

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 16-31
KIMBERLY HABICH	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

The Vermont State Employees' Association ("VSEA") filed a grievance on May 18, 2016, on behalf of Kimberly Habich, Dispatch Shift Supervisor with the State Department of Public Safety. VSEA contended that the State of Vermont ("State") violated Article 20 of the collective bargaining contract between VSEA and the State for the Supervisory Unit, effective July 1, 2014, to June 30, 2016 ("Supervisory Unit Contract"), established past practice and an August 3, 2015, Memorandum of Understanding between VSEA and the State, when it permitted an employee with less seniority as a supervisor to displace Grievant from her position on the first shift at the Rockingham Public Safety Answering Point ("PSAP").

A hearing was held in the Labor Relations Board hearing room in Montpelier on November 4, 2016, before Board Members Gary Karnedy, Chairperson; Richard Park and James Kiehle. VSEA General Counsel Timothy Belcher represented Grievant. Assistant Attorney General Melanie Kehne represented the State. The parties filed post-hearing briefs on November 28, 2016.

FINDINGS OF FACT

1. Dispatch Shift Supervisors with the Department of Public Safety are covered by the Supervisory Unit Contract, which provides in pertinent part:

...

**ARTICLE 20  
EMPLOYEE WORKWEEK/WORK LOCATION/WORK SHIFT**

...

## **2. NEW SHIFTS/WORKWEEK**

In any department or institution, prior to establishment of a new shift (a shift with starting and quitting times different from any existing shift) or a new workweek (a combination of workdays constituting 40 hours [or 80 hours biweekly if applicable] which is different from any existing combination of workdays, or which includes evenings or half days), the State shall notify the VSEA, and will meet, if requested within 10 days, on a regular basis to negotiate the impact of this decision for up to 45 calendar days. At the end of the 45 day calendar day period commencing from the date VSEA requests negotiations the State may implement its proposed new shift or new workweek without further negotiations or recourse to the statutory impasse procedure.

## **3. SELECTION FOR ASSIGNMENT TO A NEW SHIFT/NEW WORKWEEK/NEW GEOGRAPHIC AREA**

(a) Subject to the operating needs of a Department, as determined by the appointing authority, which may require the assignment (for 30 days or more) of any employee to a different or new shift, workweek, or geographic area, the State will select qualified volunteers first, after which selection shall be in reverse order of (continuous state service) seniority, i.e., the most junior employee(s) will be selected. . .

...

5. These provisions shall not apply to state police supervisors.

...

# **ARTICLE 69 REEMPLOYMENT RIGHTS (RECALL RIGHTS)**

## **1. MANDATORY REEMPLOYMENT RIGHTS**

An employee with permanent status who has received an official notice of layoff, and who is about to be laid off under the Reduction in Force article, shall have the following mandatory reemployment rights:

a) Beginning thirty (30) days immediately prior to the effective date of the layoff and continuing for two (2) years beyond such effective date, such employee will have mandatory reemployment rights to any vacant classified bargaining unit (except positions in the State Police) position when management intends to fill it, provided:

(1) Such position is at the same or lower pay grade as the position from which the employee was laid off, or up to the highest position in the classified service from which such employee was laid off or from which such employee exercised vertical displacement rights within the two (2) year period prior to the next scheduled effective date of layoff; and

(2) The employee meets the minimum qualifications for the position; and

(3) The employee has indicated a desire and willingness for the job by stating so in "parameters" established before implementation of these reemployment rights (e.g., full-time, part-time, limited service, permanent, type of position, department, occupation, etc.). During the period of mandatory reemployment rights an employee may at any time change these reemployment parameters for the remainder of the period.

b) Notwithstanding subsection (1) above, management shall have the right to first fill vacant classified bargaining unit positions by promotion, demotion, or lateral transfer of classified employees from within the Department, so long as such actions produce a different vacant bargaining unit position which management intends to fill.

c) An employee who exercises mandatory reemployment rights to a higher pay grade under this subsection shall not be considered to have been promoted thereto for pay purposes.

d) If the class from which the employee was laid off has been reassigned to a higher or lower pay grade between the time the employee was laid off and the time a job offer is made pursuant to this Article, the employee has reemployment rights at the higher pay grade.

...

## **APPENDIX A DEFINITIONS**

...

**CONTINUOUS STATE SERVICE** – uninterrupted service by an employee; authorized military leaves, educational leaves and other authorized leaves of absence shall not be an interruption of service.

...

**SENIORITY** – the length of continuous State service.

..

(Exhibit 1)

2. Over a period of several years between approximately 1995 to 2005, the Department of Public Safety consolidated its dispatching services from 12 dispatch centers located in individual State Police barracks to four regional Public Safety Answering Points (“PSAPs”) located in Derby, Williston, Rockingham and Rutland. The Department did not employ civilian supervisors or administrators to supervise dispatchers prior to the regional consolidations. New supervisory positions were created in each regional PSAP to oversee the dispatchers as a result of the regional consolidations. The supervisors reported to the PSAP Administrator. The impact of these consolidations was negotiated with VSEA.

3. Grievant was hired by the Department of Public Safety as a part-time dispatcher in 2007. She became a full-time supervisor at the Rockingham PSAP in June 2010, working the second shift (i.e., 3 p.m. to 11 p.m.). In January 2013, first shift (i.e., 7 a.m. to 3 p.m.) supervisor

Stacia Anderson stepped down to a position as a dispatcher. Grievant bid for the first shift supervisor position, and prevailed over another dispatch supervisor who had greater time in state service, but less time as a supervisor, than Grievant.

4. Shift bids for supervisors in the PSAPs were awarded by time in grade seniority, rather than by continuous state service seniority, from the time supervisory positions were first established in the PSAPs until August 14, 2015. This practice was consistent with the way seniority for bidding is determined for uniformed members of the Vermont State Police under the collective bargaining agreement between the State and the Vermont Troopers Association covering employees in the State Police Unit – i.e., by time in grade seniority.

5. In January 2015, Governor Shumlin announced in his budget address a plan to further consolidate the regional PSAPs from four to two: one PSAP in Williston and one PSAP in Rockingham. Captain Donald Patch was placed in charge of overseeing the 2015 consolidation.

6. On February 25, 2015, Patch sent an email to the administrators of the four existing PSAPs informing them that he was working on adding one additional supervisor position in Rockingham and one in Williston due to the consolidation. He requested that the administrators identify which schedule these supervisors would fill. Rockingham PSAP Administrator Thomas Field responded that the new position would be assigned to work Sunday through Thursday from 3 p.m. to 11 p.m. (Exhibit 10).

7. At this time, there were three dispatch supervisors in Rockingham. They worked the following schedules:

	Hours	Days worked	Regular days off
Grievant	7 a.m. to 3 p.m.	Tuesday to Saturday	Sunday and Monday

Sarah Lique	3 p.m. to 11 p.m.	Tuesday to Saturday	Sunday and Monday
Sabrianna Pippin	11 p.m. to 7 a.m.	Wednesday to Sunday	Monday and Tuesday

8. Patch requested that Jim Cronan, Williston PSAP Administrator, create the post-consolidation schedule for the Williston PSAP. Patch asked Elizabeth Adams, the Rutland PSAP Administrator prior to consolidation, to create the post-consolidation schedule for Rockingham. Her position was eliminated upon consolidation (Exhibit 8, 47).

9. Cronan created a schedule providing that the three existing supervisor shifts in Williston remain in place through the consolidation, and that they would retain the same scheduled days off and starting and finishing times. The fourth supervisor position appeared as a split shift on the Williston schedule, from 7:00 p.m. to 3:00 a.m.

10. Adams created a schedule that retained the same starting and finishing times of the three existing supervisor shifts in Rockingham but changed their regular days off. Adams added a fourth supervisor position to the second shift with assigned work days of Sunday through Thursday. Adams did not consult with the Rockingham supervisors on the revised schedule. The schedule developed by Adams specifically provided the following four shifts:

Hours	Days worked	Regular days off
7 a.m. to 3 p.m.	Sunday to Thursday	Friday and Saturday
3 p.m. to 11 p.m.	Sunday to Thursday	Friday and Saturday
3 p.m. to 11 p.m.	Monday to Friday	Saturday and Sunday
11 p.m. to 7 a.m.	Tuesday to Saturday	Sunday and Monday

(Exhibit 8)

11. On February 26, 2015, John Berard, Director of Labor Relations for the Department of Human Resources, sent an email to Steve Howard, VSEA Executive Director, which provided:

As you are aware, the Department of Public Safety is moving forward with a plan to consolidate the number of (PSAPs) from four to two. As you may also be aware, while the collective bargaining agreements have well established procedures for implementing a Reduction-in-Force (RIF), they contain no provisions which directly address such a consolidation. As a result, I'd like to meet with VSEA to discuss methods which will minimize the impact of the consolidation on employees without modifying existing RIF provisions.

...

Exhibit 13)

12. Gary Hoadley, VSEA Director of Labor Relations, responded to Berard's email, and agreed to the meeting. The meeting was scheduled for March 13, 2105 (Exhibit 13).

13. Patch sent Berard emails on March 5, 2015, concerning the consolidation. He reported that employees in the PSAPs not being closed were upset because they apparently did not think that the Department of Public Safety could do a full shift bid. Patch asked Bedard whether this was something they could discuss with VSEA now so it was not an issue when the consolidation occurred. Bedard replied that he would "add it to the list of things to talk to VSEA about" (Exhibit 12).

14. On March 10, 2015, Captain Patch sent all dispatchers and supervisors an email attaching the post-consolidation schedules for the Williston and Rockingham PSAPs developed by Adams and Cronan. It was planned that the number of dispatching positions in Rockingham would increase from 14 to 24 due to the consolidation (Exhibit 20).

15. VSEA and the State met as scheduled on March 13, 2015, to negotiate over the impact of the consolidation. The Supervisory Unit and Non-Management Unit bargaining teams for VSEA attended the meeting. Berard was spokesperson for the State, and was accompanied by

Patch. During the meeting, the State indicated that new positions would be created in Rockingham and Williston, and proposed that these positions be reserved for employees who wished to transfer from Rutland and Derby, without posting the positions and considering other applicants as would otherwise be required. The State also proposed to open all shifts in Rockingham and Williston for bid, permitting the transferring Rutland and Derby employees to displace Rockingham and Williston employees based on statewide seniority. The State also provided VSEA with the post-consolidation schedules prepared by Adams and Cronan (Exhibit 15).

16. After the meeting, Berard sent a letter dated March 24, 2015, to Hoadley which provided in pertinent part:

I would like to thank you and the members of your bargaining team for meeting with myself and representatives of the Department of Public Service (DPS) on March 13, 2015, to discuss the establishment of the following new work shifts/schedules in accordance with Article 20, Section 2 of the Collective Bargaining Agreements:

1000-1900 Monday through Friday

1100-1900 Sunday, 0700-1500 Monday through Thursday

As discussed, DPS intends, absent an agreement to implement sooner, to establish these new shifts/schedules for use effective no later than the payroll period beginning May 3, 2015.

...

(Exhibits 13, 22)

17. On June 24, 2015, Laura Moulton, PSAP Supervisor in Rutland, sent an email to Patch asking: "When will you be hiring more dispatchers for Rockingham? I want to transfer." Patch responded: "(T)he next opportunity will be when we consolidate. With your seniority you shouldn't have any issue getting a position. That will be with a new schedule with shift bid" (Exhibit 23).

18. Captain Ray Keefe was Commander of Troop D, which included the Rockingham PSAP, throughout 2015. At some point prior to August 2015, he presented the post-consolidation schedule developed by Adams to the Rockingham PSAP supervisors. Keefe informed them that the changed schedules were intended to provide each supervisor with at least one weekend day off. Grievant asked Keefe whether she would lose her day shift, and he replied that she would retain the day shift. Keefe did not know if the change in day off would require a shift bid, but he understood that, if a bid occurred, Grievant would receive the shift based on her greater seniority as a supervisor.

19. VSEA and the State continued negotiations during the spring and summer over the impact of the consolidation. The question of shift bids was controversial. The employees losing their jobs in the Derby and Rutland PSAPs wished to be able to displace less senior employees from desirable shifts in Rockingham and Williston. The PSAP employees in Rutland and Williston sought to protect their existing shifts. VSEA rejected the State's proposal to open all shifts in Rockingham and Williston for bid, which would have permitted the transferring Rutland and Derby employees to displace Rockingham and Williston employees based on statewide seniority.

20. VSEA and the State executed a Memorandum of Understanding on August 3, 2015, which provided in part as follows:

This Memorandum of Understanding serves to memorialize the agreement between the State . . . , Department of Public Safety ("DPS"), and . . . VSEA . . . setting forth and clarifying changes in the applicable provisions of the Non-Management Unit and/or Supervisory Unit Collective Bargaining Agreements ("CBA") . . . concerning implementing a Pre-Reduction in Force ("RIF") process for current classified State employees employed by DPS in the Derby and Rutland (PSAPs). Therefore, the Parties agree as follows:

1. Classified employees currently employed by DPS in the Derby and Rutland PSAPs shall be provided with advance notice of any vacant classified bargaining unit



position, located at the Williston or Rockingham PSAPs which management intends to fill. Such positions shall not be subject to the mandatory reemployment provisions of Section 1 of the Reemployment Rights Article of the applicable CBA, until they have first been offered to current classified employees in the bargaining units working at the Derby or Rutland PSAPs. During this notice period, employees will be made aware of, and may volunteer to transfer to the aforementioned positions . . .

...

4. If the number of volunteers exceeds the number of vacant classified bargaining unit positions, located at the Williston or Rockingham PSAP's which management intends to fill, the successful candidate shall be selected, within each applicable classification, by the length of continuous state service. Members of the Supervisory bargaining unit, who are not successful in obtaining a supervisory vacancy, shall be placed in the non-management pool of volunteers.

...

6. This Agreement sets forth all the terms of the Parties' understanding, and there are no other promises or obligations other than what is specifically stated herein. All prior agreements, representations, statements and understandings relating to this matter, shall have no force and/or effect.

... (Exhibit 27)

21. On August 3, 2015, Patch sent an email to Rutland and Derby dispatchers and dispatch supervisors. He informed them of the Memorandum of Understanding between the State and VSEA, which he attached to the email. He further stated: "At this time I anticipate having 8 openings in Williston and 8 openings in Rockingham. If you are interested in volunteering to transfer into one of these open positions please let me know by email." Moulton sent a responsive email to Patch on August 4, stating: "Williston or Rockingham". Then, the following email exchange occurred on August 4 and 5 between Patch and Moulton:

Patch: "Can I put you down for a Rockingham Supervisor position so you remain at your same position and pay grade?"

Moulton: "Depends on the shift"

Patch: "What shift would you be interested in? I think the new schedule will have 1 day, 2 evening and 1 midnight supervisor position."

Moulton: "Days."

Patch: "Received. I will be meeting with Labor Management tomorrow and hope to have an answer on how the shift bidding will work. If it is a complete shift bid you have

seniority over the other Rockingham Supervisors. I will let you know. How late are you working today?”

Moulton: “I will be here until 1500 hours today. If it is a ‘new’ schedule then I would think it will be a total shift bid, just my thought.☺”  
(Exhibit 30)

22. On August 4, 2015, Patch sent the following email to all dispatch staff:

I have received several inquiries about the shift bidding process when we implement the new schedule for consolidation. When the new schedule is implemented at Rockingham and Williston we will be conducting a full shift bid. This is consistent with past practices at the PSAPs. Feel free to contact me or your PSAP Administrator if you have questions.  
(Exhibit 31)

23. On August 7, 2015, Hoadley sent the following email to Berard:

VSEA has received complaints from union members that Captain Patch intends to conduct a statewide PSAP shift bid. Be advised that such action is a unilateral change in working conditions and a mandatory bargaining subject that requires negotiation with VSEA. VSEA has statutory negotiations and impasse procedure rights. If the State contends that bargaining with VSEA over this matter is not required, please advise me immediately so that the union can adequately protect the bargaining rights of VSEA members.  
(Exhibit 40)

24. On August 10, 2015, Brian Johnson, VSEA Steward at the Rockingham PSAP, filed a Step I grievance with PSAP Administrator Tom Field contesting the full shift bid announced by Patch (Exhibit 32).

25. On August 13, 2015, at 11:09 a.m., Patch sent the following email to all dispatch staff:

I sent an email out last week indicating that we would be completing a full shift bid when the new consolidation schedule was implemented. The intention was to use the past shift bidding process believed by many to be the fairest. Based on grievances filed and communications from VSEA, I have been advised by Labor Relations that engaging in a debate with VSEA over this issue will only slow the process down and to base the shift bidding only on vacant shifts being offered and not to engage in a full shift bid. This will be our policy moving forward for all shift bidding. I apologize for any confusion caused. Any concerns about this issue should be directed to VSEA.  
(Exhibit 33)

26. On August 13, 2015, at 12:44 p.m., Moulton sent Patch an email stating: “what I am agreeing to per our conversation is a supervisor’s position in Rockingham with a new shift bid for supervisors. In the event that the shift bid does not occur I will be requesting a demotion to ECD11.” “ECD11” referred to “Emergency Communications Dispatcher II”. Patch responded in an 1:01 p.m. email sent that day:

As I stated I cannot guarantee your shift. I can offer you a Supervisor’s position at Rockingham (or Williston) and I can tell you we plan on bidding the open shifts which in Rockingham’s case are all the Supervisor shifts. I cannot approve a demotion at this time and cannot offer you an ECD 2 position at this time.  
If you would like to volunteer for a Rockingham (or Williston) Supervisor’s position let me know. Otherwise you need to attend the meeting on August 18<sup>th</sup> at 1400 or 1530 for your official RIF notice.  
Let me know if you need to talk.  
(Exhibit 38)

27. Berard responded to Hoadley’s August 7 email on August 13, 2015, at 2:51 p.m., stating:

After some discussion with DPS, they have decided that engaging in a debate with VSEA vis a vis the appropriateness of a full shift bid in these circumstances will only unnecessarily delay moves of operational necessity. As a result, DPS does not intend to conduct a full shift bid of the Williston and Rockingham PSAPs. Employees who have questions and/or concerns regarding this issue are being directed to contact VSEA as their sole and exclusive bargaining representative.  
(Exhibit 40)

28. On August 14, 2016, at 1:18 p.m., Patch sent the following email to Keefe, Cronan, and Field, among others, which email was consistent with a discussion he had with Berard:

John advised that seniority for the dispatch supervisors is based on continuous State service not time in grade. He directed me to the Supervisor’s CBA Appendix A, Definitions.  
**SENIORITY – the length of continuous State service.**  
He was not aware of anything to the contrary as it applies to Supervisors.  
(Exhibit 41, emphasis in original)

29. On August 18 or 19, 2015, Keefe informed Grievant that the first shift supervisor's position that she held would be put out to bid due to the change in days off, and that Moulton would be assigned the shift if she bid on it based on her greater length of state service than Grievant.

30. On August 15, 2015, Field sent an email to PSAP staff which provided in pertinent part:

With the pending consolidation, a new schedule will be taking effect-the following shifts do not currently exist at Rockingham and are posted for shift bidding. Movement internally may create additional openings on other shifts, so please submit your first, second and third choices for shifts to me by 1300 hours 8/26/15. . .

These are the "new" shifts

Supervisor 07-15 Fri/Sat off

Supervisor 15-23 Fri/Sat off

Supervisor 15/23 Sat/Sun off

Supervisor 23-07 Sun/Mon off

. . .

Effective date of the new schedule is yet to be determined.

(Exhibit 47)

31. The post-consolidation schedule for the Rockingham PSAP did not change from the time it was developed in March 2015 to the time shifts were bid in August 2015. It did not add any new shifts to the Rockingham schedule that did not already exist at the Department of Public Safety.

32. Grievant and Moulton bid for the first shift Supervisor position – 7 a.m. to 3 p.m. with Friday and Saturday as the regular days off duty. At the time of the shift bid, Grievant had more time in a supervisory position than Moulton, and Moulton had more continuous state service than Grievant. The Department of Public Safety selected Moulton for the shift because she had greater continuous state service seniority than Grievant. Grievant received a 3 p.m. to 11 p.m. shift with Friday and Saturday as regular days off duty. In May of 2016, by request of

Grievant, her shift changed to a split shift from 11 a.m. to 7 p.m. with Friday and Saturday as regular days off duty. She has remained in this shift since then.

33. There was difficulty in implementing the consolidation of the PSAPs due to an insufficient number of Derby and Rutland PSAP staff agreeing to transfer to Williston and Rockingham. The State and VSEA resumed negotiations to develop transfer incentives. The parties reached agreement on an Addendum to the Memorandum of Understanding which offered incentives for employees who transferred. Patch sent an unsigned copy of the agreed-upon Addendum to Rutland and Derby PSAP staff on August 26, 2015 (Exhibit 52).

34. After the consolidation, which became effective in September 2015, each of the two PSAPs had four supervisory positions. During the 2015 consolidation, a supervisory position from Derby was relocated to the Williston PSAP, and a supervisory position from Rutland was relocated to the Rockingham PSAP.

35. The fourth supervisor position in Williston remained vacant until 2016. No supervisor from Derby wished to transfer to Williston during the 2015 consolidation. The supervisors working in the Williston PSAP were not required to bid on shifts because of the consolidation, and retained the shifts they had been assigned prior to the consolidation.

36. In 2016, the Rockingham PSAP moved to a newly constructed barracks in Westminster.

### OPINION

Grievant contends that the State violated Article 20 of the Supervisory Unit Contract, and an August 3, 2015, Memorandum of Understanding between VSEA and the State, when it permitted an employee with less seniority as a supervisor to displace Grievant from her position

on the first shift at the Rockingham PSAP during the consolidation of the four PSAPs in the state to two PSAPs.<sup>1</sup>

Grievant asserts that, while the State had sought during negotiations with VSEA on the implementation of the consolidation an agreement that would have opened all shifts in the remaining PSAPs for bid, the Memorandum of Understanding entered into by the parties only permitted the transferring employees to take the newly created jobs in Rockingham and Williston. Grievant contends that, having reached an agreement that abandoned its shift bid proposal, the State then improperly proceeded to implement a shift bid that essentially only affected Grievant's day shift. Grievant further maintains that the Memorandum of Understanding by its terms superseded any prior agreements, including the provisions of Article 20, Section 3, of the Supervisory Unit Contract.

Grievant also asserts that the State made a one-time exception to its rule that supervisor shift bids would be governed by seniority as a supervisor by instead using continuous state service seniority to govern the supervisor shift process in Rockingham. Grievant maintains that the State took this action to convince Laura Moulton, who had less supervisor seniority but more continuous state service seniority than Grievant, to transfer as a supervisor after engaging in extensive negotiations with Moulton. Grievant contends that the State's actions constituted both a violation of the Memorandum of Understanding and a violation of the State's obligation to bargain with the VSEA as set forth in Article 20, Section 2, of the Supervisory Unit Contract.

The State responds to the contrary that the clear and unambiguous language of Article 20, Section 3, and Appendix A of the Supervisory Unit Contract provide that supervisor bids for

---

<sup>1</sup> Grievant's further claim in the grievance that the State violated a binding practice was not pursued by Grievant at the hearing and in the post-hearing brief except to the extent that Grievant incorporated the change in practice by the State into the contention that the State violated Article 20, Section 2, of the Supervisory Unit Contract.

different work weeks or shifts is governed by continuous state service seniority rather than seniority as a supervisor. The State further contends that the Memorandum of Understanding does not apply because it does not address the situation here of multiple bids for a single workweek or shift. The State asserts that, even if the Memorandum of Understanding does apply, it was not violated because it provides for continuous state service seniority prevailing over seniority as a shift supervisor in shift bids.

In determining whether the State violated the Memorandum of Understanding and the Supervisory Unit Contract by its actions, the Board is interpreting the provisions of collective bargaining agreements. In such cases, 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, 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 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).

In applying these rules of construction, we first determine whether the State violated the August 3, 2015, Memorandum of Understanding (“MOU”). The MOU is clear and unambiguous in that it is limited to “any vacant classified bargaining unit positions, located at the Williston or Rockingham PSAPs which management intends to fill”. These are the positions added to the Rockingham and Williston PSAPs due to the consolidation. The MOU does not address the change in the supervisory shift worked by Grievant which is in dispute in this grievance. This did not involve a vacant classified bargaining unit position. Instead, it involved a change to a different workweek for an occupied bargaining unit position.

The conclusion that the MOU is limited to addressing how to handle the vacant bargaining unit positions which management intended to fill in Rockingham and Williston is made clear by



its terms, which specifically address just the vacant positions and contains the following provision in paragraph 6: “This Agreement sets forth all the terms of the Parties’ understanding, and there are no other promises or obligations other than what is specifically stated herein.” This defeats Grievant’s claim that the MOU extends to the change to a different workweek for Grievant since all the terms of the parties’ understanding are set forth in the MOU which does not address such a change.

We further disagree with Grievant that the further statement in paragraph 6 of the MOU that “(a)ll prior agreements . . . relating to this matter, shall have no further force and effect” means that the provisions of Article 20, Section 3, of the Supervisory Unit Contract are superseded by the MOU. The only provisions of the Supervisory Unit Contract referenced in the MOU are the mandatory reemployment provisions of Section 1 the Reemployment Rights Article of the Supervisory Unit Contract. The MOU states that the vacant bargaining unit positions addressed in the MOU are not subject to such mandatory reemployment provisions. In requesting that we rule that the provisions of Article 20, Section 3, of the Contract also are superseded by the MOU, Grievant is requesting that we read terms into the MOU which do not arise by necessary implication. In reading the MOU in its entirety and giving effect to every part, it is clear that the only part of the Supervisory Unit Contract superseded by the MOU are the mandatory reemployment provisions.

In sum, Grievant has not established that the State violated the MOU in this matter. We turn to addressing whether the State violated Article 20, Section 2, of the Contract as alleged by Grievant. Grievant contends that, since Article 20, Section 2, requires the State to bargain with VSEA to negotiate the impact of a new shift or workweek prior to their implementation, then the

State had an obligation to bargain with VSEA prior to implementing a shift bidding process which operated in favor of Moulton to Grievant's detriment.

A careful reading of Article 20, Section 2, results in a conclusion that Grievant's reliance on this contract provision is unwarranted. Article 20, Section 2, provides in pertinent part: "In any department . . . , prior to establishment of a new shift (a shift with starting and quitting times different from any existing shift) or a new workweek (a combination of workdays constituting 40 hours . . . which is different from any existing combination of workdays . . . ), the State shall notify the VSEA, and will meet, if requested . . . to negotiate the impact of this decision". Grievant's interpretation of this contract provision disregards the words "(i)n any department".

The evidence establishes that the post-consolidation schedule for the Rockingham PSAP, including the supervisory shift for which Moulton was selected over Grievant, did not add any new shifts that did not already exist at the Department of Public Safety. Further, Grievant has not established that the post-consolidation supervisory shifts at Rockingham constituted a new workweek in the Department. A condition precedent to required bargaining under Article 20, Section 2, is that a new shift or new workweek is being established in the Department of Public Safety. Grievant has not established that such a new shift or new workweek was being established. Thus, Article 20, Section 2, did not apply in this situation.

Instead, the operative provision of the Supervisory Unit Contract in this situation was Article 20, Section 3. It provides in pertinent part: "Subject to the operating needs of a Department, as determined by the appointing authority, which may require the assignment (for 30 days or more) of any employee to a different or new shift, workweek, or geographic area, the State will select qualified volunteers first, after which selection shall be in reverse order of (continuous state service) seniority, i.e., the most junior employee(s) will be selected". The post-consolidation

supervisory shift in Rockingham for which Moulton was selected over Grievant constituted a different workweek.

There were two qualified volunteers vying to be assigned to this different workweek, Grievant and Moulton. Although Article 20, Section 3, explicitly provides what will happen if there are no qualified volunteers – i.e., that assignment to this different workweek will be in reverse order of continuous state service seniority – it does not specify how the assignment will be made under the circumstances existing here of two qualified volunteers. Given the contractual silence, it did not violate the Supervisory Unit Contract for the State to make the assignment based on which employee had the most continuous state service seniority, which resulted in Moulton being assigned. This is particularly so since continuous state service seniority, rather than seniority as a supervisor, is otherwise the recognized basis of assignments under this contract section and constitutes the definition of seniority under Appendix A of the Supervisory Unit Contract.

Nonetheless, Grievant contends that the Department of Public Safety selectively applied its seniority rules here in an arbitrary and capricious manner. Grievant contends that this occurred here because the general rule in the Department, for both uniformed and civilian members of the Department, is that supervisory seniority is based on time as a supervisor. Grievant asserts that the action here of a one-time deviation from the general practice to favor one employee over another is the very definition of arbitrariness and capriciousness.

Grievant's argument in this regard is not persuasive. First, our task is to apply the rules of contract construction in deciding whether the Supervisory Unit Contract was violated. It is clear in applying such rules that Grievant has not demonstrated that the provisions of the Contract were violated. Grievant's argument invoking an arbitrary and capricious standard of review ignores the governing contract construction standards.

Second, Grievant's reliance on how work shifts and workweeks are handled for uniformed supervisors in the Department is misplaced. The Supervisory Unit Contract explicitly treats uniformed supervisors in the Department differently than other supervisors in applying the employee workweek and work shift provisions of Article 20 of the Contract. Article 20, Section 5, states that "(t)hese provisions shall not apply to state police supervisors."

Third, the characterization of what occurred here as a one-time deviation from the general practice is not a fair reading of the evidence. The evidence indicates that the Department changed its practice with respect to seniority for non-uniformed supervisors of the Department when the Director of Labor Relations for the State Department of Human Resources indicated in August 2015 that seniority for the dispatch supervisors is based on continuous state service, not time as a supervisor. It is true that Grievant was the only dispatch supervisor for which we have evidence who was affected by this change in practice. However, the evidence is simply devoid of any other comparable circumstances affecting a dispatch supervisor.

In sum, Grievant has not demonstrated that the State violated Article 20 of the Supervisory Unit Contract or the August 3, 2015, Memorandum of Understanding in this matter. Thus, this grievance is dismissed.

ORDER

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

Dated this 30th day of December, 2016, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Gary F. Karnedy

---

Gary F. Karnedy, Chairperson

/s/ Richard W. Park

---

Richard W. Park

/s/ James C. Kiehle

---

James C. Kiehle