VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 17-37
JUDY ROSENSTREICH	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On September 1, 2017, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of Judy Rosenstreich ("Grievant"), alleging that the State of Vermont ("State") violated Articles 20, 24, 34 and 45 of the collective bargaining agreement between the State and VSEA for the Non-Management Unit, effective July 1, 2016, to June 30, 2018, ("Contract"), and violated a longstanding past practice between the parties, by not compensating her for the time while she was representing the Vermont State Employees Retirement System Board of Trustees at the National Conference of Public Employees Retirement System Annual Conference.

A hearing was held before Labor Relations Board Members Richard Park, Chairperson; Alan Willard and Edward Clark, Jr., on March 1, 2018. VSEA General Counsel Timothy Belcher represented Grievant. Assistant Attorney General Melanie Kehne represented the State. The parties filed post-hearing briefs on March 19, 2018.

FINDINGS OF FACT

1. The Contract provides in pertinent part as follows:

. . .

ARTICLE 2
MANAGEMENT RIGHTS

1. Subject to law, rules and regulations . . . and subject to terms set forth in this Agreement, nothing in this Agreement shall be construed to interfere with the right of the Employer to carry out the statutory mandate and goals of the agency, to restrict the State

in its reserved and retained lawful and customary management rights, powers and prerogatives, including the right to utilize personnel, methods and means in the most appropriate manner possible . . .

ARTICLE 20
EMPLOYEE WORKWEEK/WORK LOCATION/WORK SHIFT

An employee's basic weekly salary and eligibility for overtime compensation shall be based on a forty (40) hour workweek schedule.

. . .

ARTICLE 24
OVERTIME

1. INTRODUCTION

. . .

(c) It is understood and agreed that determining the need for overtime work, scheduling the hours overtime shall be worked, and requiring overtime work are exclusively employer's rights.

. . .

2. AUTHORIZATION OF OVERTIME

(a) Overtime work shall be assigned and authorized only by appointing authorities or their designated representatives either verbally or in writing.
(b) All overtime work which has been assigned to an employee, by the appropriate authority and is actually worked by the employee shall be authorized and compensated.

. . .

(d) Employees may not authorize their own overtime without permission from management.

. . .

ARTICLE 34
OFF PAYROLL AND ADMINISTRATIVE
LEAVES OF ABSENCE

1. POLICY

. . .

(j) Off Payroll

(1) A classified employee, including those in original probationary status, may be granted time off the payroll for short periods when it is necessary to be absent from duty and the employee has no accumulated annual leave, personal leave, compensatory time off . . .

. . .

(Grievant Exhibit 16)

2. Grievant was a Senior Policy Advisor for the State of Vermont Department of Mental Health until she retired from state service on August 1, 2017. She worked for the Department of Mental Health for eleven and one-half years and for the State for a total of

twenty-two and one-half years. She was a member of the Non-Management Bargaining Unit represented by VSEA and was a member of the VSEA (State Exhibit D).

3. In September 2015, Rosenstreich attended the VSEA Annual Meeting. The agenda for the meeting included election of members to fill one or more positions on the Vermont State Employees Retirement System ("VSERS") Board of Trustees. No incumbent was running for reelection for one of the positions open for election. A VSEA member nominated Grievant to fill the seat. She was elected over several other candidates.

4. VSERS is one of the public employee retirement systems managed by the Treasurer of the State of Vermont. The enabling statute provides as follows:

> 3 V.S.A. § 471. Retirement Board . . . (a) The general administration and responsibility for the proper operation of the Retirement System and for making effective the provisions of this subchapter are hereby vested in a board of eight trustees, known as the Retirement Board. The Board shall consist of the Governor or his or her designated representative, the State Treasurer, the Commissioner of Human Resources, the Commissioner of Finance and Management, three members of the Vermont State Employees' Association who are members of the System, each to be chosen by such Association in accordance with its articles of association and bylaws or policies for a term of two years, and one retired State employee who is a beneficiary of the System, to be elected by the Vermont Retired State Employees' Association for a term of two years. . .
> (b) The trustees as such shall serve without compensation, but they shall be reimbursed from the funds of the Retirement System for all necessary expenses that they may incur through service on the Retirement Board. . .
> (c) Each trustee shall be entitled to one vote in the Retirement Board. Five trustees shall constitute a quorum for the transaction of any business. A majority vote of those present and voting shall be necessary for resolution or action by the Retirement Board at any meeting of the Board. . .

5. At the time of Grievant's election to the VSERS Board, the other VSEA members on the Board were Thomas Hango, Captain with the Vermont State Police, and Jeffrey Briggs, Forester with the Agency of Natural Resources. They had been on the VSERS Board for a period of time prior to Grievant's election to the Board.

6. The members of the VSERS Board of Trustees serve as fiduciaries to the system as a whole, managing the funds and benefits systems for all state employees and retirees, including employees who are exempt from any bargaining unit represented by an employee organization.

7. Shortly after her election, Grievant asked Joshua McCormick, Administrative Services Coordinator of the State Retirement Division of the Treasurer's Office, how she should code the time she spent at VSERS Board meetings. McCormick asked Briggs and Hango how they coded their time spent at VSERS meetings. Briggs responded that he coded the time as VSEA leave and Hango indicated that he coded it as work time. Grievant asked Maribeth Spellman, Commissioner of Human Resources, how to code time during an employee's work day for VSERS business. Commissioner Spellman responded on October 20, 2015, by email: "Consensus here is to code it as WORK." (Grievant Exhibit 5).

8. The VSERS Board is a member of national organizations composed of similar entities as the VSERS Board. The organizations conduct conferences. The Treasurer's budget at all times relevant has included funding to pay for registration fees and the reimbursement of expenses of members of the Board to attend such conferences.

9. Members of the VSERS Board, including the VSEA-elected members, have attended such conferences in the past, including the National Conference on Public Employee Retirement Systems ("NCPERS"). Terence Macaig, a VSEA-elected member to the Board from 1980 to 2000, and an employee of the State Department of Health during this time, attended the NCPERs conference six times as a member of the Board during this period. He was never charged with accrued leave time of any kind, or required to go off payroll, for attending the conference as a member of the Board (Grievant Exhibit 17).

10. When Grievant began sitting as a member of the Board, the Treasurer provided information to board members concerning their roles as board members, including their duty as fiduciaries. The Treasurer did not provide in-depth training on the technical aspects of public employee pensions.

11. As Grievant participated in Board meetings, she realized that her colleagues on the Board had a deeper knowledge of the complex and technical area of public employee pension systems. She determined that she would be better able to fulfill her role on the Board with training in the field offered at national conferences.

12. Grievant asked the Board to attend the NCPERS conference scheduled to be held in May of 2017, in Hollywood, Florida. Briggs also sought to attend the conference. Their requests were considered by the Board at the February Board meeting. The Board indicated that it would approve only one of them to attend due to budgetary constraints. The Board deferred the issue to the March Board meeting. Briggs subsequently decided to defer to Grievant and withdrew his request to attend the conference. The Board voted at its March 9, 2017, meeting to allow Grievant to attend the conference (Grievant Exhibits 7, 8, 9).

13. On March 9, 2017, Grievant sent her DMH supervisor, Nick Nichols, an email, providing in pertinent part:

> Dear Nick,
>
> Dates to plan for when I will be away from the office:
>
> May 18, starting at 1:00 pm through May 25 – I am attending an educational conference for the Vermont State Employees Retirement System (VSER) Board of Trustees. Out of state travel form, travel arrangements, registration, lodging, expense reimbursement is handled/paid by the Treasurer's Office through their budget. Time is coded Hours Worked. I may wish to take Friday, May 26, off since it is just before Memorial Day weekend. If so, May 26 would be annual leave or comp, not time worked.
> . . .
> (Grievant Exhibit 13)

14. The March 9 email was the first time that Grievant informed Nichols of her plans to attend the conference. Nichols responded by email on March 21, 2017, stating in pertinent part:

> Judy,
>
> Thanks for letting me know. Given that attending this conference presents a time commitment beyond what is outlined in Statute for VSERS members, DMH will need the following information to consider whether the time may be considered "hours worked" or whether you should be using your own accrued leave time:
>
> 1. Verification from VSERS that attendance at this educational event is not optional or discretionary, but a mandatory/required activity of VSERS members.
> 2. Written materials identifying the purpose, dates, and hours attributable to the event.
>
> . . .
> (Grievant Exhibit 13)

15. Grievant followed up on Nichols's requests, and sent him a responsive email on Wednesday, March 29, 2017, at 3:50 p.m. It stated in pertinent part:

> Nick,
> I gave your request to the Treasurer's Office, which told me that our department, DMH, signs the travel authorization form for out-of-state travel authorization. I completed the form providing the dates and costs of the conference . . The (conference) brochure contains the purpose, dates, and hours you have requested. The conference is not mandatory or required. The State uses many terms – appropriate, necessary, valid, prudent, reasonable, allowable – to describe business expenses consistent with Bulletin 3.4. The VSERS board authorized me to attend and the expenses are being paid from the budget of the State Treasurer. Her office expects to make the travel reservations on Friday of this week to obtain the most cost-effective rates available. Travel authorization is requested in a timely manner.
>
> Let me know if you have further questions. I have the form and the brochure for you.
>
> . . .
> (Grievant Exhibit 13)

16. Nichols responded by email on Friday, March 31, 2017, at 12:28 p.m. He stated:

> Judy,
>
> As you indicated, your attendance at this conference is not mandatory or required. Any leave time associated with this conference would not be necessary work on behalf of the

> State or DMH. As such, your leave request is being treated as any other employee request for time off, and it is expected that you use your leave time to cover your time off.
>
> I did notice that you may not have enough accrued leave to cover the time you've requested. If you do not have enough leave to cover your time off, the Commissioner has approved you to use authorized off payroll. Since expenses associated with the conference would be submitted through VSERS, it would not be necessary for DMH to complete a travel authorization.
>
> (Grievant Exhibit 13)

17. Grievant then sought guidance from the Department of Human Resources through an April 10, 2017, email on how the hours attending the NCPERS conference should be coded and the signing requirements for a travel authorization form. Director of Labor Relations John Berard responded in an April 10, 2017, email, stating in pertinent part:

> Given the information provided, it appears that DMH has exercised its discretion in determining that voluntary attendance at this conference is not required as part of your duties and has declined to pay you to attend. As a result, effectively, you are traveling as a member of the Board, not in your capacity as an employee of DMH and a Travel Authorization Form would be unnecessary as the Board will be reimbursing you for travel related expenses.
> . . .
> (Grievant Exhibit 14).

18. Grievant attended the NCPERS conference. The Treasurer's Office paid Grievant's registration fee and travel expenses for the conference. She traveled to the conference on Friday, May 19. She attended pre-conference training on Saturday and Sunday of the weekend. She attended conference sessions on Sunday, May 21, through Thursday, May 25. She traveled back to Vermont on May 25 (State Exhibit B, C)

19. Grievant coded her time for May 19, 22, 23, 24 and 25 as unpaid off payroll (Grievant Exhibit 15).

OPINION

Grievant alleges that the State violated Articles 20, 24, 34 and 45 of the Contract, and violated a longstanding past practice between the parties, by not treating as time worked the time she was representing the Vermont State Employees Retirement System Board of Trustees at the National Conference of Public Employees Retirement System Annual Conference.

The VLRB has such adjudicatory jurisdiction as is conferred on it by statute. In re Grievance of Brooks, 135 Vt. 563, 570 (1977). In deciding grievances the VLRB is limited by the statutory definition of grievance, which provides:

> "Grievance" means an employee's, group of employees', or the employee's collective bargaining representative's expressed dissatisfaction, presented in writing, with aspects of employment or working conditions under a collective agreement or the discriminatory application of a rule or regulation, which has not been resolved to a satisfactory result through informal discussion with immediate supervisors. 3 V.S.A. §902(14).

In interpreting the provisions of collective bargaining agreements in resolving grievances, the VLRB 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. Grievance of Cronan, et al, 151 Vt. 576, 579 (1989). 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).

We apply these rules of construction to each of Grievant's alleged violations of the Contract. Grievant asserts that the State violated the Article 20 provision that "(a)n employee's basic weekly salary and eligibility for overtime compensation shall be based on a forty hour (40) hour workweek schedule." This provision simply provides for an employee's salary and overtime compensation eligibility to be based on a 40 hour workweek. It does not address the question present in this case of whether management has the discretion to decide in advance to not approve time spent by an employee at a voluntary conference as time worked. A contrary ruling would constitute reading terms into a contract which do not arise by necessary implication and remake the Contract.

We reach a similar conclusion with respect to Grievant's contention that the State violated Article 45 of the Contract. This article simply contains the provisions determining the salaries and wages paid employees. It does not address the question present in this case of whether management has the discretion to decide in advance to not approve time spent by an employee at a voluntary conference as time worked. Grievant essentially is requesting that we remake the parties' contract. The provisions of Article 20 and Article 45 cited by Grievant depend upon - rather than support – a determination that Grievant's time spent attending a voluntary conference should constitute hours worked.

Grievant next asserts that the State violated the Article 24 provision that "(a)ll overtime work which has been assigned to an employee, by the appropriate authority and is actually worked by the employee shall be authorized and compensated". Grievant has not demonstrated a violation of this article when the article is viewed in its entirety and read together. In addition to

the Article 24 language cited by Grievant, Article 24 also provides that "(o)vertime work shall be assigned and authorized only by appointing authorities or their designated representatives", and that "determining the need for overtime work, scheduling the hours overtime shall be worked, and requiring overtime work are exclusively employer's rights." Here, Grievant's appointing authority, the Department of Mental Health, did not assign and authorize Grievant's attendance at the NCPERS conference as overtime work. Instead, Grievant's supervisor exercised the employer's express rights to not approve Grievant's attendance at the conference as required overtime work.

The final violation of a contract article alleged by Grievant is that the State violated the Article 34 provision that an employee "may be granted time off the payroll for short periods when it is necessary to be absent from duty and the employee has no accumulated annual leave, personal leave, compensatory time off". Grievant asserts she was not absent from duty but rather was serving with the VSERS Board when she attended the NCPERS conference. Once again, Grievant is reading terms into this contract provision which do not arise by necessary implication. The provisions of Article 34 do not inform the determination *whether* an employee is absent from duty when attending a voluntary conference – the question at issue in this case. Instead, it simply provides the employee may be granted time off payroll *if* the employee is absent from duty.

Grievant further contends that the State violated the longstanding past practice between the parties that VSERS board members elected from within the VSEA membership would attend NCPERS annual conferences on work time. In deciding grievances, the Labor Relations Board has concluded that past practices are encompassed within the statutory definition of grievance. Grievance of Cronin, 6 VLRB 37, 67-69 (1983). The Board has recognized that 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. VSEA v. State of Vermont Judiciary Department (Re: Use of Personal Cell Phones), 34 VLRB 155, 170-71 (2017). Grievance of Hanifin, 11 VLRB 18, 27 (1988). Grievance of Cronin, supra. Grievance ofAllen, 5 VLRB 411, 417 (1982). Grievance of Beyor, 5 VLRB 222, 238-239 (1982).

In holding the view that the contractual relationship between the parties in labor relations normally consists of more than the specific contract provisions and encompasses existing practices, the Board has cited with approval the statement of the U.S. Supreme Court that there are "too many people, too many problems, too many unforeseeable contingencies to make the words of the contract the exclusive source of rights and duties." Grievance of Allen, 5 VLRB 411, 417-418 (1982); *citing* United Steelworkers of America v.Warrior and Gulf Navigation Co., 363 U.S. 574 (1960). 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.

The evidence is insufficient to support a conclusion that there was a violation of a binding past practice. The only specific evidence we have supporting a practice of treating attendance at NCPERS conferences as time worked involves one employee in a different department than Grievant. This falls well short of demonstrating a mutually accepted binding past practice that the parties can be presumed to have bargained in reference to it.

Grievant contends in the post-hearing brief that the State has not followed the provisions of the Fair Labor Standards Act. The Board has held that statutory provisions are not encompassed within the definition of "grievance" unless they are incorporated into a collective

bargaining agreement, rule or regulation. Boynton v. Snelling, 147 Vt. 564 (1987). In re McMahon, 136 Vt. 512 (1978). Grievance of VSCSF and Laflin, 16 VLRB 276 (1993). The Board has held previously that it did not have jurisdiction over alleged violations of the federal Fair Labor Standards Act. Grievance of VSEA, Gibney, et al, 32 VLRB 256, 273 (2013). Grievant has not established, or even alleged, that the terms of the Fair Labor Standards Act are incorporated into the Contract. Accordingly, there is no merit to Grievant's claim in this grievance action.

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered that the Grievance of Judy Rosenstreich is dismissed.

Dated this 23rd day of May 2018, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Richard W. Park
Richard W. Park, Chairperson

/s/ Alan Willard
Alan Willard

/s/ Edward W. Clark, Jr.
Edward W. Clark, Jr.