VERMONT LABOR RELATIONS BOARD

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| GRIEVANCE OF: | ) | |
| | ) | DOCKET NO. 09-18 |
| SHAWN STOCKER | ) | |

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On June 26, 2009, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of Shawn Stocker ("Grievant"). The grievance alleged that the State of Vermont Department of Corrections ("Employer") violated Article 43 of the collective bargaining agreement between the VSEA and the State of Vermont effective July 1, 2008 – June 30, 2010 ("Contract") by requiring Grievant to use all of his paid military leave before permitting him to go on paid military leave without pay status.

A hearing was held in the Labor Relations Board hearing room in Montpelier on February 18, 2010, before Board Members Edward Zuccaro, Chairperson; James Kiehle and Gary Karnedy. Michael Casey, VSEA General Counsel, represented Grievant. Assistant Attorney General Marie Salem and Department of Human Resources General Counsel Steven Collier represented the Employer. The Employer and Grievant filed post-hearing briefs on April 29 and 30, 2010, respectively.

FINDINGS OF FACT

1. The Contract provides in pertinent part as follows:

. . .

**ARTICLE 34**
**ANNUAL LEAVE**

**1. PURPOSE**

. . .

**2. POLICY**

(a) A classified employee is provided opportunity to accrue annual leave in order to have periods of rest and relaxation from his or her job for health and well being, consistent with workload requirements of the agency or department.

(b) Employees are encouraged to request annual leave in blocks of time sufficient to ensure rest and relaxation. However, annual leave may also be taken in brief amounts for the personal convenience of the employee.

. . .

(i) . . . A permanent status classified employee shall not be penalized his or her annual leave credit for any pay period during which an employee is off payroll or on an unpaid leave of absence for fewer than twenty (20) hours. However, an employee who is off payroll or on an unpaid leave of absence for twenty (20) hours or more during a pay period shall not accrue annual leave for that pay period. . .

. . .

(n) Vacation scheduling is the exclusive prerogative of the appointing authority. Leave must be requested in advance by the employee and is subject to approval by the appointing authority or his or her delegated representative. Such approval shall not be unreasonably withheld.

. . .

**3. RESPONSIBILITIES**

(a) The employee shall:

(1) Such leave shall not be taken unless the appropriate supervisor has authorized the leave.

. . .

(b) The appointing authority shall:

(1) Make a reasonable effort to schedule vacations in accordance with the wishes of his or her employees consistent with the needs of agency or department.

. . .

## ARTICLE 35
## SICK LEAVE

. . .

**2. POLICY**

. . .

(a) Accrual

. . .

(9) . . . A classified employee shall not be penalized his or her sick leave credit for any pay period during which the employee is off payroll for fewer than twenty (20) hours. However, an employee who is off payroll for twenty (20) hours or more during a payroll period shall not accrue sick leave for that pay period. . .

. . .

**ARTICLE 43**
**MILITARY LEAVE**

**1. POLICY**

. . .

(g) MILITARY TRAINING
A permanent status or limited-status classified employee who is a member of the Organized Reserve or National Guard shall be allowed military leave with pay, at the rate of his or her normal base salary prorated as appropriate, for any authorized training, UTA, AT Period, or other State or Federal service up to a maximum of fifteen (15) workdays scheduled by military authority in any Federal Training Year – October 1 to September 30. A permanent-status or limited-status classified employee who has more than fifteen (15) days of authorized military duty scheduled in one (1) Federal Training Year shall not be entitled to leave with pay for those days in excess of fifteen (15), and shall be placed in an off payroll or leave of absence status, unless he or she elects to use accumulated annual, personal leave, or compensatory time leave credits for the period of absence.

. . .

(i) Employees who are in an off payroll or leave of absence status because they have exhausted all available days of paid military leave and are absent pursuant to orders for authorized training or service, are entitled to continue coverage in a health insurance plan if the orders are for 30 days or less and the employee pays the regular employee percentage of premium contribution for the coverage in advance.

. . .

**3. NO LOSS OF OTHER BENEFITS**

Any employee on off payroll status of short duration due to Active Service, Active Duty for Training, or other obligatory military service or training shall not be denied personal leave accrual or holiday pay, solely on the basis of such absence.

(Grievant's Exhibit 1)

2. There have been Military Leave articles in the collective bargaining agreements between the State and VSEA since at least 1976. Between 1976 and the current Contract, the maximum number of paid military leave days expanded from 9 days, to 11 days, and then to 15 days. The number of paid military days went to 15, and the type of military training covered by Article 43 expanded, in the current Contract

effective July 1, 2008. The "UTA" military training mentioned in Article 43, Section 1(g), stands for "Unit Training Assemblies" for Vermont Air National Guard ("VTANG"). VTANG members are required to attend UTA's one weekend per month. The coverage of UTA's for paid military leave was added to the contract effective July 1, 2008. "AT Period" mentioned in Article 43, Section 1(g), refers to "Annual Training Period" for VTANG. VTANG members are required to attend a two-week AT Period annually. Article 43, Section 1(i) was added to the contract in July 2001. There were no discussions between VSEA and the State during negotiations for the current Contract on exhaustion of paid military leave before using unpaid leave.

3. Vermont Department of Human Resources Policy and Procedure 14.7, entitled "Military Leave", provides in pertinent part as follows:

> . . .
> **Revised Date:** March 23, 2006
> . . .
> **PURPOSE AND POLICY STATEMENT**
>
> The State of Vermont is committed to protecting the job rights and benefits of employees who are absent on military leave. This policy provides permanent employees with the opportunity to fulfill their military obligations without penalty.
> . . .
> The Military Leave article of the current Agreements between the State of Vermont and the Vermont State Employees Association, Inc., as applicable, must be observed in administering this policy. . .
> . . .
> **PROCEDURES FOR USE OF MILITARY LEAVE**
> . . .
> 4. Employees on temporary or extended military leave may, at their option, use any or all accrued paid vacation, compensatory time or personal leave during their absence.
> . . .
> **BENEFITS**
>
> If an employee is absent from work due to military service, benefits will continue as follows:

> . . .
> 4. Employees do not accrue annual, personal, or sick leave while on unpaid military leave of absence status. However, employees on extended military leave who elect to use accrued leave balances such that they qualify for leave accruals in accordance with the collective bargaining agreements, and/or leave accrual policies, will accrue leave as appropriate.
> . . .
> (Grievant's Exhibit 7)

4. The federal training year for military leave purposes commences each October 1, and concludes the following September 30. Each employee's annual allotment of paid military leave days pursuant to the Contract is replenished each October 1 when the federal training year begins.

5. Grievant has worked for the Department of Corrections since 2003. He works at the Marble Valley Regional Correctional Facility in Rutland. He began work as a Correctional Officer I, was promoted to Correctional Officer II, and currently serves as an Acting Shift Supervisor.

6. In addition to working full-time for the Department of Corrections, Grievant is a Master Sergeant in VTANG. He has a combined total of 24 years of military service with the United States Marine Corps, Vermont Army National Guard and VTANG. Like other VTANG members, Grievant is required to attend Unit Training Assemblies ("UTA's") for VTANG one weekend every month, and attend Annual Training for a continuous two-week period usually during the months of May, June or July. These commitments result in him attending 39 days of training annually. Further, as a sergeant, Grievant is subject to additional orders that require him to attend other trainings. In total, Grievant is required to attend 51 days of training a year.

7. Grievant receives his VTANG training schedule at the beginning of each calendar year. He uses the schedule to plan his entire year, including his use of paid

military leave and other forms of leave under the Contract. He seeks to ensure a fairly steady income stream when he is away from home for military training. Although his income is generally lower during these periods, he always codes his timesheets to ensure that he has sufficient paid hours each pay period to avoid losing sick or annual leave accruals (Grievant's Exhibit 2).

8. Grievant has sought to conserve his paid military leave days under Article 43 of the Contract so that he can use them throughout the entire federal training year. He does this to maintain sufficient hours each pay period to maintain leave accruals, to ensure that he preserves some paid military leave days to attend the two week Annual Training and other military obligations that occur later in the training year, and so that he does not have to use his accrued annual leave to attend military training that occurs later in the training year.

9. Prior to the fall of 2008, the Department of Corrections permitted Grievant to use accrued compensatory time, annual leave, and personal leave for his military obligations before requiring him to exhaust his paid military leave. The Department also permitted Grievant to use unpaid military leave prior to exhausting his paid military leave.

10. On October 1, 2008, a new federal training year commenced. On October 4 and 5, 2008, Grievant used two unpaid military leave days for military training (Grievant Exhibits 5, 6).

11. Grievant received a VTANG Special Order dated October 17, 2008, requiring him to attend training in Texas from November 2 through December 20, 2008. Prior to leaving for the Texas training, Grievant completed timesheets covering the

period of his absence, signed them and submitted them to his immediate supervisor. The timesheets which he submitted used both paid and unpaid military leave days, preserved his sick and annual leave accruals, and ensured a lower but fairly steady income during his absence (Grievant's Exhibit 3).

12. During the period Grievant was attending his military training in Texas, his wife contacted him from Vermont to inform him that he had received more pay than he had scheduled for a pay period covering his Texas training. Grievant contacted the Employer but was unable to resolve the matter.

13. Upon returning to Vermont after the Texas training, Grievant inquired into what had occurred concerning his time sheets for the period he was attending military training in Texas. The Employer provided Grievant with copies of time sheets for him for these pay periods. The time sheet provided for the payroll period October 26 through November 8 was the same timesheet signed and submitted by Grievant before he left for training. It provided for 32 hours worked, 8 hours on annual leave, and 40 hours on paid military leave. This resulted in Grievant using 5 of his 15 annual paid military leave days during this payroll period (Grievant's Exhibit 6, p.16-18).

14. However, the timesheets for the November 9 through November 22, and November 23 through December 6, payroll periods were not the same timesheets he had submitted before leaving for Texas. They contained time-reporting codes different from what Grievant had submitted, and did not have his signature on them. The Employer had changed Grievant's timesheets (Grievant's Exhibit 6, p.19-24).

15. The Employer coded Grievant's timesheet for the November 9 through November 22 pay period so that he used 64 hours of paid military leave (Code 25) and 8

hours of unpaid military leave (Code 22). This resulted in Grievant using 8 of his 15 annual paid military leave days during this pay period. The timesheets which Grievant had submitted for this pay period did not use so much paid military leave (Grievant's Exhibit 6, p.19-21).

16. The Employer coded Grievant's timesheet for the following pay period, covering November 23 through December 6, to indicate 64 hours of unpaid military leave. Placing Grievant in an unpaid status for 64 hours constituted a significant change from how he had coded his timesheet. Grievant had coded his timesheet so that he would not be off payroll for 20 or more hours to preserve his sick and annual leave accruals. The change made by the Employer resulted in Grievant not receiving any sick and annual leave accruals for that pay period (Grievant's Exhibit 6, p.22-24).

17. The Employer coded Grievant's timesheets for the November 9 through 22 pay period, and November 23 through December 6 period, to place him on unpaid military leave during those periods even though he had not exhausted his paid military leave. He had used only 13 of his 15 paid military leave days by the conclusion of these pay periods (Grievant's Exhibit 6, p. 16, 19, 22).

18. Subsequently, the Employer allowed Grievant to use unpaid military leave during the federal training year prior to exhausting his remaining two days of paid military leave. Grievant used the remaining two days of paid military leave later in the federal training year.

19. Several years earlier, another State employee, Anne Young, was required to exhaust her paid military leave benefit before being allowed to use unpaid military leave or other types of accrued leave. Young was employed by the State Department of

Social and Rehabilitation Services. VSEA filed a grievance on Young's behalf. The grievance was denied by the Department of Human Resources, and VSEA filed a grievance on behalf of Young with the Labor Relations Board on June 26, 2001. While the grievance was pending before the Board, Young resigned from state employment. The VSEA Staff Legal Assistance Committee then convened to consider whether VSEA should continue representing Young in the grievance given her resignation. The Committee concluded that because Young had not suffered a monetary loss or loss of leave accruals, and because she no longer would be subject to the military leave provisions of the collective bargaining agreement, the Labor Relations Board likely would conclude that Young had suffered no harm that the Board would be capable of remedying. VSEA withdrew from representing Young. Young subsequently withdrew her grievance pursuant to an agreement reached by her and the State (State's Exhibits 9 and 10; VLRB Docket No. 01-37).

## OPINION

Grievant contends that the Employer violated Article 43 of the Contract by requiring him to use all of his paid military leave before permitting him to go on unpaid military leave status. Article 43 is the military leave article of the Contract. The Board needs to interpret its meaning to decide this grievance.

In interpreting the provisions of collective bargaining agreements in resolving grievances, the Board 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,

[1] Grievance of Cronan, et al, 151 Vt. 576, 579 (1989).

so as 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]

The Board will not read terms into a contract unless they arise by necessary implication.[6] 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.[7] However, if sufficient ambiguity exists in the contract, 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.[8]

In applying these rules of contact construction, we examine the provisions of Article 43, Sections 1(g) and (i), which provide:

> (g) A permanent status or limited-status classified employee who is a member of the Organized Reserve or National Guard shall be allowed military leave with pay, at the rate of his or her normal base salary prorated as appropriate, for any authorized training, UTA, AT Period, or other State or Federal service up to a maximum of fifteen (15) workdays scheduled by military authority in any Federal Training Year – October 1 to September 30. A permanent-status or limited-status classified employee who has more than fifteen (15) days of authorized military duty scheduled in one (1) Federal Training Year shall not be entitled to leave with pay for those days in excess of fifteen (15), and shall be placed in an off payroll or leave of absence status, unless he or she elects to use accumulated annual, personal leave, or compensatory time leave credits for the period of absence.
> . . .

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[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] In re Stacey, 138 Vt. at 71.
[7] Vermont State Colleges Faculty Federation v. Vermont State Colleges, 141 Vt. 138, 144 (1982).
[8] Grievance of Majors, 11 VLRB 30, 35 (1988).

> (i) Employees who are in an off payroll or leave of absence status because they have exhausted all available days of paid military leave and are absent pursuant to orders for authorized training or service, are entitled to continue coverage in a health insurance plan if the orders are for 30 days or less and the employee pays the regular employee percentage of premium contribution for the coverage in advance.

Grievant contends that the plain meaning of Article 43, Section 1(g), is that employees are entitled to use their allotment of 15 days of paid military leave for any training, not just the first 15 days of training. Grievant maintains that Section 1(i) of Article 43 pertains strictly to the ability of military families to remain in the negotiated health insurance plan under certain conditions once they have exhausted their paid military leave, but that it says nothing about when or how employees must use their 15 paid military leave days during the federal training year. The Employer asserts to the contrary that these provisions, when considered together, establish clearly and unambiguously that the State is authorized to require that an employee's paid military leave allotment of 15 days be exhausted before an employee may use unpaid military leave.

At first blush, the contract language appears to be more favorable to Grievant's position than that of the Employer. However, we conclude that there is sufficient ambiguity in the language to warrant looking to the extrinsic evidence of bargaining history and past practice to determine whether they provide any guidance in interpreting the meaning of the contract.

We first discuss the contract language itself. In contending that Article 43, Section 1(g) and (i), clearly establish that an employee must exhaust his or her paid military leave allotment before using unpaid military leave, the Employer is requesting that we read terms into the Contract which do not arise by necessary implication.

Article 43, Section 1(g), simply provides that an employee "shall be allowed military leave with pay . . . up to a maximum of fifteen (15) workdays " for military obligations. It does not state or necessarily imply that the 15 paid military leave days have to be exhausted before unpaid military leave can be used by an employee. Article 43, Section 1(i), provides for continued health insurance coverage, with conditions, in the event that an employee has exhausted available paid military leave and is in an off payroll or leave of absence status. This provision, when considered together with Section 1(g), does not necessarily imply that an employee's paid military leave entitlement has to be exhausted before unpaid military leave can be used. It simply indicates the status of an employee's continued health insurance coverage once paid military leave is exhausted.

The Employer's proffered interpretation of the Contract resulted in Grievant in this case not earning annual and sick leave accruals for the November 23 to December 6, 2008, payroll period. Although Grievant had coded his timesheet so that he would not be off payroll for 20 or more hours to preserve his sick and annual leave accruals pursuant to the sick leave and annual leave articles of the Contract, the Employer changed his timesheet as a result of its interpretation of the military leave provisions of the Contract to place him on unpaid leave for 64 hours for the payroll period.

If the parties had intended that an employee would not be able to balance the use of paid and unpaid military leave to preserve the important benefit of sick and annual leave accruals, we lean towards concluding that they would have so explicitly provided in the Contract. The military leave provisions of the Contract do not so explicitly provide, and we do not construe such provisions to imply such a result.

Our initial impression in this regard is bolstered by Vermont Department of Human Resources Policy 14.7, entitled “Military Leave”. It provides that the “State of Vermont is committed to protecting the job rights and benefits of employees who are absent on military leave”, and that employees are provided “with the opportunity to fulfill their military obligations without penalty”. The ability of an employee to balance paid and unpaid military leave to preserve his or her annual and sick leave accruals protects job rights and benefits of employees performing military obligations, and allows them to fulfill such obligations without penalty.

However, there is sufficient ambiguity in the contract language to examine bargaining history and past practice to see if they provide any guidance in support of, or in opposition to, our initial interpretation of the contract language. Bargaining history is unavailing as there is no evidence of any discussions between VSEA and the State during collective bargaining negotiations on exhaustion of paid military leave before using unpaid leave.

The evidence on past practice likewise does not result in any change in our initial interpretation of the contract language. The Employer has presented evidence of only one prior instance when in 2001 it required an employee to exhaust paid military leave prior to using unpaid leave. VSEA filed a grievance with the Board on behalf of the employee. VSEA ultimately did not pursue its representation of the employee, but this was because the employee resigned from state employment and VSEA reasonably concluded that the employee had suffered no harm which the Board would be capable of remedying. These circumstances indicate that VSEA did not acquiesce in the State’s action in this regard.

The Employer offered no additional evidence of any other state employee, prior to Grievant, being required to exhaust paid military leave before using unpaid leave. The only other evidence on a past practice concerns Grievant. Prior to the fall of 2008, the Employer permitted Grievant to use unpaid military leave prior to exhausting his paid military leave. As recently as October 4 and 5, 2008, Grievant was permitted to use two unpaid military leave days for military training even though he had an unused balance of 15 paid military leave days. Even after the Employer changed Grievant's timesheets in November and December 2008 to purportedly require him to exhaust his paid military leave prior to using unpaid leave, the Employer allowed him to use unpaid military leave before requiring him to use two remaining days of paid military leave. We conclude that the evidence on past practice is too limited and conflicting to aid the Employer's proffered interpretation of the contract language.

In sum, we conclude that the military leave article of the Contract allows an employee a maximum of 15 workdays of military leave a year, and that the State violates the Contract by requiring an employee to exhaust these paid leave days prior to using unpaid leave. In determining a remedy for the Employer's violation of the Contract, we are seeking to make Grievant "whole". To make an employee whole is to place the employee in the position he or she would have been in if the Contract had not been violated. Grievance of Lilly, 24 VLRB 233, 244 (2001). Grievance of Lowell, 15 VLRB 291, 339-40 (1992). As a result of the Employer's action improperly changing his timesheet for the payroll period November 23 through December 6, 2008, Grievant did not receive sick and annual accruals for this period. An appropriate remedy to redress this violation is to restore to Grievant's annual and sick leave banks the amount of leave he

should have accrued during this period. A further remedy to make Grievant whole is to order the Employer to cease and desist from requiring Grievant to exhaust his paid military leave prior to using unpaid military leave.

ORDER

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

1. The Grievance of Shawn Stocker ("Grievant") is sustained;
2. The State of Vermont Department of Corrections ("Employer") shall restore to Grievant's sick and annual leave banks the amount of leave he would have accrued for the payroll period November 23 through December 6, 2008, but for the Employer's action improperly changing his timesheet for this period; and
3. The Employer shall cease and desist from requiring Grievant to exhaust his paid military leave prior to using unpaid military leave.

Dated this 20th day of July, 2010, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

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

/s/ James C. Kiehle
James C. Kiehle

/s/ Gary F. Karnedy
Gary F. Karnedy