VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	
VERMONT STATE EMPLOYEES' ASSOCIATON (RE: PRESCRIPTION DRUG POLICY)	)))	DOCKET NO. 02-42

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On August 12, 2002, the Vermont State Employees' Association ("VSEA") filed a grievance with the Vermont Labor Relations Board. VSEA alleged that the State of Vermont ("State") violated past practice and Articles 1, 3 and the health plan articles of the collective bargaining agreements between VSEA and the State, effective July 1, 2001 – June 30, 2003 ("Contracts"), by restricting employees who purchased prescription drugs at retail to a 30-day supply of medication.

A hearing was held before Labor Relations Board members Richard Park, Chairperson; Carroll Comstock and Joan Wilson on October 16, 2003. State Department of Personnel General Counsel David Herlihy represented the State. VSEA General Counsel David Stewart represented VSEA. The parties filed briefs on November 6, 2003.

FINDINGS OF FACT

1. VSEA is the exclusive bargaining representative of employees in the Non-Management, Supervisory, Corrections and State Police bargaining units. The health insurance benefits for each of the units are negotiated in the collective bargaining contract covering each unit and are the same for each unit.

2. The State Employee Health Plans articles of the Contracts provide in pertinent part as follows:

1. **State Employee Health Plans:**

Until January 1, 2002, the State will maintain the following health insurance plans:

(a) The State Employee Medical Benefit Plan (also known as the Choice Plus Plan);
(b) Blue Cross/Blue Shield, a limited plan established under 3 VSA 631(b);
(c) The MVP Health Plan, a health maintenance organization (HMO); and
(d) The Vermont Health Plan (TVHP), a health maintenance organization (HMO);
(e) The State may offer additional managed care health plan(s) as it deems appropriate during an open enrollment period.

Effective January 1, 2002, the health plans referenced in subsections 1(a), 1(c), and 1(d) above, shall be abolished and shall be replaced by four plan choices as set forth in the *"Report and Exhibits of the November 2000 State of Vermont Labor-Management Health Care Study Committee"* (dated 12/8/2000), from which each employee may choose. The new plans are as follows: (1) an Indemnity-type plan with the common mental health and substance abuse, prescription drug, vision, and wellness benefits; (2) a Preferred Provider Organization (PPO) plan with the common mental health and substance abuse, prescription drug, vision and wellness benefits; (3) a Point of Service (POS) plan with the common mental health and substance abuse, prescription drug, vision, and wellness benefits; and (4) a Catastrophic plan with only the common wellness benefits. One single risk pool shall be created for all covered employees. . .

5. Self Insurance
Nothing herein shall prevent the State from self-insuring the terms of coverage or from contracting with an insurance company to provide substantially equivalent coverage.

. . .
(Grievant's Exhibit 1)

3. During negotiations for the Contracts, the State and VSEA agreed to create a Health Care Study Committee "for the purpose of addressing the rapidly spiraling health care increases to the state employees health plans in recent years". The committee sought to "understand the problems and jointly construct viable solutions . . . designed to ameliorate future health care cost increases". The committee consisted of representatives of the State and VSEA as well as a consulting firm, Buck Consultants.

Committee meetings were held from November 9 through December 1, 2000. These meetings resulted in a report issued by the committee that reflected the consensus of all members of the committee (Grievant's Exhibit 1).

4. The Health Care Study Committee presented its report to the State and VSEA bargaining teams. The bargaining teams agreed to incorporate the health plans set forth in the report into the Contract.

5. The committee agreed to replace the Choice Plus plan and two HMO plans with four new health plans. One component of health care costs that was the subject of both the committee's discussion and the report was prescription drugs. The committee agreed to provide a carveout plan for prescription drugs, which was applicable to all the plans except the catastrophic plan. A carveout plan is a single plan of benefits for all participants regardless of which base health plan they join. The committee report provided in pertinent part as follows concerning the prescription drug plan:

> **PRESCRIPTION DRUGS: CARVEOUT PLAN**
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> **Buck Study Finding:** The prescription drug program, particularly the mail order component, was the driver of increases for all participants within the Choice Plus plan. While the cost per mail order prescription was in line with industry standards, **the number of prescriptions for state employees exceeded the industry average by 1.5 to 5 times, depending on the group** *(emphasis in original)*. Retirees were by far the highest users of the Choice Plus drug program.
>
> **Buck Study Recommendation:** The program needs to be overhauled to create better coordination between the retail and mail programs – consider a carveout with appropriate cost-sharing and plan design features.
>
> **Committee Recommendation:** A single carved out drug plan for all employees and retirees, regardless of health plan choice, except for those in the Catastrophic plan. Combine retail and mail order drugs under one pharmacy benefit manager (PBM) for greater purchasing power and efficiency. The plan will have the following agreed-upon features:
>
> . . .

E. Initial prescription *(emphasis in original)* must be purchased at retail (no more than 30 day supply) to avoid wastage.

. . .

(Grievant's Exhibit 1)

6. The "wastage" mentioned in the report referred to the problem of members in the Choice Plus health plan filling initial prescriptions with a ninety-day supply. "Wastage" occurred because sometimes a member would use only a small fraction of the ninety-day supply because the medication was not effective or caused side effects. The committee specifically discussed this problem and agreed that initial prescriptions had to be purchased at retail for no more than a 30-day supply. The 30-day limitation could not apply to filling prescriptions through mail order because prescriptions by mail order have to be for a 90-day supply. The committee did not discuss the 30-day limitation applying beyond initial prescriptions. During committee discussions, a summary of the points on which general agreement had been reached by the committee provided in pertinent part: "The Committee endorsed the following drug plan: . . . To avoid wastage, require that initial prescription is filled at retail rather than through mail order" (Grievant's Exhibits 1 and 7; State's Exhibit 9, p.31).

7. Members of the MVP HMO plan, one of the options offered up to January 1, 2002, were limited to a 30-day supply of medication at retail and a 90-day supply by mail order. Members of the Choice Plus plan, another option offered up to January 1, 2002, were allowed to receive a 90-day supply of medication either at retail or through mail order (State's Exhibits 1 and 2).

8. The health care industry standard is to limit retail prescription drug purchases to a thirty-day supply. The standard is to limit mail order prescription drug purchases to a ninety-day supply.

9. On March 22, 2002, the State executed a contract with the prescription benefits manager Express Scripts. Among other things, the contract authorizes Express Scripts to provide a prescription mail order service for members of state employee health plans. The contract also includes a provision limiting all prescriptions purchased at retail to a 30-day supply. VSEA is not a party to the Express Scripts contract and was not consulted regarding its terms (Grievant's Exhibit 4).

10. The State began limiting all retail prescriptions to a 30-day supply effective January 1, 2002, and continues to do so. The State did not discuss this limitation with VSEA prior to implementing it (Grievant's Exhibits 4 and 6).

OPINION

VSEA contends that the State violated the Contracts with VSEA by unilaterally restricting the quantity of prescription medication that employees can purchase at retail pharmacies. VSEA maintains that the VSEA and the State unambiguously agreed in the Contracts to require employees to purchase their initial prescriptions at a retail pharmacy, limited to a 30-day supply, to reduce wastage. The State violated the Contracts, VSEA alleges, by unilaterally expanding the 30-day supply limit to all retail prescription drug purchases.

The State contends that the Contracts indicate that a 30-day limitation on drugs purchased at retail was encompassed within the parties' discussions of the medical plan revisions. The State thus maintains that VSEA has not met its burden of proving that the State is imposing a material change in the health plan that was not reasonably encompassed within the contracts.

A contract will be interpreted by the common meaning of its words where the language is clear. In re Stacey, 138 Vt. 68, 71 (1980). 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). 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).

The contract language at issue here, contained in the health care study committee report that was incorporated into the Contracts, provides: "Initial prescription *(emphasis in original)* must be purchased at retail (no more than 30 day supply) to avoid wastage". The clear and common meaning of these words is limited to providing that employees must purchase initial prescriptions at retail for no more than 30 days for the purpose of avoiding wastage. The State would read into these words that the parties agreed that all retail prescription purchases would be limited to 30 days. If we were to agree with the State, we would be improperly reading terms into the Contracts that do not arise by necessary implication. The parties expressly limited their agreement to initial prescriptions. For the Board to rule that this agreement extends to subsequent prescriptions would be to improperly remake the parties' Contracts.

Even assuming *arguendo* that the disputed language is ambiguous, further inquiry does not support the State's position. Where the disputed language is sufficiently

ambiguous, it is the duty of judicial or quasi-judicial bodies to construe a contract so as to ascertain the true intention of the parties. Grievance of Gorruso, 150 Vt. 139, 143 (1988). Where the language used in a contract will admit of more than one interpretation, we will look at the situation and motive of the parties, the subject matter of the contract, and the object sought to be obtained by it. Id. In such circumstances, it is appropriate to look to the extrinsic evidence of past practice and bargaining history to ascertain whether such evidence provides any guidance in interpreting the meaning of the contract. Grievance of Majors, 11 VLRB 30, 35 (1988).

The agreed-upon language developed from health care study committee discussions on "wastage" resulting from some members in the Choice Plus health plan filling initial prescriptions with a ninety-day supply and then using only a small fraction of the supply because the medication was not effective or caused side effects. The committee specifically discussed this problem and agreed that initial prescriptions had to be purchased at retail for no more than a 30-day supply. The 30-day limitation could not apply to filling prescriptions through mail order because prescriptions by mail order have to be for a 90-day supply. The committee did not discuss the 30-day limitation applying beyond initial prescriptions.

The State contends nonetheless that a 30-day limit at retail was an inherent, understood characteristic of retail drug purchases because the health care industry standard is to limit retail prescription drug purchases to a thirty-day supply. The State has not demonstrated an understanding by both parties that the industry standard would apply on purchases beyond the initial prescription. This showing is particularly necessary in this case because, at the time the health care study committee met, many state employees

and retirees were members of the Choice Plus health plan which permitted members to receive a 90-day supply of medication at retail. Given the evidence before us that there was no committee discussion on supply limitations applying beyond initial prescriptions, we cannot conclude that there was any mutual understanding that the 30-day industry standard would apply on purchases beyond initial prescription.

This history of health care study committee discussions informs our interpretation of the contract language in that it indicates that the intent of the parties was limited to addressing the wastage resulting from initial prescriptions. There is no evidence in the record that there was discussion on having supply limitations applying beyond initial prescriptions. In sum, the parties' agreement is limited to providing that employees must purchase initial prescriptions at retail for no more than 30 days for the purpose of avoiding wastage.

Nonetheless, this does not result in a conclusion that there is an actionable grievance before us. VSEA contends that the State violated the Contracts by unilaterally expanding the 30-day supply limit to all retail prescription drug purchases. To prevail on this claim, VSEA must demonstrate that a specific provision of the Contracts has been violated by the State's action. VSEA has failed to make such a showing. This is because the Contracts are silent concerning supply limitations on prescription drug purchases beyond initial prescriptions. There was no discussion by the parties on such limitations and no meeting of the minds on the issue.

VSEA also contends that the State violated a past practice through expanding the 30-day supply limit to all retail prescription drug purchases. In deciding grievances, the Board has concluded that past practices are encompassed within the statutory definition

of grievance. Grievance of Cronin, 6 VLRB 37, 67-69 (1983). Day-to-day practices mutually accepted by the parties may attain the status of contractual rights and duties, particularly where they are significant, long-standing and not at variance with contract provisions. Grievance of Hanifin, 11 VLRB 18, 27 (1988). Grievance of Cronin, supra. Grievance of Allen, 5 VLRB 411, 417 (1982). Grievance of Beyor, 5 VLRB 222, 238-239 (1982). If contractual effect is to be granted a past practice, that practice must be of sufficient import to the parties that they can be presumed to have bargained in reference to it and reached a mutual agreement or understanding. Cronin, 6 VLRB at 68-69.

There is no binding past practice here under these standards. Prior to January 1, 2002, members of the MVP HMO plan were limited to a 30-day supply of medication at retail and a 90-day supply by mail order. Members of the Choice Plus plan were allowed to receive a 90-day supply of medication either at retail or through mail order. However, effective January 1, 2002, these plans ceased to exist. Instead, all state health plan members except those in the catastrophic plan were covered by the same carveout plan for prescription drugs.

In such circumstances, where employees covered by separate plans are merged into the same prescription drug plan, there can be no presumption that VSEA and the State agreed that differing past practices on supply limitations had a binding effect. In fact, the nature of a carveout plan precludes the practical application of the different supply limitations that existed under the previous plans.

Thus, the failure of VSEA to demonstrate violation of a contact provision or a binding past practice results in the dismissal of this grievance. However, this conclusion does not end the matter. VSEA filed, along with this grievance, an unfair labor practice

charge alleging that the State interfered with employee rights and failed to bargain in good faith in violation of the State Employees Labor Relations Act by unilaterally restricting employees who purchase prescription drugs at retail to a 30 day supply of medication. Vermont State Employees' Association v. State of Vermont (Re: Prescription Drug Policy, Board Docket No. 02-32. The Board issued an order on April 17, 2003, that it would decline to rule on the charge until resolution of this grievance. Although the State's unilateral action did not result in an actionable grievance, it may have constituted an unfair labor practice.

The State Employees Act contains a broad scope of bargaining. It provides that "all matters relating to the relationship between the employer and employees shall be the subject of collective bargaining except those matters which are prescribed or controlled by statute". 3 V.S.A. §904(a). In a 1980 decision interpreting this language under the State Employees Act, Vermont State Colleges Faculty Federation v. Vermont State Colleges, 138 Vt. 451 (1980), the Vermont Supreme Court declined to adopt the distinction between mandatory and permissive bargaining subjects developed in the private sector. The Court determined the statutory bargaining obligation applied if the subject was a matter "relating to the relationship between the employer and employees" and was not "prescribed or controlled by statute". Collective bargaining was precluded only where "the outcome of any negotiations has been statutorily predetermined or expressly committed exclusively to the discretion of one party".

Given this broad scope of bargaining, and given the evidence before us that the State has limited all retail prescriptions to a 30-day supply since January 1, 2002, without discussing such limitation with VSEA prior to implementing it, we believe that the State

may have committed an unfair labor practice by making this unilateral change. The implementation of the supply limitation constituted a change for those health plan members previously covered by the Choice Plus plan, and we conclude it is appropriate to have a hearing to decide whether an improper unilateral change on a matter relating to the relationship between the State and employees occurred in violation of the unfair labor practice provisions of the State Employees Act. Accordingly, in conjunction with issuing this grievance decision, we are issuing an unfair labor practice complaint in Docket No. 02-32, and will have an evidentiary hearing on the charge.

We note that unfair labor practice hearings are governed by the Rules of Evidence; 3 V.S.A. §965(b); unlike grievance hearings. 3 V.S.A. §928(b)(3). We would prefer for purposes of judicial economy to incorporate as much of the record as possible in this grievance into the unfair labor practice proceeding. However, given the difference in applicability of the rules of evidence, we will provide the parties with an opportunity to indicate any evidence in the grievance that should not be considered in the unfair labor practice case.

In closing, we view this dispute between the parties as resulting from a lack of communication and cooperation in addressing an issue that is in both parties' interests to mutually resolve. We urge the parties to use the time between the issuance of this grievance decision and the unfair labor practice hearing in Docket No. 02-32 to endeavor to mutually resolve their differences, thus making continued litigation to decide the parties' dispute unnecessary.

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered that this grievance is dismissed.

Dated this ____ day of December, 2003, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

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Richard W. Park, Chairperson

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Carroll P. Comstock

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Joan B. Wilson