VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 13-30
BRIAN SMITH	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

There are three motions to compel discovery before the Labor Relations Board in connection with this grievance filed by the Vermont State Employees' Association ("VSEA") on behalf of Brian Smith ("Grievant") contesting his dismissal as a Security Guard with the State of Vermont Military Department ("Employer").

On January 7, 2014, Grievant filed a Motion to Compel Discovery with the Labor Relations Board. Grievant requested that the Board determine that the State has failed to adhere to the discovery schedule, order that the State produce discovery, and order that VSEA be reimbursed for all reasonable expenses, including attorney fees, incurred in obtaining this order. On January 14, 2014, the Employer filed a memorandum in opposition to the motion to compel discovery.

On March 10, 2014, Grievant filed two further motions to compel discovery. The first motion requests that the Board order the State to respond to interrogatories and produce documents related to uniformity and consistency of discipline throughout state government and not just limited to the Military Department.[1] In the second discovery motion, which incorporates by reference Grievant's January 7 motion to compel discovery, Grievant contends that the State's failure to adhere to the discovery schedule

[1] Grievant also asserted in this motion that the State has not produced all the examples of uniformity and consistency it has indentified that relate to the Military Department. Grievant subsequently withdrew this as an issue.

established by the parties on November 12, 2103, has caused this grievance to be rescheduled and has compromised a timely hearing of this matter. Grievant requests that the Board order that the State comply forthwith with the Board's determination of discovery which remains to be produced, and order that VSEA by reimbursed for all reasonable expenses incurred in obtaining its discovery requests. On March 19, 2014, the Employer filed a memorandum in opposition to the motions to compel discovery.

The Labor Relations Board held a hearing and oral argument on the three motions on March 27, 2014, before Board Members Richard Park, Chairperson; James Kiehle and Alan Willard. VSEA Attorney Vivian Schmitter represented Grievant. Assistant Attorney General William Reynolds represented the Employer. The parties presented evidence and oral argument on the motions. The Findings of Fact herein are based on written communications exchanged among the parties and the Board during the processing of this case, exhibits filed by Grievant and evidence presented at the March 27 hearing.

FINDINGS OF FACT

1. The collective bargaining agreement applicable to this grievance, the agreement between the State of Vermont and the VSEA for the Non-Management Unit effective July 1, 2012 to June 30, 2014, provides as follows in pertinent part:

. . .

ARTICLE 14
DISCIPLINARY ACTION

1. No permanent or limited status employee covered by this Agreement shall be disciplined without just cause. The parties jointly recognize the deterrent value of disciplinary action. Accordingly, the State will:

(a) Act promptly to impose discipline . . within a reasonable time of the offense;

(b) Apply discipline . . with a view toward uniformity and consistency;

(c) Impose a procedure of progressive discipline . . .

(d) In misconduct cases, the order of progressive discipline shall be:

(1) oral reprimand;
(2) written reprimand;
(3) suspension without pay;
(4) dismissal.

. . .

(f) The parties agree that there are appropriate cases that may warrant the State:

(1) bypassing progressive discipline . .
(2) applying discipline . . in different degrees;
(3) applying progressive discipline for an aggregate of dissimilar offenses, except that dissimilar offenses shall not necessarily result in automatic progression; as long as it is imposing discipline . . for just cause.

. . .

2. The appointing authority or designated representative, after complying with the provisions of paragraph 4 of this Article, may dismiss an employee with just cause with two (2) weeks' notice or two (2) weeks' pay in lieu of notice. . .

3. Notwithstanding the provisions of paragraph 2 above, the appointing authority or authorized representative, after complying with the provisions of paragraph 4 of this Article, may dismiss an employee immediately without two (2) weeks' notice or two (2) weeks' pay in lieu of notice for any of the following reasons:

(a) gross neglect of duty;
(b) gross misconduct;
(c) refusal to obey lawful and reasonable orders given by supervisors;
(d) conviction of a felony;
(e) conduct which places in jeopardy the life or health of a co-worker or of a person under the employee's care.

4. Whenever an appointing authority contemplates dismissing an employee, the employee will be notified in writing of the reason(s) for such action, and will be given an opportunity to respond either orally or in writing. . .

. . .

8. The appointing authority or authorized designee may suspend an employee without pay for reasons for a period not to exceed thirty (30 workdays. . .

. . .

APPENDIX A
DEFINITIONS

Unless a different meaning is plainly required by the context, the following words and phrases mean:

. . .

APPOINTING AUTHORITY – the person authorized by statute, or lawfully-delegated authority, to appoint and dismiss employees. . .

. . .

STATE - Unless otherwise specified the Agency of Administration, Department of Human Resources.

. . .

(Grievant Exhibit 1)

2. The above provisions of the collective bargaining agreement with respect to the State applying discipline with a view toward uniformity and consistency, the appointing authority or authorized representative dismissing and suspending employees, and the definition of appointing authority have been included in collective bargaining agreements between the State and VSEA since July 1, 1979 (Grievant Exhibit 12).

3. 3 V.S.A. § 2283 provides that the Department of Human Resources ("DHR") in the Agency of Administration is responsible for the provision of centralized human resources management services for State government (Grievant Exhibit 3).

4. Governor James Douglas, effective July 1, 2010, transferred numerous human resources and personnel administration positions from various departments and agencies in State government to DHR (Grievant Exhibits 2, 4).

5. Assistant Attorney General Kurt Kuehl served the State's First Set of Interrogatories and Requests to Produce on Grievant on October 7, 2013.

6. Board Executive Director Timothy Noonan met with the parties' representatives, Kuehl and VSEA Attorney Vivian Schmitter, on November 12, 2013, to discuss a discovery and hearing schedule in this matter. During the meeting, the following schedule was agreed to by the parties and the Board: 1) Grievant shall respond to the State's Interrogatories and Requests to Produce by November 25, 2013; 2) Grievant shall serve written discovery by November 19, 2013; 3) the State shall respond to Grievant's written discovery by December 19, 2013; 4) the parties shall file any

motions to compel discovery by January 7, 2014; and 5) the hearing on the merits will be scheduled for February 13, 2014.

7. Schmitter served Grievant's First Set of Interrogatories and Request for Production of Documents on the State on November 19, 2013, by hand-delivering them to Kuehl.

8. Schmitter served Grievant's responses to the State's First Set of Interrogatories and Request to Produce Documents on November 25, 2013, by hand-delivering them to Kuehl.

9. Noonan sent Schmitter and Kuehl an email on December 18, 2013, providing: "Due to one of our Board members recently resigning, creating a vacancy on the Board, we need to reschedule the February 13 hearing in this matter. One of the potential dates offered by Noonan for a rescheduled hearing was February 20. Schmitter and Kuehl notified Noonan that February 20 was an acceptable date. On December 20, Noonan informed the parties that the hearing would be rescheduled to February 20, 2014.

10. On December 20, 2013, Schmitter sent Kuehl an email, stating: "Kurt – Discovery in (#13-30, Brian Smith) was due yesterday and I have not received anything as best as I can determine. Will I have it today as I will be leaving town and away all next week? Please advise."

11. On December 30, 2013, Schmitter sent an email to Kuehl providing:

> I am following up on my voicemail of this morning to request once again that the State provide discovery in the above matter. As you know, discovery was due on 12/19 and on 12/20 I emailed you asking about and advising you that I would be out of town for the week of Christmas. I again left you a voicemail on 12/24 asking for this discovery. You did not reply to either of these communications. As it is, my ability to appropriately prepare for this case has been impacted by your failure to adhere to the schedule and I am concerned that further delay will only

> exacerbate things. Please advise as soon as possible when you intend to provide discovery?

12. Kuehl sent an email on December 31, 2013, to Schmitter in response to this email, stating: "Hi Vivian. I'll get it to you by the end of the week." The end of the workweek was Friday, January 3, 2104. Kuehl did not provide any response to Schmitter by then.

13. On January 6, 2014, Schmitter left a voicemail message with Kuehl seeking production of the discovery. Schmitter did not receive a response from Kuehl.

14. On January 7, 2014, Schmitter filed a Motion to Compel Discovery with the Labor Relations Board. She requested that the Board determine that the State has failed to adhere to the discovery schedule, order that the State produce discovery, and order that VSEA be reimbursed for all reasonable expenses, including attorney fees, incurred in obtaining this order.

15. On January 14, 2014, Kuehl filed with the Board a memorandum in opposition to the motion to compel discovery. He indicated that Grievant's interrogatories and requests to produce were unnecessarily broad in scope. As an example, he stated: "Rather than seeking information about discipline the appointing authority has imposed on employees who engaged in conduct similar to Grievant, he seeks that information for all branches, agencies and departments of the State. . . In short, Grievant has propounded discovery that is excessive in scope and intended to cause the State undue burden and expense responding thereto." He further stated: "Counsel is endeavoring to complete the State's responses to Grievant's discovery as soon as possible and is nearly done."

16. On Tuesday, January 14, 2014, Noonan sent an email to Kuehl and Schmitter indicating that he "would like to have a conference call as soon as possible to discuss the motion to compel discovery and the State's response to the motion." Noonan met with Kuehl and Schmitter on Friday, January 17, 2014, in the Board hearing room. At the meeting, Kuehl agreed that he would provide some of the requested information to Schmitter by Tuesday, January 21, 2014, and that he would provide the remaining information which the State agreed was pertinent to provide by Friday, January 24.

17. Schmitter sent an email to Assistant Attorney General William Reynolds on Thursday, January 30. Kuehl was scheduled to shortly leave the Attorney General's office to accept another position in State government and Reynolds was substituting for him as the attorney for the employer. Schmitter's email provided in pertinent part:

> I am writing once again in regards to the long overdue discovery in this matter. It was agreed in the meeting with Tim Noonan on January 17, 2014, that most if not all of the information requested would be provided by Kurt by Friday, January 24th. To date, I have received very little of the promised information. Please contact me directly to advise of your anticipated response to discovery. If I do not hear back by noon on Monday, I will be forced to take whatever further measures are at my disposal.

18. On Monday, February 3, 2014, Reynolds sent an email in response to Schmitter which provided in pertinent part:

> Please excuse my delay in response but I was out of the office Wednesday through Friday of last week. Also, Kurt was not copied on your message. I spoke to Kurt and he is working on getting you the rest of the discovery. Hopefully, he will be able to respond by the end of the week.

19. On Tuesday, February 4, 2014, Noonan sent an email to Schmitter and Reynolds, stating: "Given that the hearing in this case is scheduled for February 20 and there are still outstanding information requests, we need to have a conference call as soon as possible to discuss this case." Noonan had a conference call with Schmitter, Reynolds

and Kuehl on Wednesday, February 5, 2014. During this conference call, it was decided to convert the February 20 hearing from one on the merits of the case to a hearing/argument on Grievant's motion to compel discovery, and that the hearing on the merits would be rescheduled to March 27. It was further decided that the State would serve its response to Grievant's First Set of Interrogatories and Request for Production of Document by Wednesday, February 12, 2014.

20. Kuehl served on Schmitter the State's Response to Grievant's First Set of Interrogatories and Request for Production of Documents on February 12, 2014.

21. On February 14, 2014, Schmitter sent an email to Noonan and Reynolds providing:

> VSEA requests to proceed to hearing on the motion. Although information was turned over at the end of the day on 2/12, it appears that there may be additional discovery issues bearing on the Union's presentation of its case or timely hearing in the matter, consequently we would need the guidance that a hearing might offer.

22. Schmitter informed Noonan, Reynolds and Kuehl during a February 18, 2014, conference call that Grievant may be filing a second discovery motion in this matter. During the conference call, it was decided to postpone the February 20 hearing on Grievant's pending discovery motion so that there would be one hearing on all discovery motions. In an email Schmitter sent to Noonan, Reynolds and Kuehl later that day, she indicated that Grievant was not available for a hearing on the merits on March 27. On February 19, 2014, Schmitter informed Noonan, Reynolds and Kuehl that it would be possible to have a hearing on discovery motions on March 27 because it was not required that Grievant attend such a hearing.

23. Noonan proposed a schedule to resolve discovery issues that was agreed to by the parties. In a February 20 email to Reynolds and Schmitter, he confirmed the following schedule: 1) the State responds to all of Grievant's requests for additional discovery information by February 28, 2) Grievant submits a second discovery motion by March 10, 3) the State responds to the second discovery motion by March 17, and 4) the hearing on the two discovery motions is March 27.

24. On March 10, 2014, Grievant filed the two motions to compel discovery which are at issue in this matter. On March 19, 2014, the Employer filed a memorandum in opposition to the motions to compel discovery.

25. State employees in the Non-Management Unit work for a large number of departments and agencies throughout State government.

26. Employees of DHR conduct investigations of employees suspected of misconduct in all the agencies and departments covered by the Non-Management Unit.

27. The DHR General Counsel and other DHR employees provide guidance to appointing authorities and their designated representatives when they are considering whether to impose disciplinary action on employees. DHR employees advise appointing authorities or designated representatives to consider the factor of uniformity and consistency of discipline along with the other factors relevant in determining the appropriateness of discipline. Ultimately, appointing authorities or their designated representatives decide whether and what discipline to impose on employees in their departments and agencies. DHR does not impose discipline on State employees outside the DHR.

28. *Loudermill* letters to employees, indicating that the employer is contemplating disciplinary action up to and including dismissal, may be drafted by the DHR General Counsel, other state attorneys or State managers. They can be drafted by DHR representatives or managers in the affected department. The appointing authority or designated representative ultimately decides whether to sign a *Loudermill* letter.

29. Representatives of DHR and VSEA often enter into settlement discussions after DHR has conducted an investigation and before the appointing authority or designated representative makes a discipline decision. VSEA representatives mostly interact with DHR employees during these settlement discussions and may have little interaction with the appointing authority or designated representative beyond the *Loudermill* pre-termination hearing process. DHR generally presents recommendations to the appointing authority or designated representative on the appropriate disciplinary action. The result of these settlement discussions in the majority of cases is an agreement between the employee and appointing authority as to the disciplinary action between the involved employee and the employer. These agreements generally are non-precedential and not admissible in Board proceedings.

30. There have been occasions in the last year or so where VSEA has made requests of the State to provide specific information on disciplinary actions taken across the Non-Management Unit in connection with representing employees who are being investigated for disciplinary action. The State has not provided such information beyond the specific department or agency in which the employee works (Grievant Exhibit 6).

31. There have been other recent occasions in which disciplinary action is contemplated against employees in the Non-Management Unit where VSEA

representatives have not requested specific information on disciplinary actions taken across the Non-Management Unit in connection with representing the employees being investigated for disciplinary action.

32. There have been occasions during the *Loudermill* hearing process where a VSEA representative has expressed the view that the State should apply discipline uniformly and consistently throughout State government.

33. State employees in the Non-Management Unit do not always contact VSEA upon being disciplined.

34. Although appointing authorities are receptive in most cases to the guidance and advice provided by DHR, there have been instances of appointing authorities or their designated representatives taking a different action in a discipline case than advised by DHR. There have been other instances where appointing authorities or designated representatives take disciplinary action against an employee without consulting with DHR, although DHR advises against such an approach.

35. DHR representatives do not share specific information on past disciplinary actions with appointing authorities or designated representatives beyond their chain of command. The specific information shared on uniformity and consistency of discipline is limited to the appointing authority's department. There have been occasions where DHR representatives have discussed information generally on situations in other departments which may have resulted in disciplinary action. However, the focus is on past disciplinary actions taken under the unique parameters of the particular department in which disciplinary action is being contemplated.

36. DHR does not have a comprehensive database on specific disciplinary actions taken throughout State government. Manual searches by department are needed to perform comprehensive searches of disciplinary actions. Also, efforts to protect the confidentiality of disciplinary records add a significant amount of time to producing information on uniformity and consistency of discipline. This results in an extensive time-consuming process. The ability to develop a database has improved since the centralization of State government human resources functions in 2010.

37. The State, in responding to discovery requests from VSEA in disciplinary cases pending before the Board, has engaged in the consistent practice over the years of providing uniformity and consistency of discipline information limited to the department or agency in which discipline was imposed.

OPINION

There are three motions to compel discovery filed by Grievant before the Labor Relations Board in connection with this grievance over the dismissal of a security guard with the State of Vermont Military Department. On January 7, 2014, Grievant filed a Motion to Compel Discovery with the Labor Relations Board. Grievant requested that the Board determine that the State has failed to adhere to the discovery schedule established on November 12, 2013, order that the State produce discovery, and order that the VSEA be reimbursed for all reasonable expenses, including attorney fees incurred in obtaining this order.

In a subsequent discovery motion, filed on March 10, 2014, which incorporates by reference Grievant's January 7 motion to compel discovery, Grievant contends that

the State's failure to adhere to the discovery schedule established by the parties on November 12, 2103, has caused this grievance to be rescheduled and has compromised a timely hearing of this matter. Grievant requests that the Board order that the State comply forthwith with the Board's determination of discovery which remains to be produced, and order that VSEA by reimbursed for all reasonable expenses, including attorney fees, incurred in obtaining its discovery requests.

The Employer contends that these motions to compel discovery are moot because, with the exception of the uniformity and consistency of discipline information at issue in the third motion to compel filed by Grievant, the Employer has fully responded to every interrogatory and request to produce propounded by Grievant in this matter.

Grievant filed these two motions to compel discovery pursuant to Rule 37 of the *Vermont Rules of Civil Procedure*, as adopted by Section 12.1 of Labor Relations Board *Rules of Practice*. Rule 37 provides that a party "may apply for an order compelling discovery" if a party fails to answer an interrogatory or produce documents.[2] The "discovering party may move for an order compelling an answer . . . or an order compelling production . . . in accordance with the request."[3]

"If the motion is granted," the Board "shall, after opportunity for a hearing, require the party . . whose conduct necessitated the motion or the party or attorney advising such conduct, or both of them, to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the (Board)

[2] V.R.C.P. 37 (a), (2).
[3] Id.

finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust."[4]

We conclude that, given the current status of the Employer's responses to Grievant's discovery requests, there is no basis to grant these two motions to compel discovery. Grievant concedes that, with the exception of the uniformity and consistency of discipline information at issue in the third motion to compel filed by Grievant, Grievant no longer is seeking any further responses from the Employer on interrogatories and requests to produce propounded by Grievant in this matter. Thus, there is no order the Board can issue compelling discovery with respect to these two motions.

Further, there is no basis to require the Employer to pay Grievant reasonable expenses incurred, including attorney's fees, with respect to the motions. Since we are not granting the motions, we are issuing no order compelling discovery which is a prerequisite to reimbursement of reasonable expenses pursuant to Rule 37.

Our dismissal of Grievant's motions should not be construed as condoning the failures of the Employer's attorney during the discovery process in this matter. As detailed in the Findings of Fact, the attorney neglected to inform Grievant's attorney in advance that he was not going to respond to discovery according to the discovery schedule agreed to by the parties and the Board, and he did not communicate with her otherwise of problems he was having in timely responding to the discovery requests. He further did not respond for eleven days to the attempts of Grievant's attorney to contact him after the missed deadline to discuss the status of the requested information. When he

[4] V.R.C.P. 37 (a) (4).

finally communicated with her, he told her he would provide requested information by the end of the week, and then failed to do so.

Subsequently, it took a motion to compel discovery filed by Grievant, and two conferences among the parties and the Board Executive Director, before the State's attorney finally produced the State's complete responses to Grievant's discovery requests nearly two months after they were first due. The actions of the State's attorney in this respect were not consistent with the obligation of attorneys appearing before the Board to cooperate in the efficient processing of cases.

This leaves consideration of the third discovery motion to compel discovery filed by Grievant. This motion requests that the Board order the State to respond to interrogatories and produce documents related to uniformity and consistency of discipline throughout state government and not just limited to the Military Department.

In ruling on a motion to compel discovery, the Board applies Rule 26(b)(1) of the Vermont Rules of Civil Procedure, which provides that "parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action". The information sought is discoverable "if it appears reasonably calculated to lead to the discovery of admissible evidence".

Grievant focuses on the language of Article 14, Section 1, of the Non-Management collective bargaining agreement providing "the State will . . apply discipline . . with a view toward uniformity and consistency" to support its motion. Grievant contends that, since the "State" is required to apply discipline uniformly and consistently, he is entitled to responses to interrogatories and requests to produce documents related to uniformity and consistency of discipline throughout all agencies and

departments in state government that have employees in the Non-Management Bargaining Unit. Grievant submits that required responses are not just limited to those arising from the Military Department. Grievant asserts that this information sought to evaluate the discipline levied against him is relevant, and thus must be produced.

In opposing the motion, the Employer contends that Grievant is seeking to subject the Employer to a timely, costly and oppressive burden that will not lead to the discovery of admissible evidence by broadening discovery requests involving uniformity and consistency to encompass all employees in all agencies and departments in the Non-Management Bargaining Unit. The Employer asserts that the parties in the past have routinely limited discovery of uniformity and consistency information to the particular appointing authority that had imposed disciplinary action against an employee, and that this practice is consistent with the language and intent of the collective bargaining agreement.

The Employer, in support of its position opposing the motion, cites the provisions of Article 14 of the collective bargaining agreement stating that the "appointing authority" or designated representative "may dismiss an employee with just cause" (Sections 2 and 3), or "suspend an employee without pay" (Section 8). The Employer contends that, because it is the "appointing authority" who determines when and to what extent to discipline an employee, uniformity and consistency discovery should be limited to a particular appointing authority in a department and not extend to the entire Non-Management Bargaining Unit. The Employer asserts that the determination of when and to what extent discipline is warranted in a particular case always falls to the appointing authority in the applicable department, and to require an appointing authority to have

knowledge of, and conform discipline decisions to, such decisions in other agencies and departments would inappropriately alter the way state government has functioned.

Thus, Grievant and the Employer are relying on different provisions of Article 14, the Disciplinary Action article of the collective bargaining agreement, to support their respective positions on the motion to compel discovery. In interpreting the provisions of collective bargaining agreements in resolving grievances, we follow the rules of contract construction developed by the Vermont Supreme Court. The cardinal principle in the construction of any contract is to give effect to the true intention of the parties.[5] A contract must be construed, if possible, so as to give effect to every part, and from the parts to form a harmonious whole.[6] The contract provisions must be viewed in their entirety and read together.[7]

A contract will be interpreted by the common meaning of its words where the language is clear.[8] 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.[9] Ambiguity exists where the disputed language will allow more than one reasonable interpretation.[10] The threshold question of whether a contract is ambiguous is a question of law.[11] In making this determination, we may consider evidence as to the circumstances surrounding the making of the agreement as well as well as the object, nature and subject matter of the

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

writing.[12] Ambiguity will be found where a writing in and of itself supports a different interpretation from that which appears when it is read in light of the surrounding circumstances, and both interpretations are reasonable.[13] If a contract is ambiguous, extrinsic evidence may be relied upon to construe it.[14]

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.[15] 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.[16]

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.[17] Bargaining history is relevant to the extent that it reveals the

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[12] *Isbrandtsen*, 150 Vt. at 578. *Breslauer*, 163 Vt. at 425. *Grievance of Verderber and Vermont State Colleges Faculty Federation*, 173 Vt. 612, 616 (2002).
[13] *Isbrandtsen*, 150 Vt. at 579. *Breslauer*, 163 Vt. at 425.
[14] *Breslauer*, 163 Vt. at 425.
[15] *Hackel v. Vermont State Colleges*, 140 Vt. 446, 452 (1981).
[16] *Vermont State Colleges Faculty Federation v. Vermont State Colleges*, 141 Vt. 138, 144 (1982).
[17] *Nzomo, et al. v. Vermont State Colleges*, 136 Vt. 97, 101-102 (1978). *Grievance of Majors*, 11 VLRB 30, 35 (1988).

result contemplated by the parties and their true intentions when they negotiated the contract language.[18]

Interpretation of an agreement may involve interpolating from a written text solutions not expressly spelled out in the text.[19] This may require blending textual interpretations and the "contracts implied in fact" in the form of established past practices.[20] 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".[21] 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."[22]

In addressing the threshold question of whether the contract language is ambiguous, we need to determine whether the disputed language of Article 14 will allow more than one reasonable interpretation when considered in its entirety. The provision that "the State will . . apply discipline . . with a view toward uniformity and consistency", when considered together with the provisions that the "appointing authority" will make the particular discipline decision in his or her department, make it unclear whether the relevance of uniformity and consistency information is limited to the particular department of the appointing authority or extends throughout State government. We

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[18] *Grievance of Candon*, 31 VLRB 398, 407 (2011).
[19] *Burlington Area Public Employees Union, Local 1343, AFSCME, AFL-CIO v. Champlain Water District*, 156 Vt. 516, 520 (1991).
[20] Id. at 521.
[21] *In re Grievance of Cole and Cross*, 184 Vt. 64, 73 (2008) citing *In re Cronan*, 151 Vt. at 579.
[22] *In re Gorruso*, 150 Vt. 139, at 143, 145 (1988). See also *Grievance of Cole and Cross*, 28 VLRB 345, 371-372 (2006).

conclude that the contract language is sufficiently ambiguous because it allows more than one reasonable interpretation.

Thus, it is appropriate to look to the extrinsic evidence of bargaining history and past practice to ascertain whether such evidence provides guidance in interpreting the meaning of the contract. Bargaining history is helpful to the extent of indicating that the key provisions of the collective bargaining agreement with respect to the State applying discipline with a view toward uniformity and consistency, and the appointing authority or authorized representative dismissing and suspending employees, have been included in collective bargaining agreements between the State and VSEA since July 1, 1979. This provides a 35 year period to examine the practice of the State and the VSEA in handling the scope of uniformity and consistency information.

The practice indicates that appointing authorities or designated representatives do not consider specific information on past disciplinary actions with appointing authorities or designated representatives beyond their chain of command. The focus is on past disciplinary actions taken under the unique parameters of the particular department in which disciplinary action is being contemplated. The practice further indicates that the State, in responding to discovery requests from VSEA in disciplinary cases pending before the Board, has engaged in the consistent practice over the years of providing uniformity and consistency of discipline information limited to the department or agency in which discipline was imposed. VSEA has not provided evidence that it has taken issue with this practice until very recently.

This practical construction of the contract language by the State and VSEA for many years demonstrates to us that the State and VSEA both intended that: 1) the

appointing authority or designated representative when making disciplinary decisions is obligated to consider only uniformity and consistency information in his or her own department or agency, and 2) uniformity and consistency information in discipline cases is discoverable only to the extent of the particular department or agency under the direction of the appointing authority in a particular case. This practical construction of the contract language is controlling on the parties.

We note that these intentions of the State and VSEA are reflected in our own cases. Uniformity and consistency comparisons were limited to the department or agency under the direction of the appointing authority in the particular case in all 23 state employee disciplinary cases from 1992 to the present in which uniformity and consistency of discipline were at issue.[23]

The parties' long-standing practice concerning the discoverability of uniformity and consistency information in discipline cases follows from the appointing authority's obligations in considering such information and the appropriate nature of the inquiry when disciplinary actions are being challenged through the grievance process. The Board has adopted a number of factors as relevant in determining the legitimacy of a particular

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[23] *Grievance of VSEA (Re: Refusal to Provide Information)*, 15 VLRB 13 (1992). *Grievance of Terrell*, 15 VLRB 342 (1992). *Grievance of Towle*, 15 VLRB 506 (1992); 17 VLRB 21 (1994). *Grievance of Glover*, 18 VLRB 352 (1995). *Grievance of Brabant*, 18 VLRB 410 (1995). *Grievance of Petty*, 20 VLRB 44 (1997). *Grievance of Petty*, 20 VLRB 61 (1997). *Grievance of Porwitzky*, 20 VLRB 83 (1997). G*rievance of Paolillo*, 22 VLRB 200 (1999). *Appeal of Danforth*, 23 VLRB 51 (2000); 23 VLRB 288 (2000); 24 VLRB 52 (2001); 24 VLRB 81 (2001). *Grievance of Lilly*, 23 VLRB 25 (2000). *Grievance of Corrow*; 23 VLRB 101 (2000). *Grievance of Newton*, 23 VLRB 172 (2000). *Grievance of Camley*, 24 VLRB 119 (2001). *Grievance of Charnley*, 24 VLRB 119 (2001). *Grievance of Leclair*, 24 VLRB 119 (2001). *Grievance of Brown*, 24 VLRB 159 (2001). *Grievance of Ducas*, 28 VLRB 238 (2006). *Grievance of Kerr*, 28 VLRB 264 (2006). *Grievance of Rosenberger*, 29 VLRB 56 (2007); 31 VLRB 162 (2010). *Grievance of Jewett*, 29 VLRB 206 (2007). *Grievance of Jacobs, Grievance of Martinson*, 31 VLRB 152 (2010).

disciplinary action. One of the relevant factors is the consistency of the disciplinary penalty with those imposed upon other employees for the same or similar offenses.[24] The Board reviews the employer's application of these factors in a particular case. If the employer establishes that management responsibly balanced the relevant factors in a particular case and struck a reasonable balance, its penalty decision will be upheld.[25]

The Board has concluded that evidence of alleged inconsistent discipline is not relevant to the Board's review of an employee's dismissal to the extent that it involves alleged improper conduct by other employees of which management was unaware at the time of the employee's dismissal. The Board stated: "Since our duty is to police the exercise of discretion by the employer to ensure the employer considered the relevant factors in each particular case and took actions within tolerable limits of reasonableness, the relevant focus is on management's actions and knowledge at the time the dismissal decision was made."[26] The Board subsequently relied on the rationale of this holding to generally conclude in another case that evidence was not relevant to the Board's review of an employee's dismissal to the extent that it involved information of which management was unaware at the time of dismissal.[27]

Since the relevant focus is on management's actions and knowledge at the time the disciplinary decision is made, and since the appointing authority when making disciplinary decisions is obligated to consider only uniformity and consistency information in his or her own department or agency, uniformity and consistency

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[24] *Grievance of Colleran and* Brit, 6 VLRB 235, 268-69 (1983).
[25] Colleran and Britt, 6 VLRB at 235.
[26] Appeal of Danforth, 23 VLRB 288, 294-97 (2000). *Affirmed*, 174 Vt. 231, 244-45 (2002). *See also* Grievance of Newton, 23 VLRB 172, 197 (2000).
[27] Grievance of Rosenberger, 28 VLRB 284, 305-307 (2006).

information beyond the involved department or agency is not reasonably calculated to lead to the discovery of admissible evidence. Disciplinary actions in other departments of which the appointing authority is unaware and has no obligation to consider will not further the inquiry on the appropriateness of the disciplinary action imposed.

Also, the limiting of uniformity and consistency comparisons to the department or agency under the direction of the appointing authority in a particular case follows from other important considerations. Agencies and departments in state government have varying functions and expectations of employees which may differ based on the particular workplace. The seriousness of a seemingly similar offense could be quite different in different work environments. This diminishes the utility of discipline comparisons across agency and department boundaries.

Similarly, determining comparability of different offenses is a difficult undertaking dependent on knowledge of the context and factual details of each incident. These difficulties are exacerbated if comparisons are made among various agencies and departments operating under different missions in dissimilar workplaces.

Further, confidentiality concerns constrain the sharing of employee discipline information outside of a particular agency or department. The casting of a uniformity and consistency net across state government would make it more difficult to protect the privacy of employees in cases where the discipline imposed on them has not become a public matter.

Finally, the outcome in this case reflects practical realities. The appointing authority or designated representative in a particular department has the responsibility to decide whether and what discipline to impose in a particular case, and is required to do so

"within a reasonable time of the offense" pursuant to Article 14, Section 1, of the collective bargaining agreement. If the appointing authority was required to obtain information to how similar situations were handled in the numerous departments and agencies employing thousands of employees in the Non-Management Unit, the resources and time required would be staggering. We cannot presume the State and VSEA intended such a requirement in negotiating the disciplinary article of the collective bargaining agreement. Instead, their long-standing practices indicate they intended no such result.

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered that the motions to compel discovery filed by Grievant in this matter on January 7, 2014, and March 10, 2014, are denied.

Dated this 9th day of April, 2014, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Richard W. Park

Richard W. Park, Chairperson

/s/ James C. Kiehle

James C. Kiehle

/s/ Alan Willard

Alan Willard