VERMONT LABOR RELATIONS BOARD

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| GRIEVANCE OF: | ) | |
| | ) | DOCKET NO. 16-53 |
| BARBARA KING, THRESSA BRACE | ) | |
| AND RAE ANN WOODS | ) | |

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On November 2, 2016, the Vermont State Employees' Association ("VSEA") filed a grievance with the Vermont Labor Relations Board on behalf of Barbara King, Thressa Brace and Rae Ann Woods ("Grievants"), contending that the State of Vermont ("State") violated Article 3 of the collective bargaining agreement between the State and the VSEA for the Non-Management Bargaining Unit effective July 1, 2014 to June 30, 2016 ("Contract") by denying them leave to attend a VSEA-sponsored training session after it was approved and after they already had attended the session in reliance on the approval.

A hearing was held in the Labor Relations Board hearing room in Montpelier on April 27, 2017, before Board Members Richard Park, Acting Chairperson; Alan Willard and Edward Clark, Jr. Assistant Attorney General Katherine Pohl represented the State. VSEA General Counsel Timothy Belcher represented Grievants. The State and Grievants filed post-hearing briefs on May 16 and 17, 2017, respectively.

FINDINGS OF FACT

1. The Contract provides in pertinent part:

**ARTICLE 3**
**VSEA RIGHTS**

. . .
3. VSEA TIME OFF: Subject to the efficient conduct of State business, which shall prevail in any instance of conflict, permission for reasonable time off during normal working hours without loss of pay and without charge to accrued benefits shall not be unreasonably withheld. The VSEA shall provide written notice of the meeting and date to

the Department of Human Resources, for those meetings outlined in subsection (a) – (f) below, with as much notice as possible. Subject to the foregoing, time off shall be granted in the following instances to:

(a) Members of the VSEA Board of Trustees to attend twelve (12) regular Trustee meetings and up to two (2) special Trustee meetings a year.

(b) Members of the Council for attendance at any of the four (4) regular council meetings per year. The State may grant permission for attendance at not more than one (1) additional special meeting.

. . .

(d) Unit Chairperson, up to forty (40) hours per year, subject to the operating needs of the department for conduct of unit Labor Relations/Contract Administration business;

(e) Members of VSEA standing committees will be permitted to attend ten (10) meetings per year. This subsection shall be applicable to the eighteen (18) presently existing VSEA standing committees . . .

(f) Unit executive committee members will be given time off to attend five (5) meetings per year;

(g) Stewards for the processing and handling of complaints and grievances . . .

. . .

An employee will not be permitted more than a total of two hundred forty (240) hours, two hundred eighty (280) for Unit Chairpersons, time off in any fiscal year under paragraph 3, subsections (a) – (g) above.

. . .

(j) Any of the above or to chapter officers for the purpose of attending training sessions approved in advance by the Department of Human Resources. Approval shall not unreasonably be withheld.

In any such instances, under this Section, such employees shall coordinate their absences from work to minimize the adverse impact on the efficient conduct of State business and in all cases must secure advance permission from appropriate supervisors and shall give the State as much prior notice of any such meetings as possible, including concurrent written notice to Department Heads when VSEA sends a notice of meetings to its own representatives. . .

(Exhibit 1)

2. VSEA recruits and trains stewards in workplaces throughout state government to advise and represent state employees. The trainings generally focus on a range of skills, including contract interpretation and advocacy. During all times relevant, the trainings have been conducted throughout the year by a Labor Educator employed by VSEA.

3. Peter Garon held the position of VSEA Labor Educator from early 2013 to late 2013. During this time, he sent schedules of trainings to Thomas Ball, Director of the Labor

Relations Division of the State Department of Human Resources ("DHR"). DHR then sent out a list of the trainings to the DHR field staff who worked directly with state agencies. The list was used by the agencies to determine whether an individual request for leave from an agency should be granted (Exhibit 3).

4. On August 15, 2013, Garon sent Ball an email stating: "Tom, here is the training schedule for the next year." Attached to the email was a schedule for "2013-2014". VSEA did not provide any other training schedule to DHR between this communication and March 13, 2016 (Exhibit 4).

5. On November 26, 2013, Garon sent a message to Ball informing him of a training scheduled for December 13, 2013, and stated this training would be "one of my last official acts" (Exhibit 5)

6. VSEA had many staffing changes between 2013 and 2016. Among them were that in December 2013, Timothy Lenoch replaced Garon as VSEA Labor Educator, and Ray Stout became VSEA Director of Operations.

7. Stout was not aware before March 2016 of the Article 3, Section 3, requirement that VSEA provide notice to DHR of VSEA meetings and trainings. No one at VSEA or DHR informed him of such an obligation before March 2016. He did not provide such notice to DHR prior to March 2016.

8. No one told Lenoch when he assumed the Labor Educator position that he was responsible for notifying DHR of the VSEA Steward trainings or securing DHR's approval in advance. He was aware of the Article 3, Section 3, provisions but did not understand how they were administered in practice. He never provided notice to DHR of any steward trainings prior to

March 14, 2016, received no request from DHR to provide such notice, and did not know that VSEA was failing to meet its contractual obligations.

9. John Berard, a longtime DHR employee, replaced Ball as Director of Labor Relations in August 2014. Berard did not receive any notice from VSEA of VSEA trainings from when he assumed the position until March 2016. He knew VSEA was conducting trainings during this period and that employees were receiving VSEA leave to attend the trainings. He did not raise the notice issue with VSEA until March 2016 (Exhibit 7, Exhibit 7A).

10. Lenoch conducted approximately 28 trainings of VSEA Stewards, VSEA Council members, VSEA Chapter officers and VSEA members of Labor Management Committees between March 2015 and early March 2016. Many of the VSEA members attending these trainings and meetings requested, and were granted approval by their agencies, to use VSEA leave time to attend these trainings. Agencies approved the leave requests without any notice to, or preapproval of, DHR. Lenoch's practice for VSEA Steward trainings was to send the Steward an email confirming that they were registered for the training, and informing them as follows: "If you have not done so, you are advised to inform your supervisor that you will be off these days to attend training. As a VSEA Steward, you may have paid release time to attend these trainings" (Exhibits 9, 20).

11. Grievants are Vermont Veterans Home employees. Grievant King is a Licensed Nursing Assistant. Grievant Brace is a Custodian III. Grievant Wood is an Activities Aide. At all times relevant, all three Grievants have served as VSEA Stewards.

12. Each Grievant requested permission for time off during normal working hours to attend a VSEA Steward training on March 9, 2016, by submitting a completed Veterans Home leave request form to their respective supervisors. The form they submitted contained the

following “Note”: “Approval of any leave is conditional and subject to the employee maintaining sufficient leave accruals to cover the absence. Approved leave may be shortened or canceled if an employee has insufficient accrued leave time to cover an absence.” Grievant King submitted a leave request form on February 10, 2016. The next day, her supervisor signed the form and approved the absence. Grievant Brace submitted a leave request form on February 22, 2016. Her supervisor signed the form and approved the absence on February 25, 2016 (Exhibit 8).

13, None of the Grievants were aware that VSEA had to provide advance notice to DHR of VSEA Steward trainings pursuant to Article 3 of the Contract. Each Grievant understood that Veterans Home management had authority to grant leave on behalf of the State and that they could rely on the authorizations received prior to the trainings. Grievant King may have taken the training without the VSEA leave, but she probably would have rescheduled if that had been an option and she had known that the VSEA leave would be denied. Grievants Brace and Woods would not have attended the training if they had known they would not be granted VSEA time off without loss of annual leave. Grievant Brace was careful about her use of leave time because she used it to attend medical appointments with her husband who had medical issues requiring frequent visits to medical providers.

14. Each Grievant attended the March 9 VSEA Steward training. Neither Grievants nor Lenoch had any knowledge at the time of the trainings that the VSEA leave time approved by Grievants’ supervisors may be revoked.

15. On March 8, 2016, at 11:45 a.m., Laurie Bouyea-Dumont, a DHR Human Resources Manager assigned to work with the Department of Fish and Wildlife (“DFW”), sent an email to Berard asking if he had a list of scheduled VSEA Steward trainings because a DFW employee who was a VSEA Steward had requested several Fridays off to attend VSEA Steward

trainings. Berard responded to this email at 12:06 p.m., stating in part: “We have not received a request from VSEA regarding such training as required under the CBA. Therefore, no release time should be approved until such trainings are approved” (Exhibit 10).

16. Berard sent the following email to Stout at 12:00 p.m. on March 8 before he had responded to Bouyea-Dumont:

> I am not sure who I should direct this email to, so I am sending to you. Please forward it to the appropriate person, if this is not you. I’m getting inquiries regarding VSEA Steward trainings, but Labor Relations has not received any request for approval as required under Article 3, Section 3(j) of the Collective Bargaining Agreements. Once we receive such a request, and assuming, approval we will authorize release time for impacted employees to attend.
>
> Additionally, it would be helpful if VSEA would provide an updated schedule of meetings as required under Article 3, Section 3, so we can avoid any confusion surrounding release time for those employees as well.
> (Exhibit 11)

17. Stout responded at 12:03 p.m. that day as follows: “Thank you for reaching out John. I will loop in the folks on our side and have someone get back to you” (Exhibit 11).

18. Stout forwarded the email exchange between him and Berard immediately to others on the VSEA staff, including VSEA Director of Labor Relations Gary Hoadley. Stout did not know at the time that a VSEA Steward training was scheduled for the next day.

19. On March 9, at 9:04 a.m., Stout sent Lenoch a message asking: “Tim do you have a full list of your scheduled steward trainings?” This was the day Lenoch was conducting the VSEA Steward training. Lenoch responded by sending Stout a link to the page on the VSEA website that listed all such trainings (Exhibit 13).

20. On March 9, at 7:59 a.m., DHR Labor Relations Specialist Brandi Murray sent an email message to a list of DHR staff stating in part: “Labor Relations has not received a request from VSEA regarding steward trainings as required under the CBA. Therefore, release time

should not be granted until such trainings are approved." Human Resources Manager Juliette Anderson responded at 8:58 a.m., asking "what is the effective date – in other words, how far back would we need to look?" Murray forwarded the inquiry to Berard at 11:16 a.m., with the following recommendation: "Please see Juliette's question below. I would say prospectively, we wouldn't go back in time and change it." Berard responded as follows as 11:58 a.m." "Agreed" (Exhibit 12).

21. On March 14 and 15, Stout sent Berard the schedule for all VSEA trainings and meetings between March 4, 2016, and September 9, 2016. On March 17, Berard requested that Stout provide some additional information on the trainings on the schedule. Stout sent Berard the information on March 17. On March 18, Berard informed Stout by email: "In accordance with Article 3, Section 3, DHR is approving release time for the VSEA Stewards trainings listed below, held on or after March 17, 2016" (Exhibit 17).

22. On or around March 21, 2016, Grievants were notified by Veterans Home management that VSEA leave time was not approved for the March 9 VSEA Stewards training, and that they were required to use personal leave time to cover their absences that day.

## MAJORITY OPINION

Grievants contend that the State violated Article 3 of the Contract by denying them leave to attend a VSEA-sponsored training session on March 9, 2016, after it was approved and after they already had attended the session in reliance on the approval. Grievants contend: 1) the State's actions in this case violate the Contract's requirement that leave time will not be unreasonably denied; 2) the State is equitably estopped from raising the Contract as a defense because Grievants relied to their detriment on the State's failure to administer the Contact; 3) the

State had ceded its authority to the Vermont Veterans Home to approve the leave; and 4) the State itself contributed to the problem it was seeking to remedy.

The State contends that Grievants cannot meet their burden of proving that the State breached its duty under the Contract. The State asserts that it was VSEA that violated the Contract by failing to provide the State with advance notice of the March 9 training for approval, and that the State should not be liable for VSEA's failure to abide by the terms of the Contract. The State further contends that Grievants cannot establish that they are entitled to use equitable estoppel to abrogate the clear language of the Contract.

We first address Grievants' claim that the State's actions in this case violate the Contract's requirement that leave time shall not be unreasonably denied. Article 3, Section 3, of the Contract provides in pertinent part: "(T)ime off shall be granted in the following instances to . . . (g) Stewards . . . (j) . . for the purpose of attending training sessions approved in advance by the Department of Human Resources. Approval shall not unreasonably be withheld."

Grievants assert that the notice and pre-approval requirement, and the reasonableness provision, of this contractual language are set forth in separate sentences and are therefore distinct. Under most circumstances, they contend, a denial based on a notice failure would be reasonable. However, they maintain the Contract clearly prohibits the State from denying leave, even where not noticed and unapproved, if the denial is unreasonable.

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 must be construed, if possible, so as to give effect to every part, and from the parts to from a harmonious whole. In re Grievance of VSEA on Behalf of "Phase Down" Employees, 139 Vt. 63, 65 (1980). 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).

If there is a determination that the language is clear and unambiguous, extrinsic evidence under such circumstances is not to be considered 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). If the analysis instead leads to a conclusion that the contract language is ambiguous because the disputed language allows more than one reasonable interpretation, it is appropriate to look to the extrinsic evidence of bargaining history and past practice to ascertain whether such evidence provides any guidance in interpreting the meaning of the contract. Nzomo, et al. v. Vermont State Colleges, 136 Vt. 97, 101-102 (1978). Grievance of Majors, 11 VLRB 30, 35 (1988).

In reviewing the contract provisions at issue in their entirety, we conclude that the interpretation advanced by Grievants is not reasonable. Contrary to Grievants' assertion, the fact that the notice and pre-approval requirement, and the reasonableness provision, are set forth in separate sentences does not make them distinct. It is clear that the approval mentioned in the second sentence relates back to the advance approval required in the first sentence. The parties to the Contract, the State and VSEA, intended by their language that approval "shall not

unreasonably be withheld" in situations where notice has been provided by VSEA in advance to the Department of Human Resources.

Nonetheless, this does not necessarily result in a conclusion that the State may rely on this contract provision to defeat this grievance on the grounds that VSEA did not provide advance notice to the Department of Human Resources of the March 9, 2016, VSEA Steward training session. Under the well-established legal doctrine of equitable estoppel which has applicability to labor relations disputes, a party to a contract may lose the right to assert a term of the contract by estoppel. Greenmoss Builders, Inc. v King, 155 Vt. 1, 6-7 (1990). Grievance of Vermont State Colleges Faculty Federation, AFT Local 3180, AFL-CIO (Re: Adrianne Lioce), 19 VLRB 1, 10 (1996).

Equitable estoppel is based upon concerns of public policy and an interest in encouraging fair dealings, good faith and justice. Id. Its purpose is to forbid one to speak against his or her own acts, representations or commitments to the injury of one to whom they were directed and who reasonably relied thereon. Id. The test to determine whether a party is estopped from a claim is whether, in all the circumstances of the case, conscience and duty of honest dealing should deny one the right to repudiate the consequences of his or her representations or conduct. Id.

The party invoking the doctrine of equitable estoppel has the burden of establishing that: 1) the party to be estopped knows or should have known the facts; 2) the party being estopped intends that his or her conduct shall be acted upon or the acts must be such that the party asserting the estoppel has the right to believe it is so intended; 3) the party asserting the estoppel must be ignorant of the true facts; and 4) the party asserting the estoppel must rely on the conduct of the party to be estopped to his or her detriment. Id.

In applying these standards to this case, we conclude that the State is estopped from now asserting that the failure of VSEA to provide advance notice of March 9 training session means Grievants are not entitled to VSEA leave time for the training session. DHR Labor Relations Director John Berard knew that VSEA was holding numerous training sessions and meetings throughout the first 18 months of his tenure as Labor Relations Director. He also knew or should have known that the State was approving VSEA leave for these trainings and meetings based on authorizations from agencies without DHR receiving any advance notification from VSEA.

Grievants reasonably understood that the State intended for them to rely on these authorizations. Numerous VSEA members attending VSEA trainings and meetings over an approximate one and one-half year period requested, and were granted approval by their agencies, to use VSEA leave time to attend these trainings and meetings. Agencies approved the leave requests without any notice to, or preapproval of, DHR. The Veterans Home management bears some responsibility for what occurred here by approving the requests absent knowledge of whether there had been advance approval by the DHR.

Estoppel can be based on silence where there is an obligation to speak. Greenmoss Builders v. King, 155 Vt. at 7. Given this one and one-half year history, if DHR wished to rescind approval of Grievants being granted VSEA leave to attend the March 9 training session, it had the obligation to so inform them prior to them attending the training session. Grievants had no knowledge at the time of the trainings that the VSEA leave time approved by Grievants' supervisors may be revoked. The DHR's silence in this regard meant Grievants reasonably understood that the State intended them to rely on the approvals to use the VSEA leave granted by Veterans Home management.

We also consider Grievants as having been ignorant of the true facts of the situation. None of the Grievants were aware that VSEA had to provide advance notice to DHR of steward trainings pursuant to Article 3 of the Contract. Each Grievant understood that Veterans Home management had authority to grant leave on behalf of the State and that they could rely on the authorizations received prior to the trainings.

Finally, we conclude that Grievants relied on the conduct of the State to their detriment. They relied on the authorizations issued by Veterans Home management to use VSEA leave to attend the March 9 training session, attended the training session pursuant to this authorization, and then had to use personal leave to their detriment once the authorizations were rescinded after they already had attended the training session. Two Grievants would not have attended the training if they had known they would not be granted VSEA time off without loss of personal leave. The third Grievant may have taken the training without the VSEA leave, but she probably would have rescheduled if that had been an option and she had known that the VSEA leave would be denied.

In sum, concerns of public policy and an interest in encouraging fair dealings, good faith and justice result in our conclusion that the State is estopped under the unusual circumstances of this case from using the advance notice provisions of Article 3, Section 3, of the Contract to rescind the VSEA leave approvals the Veterans Home management granted Grievants to attend the March 9 VSEA Steward training session. Grievants were caught in the untenable situation of having the leave rescinded through no fault of their own after already having attended the training session. They fell victim to VSEA's failure to properly provide advance notice of the training session and the State's tardy enforcement of the advance notice provisions. This is a rare

case where the application of the doctrine of equitable estoppel results in loss of the right to assert a contract provision.

We note that our decision should not be construed as being based on a binding past practice. Day to day practices mutually accepted by the parties may attain the status of contractual rights and duties, particularly where they are significant, longstanding and not at variance with contract provisions. Grievance of Hanifin, 11 VLRB 18, 27 (1988). Grievance of Cronin, 6 VLRB 37, 67-69 (1983. The approximate one and one-half year period where VSEA was not providing advance notice of training and meetings, and employees were nonetheless receiving VSEA leave to attend these trainings and meetings, does not translate into a binding past practice.

A past practice is not binding if it conflicts with contract provisions. The State has the right under the Contract to require advance notice from VSEA before it will approve VSEA leave for training sessions and meetings, and had no obligation to adhere to any practice which had developed which conflicts with this clear contractual right. The State is estopped in this case from rescinding the approval of the VSEA leave granted Grievants after they already had used the leave to attend the training session. However, the State is entitled to rely on its contractual right to require advance notice when employees have not yet attended the training session or meeting and are provided notice that VSEA leave is not authorized absent advance notice.

/s/ Alan Willard

Alan Willard

/s/ Edward W. Clark, Jr.

Edward W. Clark, Jr.

DISSENTING OPINION

I concur with my colleagues that the State and VSEA, in negotiating the provisions of Article 3, Section, of the Contract, intended that approval for VSEA leave shall not be unreasonably withheld applied only in situations where notice has been provided by VSEA in advance to the Department of Human Resources. However, I dissent from their conclusion that the State is estopped from using the advance notice provisions of Article 3, Section 3, of the Contract to rescind the VSEA leave approvals the Veterans Home management granted Grievants to attend the March 9 VSEA Steward training session.

The Board majority has stretched the doctrine of equitable estoppel beyond an acceptable point. The result is that one party to the collective bargaining contract – the State – is bearing the entire responsibility for a problem created by the other party to the contract – the VSEA. It was VSEA that failed to adhere to the Contract by not providing advance notice to the Department of Human Resources of the March 9 VSEA Steward training session for approval. The State should not be liable for VSEA's failure to abide by the terms of the Contract.

Further, I disagree with the Board majority placing reliance on the eighteen-month period in which the State was approving VSEA leave for trainings and meetings, based on authorizations from agencies without DHR receiving any advance notification from VSEA, to support its estoppel conclusion. This period is too short in duration under the circumstances for estoppel to be applied. I would view it differently if this extended for several years.

I would dismiss this grievance. I agree with my colleagues that Grievants were caught in the untenable situation of having their leave rescinded through no fault of their own after already having attended the training session. They bore the brunt of VSEA's failure to properly provide advance notice of the training session once the State decided to enforce the advance notice

provisions. However, it should be VSEA that makes Grievants whole for the harm done them, not the State. I recognize that the Board has no ability in the context of this grievance to order a union to make employees whole. This does not prevent VSEA from taking responsibility through internal means for rectifying a situation created by its failure to adhere to contract requirements.

/s/ Richard W. Park

Richard W. Park, Acting Chairperson

ORDER

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

1. The Grievance of Barbara King, Thressa Brace and Rae Ann Woods is sustained;
2. The State of Vermont shall reinstate the approval of Grievants to use VSEA leave to attend the March 9, 2016, VSEA Steward training session; and
3. The State of Vermont shall restore Grievants' personal leave banks by the amount of time charged to such banks for attending the March 9, 2016, VSEA Steward training session.

Dated this 16th day of June 2017, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Alan Willard

Alan Willard

/s/ Edward W. Clark, Jr.

Edward W. Clark, Jr.