Board for decision are: 1) May the State offer voluntary overtime on a compensatory time off basis only to an Article 24 of the Contract, Overtime Category 11, employee?; and 2) Did Grievant submit her grievance in a timely manner under Article 15 of the Contract?

Oral argument was held in the Labor Relations Board hearing room in Montpelier on September 10, 2015, before Labor Relations Board Members Gary Karnedy, Chairperson; Edward Clark and Robert Greemore. VSEA Associate General Counsel Justin St. James represented Grievant. Senior Assistant Attorney General Michael Duane represented the Employer.

During the oral argument, the parties stipulated to additional facts concerning the dates of the filing of the grievance at the lower steps of the grievance procedure. The following Findings of Fact consist of the Stipulated Facts filed by the parties and the additional facts agreed to at the oral argument.

FINDINGS OF FACT

1. At all times relevant herein, Grievant was a permanent-status employee as that term is used in the Contract. As such, she was entitled to all rights afforded such employees by the Contract, the rules and regulations for personnel administration, and by statute.

2. Grievant was employed by the Agency of Natural Resources, within the Department of Fish and Wildlife, as a District Office Chief Clerk II.

3. Grievant was compensated at pay grade 16 in October 2014.

4. Grievant's overtime classification was Overtime Category 11 under Article 24 of the Contract.

5. On approximately September 25, 2014, Cedric Alexander, Grievant's direct supervisor, asked Grievant if she wanted to work the weekend of October 18 and 19, 2014. Grievant asked if she could receive cash and Alexander made it clear that nothing had changed since last year and management's position was still that cash overtime would not be offered for working moose or deer check stations. Alexander also told Grievant that because moose permit

numbers were much lower than previous years it was not necessary for her to work on the weekend but that the choice was solely hers if she wanted to work it for compensatory time hours only. Grievant asked if she could appeal directly to Director of Wildlife Mark Scott for cash overtime. Alexander replied yes and asked Grievant to just let him know within a few days of what was her final decision so he could finalize the assignment schedule and send it out to all the other involved department staff. Grievant ultimately advised Alexander that she would rather work for compensatory time than not at all.

6. On or about October 14, 2014, Grievant sent an email to Mark Scott, Director of Wildlife, requesting that she receive cash for overtime hours to be worked on Saturday, October 18, and Sunday, October 19, 2014. Grievant was told by Scott that because of budgetary constraints she would not receive cash for overtime worked, but instead would receive compensatory time.

7. Grievant did not agree to waive her right to challenge the Employer's denial of paid overtime instead of compensatory time.

8. On October 16, 2014, Grievant communicated via email with Human Resources Administrator Barbara Morway regarding the decision to offer Grievant only compensatory time for overtime hours worked on October 18 and 19.

9. On October 17, 2014, Grievant sent an email to a VSEA representative explaining her situation and asking for help in analyzing the interpretation of the overtime provision of the collective bargaining agreement.

10. On October 18 and 19, 2014, Grievant worked a total of 20 hours of overtime.

11. On October 20, Grievant recorded her time for the pay period that included October 18 and coded the 10 hours worked on the 18th as compensatory time.

12. On October 31, Grievant entered her time for the pay period that included October 19, 2014, and coded the 10 hours worked on the 19th as compensatory time.

13. On or about November 13, 2014, Grievant reviewed her pay advice and confirmed that she had received 30 compensatory hours for the hours of overtime she worked on October 18 and 19, 2014. On November 14, 2014, VSEA filed a Step I complaint on behalf of Grievant on the issuance of compensatory time instead of cash for overtime worked on October 18 and 19, 2014. On November 19, 2014, Grievant's supervisor indicated that the grievance should proceed to Step II of the grievance procedure. VSEA filed a Step II grievance on behalf of Grievant on November 20, 2015. On January 22, 2015, the Department of Human Resources Human Resources Manager denied the Step II grievance.

14. Grievant filed a Step III grievance on January 23, 2015. Labor Relations Director John Berard denied this grievance on April 20, 2015.

15. The Contract provides in pertinent part:

> . . .
> **Article 15, GRIEVANCE PROCEDURE**
> . . .
> 3. **GRIEVANCE PROCEDURE**
> (a) (1) The employee, or his/her representative, or both, shall notify his/her immediate supervisor of a complaint within fifteen (15) workdays of the date upon which the employee could have reasonably been aware of the occurrence of the matter which gave rise to the complaint. The notice shall clearly identify the matter as a Step I grievance complaint. This is not a required first step of the grievance procedure.
> . . .
>
> **Article 24, OVERTIME**
> . . .
> 2. **DISTRIBUTION OF OVERTIME**
> . . .
> (b) Overtime shall be assigned whenever practicable to volunteers. Assignment of overtime work to volunteers shall not be considered contrary to the concept of equitable distribution of overtime.
> . . .
> 4. **ELIGIBILITYFOR OVERTIME COMPENSATION**

(a) . . . (1) Overtime Category 11. Employees in classes assigned to pay grades 5 through 22 shall receive overtime compensation at the rate of one and one-half (1 ½) times their regular hourly rate for all hours worked in excess of eight (8) in any workday or forty (40) in any workweek. Employees in classes assigned to pay grade 22 shall receive overtime compensation in the form of cash or compensatory time off, solely at Management's discretion.

. . .

6. **COMPENSATORY TIME**

(a) Employees entitled to be paid cash for overtime may request compensatory time off at the applicable rate. Management may grant or deny such request consistent with the provisions of section (b) below, which allows for compensatory time accrual of at least fifty-six (56) hours or for eighty (80 hours in the case of certain Agency of Transportation employees as referenced below in subsection (b), and if granted, shall endeavor to schedule the time off within a reasonable time. . .

. . .

(c) Compensatory time off granted in lieu of cash overtime compensation in accordance with the requirements of the Fair Labor Standards Act (FLSA) shall not exceed the statutory limits of accrual, and usage of any such FLSA compensatory time off shall be in compliance with appropriate FLSA regulations.

. . .

OPINION

The issues presented by the parties to the Board for decision are: 1) whether Grievant submitted her grievance in a timely manner under Article 15 of the Contract; and 2) whether the State may offer voluntary overtime on a compensatory time off basis only to an individual who is an Overtime Category 11 employee under Article 24 of the Contract.

We first consider the threshold issue of whether Grievant submitted her grievance in a timely manner. Article 15, Section 3, of the Contract states: "The employee, or his/her representative, or both, shall notify his/her immediate supervisor of a complaint within fifteen (15) workdays of the date upon which the employee could have reasonably been aware of the occurrence of the matter which gave rise to the complaint." VSEA filed a Step I complaint on behalf of Grievant on November 14, 2014, on the issuance of compensatory time instead of payment for overtime worked on October 18 and 19, 2014.

The Employer contends that there were four occasions in which Grievant could have reasonably been aware of the occurrence of the matter giving rise to the grievance, thereby resulting in her November 14 complaint being untimely filed. These occasions were: 1) on or about October 14, 2014, when Director of Wildlife Mark Scott told Grievant that because of budgetary constraints she would not receive pay for overtime worked on October 18 and 19, but instead would receive compensatory time; 2) on October 16, 2014, when Grievant communicated via email with Human Resources Administrator Barbara Morway regarding the decision to offer Grievant only compensatory time for overtime hours worked on October 18 and 19; 3) on October 18 and 19, 2014, when Grievant decided to work the 20 hours of overtime; and 4) on October 20, when Grievant recorded her time for the pay period that included October 18 and coded the 10 hours worked on the 18th as compensatory time.

Grievant asserts to the contrary that the occurrence of the matter giving rise to her grievance was when she received her pay advices indicating she was provided compensatory time rather than wages for the overtime she worked on October 18 and 19. Grievant contends that the Step I complaint was timely since it was submitted within 15 workdays of receipt of the pay advices.

The Board will resolve an issue on the merits if at all possible unless the collective bargaining agreement requires it to be dismissed on procedural grounds. Grievance of Brewster, 23 VLRB 96, 98 (2000). Grievance of Kimble, 7 VLRB 96, 108 (1984). Grievance of Amidon, 6 VLRB 83, 85 (1983). One area where the Board has dismissed grievances on procedural grounds has been if grievances were not timely filed at earlier steps of the grievance procedure. Under contracts providing that grievances must be filed within specified times at earlier steps of the grievance procedure, the Board, with the approval of the Vermont Supreme Court, has

refused to consider grievances which were untimely filed at earlier steps of the grievance procedure. Grievance of Adams, 23 VLRB 92 (2000). Grievance of Boyde, 18 VLRB 518 (1995); *Affirmed*, 165 Vt. 624 (1996).

In past cases where pay practices were involved and the timeliness of a grievance was at issue, the Board held that the occurrence of the matter giving rise to a grievance was when a paycheck was issued. Grievance of Shine, 21 VLRB 103 (1998). Grievance of Reed, 12 VLRB 135, 143-44 (1989). Grievance of Cole, 6 VLRB 204, 209-210 (1983). Grievance of Byrne, 6 VLRB 1, 8 (1983). Grievance of VSEA on Behalf of Meat Inspectors, 4 VLRB 144 (1981). The pay practices in those cases involved payment of standby pay rather than call-in pay, non-payment of alternate rate pay, non-payment of the difference between regular pay and worker compensation benefits, non-payment of salary increase due to reallocation, and non-payment of overtime for travel time between home and assignment.

A pay practice likewise is involved in this case – providing compensatory time rather than pay for overtime worked. It is in line with these past cases to conclude that the occurrence of the matter giving rise to the grievance within the meaning of Article 15 of the Contract was when Grievant received her pay advices indicating that she received compensatory time rather than wages for the overtime she worked on October 18 and 19, 2014.

Further, such a result is consistent with our precedents that the Board will resolve an issue on the merits if at all possible unless the collective bargaining agreement requires it to be dismissed on procedural grounds. A certain ambiguity existed with respect to the way Grievant proceeded concerning her entitlement to pay instead of compensatory time for the overtime she worked. Nonetheless, she made it evident to the Employer that she wished to receive cash for the overtime and she did not agree to waive her right to challenge the Employer's denial of paid

overtime instead of compensatory time. Under the circumstances, we hold that the Contract does not require this grievance to be dismissed on procedural grounds. Thus, Grievant submitted her Step I complaint in a timely manner by filing it within 15 workdays of receipt of her pay advices indicating she was provided compensatory time for the October 18 and 19 overtime.

We turn to considering the merits of the grievance. The issue on the merits is whether the State may offer voluntary overtime on a compensatory time off basis only to an individual who is an Overtime Category 11 employee under Article 24 of the Contract. Article 24 provides that "(e)mployees in classes assigned to pay grades 5 through 22 shall receive overtime compensation at the rate of one and one-half (1 ½) times their regular hourly rate for all hours worked in excess of eight (8) in any workday or forty (40) in any workweek." It further states: "Employees entitled to be paid cash for overtime may request compensatory time off at the applicable rate. Management may grant or deny such request . . ."

Grievant contends that this contact language clearly entitles Grievant, a Category 11 employee, to cash overtime if she requests it. She asserts that she controls whether to receive cash or compensatory time, and the Employer does not have such discretion. Grievant further contends that the State attempted to enter into an individual contract with Grievant here, and that no individual contract can supersede the collective bargaining contract.

The Employer asserts that Article 24 of the Contract is silent on the particular circumstances at issue and does not prohibit offering overtime on a purely compensatory time basis to volunteers. The Employer contends that Article 2, the Management Right article of the Contract, governs here and allows the Employer to proceed as it did in this case.

In interpreting the provisions of collective bargaining agreements in resolving grievances, 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). 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 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. Hackel v. Vermont State Colleges, 140 Vt. 446, 452 (1981). The Board will not read terms into a contract unless they arise by necessary implication. In re Stacey, 138 Vt. at 71. 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).

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. Nzomo, et al. v. Vermont State Colleges, 136 Vt. 97, 101-102 (1978). Grievance of Majors, 11 VLRB 30, 35 (1988).

The Board and the Supreme Court have indicated that they will not recognize an individual contract inconsistent with the collectively bargained agreement. This is because "(t)he very purpose of a collective bargaining agreement is to supersede individual contracts with terms which reflect the strength and bargaining power and serve the welfare of the group." Morton v. Essex Town School District, 140 Vt. 345 (1982). Grievance of Austin, 6 VLRB 150, 160 (1983). Grievance of McFarland, 10 VLRB 220, 227 (1987). An employer is not permitted to take away a collectively-bargained condition of employment without negotiating with the employees' collective bargaining representative. Austin, 6 VLRB at 160.

In applying these rules of contract construction here, we conclude that Article 24 of the Contact clearly and unambiguously entitles a Category 11 employee to paid overtime rather than compensatory time if she or he requests it. The Employer has the discretion whether to assign overtime work all, and has the discretion under Article 24 whether to grant or deny a request of a Category 11 employee entitled to be paid cash for overtime to instead receive compensatory time off at the applicable rate. However, contrary to the Employer's contention, the Employer is prohibited from offering overtime to Category 11 employees on a purely compensatory time basis to volunteers.

If we were to construe the Contract to allow the Employer to offer overtime on such a basis, employees who wished to volunteer for overtime and desired to be paid wages rather than provided compensatory time would be excluded from such offered overtime. This would be

contrary to the clear provisions of the Contract that a Category 11 employee is entitled to be paid wages for overtime rather than receive compensatory time if he or she requests it. We would be allowing the Employer to enter into individual contracts inconsistent with the collective bargaining agreement, and permitting the Employer to take away a collectively-bargained condition of employment without negotiating with the employees' collective bargaining representative. We cannot construe the Contract to have such inappropriate consequences.

Thus, we conclude that the Employer violated Article 24 of the Contract by providing Grievant with compensatory time, instead of pay, for overtime she worked on October 18 and 19, 2014. Grievant made it evident to the Employer that she wished to receive cash for the overtime and she made no request to instead receive compensatory time. Once the Employer allowed Grievant to work the overtime, she was entitled to receive pay for it.

In determining a remedy for this violation, we are seeking to make Grievant "whole". To make an employee whole is to place the employee in the position he or she would have been in if the Contract had not been violated. Grievance of Lilly, 24 VLRB 233, 244 (2001). Grievance of Lowell, 15 VLRB 291, 339-40 (1992). Grievance of Sherbrook, 13 VLRB 359, 361 (1990). Grievant would have been in the position of receiving pay at one and one-half times her regular hourly rate for the 20 hours of overtime she worked on October 18 and 19, 2014, and would not have received compensatory time for the overtime. This is the remedy which we will order.

There is a question whether Grievant should receive interest on this back pay award. The standard which the Board has adopted is that a monetary award needs to be at least $600 before we will award interest. The time, cost and effort involved in computing interest on a monetary award of less than $600 makes the award of interest not appropriate in such cases. Grievance of Robinson and the Vermont State Employees' Association, 30 VLRB 278, 279 (2009). Thus,

interest will be awarded in this matter only if Grievant' s wage rate as of October 18 and 19, 2014, would result in a monetary award of at least $600.

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered:

1) The grievance of Michelle Eynon is sustained; and

2) The State of Vermont Department of Fish and Wildlife shall provide Grievant with payment at one and one-half times her regular hourly rate for the 20 hours of overtime she worked on October 18 and 19, 2014, and shall subtract 30 hours of compensatory time from Grievant's compensatory time accrual. Grievant shall receive interest at the legal rate of 12 percent per annum interest if Grievant's wage rate as of October 18 and 19, 2014, results in a monetary award of at least $600; if the monetary award is less than $600, then Grievant shall not receive interest. If Grievant is entitled to interest, it will run from the dates she would have received her paychecks for the overtime she worked to the date she receives the back pay award.

Dated this 18th day of September, 2015, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Gary F. Karnedy

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Gary F. Karnedy, Chairperson

/s/ Edward W. Clark, Jr.

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Edward W. Clark, Jr.

/s/ Robert Greemore

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Robert Greemore