

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:

MARK MAJORS AND THE VERMONT
STATE COLLEGES STAFF
FEDERATION, AFT LOCAL 4023,
AFL-CIO

DOCKET NO. 87-39

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On August 11, 1987, Mark Majors and the Vermont State Colleges Staff Federation, AFT Local 4023, AFL-CIO ("Federation") filed a grievance. The grievance alleged that the Vermont State Colleges ("Colleges") violated Article 38 of the collective bargaining contract between the Colleges and the Federation, effective July 1, 1985 to June 30, 1987 ("1985-87 Contract") by refusing to grant Majors a tuition waiver for his daughter to attend the Johnson State College Child Development Center.

A hearing was held on December 17, 1987, before Board Members Louis A. Toepfer, Acting Chairman; William G. Kemsley, Sr. and Catherine L. Frank. Attorney Nicholas DiGiovanni, Jr. represented the Colleges. Attorney Jeffrey Jacobsen represented Majors and the Federation. Briefs were filed by both parties on January 6, 1988.

FINDINGS OF FACT

1. The Johnson State College Child Development Center has been in operation on the Johnson campus at least since the beginning of the 1983-84 school year. The Center is operated by Johnson State College.

2. The Child Development Center is licensed as a day care facility by the State Department of Social and Rehabilitation Services. The Center cares for children ages two to six. It may have a maximum number of 45 children in the facility at any one time. It is open Monday through Friday, 7:30 a.m. to 5:30 p.m. (Colleges Exhibit 1).

3. The Center is available for the use of the general public as well as Johnson State College staff. Johnson staff are given no preference in the placement of children in the facility. The following numbers of Johnson staff have had children attend the Center since academic year 1983-84:

| <u>Academic Year</u> | <u>Number of Staff</u> |
|----------------------|------------------------|
| 1983-84 | 11 |
| 1984-85 | 14 |
| 1985-86 | 10 |
| 1986-87 | 13 |

(Colleges Exhibit 14)

4. The Child Development Center has four staff: one director, two teachers and one cook. The teachers are certified as teachers by the State Board of Education. The State regulations for licensed day care facilities do not require staff of licensed day care facilities to be certified as teachers.

5. Johnson State College absorbs the light, heating and space costs of the Child Development Center. Outside of these costs, the Center is intended by the College to sustain itself through fees charged parents for child care services.

6. The Child Development Center charges parents the following hourly rates: \$1.45 per hour if the child is present more than 34 hours per week; \$1.50 per hour for 16-34 hours per week; and \$1.55 per hour for 8-16 hours per week. The Center fees are guided by State-subsidized day care rates.

7. Johnson State College staff who have children attend the Child Development Center have always paid the established hourly fee. None of the employees have had the fee waived.

8. The Director of the Child Development Center views the Center as not just a babysitting service, but as a school which offers children enriching experiences so they may grow in their emotional, intellectual and physical development (Grievant's Exhibit 1).

9. Faculty of the Johnson State College Education Department have used the Child Development Center to place Department students on a volunteer basis to work with the children. Volunteer work at the Center or another child care facility in the area is a course requirement for students. The Center Director does the day-to-day supervising of students and evaluates their performance.

10. In addition to the Education Department students, work-study students at Johnson also work in the Child Development Center. They perform the same functions as Education Department students.

11. Article 38 of the 1985-87 Contract, entitled Tuition Waivers, provides in pertinent part as follows:

Full-time employees with one year of service and their immediate families, including legal wards, may enroll without payment of tuition in any course or program, including graduate and summer, at any member College. Immediate family shall include spouse and dependent children, including legal wards, whether married or unmarried.

(Joint Exhibit 1)

12. The Colleges and the Federation began negotiations for the successor contract to the 1985-87 Contract on October 28, 1986, with the exchanging of proposals. The Federation submitted a proposed new article, entitled Child Care, which provided as follows:

On campuses where Day Care and/or Child Development Program exist, employees with one year of service may enroll their children (including legal wards), at no charge.

The children must meet the eligibility requirements of the program. However, children of employees shall be given preference for placement.

(Colleges Exhibit 2)

13. Four days of negotiations were held on the successor contract, culminating in an agreement being reached on December 16. During discussions on the Federation's proposed child care article, the Federation specifically discussed the Johnson Child Care Development Center and the rates charged parents. The Colleges rejected the proposed article. The Federation did not indicate during these discussions that it was the Federation's belief that the tuition waiver article applied to child care fees. The Federation then proposed the establishment of a joint child care committee. The Colleges counter proposed, and the Federation agreed, that child care would be studied through an already-established benefits committee.

14. The successor contract, effective July 1, 1987 to June 30, 1989, contains language identical to that in Article 38, Tuition Waivers, of the 1985-87 Contract (cited above in Finding #11) except that the following sentence was inserted after the second sentence:

Full-time bargaining unit employees with one (1) year of service who are matriculated students at the College shall pay all college fees except the following:

- o College liability fee
- o Student activity fee
- o Processing fee

(Joint Exhibit 2)

15. Mark Majors became employed as a library technician at Johnson State College on April 1, 1986. Majors' daughter, Monica, has been enrolled at the Child Development Center since at least January 1985. Monica's attendance at the Center has ranged from 10 hours per week to 40 hours per week, depending on her father's work schedule (Colleges Exhibits 6-13).

16. When Majors became employed at Johnson, he expected that the fee he paid for Monica's attendance at the Center would be waived after he had been employed for a year. Majors based this expectation on his interpretation of Article 38 of the 1985-87 Contract. No one in the Johnson State College administration told him that this fee would be waived.

17. In Majors' first year of employment at Johnson, he was regularly billed for Monica's presence at the Center. Majors paid those bills.

18. In April, 1987, Majors submitted a tuition waiver request to John Lord, College Personnel Officer, for Monica's attendance at the Child Development Center. Lord rejected Majors' request (Joint Exhibits 5 and 6).

OPINION

At issue is whether the Colleges violated Article 38 of the 1985-87 Contract by refusing to grant Mark Majors a waiver of the fee for his daughter to attend the Johnson State College Child Development Center.

The task before us is one of contract construction. The parties are bound by the common meaning of their words where the language is clear, and extrinsic evidence under such circumstances is inadmissible

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). However, resort to extraneous circumstances such as custom or usage to explain or interpret the meaning of contractual language is appropriate if sufficient ambiguity exists in the contract. Nzomo, et al. v. Vermont State Colleges, 136 Vt. 97, 101-102 (1978).

We conclude that it is unclear by the language of Article 38 whether the provision that "employees... and their immediate families... may enroll without payment of tuition in any course or program... at any member college" was intended by the parties to apply to a waiver of child care fees at a college-run child care center. Sufficient ambiguity exists in the Contract so that it is appropriate to look to extrinsic evidence such as custom or usage (i.e., past practice) and bargaining history to interpret the meaning of the contract language.

In examining past practice and bargaining history, it is clear that the parties did not intend the tuition waiver article to apply to waiver of child care fees.

The practice of the parties to a contract in carrying out the terms of the contract constitutes persuasive evidence as to the interpretation that should be given to an ambiguous contract provision. Here, Johnson State College staff have been using the services of the Child Development Center since at least the 1983-84 academic year. Yet, a waiver of child care fees has never been applied. Staff have always paid the established hourly fee. It is evident the Federation accepted this arrangement since no evidence was

presented to indicate that, in the intervening three and one-half years between the beginning of the 1983-84 year and the filing of this grievance, the Federation grieved the failure to apply tuition waivers to child care fees.

Further, the evidence of bargaining history presented here aids in our conclusion that the parties did not intend that the tuition waiver apply to child care fees. In negotiations for the successor contract to the 1985-87 Contract, the Federation presented a specific proposal which provided that employees may enroll their children in "day care and/or child development programs" on campuses where such programs exist. That proposal was rejected. Where a party in contract negotiations unsuccessfully attempts 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, we are reluctant to read such a provision into the contract. This is particularly so here where the past practice to the contrary is so clear and long-standing and where the Federation did not indicate during negotiations on its rejected proposal that, notwithstanding the proposal, it was the Federation's belief that the tuition waiver article applied to child care fees.

Thus, we find the grievance without merit. The Colleges request that the Board award the Colleges reasonable attorney's fees and costs due to the frivolous nature of the grievance and because the Federation has acted in bad faith in pursuing the case. While we believe the resolution of this case is clear, we deem it inappropriate to diverge from the customary practice of not awarding attorney's fees.

ORDER

Now therefore, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED:

The Grievance of Mark Majors and the Vermont State Colleges Staff Federation, AFT Local 4023, AFL-CIO is DISMISSED.

Dated this 14th day of January, 1988, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Louis A. Toepfer
Louis A. Toepfer, Acting Chairman

William G. Kemsley, Sr.
William G. Kemsley, Sr.

Catherine L. Frank
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