VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 11-24
ANNE CANDON	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On April 14, 2011, the Vermont State Employees' Association ("VSEA") filed a grievance with the Labor Relations Board on behalf of Anne Candon ("Grievant"). Therein, Grievant alleged that the State of Vermont ("State") violated Article 45, Section 9, of the collective bargaining agreement between the State and VSEA for the Non-Management Unit, effective July 1, 2010 to June 30, 2012, by not granting Grievant an 8% salary increase upon changing her status from "non-management" to "supervisory" and placing her in the Supervisory Unit.

The Labor Relations Board conducted a hearing on September 15, 2011, in the Board hearing room in Montpelier before Board Members Richard Park, Chairperson; James Kiehle and Alan Willard. Abigail Winters, VSEA Associate General Counsel, represented Grievant. Assistant Attorney General William Reynolds represented the State. The parties filed post-hearing briefs on October 6, 2011.

FINDINGS OF FACT

1. The VSEA has been the exclusive bargaining representative of state employees in the Non-Management Bargaining Unit and the Supervisory Bargaining Unit at all times relevant.

2. Grievant was working for the Vermont Department of Taxes in a position in the Non-Management Unit in 1997 when she was promoted from a Pay Grade 19

position to a Pay Grade 21 position. Grievant was also redesignated as a supervisor and placed in the Supervisory Unit as a result of the promotion. Grievant received a 5 percent increase in pay pursuant to the collective bargaining agreement in effect at the time because the promotion resulted in her moving up two pay grades. The collective bargaining agreement did not provide for any increase in pay for moving into the Supervisory Unit.

3. On July 5, 2000, Grievant voluntarily demoted into a Non-Management Unit position at the Vermont Agency of Transportation. This position had a lower pay grade than her Department of Taxes position. Pursuant to the collective bargaining agreement in effect at the time, Grievant received a 1.5% to 2% decrease in pay.

4. In the Fall of 2001, the State and VSEA convened meetings of the Labor-Management Committee provided for in the collective bargaining agreement. Department of Human Resources Commissioner Patricia MacDonald proposed as part of the process that employees receive a salary increase for moving into the Supervisory Unit. At the time, the parties were operating under a collective bargaining agreement which was effective July 1, 2001 to June 30, 2003. The VSEA and the State negotiated a modification of the 2001-2003 agreement by adding the following sentence to the Wage and Salaries article of the agreement: "An employee who moves, for the first time, into the Supervisory Bargaining Unit by promotion, upward reallocation or reassignment, or lateral transfer, on or after January 13, 2002, shall receive a salary increase of eight percent (8%) regardless of the number of pay grades involved" (State's Exhibit 17).

5. In negotiating this provision, the State and VSEA intended to create an incentive for employees and reward them for moving into a supervisory position by

providing a salary increase when such a move was made. In inserting the "for the first time" phrase in this provision, the State and VSEA intended that employees would be prevented from "gaming the system" by moving up and down between the Non-Management and Supervisory Units and receiving the 8 percent increase more than once. There was no discussion in negotiations of whether an employee who moved into the Supervisory Unit, and subsequently returned to the Non-Management Unit, before the provision for the 8 percent increase was effective would be eligible for the 8 percent increase if the employee then returned to the Supervisory Unit after the effective date of the provision.

6. On January 10, 2002, Thomas Ball, State Director of Employee Relations, sent an e-mail message to the Extended Cabinet and personnel officers which provided in pertinent part:

> As you know, the Department of Personnel has been discussing several changes in classification/compensation procedures with the VSEA. . . we have reached agreement on several issues. . . These modifications will become effective on January 13, 2002, and are applicable to all four labor contracts . . .
>
> Specifically, the changes are:
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> > 1. Wages and Salaries Article, Section 9 – Rate After Promotion, Upward Reallocation or Reassignment, new paragraph 2, provides that: effective January 13, 2002, the rate of pay for employees who move, **<u>for the first time</u>** into a Supervisory Bargaining Unit position will be based on 8%, regardless of the number of pay grades involved. This rate shall apply to movements into the Supervisory Unit by promotion, upward reallocation or reassignment, <u>or lateral transfer</u>. . . The purpose of this change is to provide an incentive for employees to make the initial career move into a supervisory position. . .
> > . . .
>
> (State's Exhibit 18, *emphasis in the original*)

7. Ball did not provide VSEA with a copy of this e-mail message. There is no evidence that VSEA was aware of how the State was interpreting the collective

bargaining agreement provision for an 8% increase for moving into the Supervisory Unit with respect to employees who had moved in and out of the Supervisory Unit before the enactment of the contract language.

8. The change to the Wage and Salaries article of the collective bargaining agreement effective January 13, 2002, was incorporated into the July 1, 2003 – June 30, 2005 collective bargaining agreement negotiated by the State and VSEA. The provision, inserted into Article 45, Section 9, of the agreement stated: "An employee who moves, for the first time, into the Supervisory Bargaining Unit by promotion, upward reallocation or reassignment, or lateral transfer, on or after January 13, 2002, shall receive a salary increase of eight percent (8%) regardless of the number of pay grades involved" (State's Exhibit 22).

9. In July 2004, the State sent a proposal to VSEA to reopen the 2003-2005 collective bargaining agreement to amend Article 45, Section 9, of the agreement to provide employees "who are redesignated into the Supervisory Unit without change in classification or pay grade on or after July 11, 2004" with the 8 percent pay increase. VSEA did not respond to the State's proposal (State's Exhibit 19).

10. In the fall of 2004, during negotiations for the successor collective bargaining agreement to the 2003-2005 agreement, the State and VSEA discussed extending the provision for an 8% increase for moving into the Supervisory Unit to employees who were placed in the Supervisory Unit by redesignation. The State made a proposal to VSEA to provide for January 2005 start to the redesignation provision, or in the alternative to extend the benefit retroactively to the 16 employees who had been redesignated since January 13, 2002. There was no agreement reached between the

parties on either the January 2005 starting date or a retroactive increase for the 16 redesignated employees.

11. The VSEA and the State did reach agreement to amend Article 45, Section 9, of the July 1, 2005 – June 30, 2007 collective agreement to provide in pertinent part: "An employee who moves, for the first time, into the Supervisory Bargaining Unit by promotion, upward reallocation, redesignation, upward reassignment, or lateral transfer, on or after July 1, 2005, shall receive a salary increase of eight percent (8%) regardless of the number of pay grades involved" (State's Exhibit 23).

12. This provision has been incorporated into successor collective bargaining agreements negotiated between the State and VSEA, including the July 1, 2010 – June 30, 2012, agreement applicable to this grievance (State's Exhibit 24).

13. After Grievant's July 5, 2000, voluntary demotion into an Agency of Transportation position in the Non-Management Bargaining Unit, she remained in the Non-Management Unit from then until December 2010. In December 2010, due to a reorganization and assignment of new duties to Grievant, Agency of Transportation management submitted a request for reclassification of her position. The State Department of Human Resources determined that Grievant's position was properly classified at its existing Pay Grade 24, but redesignated Grievant to the Supervisory Unit based on the duties she was performing. Grievant received no change in pay due to the supervisory redesignation.

14. At some point after the contract language providing for an 8% increase for moving into the Supervisory Unit was adopted, VSEA Executive Director Anne Noonan learned from an employee that Ball was taking the position that the employee should not

be granted the 8% increase for recently moving into the Supervisory Unit because the employee previously had moved into, and then out of, the Supervisory Unit before the 8% increase was negotiated. After Ball and Noonan discussed the situation, they agreed that the employee would receive the 8% increase. There was no agreement between Ball and Noonan whether this would be precedent-setting.

15. Since the provision for an 8% increase for moving into the Supervisory Unit went into effect in 2002, the State has interpreted this language to limit the 8% increase to those entering the Supervisory Unit for the first time in their state employment. Since July 1, 2005, there have been at least eight employees in addition to Grievant whom the State denied the 8% increase for moving into the Supervisory Unit due to the fact that had previously moved into, and then out of, the Supervisory Unit. The eight employees all received wage increases of at least 5% when they moved into the Supervisory Unit for the second time pursuant to a provision of the collective bargaining agreement which provided: "Effective July 5, 1992, upon promotion, upward reallocation or reassignment of a position to a higher pay grade, an employee covered by this Agreement shall receive a salary increase by being slotted onto that step of the new pay grade which would reflect an increase of at least five percent (5%) over the salary rate prior to promotion. . . The rate of five percent (5%) as outlined above shall be eight percent (8%) if the employee is moving upwards three or more pay grades". There is no evidence that VSEA was aware of the State's actions with respect to these eight employees (State's Exhibits 24, 28 and 29).

OPINION

Grievant contends that the State violated Article 45, Section 9, of the collective bargaining agreement by not granting Grievant an 8% salary increase upon changing her status from "non-management" to "supervisory" and placing her in the Supervisory Unit. Article 45, Section 9, provides: "An employee who moves, for the first time, into the Supervisory Bargaining Unit by promotion, upward reallocation, redesignation, upward reassignment, or lateral transfer, on or after July 1, 2005, shall receive a salary increase of eight percent (8%) regardless of the number of pay grades involved."

In interpreting the provisions of collective bargaining agreements in resolving grievances, we follow 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, 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] 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.[6]

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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).

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]

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.[9] Ambiguity exists where the disputed language will allow more than one reasonable interpretation.[10] 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.[11] In addition, the Board can look at the "situation and motive of the parties," and the result "contemplated by the parties when they executed the . . . agreement."[12]

Grievant contends that the plain language of the provision of the collective bargaining agreement awarding an employee an 8% increase when moving into the Supervisory Unit is clear and unambiguous when read in its entirety, and that the plain language supports Grievant's position. Grievant asserts that, if the employee is moving into the Supervisory Unit for the first time on or after July 1, 2005, then the employee is entitled to the 8% increase. Grievant maintains that to interpret the language any other

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[7] In re Stacey, 138 Vt. at 71.
[8] Vermont State Colleges Faculty Federation v. Vermont State Colleges, 141 Vt. 138, 144 (1982).
[9] Grievance of Gorruso, 150 Vt. 139, 143 (1988).
[10] In re Grievance of Vermont State Employees' Association and Dargie, 179 Vt. 228, 234 (2005).
[11] Grievance of Majors, 11 VLRB 30, 35 (1988).
[12] Gorruso, 150 Vt. at 143, 145. *See also* Grievance of Cole and Cross, 28 VLRB 345, 371-372 (2006).

way would effectively render the phrase “on or after July 1, 2005” as merely superfluous and needless.

The State takes the position that Grievant’s interpretation of Article 45, Section 9, distorts the plain meaning of the language and would lead to an irrational result that the parties specifically intended to avoid. The State contends that the plain meaning of the language is that the 8% increase is limited to those employees who move into the Supervisory Unit for the first time. The State asserts that it is reasonable to infer that the phrase “on or after July 1, 2005”, by its later positioning in the sentence, modifies the listed personnel actions in the sentence and does not modify the phrase “for the first time”.

The State maintains that Grievant’s interpretation of the sentence could result in an employee receiving the first-time supervisor benefit on more than one occasion. This would happen, the State contends, because an employee could receive an 8% increase for a first-time move into the Supervisory Unit between January 13, 2002 and July 1, 2005, then demote to the Non-Management Unit and subsequently return to the Supervisory Unit anytime after July 1, 2005, which under Grievant’s interpretation of the language would result in awarding of a second 8% increase to the employee.

We disagree with Grievant and the State that the language of the collective bargaining agreement is clear and unambiguous. Instead, we conclude that the disputed language is sufficiently ambiguous because it allows more than one reasonable interpretation. The language could reasonably be interpreted to either grant or deny this grievance. Thus, we look to the extrinsic evidence of bargaining history and past practice

to determine whether such evidence provides any guidance in interpreting the meaning of the contract.

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. The bargaining history does not reveal that the parties considered the precise situation in which Grievant found herself. There was no discussion in negotiations of whether an employee who moved into the Supervisory Unit and subsequently returned to the Non-Management Unit, before the provision for the 8 percent increase was effective, would be eligible for the 8 percent increase if the employee then returned to the Supervisory Unit after the effective date of the provision.

Nonetheless, the general intent of the parties in negotiating this provision is instructive in guiding our consideration of the meaning of the contract language. The State and VSEA intended to create an incentive for employees and reward them for moving into a supervisory position by providing a salary increase when such a move was made. In inserting the "for the first time" phrase in this provision, the State and VSEA intended that employees would be prevented from "gaming the system" by moving up and down between the Non-Management and Supervisory Units and receiving the 8 percent increase more than once.

These intentions of the parties would be met by Grievant receiving the 8% increase. She would be rewarded for the first time for moving into a supervisory position since she did not previously receive a salary increase due to supervisory status. There would be no "gaming the system" because Grievant did not previously receive an 8%

increase for moving into the Supervisory Unit and would be ineligible to receive another such increase in the future.

Moreover, we do not interpret the contract language to result in the potential feared by the State of an employee receiving an 8% increase for a first-time move into the Supervisory Unit between January 13, 2002 and July 1, 2005, then demoting to the Non-Management Unit and subsequently returning to the Supervisory Unit after July 1, 2005, and receiving a second 8% increase. Our review of bargaining history leads us to conclude this would be contrary to the intention of the parties.

The language originally negotiated by the parties provided: "An employee who moves, for the first time, into the Supervisory Bargaining Unit by promotion, upward reallocation or reassignment, or lateral transfer, on or after January 13, 2002, shall receive a salary increase of eight percent (8%) regardless of the number of pay grades involved". This language was amended into its current form providing for the "on or after July 1, 2005" language solely to add employees who move into the Supervisory Unit on or after July 1, 2005, as a result of a redesignation to the list of employees eligible for the 8% increase.

This bargaining history makes it evident that the parties did not intend that categories of employees who previously had been covered by the 8% increase language – i.e., employees moving into the Supervisory Unit by promotion, upward reallocation or reassignment, or lateral transfer, on or after January 13, 2002 and prior to July 1, 2005 – would be able to receive a second 8% increase if they had moved to the Non-Management Unit and subsequently returned to the Supervisory Unit on or after July 1, 2005. This would be contrary to the purpose of the narrow amendment to the contract

language effective July 1, 2005, and the parties' intention that an employee would receive the 8% increase only one time.

The State further contends that the past practice of the parties favors the State's interpretation of the disputed contract language because the State has consistently granted the 8% increase for moving into the Supervisory Unit only to those employees who were first-time supervisors. The State cites the eight instances where the State has not provided employees who moved into the Supervisory Unit with an 8% increase when that employee previously had been a supervisor and had not received the 8% increase.

We disagree that this practice of the State supports the State's interpretation of the disputed contract language. There is no evidence that VSEA was aware of the State's actions with respect to these eight employees. There was one instance in which VSEA did have knowledge of the State's intent to deny an employee the 8% increase for a second movement into the Supervisory Unit where the employee had not previously received the 8% increase on her first move into the Supervisory Unit. However, the State ultimately did award the employee the 8% increase for the second movement into the Supervisory Unit when VSEA intervened on behalf of the employee. Given these circumstances, we conclude that the practice of the Employer does not provide evidence supporting the contractual validity of the practice.[13]

In sum, we conclude that the State violated Article 45, Section 9, of the collective bargaining agreement by not granting Grievant an 8% salary increase upon changing her status from "non-management" to "supervisory" and placing her in the Supervisory Unit in December 2010. The State should have provided her with the increase.

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[13] Grievance of Robinson and VSEA, 30 VLRB 192, 202 (2009).

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered as a final order in this matter:

1. The Grievance of Anne Candon is sustained;
2. The State of Vermont shall provide Grievant forthwith with back pay plus interest to reflect an 8% salary increase effective upon the date in December 2010 when Grievant's status changed from "non-management" to "supervisory" and she was placed in the Supervisory Unit; and
3. The interest due Grievant on back pay shall be computed on gross pay and shall be at the legal rate of 12 percent per annum and shall run from the date each paycheck was due during the period commencing with Grievant's placement in the Supervisory Unit and ending on the date she receives the back pay provided for in this order.

Dated this 3rd day of November, 2011, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Richard W. Park

Richard W. Park, Chairperson

/s/ James C. Kiehle

James C. Kiehle

/s/ Alan Willard

Alan Willard