VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	
VERMONT STATE EMPLOYEES' ASSOCIATION (RE: ANNUAL LEAVE ACCRUALS)	)	DOCKET NO. 15-13

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On March 12, 2015, the Vermont State Employees' Association ("VSEA") filed a grievance with the Vermont Labor Relations Board contending that the State of Vermont ("State") violated the collective bargaining agreements between the State and the VSEA, effective July 1, 2014 to June 30, 2016, for the Non-Management Unit, the Supervisory Unit and the Corrections Unit ("Contracts") by failing to timely credit employees with 48 hours of annual leave accrual upon completion of their first six months of employment.

A hearing was held in the Labor Relations Board hearing room in Montpelier on January 7, 2016, before Board Members Richard Park, Acting Chairperson; Alan Willard and Edward Clark, Jr. VSEA General Counsel Timothy Belcher represented VSEA. Special Assistant Attorney General James Shea represented the State. The parties filed post-hearing briefs on February 1, 2016.

FINDINGS OF FACT

1. The July 5, 1976 to June 30, 1979, collective bargaining agreement between the State and VSEA for the Non-Management Unit provided in pertinent part as follows:

ARTICLE XXV – ANNUAL LEAVE

. . .

2. Policy

. . .

c. Annual leave credits are not accumulated and may not be used during the first six months' employment.

d. A classified employee accrues annual leave as follows:

i. A classified employee shall be credited with six days of annual leave upon completion of his first six months of service.

ii. A classified employee with more than six months but fewer than five years of full time service shall accrue annual leave at the rate of one day per completed calendar month of service. . .

. . .

j. Upon satisfactory completion of the first six months of employment in the classified service, annual leave shall be earned on the basis of completed calendar months of service. A permanent status classified employee shall not be penalized his annual leave credit for any month during which he is off payroll for fewer than six days. However, an employee who is off payroll for six or more days during a calendar month shall not accrue annual leave for that month. This test shall also apply to the bank of annual leave credited to the employee's account upon completion of the first six months of employment. For example, an employee who was off payroll for two weeks during his second month of employment would be credited with only five days of leave upon completion of probation. If the same employee was again off payroll for two weeks during the third month of employment, he would only be credited with four days.

. . .

s. Annual leave accrued by an employee separating from the State classified service shall be paid as a lump sum with the final payment for active service. A separating employee who has been in an on payroll status twenty days (workdays plus holidays) during the final calendar month of employment, shall be entitled to annual leave accrual for that month.

. . .

. . .

4. Procedures

. . .

e. A new employee shall be credited with six days of annual leave on the first payroll time report submitted at the end of his sixth full month of employment. At the end of his seventh and each subsequent calendar month of service, the employee shall accrue annual leave on a regular basis.

f. Annual leave accrual shall be credited on the payroll time report for the pay period which includes the first day of the following month, provided the employee has not been off payroll for six or more workdays. . .

. .

(State Exhibit 9, VSEA Exhibit 4)

2. The parties replaced the above-cited Section 2(s) provision of the Annual Leave article when negotiating the July 1, 1986 – June 30, 1988 collective bargaining agreement with the following provision:

2. POLICY

. . .

q. Annual leave accrued by an employee separating from the State classified service shall be paid as a lump sum with the final payment for active service. A separating employee who has been in an on payroll status for all of his/her regularly scheduled work days of the final calendar month of employment, shall be entitled to annual leave accrual for that month.

. . .

(State Exhibit 10)

3. The parties established a grid for annual leave accruals and caps for the first time when they negotiated the collective bargaining agreement effective July 1, 1990 to June 30, 1992, as follows:

SECTION 2. POLICY

. . .

d. Accruals and caps are as follows:

i. A classified employee shall be credited with six days of annual leave upon completion of his or her first six months of service.

YRS.	ACCRUAL RATE/mo.	ACCUMULATION CAP
0-5	1.00 days	30 days
5-10	1.25	35
10-15	1.50	40
15-20	1.66	42.5
20-30	1.75	45
+30	2.00	45

Accrual rate is the number of days the employee shall accrue per complete calendar month of service.

Accumulation Cap is the maximum number of workdays an employee may accumulate.

Years is the range of the number of years of full-time service.

. . .

(State Exhibit 11)

4. The parties agreed in the July 1, 1994 – June 30, 1996 collective bargaining agreements to move from employees being paid every two weeks to being paid twice a month. Annual leave still accrued on a monthly basis.

5. The parties returned to employees being paid every two weeks, instead of twice monthly, in the collective bargaining agreements effective July 1, 1996 – June 30, 1997. The

parties also changed from annual leave accrual being determined on a monthly basis to a pay period basis in the 1996 – 1997 collective bargaining agreements. The Annual Leave article in the agreements for the Non-Management Unit and the Supervisory Unit provided in pertinent part:

> . . .
> 2. POLICY
> . . .
> (c) Annual leave credits are not accumulated and may not be used during the first six months' employment.
> (d) Accruals and caps are as follows:
> (1) A classified employee shall be credited with 48 hours of annual leave upon completion of his or her first six months of service.

YEARS	ACCRUAL RATE PER PAY PERIOD	ACCUMULATION CAP
0<5	3.69 hours	240 hours
5<10	4.62	280
10<15	5.54	320
15<20	6.13	340
20<30	6.46	360
30+	7.38	360

> Accrual rate is the number of hours the employee shall accrue per pay period.
> Accumulation Cap is the maximum number of hours an employee may accumulate.
> Years is the range of the number of years of full-time service.
> . . .
> (i) Upon satisfactory completion of the first six months of employment in the classified service, annual leave shall be earned on the basis of completed full pay periods of service. A permanent status classified employee shall not be penalized his or her annual leave credit for any pay period during which the employee is off payroll or on an unpaid leave of absence for fewer than 20 hours. However, an employee who is off payroll or on an unpaid leave of absence for 20 hours or more during a pay period shall not accrue annual leave for that month. This 20 hour test shall be prorated accordingly for part-time employees. This test shall also apply to the bank of annual leave credited to the employee's account upon completion of the first six months of employment. For example, an employee who was off payroll for two weeks during his or her second month of employment would be credited with only five days of leave at the end of the first six months. If the same employee was again off payroll for two weeks during the third month of employment, (s)he would only be credited with four days.
> . . .
> (p) . . . A separating employee who has been in an on payroll status for all of his or her regularly scheduled workdays of the final payroll period of employment, shall be entitled to annual leave accrual for that payroll period.
> . . .

(State Exhibit 12)

6. The Contracts effective July 1, 2014 to June 30, 2016, for the Supervisory Unit and the Corrections Unit contain identical pertinent language in the Annual Leave article as existed in the above 1996-1997 agreements with the exception that the third sentence in Section 2(i) has been changed. It previously provided: "However, an employee who is off payroll or on an unpaid leave of absence for 20 hours or more during a pay period shall not accrue annual leave for that month." This was changed to: "However, an employee who is off payroll or on an unpaid leave of absence for 20 hours or more during a pay period shall not accrue annual leave for that pay period." The Contract effective July 1, 2014 to June 30, 2016, for the Non-Management Unit also contains identical pertinent language in the Annual Leave article as existed in the 1996-1997 agreements with the exception noted above for the other Contracts, and one other exception. The word "complete" has been added to the sentence in Section 2(d) of the 1996-97 agreement stating "Accrual rate is the number of hours the employee shall accrue per pay period". The sentence now provides: "Accrual rate is the number of hours the employee shall accrue per complete pay period" (State Exhibits 1, 2, 3; VSEA Exhibit 1).

7. State Personnel Policy No. 9.2, "Final Pay", defines "pay periods" as follows: "Pre-established bi-weekly periods which consist of two consecutive calendar weeks, beginning at 12:01 AM Sunday and ending at 12:00 midnight on Saturday fourteen days later" (State Exhibit 4).

8. Employee EL began her State employment as a Grant Management Supervisor for the Vermont Department of Public Safety on Monday, January 13, 2014. EL was not a state employee on Sunday, January 12, 2014. She worked the regularly scheduled 80 hours for the pay

period Sunday, January 12, 2014, through Saturday, January 25, 2014. EL was covered by the provisions of the Supervisory Unit Contract.

9. EL was on payroll for every hour of scheduled work on every workday of every pay period for her first six months of employment.

10. EL was credited with 48 hours of annual leave accrual for completion of her first six months of employment in the paycheck she received on August 7, 2014. The August 7 paycheck was for work performed during the payroll period July 13, 2014, through July 26, 2014. EL was not given credit for annual leave purposes for the pay period January 12, 2014, through January 25, 2014. She began receiving credit for annual leave purposes for the pay period January 26, 2014, through February 8, 2014, and received such credit for the next 12 periods through the July 13, 2014 - July 26, 2014, period towards completion of her first six months of employment (State Exhibits 6, 7, 8; VSEA Exhibit 7).

11. EL and VSEA Field Representative Brian Morse had email communications with Department of Human Resources staff inquiring why EL did not receive credit for completing her first six months of employment for annual leave purposes as of the payroll period ending July 12, 2014. The Department of Human Resources maintained that EL was not entitled to receive such credit until the completion of the payroll period ending July 26, 2014. This was based on the position that EL was not entitled to credit for annual leave purposes for the pay period January 12, 2014, through January 25, 2014, because she was not employed for the complete pay period. The Department of Human Resources stated this position in a November 12, 2014, email from Labor Relations Specialist Brandi Murray to Morse (State's Exhibit 16, VSEA Exhibit 3).

12. EL chose not to file a grievance over this issue. VSEA filed a grievance with the Department of Human Resources on November 19, 2014, at the Step III level of the grievance

procedure as the representative of employees in the Corrections, Non-Management and Supervisory Bargaining Units. Article 15, Section 4(b) of the Contracts provides that grievances initiated at Step III shall be filed within 15 workdays of the date upon which the grievant could reasonably have been aware of the occurrence of the matter which gave rise to the grievance. The Department of Human Resources denied the grievance. VSEA then filed a grievance with the Board (State Exhibits 13,14; VSEA Exhibit 2).

13. The non-crediting for annual leave purposes of the first pay period EL worked because she started employment on Monday of a pay period which began on the preceding day of Sunday was consistent with the practice of the Department of Human Resources since the 1996-1997 collective bargaining contracts went into effect.

14. John Berard has been employed in the Labor Relations section of the Department of Human Resources since 2005, and has been Director of Labor Relations since 2014. At some time during his employment, Bedard spoke with VSEA employees Kathi Partlow and Lucinda Kirk on separate occasions about the practice of not crediting employees for annual leave purposes for the first pay period which they worked if they started employment on Monday of a pay period which began on the preceding day of Sunday. Partlow was either a Senior Field Representative or the Chief Operations Officer of VSEA, and Kirk was either a Field Representative or Senior Field Representative, at the time they spoke with Bedard.

15. VSEA did not file a grievance contesting this practice until it filed the grievance now before the Board.

OPINION

VSEA contends that the State has violated the annual leave provisions of the Contracts between the State and the VSEA for the Non-Management Unit, the Supervisory Unit and the

Corrections Unit by failing to timely credit employees with 48 hours of annual leave accrual upon completion of their first six months of employment.

Before discussing the merits of this issue, we need to address threshold issues raised by the State. The State contends that this grievance should be dismissed because there is no named employee as a grievant in this matter. It is clear from the definition of "grievance" in Section 902(14) of the State Employees Labor Relations Act that VSEA has standing to bring this grievance in its capacity as exclusive bargaining representative of employees in the Non-Management, Supervisory and Corrections Units. By specifically defining grievance in pertinent part as "an employee's, group of employees', or the employees' collective bargaining representative's expressed dissatisfaction . . . with aspects of employment or working conditions under a collective bargaining agreement", Section 902(14) grants VSEA the ability to grieve in its capacity as collective bargaining representative of state employees. Grievance of VSEA (Re: Compensatory Time Credit), 11 VLRB 300, 304 (1988).

Nonetheless, the State contends that this grievance is invalid because there is no actual controversy between the parties. The State asserts that, as a consequence of there being no grievant, there is no actual controversy because VSEA has failed to show that any employee has suffered any harm. The State's argument disregards the explicit ability of VSEA under the State Employees Act to file a grievance in its representative capacity to seek to enforce the terms of a collective bargaining agreement.

To satisfy the actual controversy requirement, there must be an injury in fact to a protected legal interest or the threat of actual injury to a protected legal interest, rather than mere speculation about the impact of some generalized grievance. Grievance of Boocock, 150 Vt. 422, 425 (1988). The dispute between the parties in this case which arose from an inquiry by a newly

hired employee presents the threat of injury to VSEA's and employees' protected legal interests that annual leave accruals for newly hired state employees are calculated consistent with the collective bargaining agreements. This is not a speculative venture as the Board decision in this matter will govern how annual leave is determined in the future for all newly hired employees covered by the Contracts as long as the applicable contract language remains in effect.

The State also contends that this grievance was untimely filed by VSEA at Step III of the grievance procedure. We disagree. VSEA Representative Brian Morse became aware on November 12, 2014, of the State position that, when a state employee commences his or her employment, they are not credited with annual leave during their first pay period unless they were a state employee for the complete pay period beginning on Sunday. Morse filed the Step III grievance on this issue in VSEA's representative capacity on November 19, 2014 This was well within the 15 workday period required by the Contracts for initially filing Step III grievances.

The issues of how annual leave accruals are calculated for newly hired employees is not a completed act for which a continuing grievance would not be recognized. Instead, it involves a continuing human resources practice on annual leave accrual with a new occurrence of the alleged violation every time a newly hired employee completes six months of employment. This is a continuing grievance, with the restriction that any remedy is waived for pay periods immediately preceding the filing of the grievance. Grievance of Cole and Cross, 28 VLRB 345, 369 (2006). *Affirmed*, 184 Vt. 64 (2008).

We turn to addressing the merits. VSEA contends that, by the plain terms of the Contracts, employees are entitled to be credited with a bank of 48 hours of annual leave credits once they have completed six months of service, reduced only if they were off payroll during any pay period for 20 hours or more. VSEA asserts that the State has violated this contractual

requirement by failing to ultimately credit newly hired employees for work performed during their first pay period of their first six months of employment, even if they have worked their regularly scheduled 80 hours during that period, if they did not work during the first Sunday of the pay period.

The State responds that it has used the same practice over the years consistent with the plain meaning of the annual leave provisions of the Contracts for determining when an employee accrues annual leave. The practice is that when a state employee commences his or her employment, they are not credited with annual leave during their first pay period unless they were a state employee for the complete pay period beginning on Sunday. Thus, if the employee begins work on the first Monday of the pay period, the employee is not credited with annual leave for that first pay period because they were not a state employee when the period began on the preceding day.

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).

In applying these rules of construction to the annual leave provisions of the Contracts, we examine the annual leave provisions to determine whether they are clear and unambiguous in deciding the issue before us. The provisions begin with a statement that "(a)nnual leave credits are not accumulated and may not be used during the first six months' employment", followed by an "employee shall be credited with 48 hours of annual leave upon completion of his or her first

six months of service". The annual leave accrual rate, defined as the "number of hours the employee shall accrue per pay period" (or "complete pay period" depending on the applicable Contract), is then set forth, beginning at "0" years, as "3.69 hours per pay period".

The annual leave provisions go on to state that "(u)pon satisfactory completion of the first six months of employment in the classified service, annual leave shall be earned on the basis of completed full pay periods of service". The final pertinent provision is confusing and internally inconsistent. It sets forth a "20 hour test", providing that "an employee who is off payroll or an unpaid leave of absence for 20 hours or more during a pay period" shall not accrue annual leave for "that pay period". This 20 hour test explicitly applies "to the bank of annual leave credited to the employee's account upon completion of the first six months of employment", and as one example indicates that an employee who was off payroll for "two weeks during his or her second month of employment would be credited with only five days of leave at the end of the first six months".

In viewing these provisions in their entirety and reading them together, they are not clear and unambiguous. The crediting of annual leave for employees in their first six months of employment is referenced in the contractual provisions by both "months" and "pay period(s)". An attempt to reconcile the use of these two different units of measurement is complicated by imprecise language and in one instance an internally inconsistent provision. The end result is more than one reasonable interpretation of the applicable language, leading us to conclude that the contract language is ambiguous. We are unable to determine the true intention of the parties by just examining the contract language.

We need 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 language. 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. Grievance of Candon, 31 VLRB 398, 407 (2011). Interpretation of an agreement further may involve interpolating from a written text solutions not expressly spelled out in the text. Burlington Area Public Employees Union, Local 1343, AFSCME, AFL-CIO v. Champlain Water District, 156 Vt. 516, 520 (1991). This may require blending textual interpretations and the "contracts implied in fact" in the form of established past practices. Id. at 521.

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

Bargaining history provides valuable guidance. Prior to the 1996-1997 contracts, annual leave crediting under applicable contracts was based on months of employment, rather than pay periods. The contracts generally provided that an employee "shall be credited with six days of annual leave upon completion of" the "first six months of service". The contracts more specifically made it clear that a new employee was credited with six days of annual leave on the first payroll time report submitted at the end of the sixth full calendar month of service.

The parties changed from annual leave accrual being determined on a monthly basis to a pay period basis in the 1996-1997 contracts. This change was an enhancement for employees, as it reduced the amount of potential waiting time for annual leave being credited from nearly a

month to under two weeks. When the parties made this change, they retained the general language about being credited with annual leave upon completion of the first six months of employment. By then establishing the annual leave accrual rates based on pay periods, replacing months, the parties did not explicitly state that a new employee was credited with annual leave on the first payroll time report they submitted after working six months of complete pay periods.

However, the language of the previous contracts crediting annual leave on the first payroll time report submitted at the end of the sixth full calendar month of service makes it evident that it was the intention of the parties to credit such leave only after completion of six months of complete pay periods. If the parties intended to change the key requirement for being employed during the full measuring period, in this case payroll periods replacing months, we expect that they would have included specific language to that effect.

Our conclusion in this respect is supported by another change they made to the annual leave article of the Contract, providing that a "separating employee who has been in an on payroll status for all of his or her regularly scheduled workdays of the final payroll period of employment shall be entitled to annual leave accrual for that payroll period". In providing that annual leave would accrue at the end of employment for working "all of his or her regularly scheduled workdays" of the final pay period, the parties specifically recognized the concept of entitlement to annual leave even if an employee was not actually employed the complete payroll period. If they wished to so provide at the beginning of employment, they had the clear model on how to create this result. The failure to do so reveals the result contemplated by the parties and their true intentions when they negotiated the contract language. The parties have made no pertinent changes in the annual leave provisions in subsequent contracts, including the existing contracts, that would affect this conclusion.

Our determination in this regard is bolstered by the evidence on past practice. The consistent practice of the State Department of Human Resources since the 1996-1997 contracts went into effect is to not credit newly hired employees for annual leave purposes for the first pay period they work if they start employment on the first Monday of a pay period which began on the preceding day. Further, the Department of Human Resources discussed this practice with VSEA representatives on at least two occasions during the last 11 years. VSEA did not file a grievance contesting this practice on those occasions. The consistent practice and VSEA's acquiescence shows the practical construction of the applicable contract language by the parties indicating their intention that newly hired employees have to be employed for the full pay period beginning on Sunday to be entitled to credit for annual leave purposes. Thus, we conclude that the State did not violate the annual leave article of the Contract in so administering its provisions.

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered that the Grievance of the Vermont State Employees' Association in this matter is dismissed.

Dated this 16th day of March, 2016, 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.