VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF CHRISTOPHER ROBINSON AND THE VERMONT STATE EMPLOYEES' ASSOCIATION	))))	DOCKET NO. 08-51

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On November 6, 2008, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of itself and Christopher Robinson. Grievants alleged that the State of Vermont Office of the Defender General ("Employer") violated Article 30 of the collective bargaining agreement between the Employer and VSEA effective July 1, 2007, through June 30, 2009 ("Contract") by failing to reimburse Robinson for the maximum tuition reimbursement amount under the Contract for courses he completed at Woodbury College.

Grievants filed a Motion for Summary Judgment on January 9, 2009. The Employer filed a Memorandum in Opposition to Grievants' Motion for Summary Judgment on February 9, 2009. The Labor Relations Board denied the motion on February 12, 2009.

The Labor Relations Board conducted a hearing on February 12, 2009, in the Board hearing room in Montpelier before Board Members Edward Zuccaro, Chairperson; Leonard Berliner and James Kiehle. Abigail Doolittle, VSEA Staff Attorney, represented Grievants. William Reynolds, Special Assistant Attorney General, represented the Employer. The parties filed post-hearing briefs on February 26, 2009.

FINDINGS OF FACT

1. VSEA has been the exclusive bargaining representative of certain employees of the Office of Defender General since 1999 (VLRB Docket No. 99-46).

2. The first collective bargaining contract negotiated by VSEA and the Employer covered the period July 1, 2001 to June 30, 2003. Article 29, Section 4, of the 2001-2003 contract provided in pertinent part as follows with respect to tuition reimbursement: "The maximum reimbursement under this Article shall not exceed 80% of the actual out-of-pocket costs for tuition, up to $250 per credit, to the employee" (Grievants Exhibit 2).

3. During the negotiations leading to the 2001-2003 contract, both VSEA and the Employer proposed the above-cited language in Article 29, Section 4. The identical language was contained in the 1999-2001 collective bargaining contract between VSEA and the State for the Non-Management Unit. VSEA and the Employer did not discuss how tuition reimbursement would be calculated under this language. The only substantive discussions regarding this article related to the total fund that the Employer would make available for tuition reimbursement each year.

4. The intent of the Employer in agreeing to this language was that employees would receive the same tuition reimbursement benefit that employees in the Non-Management Bargaining Unit were receiving. Lora Evans, Administrative Services Manager for the Employer, was on the Employer's negotiations team for the 2001-2003 contract. She was not aware when this language was negotiated how the Department of Human Resources was calculating tuition reimbursement under this language covering the Non-Management Unit. The Department of Human Resources was not involved in

negotiations covering the Defender General Bargaining Unit, and there was no discussion between the Department of Human Resources and the Employer during negotiations as to how tuition reimbursement was calculated.

5. Bonnie Kynoch was a member of the VSEA negotiations team for the 2001-2003 contract. She understood under the language of Article 29, Section 4, that employees would receive up to $250 per credit. Anne Noonan was Director of VSEA when the language was negotiated. She had the same understanding as Kynoch that employees would receive up to $250 per credit under the language. Noonan was not a member of Defender General Bargaining Unit negotiations team. No representative of the Employer told Kynoch or Noonan at the time the language was negotiated that employees would be reimbursed at the maximum rate of 80% of $250.

6. Evans was responsible for processing the Employer's tuition reimbursement applications under the 2001-2003 contract. Several employees submitted applications in December 2001. Evans spoke to Marcia Blondin of the State Department of Human Resources at that time about how to process such applications. Blondin was responsible for handling the tuition reimbursement applications under the contract covering the Non-Management Bargaining Unit. Blondin told Evans that it was the practice of the Department of Human Resources to reimburse employees for tuition up to a maximum amount of 80% of $350 per credit under the language in the existing Non-Management Unit contract. Blondin was referring to the 2001-2003 Non-Management Unit contract, which had increased the $250 amount in the 1999-2001 contract covering that unit to $350. Blondin informed Evans that she should calculate the maximum reimbursement rate as 80% of $350 per credit.

7. Subsequent to her discussion with Blondin, Evans first mistakenly calculated the tuition reimbursement applications at a rate of 80% of $350 per credit. After reviewing Article 29, Section 4, of the 2001-2003 contract covering the Defender General Bargaining Unit, she realized that it stated "$250" instead of "$350". She then recalculated the reimbursement amounts as 80% of $250 per credit. During the term of the 2001-2003 contract, Evans determined employees' maximum tuition reimbursement at a rate of 80% of $250 per credit (State's Exhibits 6, 7, 8, 9, 10).

8. The successor agreement to the 2001-2003 contract covered the period July 1, 2003 to June 30, 2005. The parties negotiated two changes to the tuition reimbursement article of the contract. The parties agreed that the fund allocated for tuition reimbursement would be divided equally among applicants if there were not enough funds for all applicants to receive the amount to which they otherwise would have been entitled. The 2001-2003 contract had provided that there was a lottery if the applications exceeded the amount in the tuition reimbursement fund. The parties also revised Section 4 of the article to state: "The maximum reimbursement under this Article shall not exceed 80% of the actual out-of-pocket cost for tuition, up to $350 per credit, to the employee" (Grievants Exhibit 2).

9. The VSEA and the Employer subsequently negotiated two successor agreements to the 2003-2005 contract: a contract covering the period July 1, 2005 – June 30, 2007; and the contract effective July 1, 2007 – June 30, 2009. There were no changes to the tuition reimbursement article in these contracts (Grievants Exhibits 1, 2).

10. Since the 2003-2005 contract took effect, Evans has determined employees' maximum tuition reimbursement at a rate of 80% of $350 per credit (State's Exhibit 7, 9, 11).

11. Grievant Christopher Robinson has been an investigator for the Employer for approximately six years. He was a member of the VSEA negotiations team for the Defender General bargaining unit during negotiations resulting in the 2005-2007 and 2007-2009 contracts.

12. In the summer of 2008, Robinson completed two three-credit courses at Woodbury College towards obtaining a Masters degree. The tuition cost was $800 per credit, totaling $4,800. Robinson applied for tuition reimbursement pursuant to tuition reimbursement article of the Contract..

13. In a memorandum dated June 18, 2008, Mary Deaett, Human Resources and Program Administrator, informed Robinson that his tuition reimbursement application was approved. She indicated that Robinson would be reimbursed a total of $1,390 for his tuition costs (Grievants Exhibit 3).

14. Robinson sent an e-mail message in response indicating that he thought he was entitled to a total of $2,100 by multiplying 6 credits times $350. The Employer ultimately decided that Robinson was entitled to $1,680 by reimbursing him 80% of $350 (i.e., $280) times 6 credits. Robinson filed a grievance over the Employer's decision (Grievants Exhibit 4).

15. Neither Bonnie Kynoch nor VSEA Director Noonan were aware that the Employer interpreted the tuition reimbursement article to reimburse employees a maximum amount of 80% of $350 per credit until after Robinson filed a grievance in this

matter. There is no evidence that any VSEA representative was aware of the Employer's interpretation until Robinson's grievance. No one from the VSEA negotiations team for the Defender General bargaining unit had requested tuition reimbursement before Robinson did in 2008.

16. A provision for tuition reimbursement first appeared in the collective bargaining contract between VSEA and the State for the Non-Management Bargaining Unit effective July 1, 1986-June 30, 1988. The contract contained the following provision:

> The maximum reimbursement for tuition and other costs, not otherwise reimbursed from any other source, shall not exceed 50% of the actual, out-of-pocket cost to the employee for: tuition (or an amount equal to the tuition for a similar course offered at a Vermont State supported educational institution, whichever is less); the cost of any necessary fees; and required books. . .
> (State's Exhibit 1)

17. The contract for the Non-Management Unit effective July 1, 1988-June 30, 1990, contained the following revised provision:

> Effective for courses begun after July 1, 1988, the maximum reimbursement for tuition and other costs hereunder shall not exceed 75% of the actual out-of-pocket cost to the employee (after any departmental grant or reimbursement from any other source) for: tuition (or an amount equal to the tuition for an equivalent number of credits at the University of Vermont, whichever is less); the cost of any necessary fees; and required books. . .
> (State's Exhibit 2)

18. The tuition reimbursement article in the succeeding contract covering the Non-Management Unit, effective July 1, 1990-June 30, 1992, was again revised. It provided:

> The maximum reimbursement under this Article shall not exceed 80% of the actual out-of-pocket cost to the employee. . .
> Costs eligible for this program include:
> Tuition (or an amount equal to the tuition for an equivalent number of credits at the University of Vermont, whichever is less);

. . .

> The cost of any necessary fees, required books, or other items required by the school to be purchased as a mandatory condition of taking the course . . . (State's Exhibit 3)

19. This provision was again revised in the next contract covering the Non-Management Unit, effective July 1, 1992-June 30, 1994. It provided: "The maximum reimbursement under this article shall not exceed 80% of the actual out-of-pocket cost for tuition, up to $250 per credit, to the employee." This language remained unchanged in succeeding contracts until the contract effective July 1, 2001-June 30, 2003, when "$350" was substituted for "$250" (State's Exhibits 4 and 5).

20. During the period covering the contracts effective for the Non-Management Unit from July 1, 1992 to June 30, 2001, the Department of Human Resources reimbursed employees a maximum amount of 80% of $250 per credit for tuition costs. Since July 1, 2001, the Department has reimbursed employees a maximum amount of 80% of $350 per credit for tuition costs (State's Exhibits 12, 13).

21. There is no evidence that Department of Human Resources staff ever discussed with VSEA representatives the method of calculating the maximum tuition reimbursement amount under the 1992-1994 contract, or succeeding contracts, covering the Non-Management Unit. VSEA Director Noonan understood that the maximum reimbursement rate during the period covering the contracts effective for the Non-Management Unit from July 1, 1992 to June 30, 2001, was $250 per credit; and was $350 per credit since the 2001-2003 contract went into effect. There is no evidence that VSEA representatives other than Noonan had a different understanding than her.

22. The contracts covering the Non-Management Unit have provided that lottery drawings will be held whenever the amount requested for tuition reimbursement

exceeds the amount available. The evidence does not indicate that the Department of Human Resources representative at the lottery drawings ever informed VSEA representatives at the drawings, or that VSEA representatives were aware, that employees were being reimbursed a maximum amount of 80% of $350 per credit (State's Exhibit 14).

OPINION

Grievants contend that the Employer violated Article 30 of the Contract by failing to reimburse Christopher Robinson for the maximum tuition reimbursement amount under the Contract for six credits of courses he completed at Woodbury College. The tuition cost was $800 per credit. Article 30, Section 4, of the Contract provides: "The maximum reimbursement under this Article shall not exceed 80% of the actual out-of-pocket cost for tuition, up to $350 per credit, to the employee."

Grievants assert that, pursuant to this contract provision, Robinson was entitled to a total of $2,100 by multiplying 6 credits by $350. However, the Employer only reimbursed Robinson $1,680. The Employer contends that he was entitled to this amount pursuant to Article 30, Section 4, by reimbursing him 80% of $350 (i.e., $280) times 6 credits.

In interpreting this provision of the Contract, we follow the rules of contract construction developed by the Vermont Supreme Court. A contract will be interpreted by the common meaning of its words where the language is clear. In re Stacey, 138 Vt. 68, 72 (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). 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).

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).

However, 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). 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).

Grievants contend that the contract language is clear and unambiguous; that a plain reading of the language indicates that the parties intended that $350 per credit would be the maximum reimbursement amount. The Employer maintains to the contrary that the evidence in this case demonstrates that the parties intended Article 30 to be interpreted to mean that tuition reimbursement would be limited to 80 percent of $350.

We construe the contract language to be more favorable to Grievants' position than that of the Employer. The structure of the relevant sentence in Article 30, Section 4,

is more supportive of an interpretation that an employee is entitled to "up to $350 per credit" as long as this does not exceed 80 percent of the actual out-of-pocket cost for tuition, rather than a conclusion that an employee is entitled to a maximum of 80 percent of $350 per credit.

However, we conclude that there is sufficient ambiguity in the contract language to examine bargaining history and past practice to ascertain whether such evidence provides any guidance in support of, or in opposition to, our tentative interpretation of the contract provision. The language originated in the first collective bargaining agreement negotiated between VSEA and the Employer covering the Defender General Bargaining Unit in 2001. The parties agreed to the same language that was contained in the collective bargaining agreement between VSEA and the State of Vermont covering the Non-Management Bargaining Unit that was in effect at the time of their negotiations.

Nonetheless, the negotiators for VSEA and the Employer did not discuss during negotiations how tuition reimbursement would be calculated. Also, the evidence does not indicate that the negotiators were aware when this language was negotiated how the Department of Human Resources was calculating tuition reimbursement under the Non-Management Unit contract. Thus, the bargaining history does not shed any additional light on the intentions of VSEA and the Employer in negotiating the contract language beyond the language itself.

The bargaining history in this case does not support our giving any weight to evidence regarding the development of the language in the Non-Management Unit contracts, and how such language was implemented, prior to the negotiation of the first Defender General Unit contract. Since the negotiators of the Defender General Unit

contract were unaware of developments and practices under the Non-Management Unit contract, such evidence provides no guidance in seeking to ascertain the intentions of the parties to the Defender General Unit contract.

An examination of the practice of the Employer in implementing the contract language since 2001 indicates that the Employer calculated tuition reimbursement applications at a rate of 80 percent of $250 during the term of the first contract between the parties, and at a rate of 80 percent of $350 during terms of subsequent contracts when the dollar amount per credit increased. However, there is no evidence that any VSEA representative or member of the Defender General Bargaining Unit negotiations team were aware of this practice until the tuition reimbursement application submitted by Robinson which resulted in this grievance. Given these circumstances, we conclude that the practice of the Employer does not provide evidence supporting the contractual validity of the practice.

The fact that the Employer has engaged in this practice for several years does not support its continuing application in the face of contrary contract language. 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. Grievance of VSEA (Re: Compensatory Time Credit), 11 VLRB 300, 306 (1988). Grievance of Nottingham, 25 VLRB 185, 192 (2002). A contractual provision which is incorrectly interpreted for a period of time does not render the provision invalid. Id.

In sum, we conclude that the Employer violated Article 30, Section 4, of the Contract by reimbursing Robinson $1,680 for the six credits of courses he took at

Woodbury College. The Employer should have reimbursed Robinson $2,100 pursuant to the contract.

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered:

1. The Grievance of Christopher Robinson and the Vermont State Employees' Association is sustained; and

2. The State of Vermont Office of the Defender General shall reimburse Robinson an additional $420.00 for courses he took at Woodbury College during the summer of 2008.

Dated this 14th day of May, 2009, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Edward R. Zuccaro
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Edward R. Zuccaro, Chairperson

/s/ Leonard J. Berliner
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Leonard J. Berliner

/s/ James C. Kiehle
_____
James C. Kiehle