Contract Construction

In interpreting the provisions of collective bargaining agreements in resolving grievances, the VLRB 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.[1] A contract must be construed, if possible, to give effect to every part, and from the parts to form a harmonious whole.[2] The contract provisions must be viewed in their entirety and read together.[3] A contract will be interpreted by the common meaning of its words where the language is clear.[4] 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.[5]

If analysis of the contract language 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.[6] The Board will not read terms into a contract unless they arise by necessary implication.[7] 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.[8]

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[1] Grievance of Cronan, et al, 151 Vt. 576, 579 (1989).
[2] In re Grievance of VSEA on Behalf of "Phase Down" Employees, 139 Vt. 63, 65 (1980).
[3] In re Stacey, 138 Vt. 68, 72 (1980).
[4] Id. at 71.
[5] Swett v. Vermont State Colleges, 141 Vt. 275 (1982).
[6] Hackel v. Vermont State Colleges, 140 Vt. 446, 452 (1981).
[7] In re Stacey, 138 Vt. at 71.
[8] Vermont State Colleges Faculty Federation v. Vermont State Colleges, 141 Vt. 138, 144 (1982).

Ambiguity exists where the disputed language will allow more than one reasonable interpretation.[9] The threshold question of whether a contract is ambiguous is a question of law.[10] 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.[11]

If the analysis of the contract language leads to a conclusion that the language is ambiguous because it allows more than one reasonable interpretation, it is appropriate to look to the extrinsic evidence of bargaining history, custom or usage, and established past practices to ascertain whether such evidence provides any guidance in interpreting the meaning of the contract. [12] Where the language used in the contract will admit of more than one interpretation, we will look at the situation and motives of the parties, the subject matter of the contract, and the object sought to be attained by it.[13] 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.[14] Also, the context of a particular usage and application of a contract provision may vary the normal meaning of an agreement's language where it appears that the parties contracted with reference to the usage.[15]

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[9] In re Grievance of Vermont State Employees' Association and Dargie, 179 Vt. 228, 234 (2005).
[10] Isbrandtsen v. North Branch Corp., 150 Vt. 575, 577 (1988). Breslauer v. Fayston School District, 163 Vt. 416, 425 (1995). Grievance of Spear, 32 VLRB 202, 206 (2012).
[11] Isbrandtsen, 150 Vt. at 579. Breslauer, 163 Vt. at 425. Spear, 32 VLRB at 206.
[12] Nzomo, et al. v. Vermont State Colleges, 136 Vt. 97, 101-102 (1978). Grievance of Majors, 11 VLRB 30, 35 (1988). Grievance of Cronan, 151 Vt. at 579. Burlington Area Public Employees Union, Local 1343, AFSCME, AFL-CIO v. Champlain Water District, 156 Vt. 516, 520-521 (1991).
[13] Grievance of Gorruso, 150 Vt. 139, 143 (1988).
[14] Id. at 145. Grievance of Cole and Cross, 28 VLRB 345, 371-372 (2006). Grievance of Candon, 31 VLRB 398, 407 (2011).
[15] Grievance of Cronan, 151 Vt. at 579.

Further, interpretation of an agreement may involve interpolating from a written text solutions not expressly spelled out in the text.[16] This may require blending textual interpretations and the "contracts implied in fact" in the form of established past practices.[17] The Supreme Court has held that, "to the extent that contract provisions are ambiguous, the practical construction placed upon an instrument by the parties would be controlling in determining the meaning of the instrument."[18] A practical construction of contract provisions involves evaluating the context in which the parties negotiated to determine the parties' intent or how a particular contract provision was applied following the execution of the collective bargaining agreement containing the contract provision.[19] Past practice cannot change the meaning of a contract; it may, however, "give meaning to, supplement, or qualify" the contract.[20]

The Board indicated in one case that, where a party in contract negotiations unsuccessfully attempted to include a specific provision in the contract and requests that the Board interpret ambiguous language in such a way as to obtain what it did not obtain across the bargaining table, the Board was reluctant to read such a provision into the contract. This was particularly so where the past practice to the contrary was so clear and longstanding and where the party requesting the interpretation did not indicate during negotiations on its rejected proposal that it believed the existing contract language was consistent with the position it was now asserting before the Board.[21]

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[16] Burlington Area Public Employees Union, Local 1343, AFSCME, AFL-CIO v. Champlain Water District, 156 Vt. at 520.
[17] Id. at 521.
[18] In re Grievance of Cole and Cross, 184 Vt. 64, 73-74 (2008) Grievance of Cronan, 151 Vt. at 579.
[19] Id.
[20] In re Grievance of Kelley, 2018 VT 94, ¶ 20, ___ Vt. ___ (2018).
[21] Grievance of Majors and Vermont State Colleges Staff Federation, 11 VLRB 30, 36 (1988).

The Board and the Supreme Court have indicated that they will not recognize an individual contract inconsistent with the collectively bargained agreement. This is because "(t)he very purpose of a collective bargaining agreement is to supersede individual contracts with terms which reflect the strength and bargaining power and serve the welfare of the group."[22]

Also, employment rules and regulations promulgated by the employer concerning a particular condition of employment are superseded by the collective bargaining agreement where the agreement addresses the same issue that is covered by the employer policy.[23] However, the Board has concluded that personnel rules and regulations unilaterally promulgated by the employer were a past practice implicitly embedded in the contract, where the parties bargained with the knowledge the personnel rules were applicable and no contract provision addressed the applicable personnel rule.[24]

A mistaken interpretation by an employer of a provision of the collective bargaining contract for many years does not justify denying employees rights to which they are entitled under a correct interpretation of the contract.[25] A contractual provision which is incorrectly interpreted for a period of time does not render the provision invalid.[26] By the same logic, a mistaken interpretation by the employer of

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[22] Morton v. Essex Town School District, 140 Vt. 345 (1982). Grievance of McFarland, 10 VLRB 220, 227 (1987). Grievance of Eynon, 33 VLRB 234, 243 (2015). Town of Bennington v. Knight, 2020 VT 17 (2020).

[23] Grievance of Cole and Cross, 28 VLRB 345, 370 (2006). Grievance of Graves, 147 Vt. 519, 522-523 (1986). In re Muzzy, 141 Vt. 463, 476 (1982). Grievance of Nottingham, 25 VLRB 185, 192 (2002).

[24] Grievance of Cole and Cross, 28 VLRB at 370-371. Grievance of Cronin, 6 VLRB 37, 69-70 (1983).

[25] Grievance of VSEA (Re: Compensatory Time Credit), 11 VLRB 300, 306 (1988). Grievance of Nottingham, 25 VLRB 185, 192 (2002).

[26] Id.

a provision of a contract does not justifying granting employees rights to which they are not entitled by a correct interpretation of the contract.[27]

In one case, the Board addressed the applicability of a part-time faculty contract to full-time faculty in a different bargaining unit, and covered by a different contract, where the same union represented both full-time and part-time faculty. The Board determined that the provisions of the part-time contract were pertinent to the extent that such provisions provided context and helped clarify existing practices when the full-time contract was unclear and ambiguous, but that such provisions could not be construed to expand the responsibilities of full-time faculty whose responsibilities were negotiated and set forth in the full-time contract.[28]

The Board concluded that it would be inappropriate to have one represented group's duties increased without their input when that group already had negotiated over specific duties, particularly when the full-time faculty and part-time faculty were placed in different bargaining units due to a lack of a community of interests shared by both groups.[29] The Board held that full-time faculty should not be placed in a worse position due to the exercise of the right to freely choose their bargaining representative, and that would be the result if the Board determined that the full-time faculty were governed by the provisions of the part-time faculty contract.[30]

An employer is not always able to rely on the terms of a collective bargaining contract to shield its actions. In one case, the State Colleges contended that a non-reappointed faculty member should be treated as a second year faculty member, even

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[27] Grievance of Brown, et al, 20 VLRB 169, 183 (1997). Grievance of Cronan, et al, 6 VLRB 347, 355 (1983); *Reversed on other grounds*, 151 Vt. 576 (1989). Grievance of Cantarra, 1 VLRB 305 (1978).

[28] Grievances of Vermont State Colleges Faculty Federation (Re: Department Chairpersons), 26 VLRB 226, 236 (2003).

[29] Id., *citing* Vermont State Colleges Faculty Federation v. Vermont State Colleges, 152 Vt. 343, 351 (1989).

[30] Grievances of Vermont State Colleges Faculty Federation (Re: Department Chairpersons), 26 VLRB at 236-37.

though the Colleges had treated the faculty member as third year faculty, because the faculty member actually was a second year member under the terms of the collective bargaining contract. The Board analyzed the issue by applying the doctrine of equitable estoppel.[31]

Under the doctrine, a party to a contract may lose the right to assert a term of the contract by estoppel. Equitable estoppel is based upon concerns of public policy and an interest in encouraging fair dealings, good faith and justice.[32] Its purpose is to forbid one to speak against his or her own acts, representations or commitments to the injury of one to whom they were directed and who reasonably relied thereon.[33] The test to determine whether a party is estopped from a claim is whether, in all the circumstances of the case, conscience and duty of honest dealing should deny one the right to repudiate the consequences of his or her representations or conduct.[34]

The party invoking the doctrine of equitable estoppel has the burden of establishing that: 1) the party to be estopped knows or should have known the facts; 2) the party being estopped intends that his or her conduct shall be acted upon or the acts must be such that the party asserting the estoppel has the right to believe it is so intended; 3) the party asserting the estoppel must be ignorant of the true facts; and 4) the party asserting the estoppel must rely on the conduct of the party to be estopped to his or her detriment.

In applying these standards, the Board concluded that the Colleges were estopped from asserting that the provisions of the collective bargaining contract

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[31] Grievance of Vermont State Colleges Faculty Federation, AFT Local 3180, AFL-CIO (Re: Adrianne Lioce), 19 VLRB 1, 17 (1996).
[32] Id.
[33] Id.
[34] Id.

required that the faculty member be considered as a second year faculty member at the time of her reappointment.[35]

In another case, involving a grievance filed by state employees, the Board also relied on the doctrine of equitable estoppel to sustain a grievance contesting the employer's rescinding of VSEA leave for three employees.[36]

[35] Id. at 11-13.
[36] Grievance of King, Brace and Woods, 34 VLRB 69 (2017).