

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	DOCKET NO. 18-11
MICHAEL WELCH)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On February 27, 2018, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of Michael Welch ("Grievant"), an employee of the Vermont Department of Liquor Control. VSEA alleged that the State of Vermont ("State") violated Articles 30 (Annual Leave) 31 (Sick Leave), 45 (Salaries and Wages), and 62 (Reemployment) of the collective bargaining agreement between the State and VSEA for the Non-Management Bargaining Unit, effective July 1, 2016, to June 30, 2018 ("Contract"), by failing to recognize Grievant's prior state service as a State Transport Deputy each time it issues Grievant a pay check and fails to pay him at the contractually required step, fails to credit him with leave time based on his prior service, and fails to accrue his leave benefits at the rate required by the Contract.

The parties filed a partial Joint Stipulation of Facts on November 9, 2018. A hearing was held on November 16, 2018, in the Labor Relations Board hearing room in Montpelier before Labor Relations Board Members Richard Park, Chairperson; Alan Willard and David Boulanger. VSEA General Counsel Timothy Belcher represented Grievant. Assistant Attorney General Laura Rowntree represented the State. The parties filed post-hearing briefs on December 17, 2018.

FINDINGS OF FACT

1. The Contract provides in pertinent part:

...

ARTICLE 30 ANNUAL LEAVE

1. PURPOSE

To establish the policies and procedures by which a classified employee shall receive time off from work for vacation or personal convenience.

2. POLICY

..

(d) Accrual rates and caps are as follows:

...

YRS	ACCRUAL RATE PER PAY PERIOD	ACCUMULATION CAP
0-5	3.69	240 hours
5-10	4.62	280
10-15	5.54	320
15-20	6.13	340
20-30	6.46	360
30+	7.38	360

Accrual rate is the number of hours and employee shall accrue per complete pay Period.

Accumulation Cap is the maximum number of hours an employee may accumulate. Years is the range of the number of years of full-time service.

...

(f) Except in the instance of reduction in force, and the applicable articles regarding reemployment credit and prior temporary service, an employee rehired by the State shall not receive credit for prior State employment in establishing his or her rate of annual leave accrual. . .

...

ARTICLE 31 SICK LEAVE

1. PURPOSE

To establish the State's policies and practices which provide for a classified employee to be absent from duty with pay in the event of illness or injury.

2. POLICY

...

(a) Accrual

(1) A classified employee shall receive sick leave benefits as follows:

- (i) Upon appointment (original or restoration), the employee shall be credited with a bank of forty-eight (48) hours of sick leave on which he or she may draw during the first six (6) months of service.
- (ii) At the end of the first full payroll period following completion of six

(6) months of service and at the end of every full payroll period thereafter, the employee shall be credited with sick leave for that payroll period, as follows:

YEARS OF SERVICE	ACCRUAL RATE
0-5	3.69 hours per pay period
5-10	4.62
10-20	5.54
20+	6.46

Accrual rate is the number of hours an employee shall accrue per payroll period of service.

...

(4) When a classified employee separates from State service, the entire amount of unused sick leave shall lapse. An employee rehired by the State shall not receive credit for prior State service in establishing his or her rate of sick leave accrual, except in the instance of separation due to reduction in force, or when temporary service or reemployment credit is granted under the applicable Articles. . .

...

ARTICLE 45 SALARIES AND WAGES

...

9. RATE AFTER PROMOTION, UPWARD REALLOCATION OR REASSIGNMENT

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 into 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 (i.e., 5% is the lowest amount an employee would receive, and the maximum amount would be governed by according to placement on a step which might be higher than, but nearest to, the 5% minimum specified). The rate of 5% as outlined above shall be 8% if the employee is moving upwards three or more pay grades.

...

ARTICLE 62 REEMPLOYMENT

An employee who:

1. After termination or transfer of employment as a permanent status employee (i.e., having successfully completed an original probationary period) or exempt employee with a satisfactory rating; and
2. who has not been dismissed for cause; and
3. is reemployed by the State within two (2) years after such termination; and
4. upon successful completion of any required original probationary period; shall have the length of previous classified and/or exempt service re-credited for the purpose of subsequent leave accrual and RIF rights. . .

Upon written request, together with any prior documentation prior classified and/or exempt service credit shall be effective as of the date the request is received by the

employing Department, but in no event earlier than the date of successful completion of any original probationary period.

...

APPENDIX A DEFINITIONS

Unless a different meaning is plainly required by the context, the following words and phrases mean:

...

CLASS – one or more positions sufficiently similar as to the duties performed, degree of supervision exercised or received, minimum requirements of training, experience, or skill, and such other characteristics that the same title, the same test of fitness, and the same pay grade may be applied to each position.

CLASSIFIED EMPLOYEE- an employee of the State of Vermont who is hired to fill a position in the classified service in accordance with merit principles as administered by the Department of Human Resources.

...

CLASSIFIED POSITION- a position in the State classified service which is assigned to a class and appointment to which is made in accordance with merit principles.

...

EXEMPTED SERVICE POSITIONS - positions excluded from the classified service by statute.

...

PROMOTION- a change of an employee from a position of one class to a different position of another class assigned to a higher pay grade.

...

REALLOCATION- change of a position from one class to another class.

REASSIGNMENT- the change of a class from one pay grade to another pay grade.

...

2. Voters in each of the fourteen counties in Vermont elect a State's Attorney and a sheriff for each county. The individual offices of each county's State's Attorney and each county's Sheriff may employ individuals other than the elected State's Attorney or elected Sheriff. Each type of employee, who is employed by a State's Attorney or a Sheriff, has different employment rights and oversight as defined by statute (Joint Stipulation of Facts).

3. The Vermont Department of State's Attorneys and Sheriffs ("SAS") also is established by statute. Among the individuals employed by the SAS are its Executive Director,

who is hired and overseen by the Executive Committee of State's Attorneys and the Executive Committee of Sheriffs, and a personnel director (Joint Stipulation of Facts).

4. Chapter 5 of Title 24 of Vermont Statutes Annotated is entitled "County Officers; Powers and Duties". Subchapter 5, entitled "Sheriffs, of Chapter 5 of Title 24 provides in pertinent part:

§ 290. County sheriff's department

(a) A sheriff's department is established in each county. It shall consist of the elected sheriff in each county, and such deputy sheriffs and supporting staff as may be appointed by the sheriff. Full-time employees of the sheriff's department, paid by the county, shall be county employees for all purposes but shall be eligible to join the State Employees Retirement System, provided the county shall pay the employer's share. The sheriff's department shall be entitled to utilize all State services available to a town within the county.

(b) Full-time deputy sheriffs whose primary responsibility is transportation of prisoners and persons with a mental condition or psychiatric disability shall be paid by the State of Vermont. The appointment of such deputies and their salary shall be approved by the Governor or his or her designee. The Executive Committee of the Vermont Sheriffs Association and the Executive Director of the Department of State's Attorneys and Sheriffs shall jointly have authority for the assignment of position locations in the counties of State-paid deputy sheriffs and shall review the county location assignments periodically for efficient use of resources.

...

5. Employees of each State's Attorney office and each Sheriff are part of the so-called special groups which are eligible to receive insurance benefits through the State of Vermont health, dental and life plans, as well as retirement benefits from the State through defined benefit or defined contribution plans (State Exhibit 31).

6. 3 V.S.A. § 311(a) provides that "(t)he classified service to which this chapter shall apply shall include all positions and categories of employment by the state, except as otherwise provided by law, and except" a following specified listing of categories excluded from the

classified service. The state transport deputy sheriffs referenced in 24 V.S.A. § 290(b) are not listed among the categories excluded from the state classified service.

7. On or about August 1, 2004, the Orange County Sheriff's Department hired Grievant as a part-time Deputy Sheriff (Joint Stipulation of Facts).

8. On or about March 1, 2007, Grievant was hired as a full-time State Transport Deputy Sheriff in the Orange County Sheriff's Department, a position he held until May 29, 2015 (Joint Stipulation of Facts).

9. State Transport Deputy Sheriffs perform specialized law enforcement work involving the transportation of prisoners, mentally ill persons, and juveniles who are in the custody of the State of Vermont and/or its agents. They routinely transport prisoners and those in custody between correctional facilities and courts within and outside the state. Duties include the scheduling and logistical planning of transports. They serve as liaisons with the courts, Department of Corrections, attorneys and other law enforcement personnel in matters related to the transportation of prisoners. They are responsible for the service of criminal process. They also perform general law enforcement duties on a countywide basis as needed and/or available. They work under the general supervision of the County Sheriff with little direct supervision (Grievant Exhibit 9).

10. When Grievant was hired into that position, he received an envelope of documents from the State of Vermont. These included some forms that Grievant completed and returned, and other documents that he retained (Joint Stipulation of Facts).

11. The title page of the documents which Grievant received upon his hiring states: "New Employee Orientation Material – State of Vermont – Department of State's Attorneys – Vermont Sheriffs' Departments". The packet included forms to enroll in the state employee

health and dental plans. He received materials relating to his membership in the state retirement system, introduced with a letter from the Office of the State Treasurer that began with the following: “Congratulations on your recent exempt employment with the State of Vermont. As a new hire in the exempt category, you have the option of electing a retirement plan that best suits your needs”. A memorandum in the packet from the Office of the Executive Director of the State’s Attorneys and Sheriffs states: “Upon being employed by the State of Vermont, you automatically become covered under the Vermont State Retirement System”. Another memorandum in the packet from the Office of the Executive Director of the State’s Attorneys and Sheriffs described a long-term disability plan that was available to exempt employees. The packet of materials further included a plan summary for Group Life Insurance for Vermont State Employees, a memorandum from the State Department of Finance and Management addressed to him as a “State of Vermont employee” describing pre-tax medical insurance premiums, and a copy of a chart of the step pay plan copied from the collective bargaining agreement between VSEA and the State. The materials also included a number of policies and procedures, one of which addressing employee schedules and overtime, originated from the “Sheriff’s Department – Office of Executive Director”. This document indicated that the “Sheriff will determine the employee’s work schedules”, and “(a)l overtime work must be approved by the Executive Director prior to working.” The other policies and procedures were part of “State of Vermont Personnel Policies and Procedures” applying to state employees. These consisted of policies and procedures on sick leave and annual leave, the employee assistance program, electronic communications and internet use, parental leave and family leave, military duty, sexual harassment, drug-free workplace policy, statewide smoking policy, bloodborne pathogens, equal

employment opportunity/affirmative action, reasonable accommodation for disabilities, and confidentiality (Grievant Exhibit 4).

12. At the time he was hired, Grievant was given a state ID and was provided with use of the state email system.

13. At the time he was hired, Grievant was given a list of state codes to use when he filled out his time report on the state system. Grievant received a regular paycheck from the State of Vermont during the period of his employment as a State Transport Deputy Sheriff (Grievant's Exhibits 5, 6).

14. The State of Vermont issued W-2 tax forms to the Internal Revenue Service identifying the State of Vermont as employer and Grievant as the employee throughout his employment as a State Transport Deputy Sheriff (Grievant Exhibit 7).

15. In 2008, a request was submitted to the Department of Human Resources for the State Transport Deputy Sheriff position held by Grievant to determine the pay grade of the position. This resulted in the pay grade of the position being upgraded to Pay Grade 20 (Grievant Exhibit 9).

16. Grievant sustained a work-related injury while working as a State Transport Deputy Sheriff. The resulting workers compensation claim was treated as a claim against the State.

17. While working as a full-time State Transport Deputy Sheriff, Grievant also continued to work on occasion as a part-time deputy paid by the Orange County Sheriff's Department (Joint Stipulation of Facts).

18. Prior to 2012, there were individuals who were hired into the Executive Branch of state government following employment with a State's Attorney office or a Sheriff's department

who were granted prior service credit for that previous employment. On or about October 26, 2008, a former deputy sheriff was hired by the DLC as a Liquor Control Investigator. The individual applied for, and received, prior service credit for his employment as a deputy sheriff. The investigator was paid at pay grade 20, step 8, as deputy sheriff, and was paid at pay grade 23, step 7, as Liquor Control Investigator. The investigator saw an increase in pay from \$21.03 per hour to \$22.70 per hour, or a percentage increase of 7.9%. The individual's sick leave and annual leave accrual rates as a deputy sheriff were 4.62 per pay period. He was credited with a bank of 55.5 hours of sick leave at the start of his employment as a Liquor Control Investigator. After completion of an initial probation period, his sick leave and annual leave accrual rates were each increased to 6.41 hours per pay period (Joint Stipulation of Facts, State Exhibits 33, 39).

19. VSEA filed a unit clarification petition in 2012 seeking to modify the existing Non-Management and Supervisory bargaining units in state government represented by VSEA to include employees of the Department of State's Attorneys and Sheriffs and of the individual State's Attorney and Sheriff offices. The State opposed the petition, contending among other things that all employees who work for a State's Attorney or for a Sheriff are county employees, not state employees, except for secretaries in State's Attorney offices. VSEA subsequently withdrew its unit clarification petition without prejudice (State Exhibit 23, Joint Stipulation of Facts).

20. Subsequent to the State opposition to the unit clarification petition, the Department of Human Resources changed some of its business processes. This included denying prior service credit pursuant to the Reemployment article of the collective bargaining agreements to individuals for their previous work with State's Attorney offices and Sheriff offices, except for secretaries in State's Attorney offices.

21. In April 2015, Grievant applied for a position as a Liquor Control Investigator with the Department of Liquor Control (“DLC”). He interviewed for the position on April 6, 2015 (Joint Stipulation of Facts, State Exhibits 8, 9).

22. The Department of Liquor Control and Grievant had questions of the Department of Human Resources concerning his hourly rate of pay and leave benefits if he was hired for the Liquor Control Investigator position. Shelley Morton of the Labor Relations Division of the Department of Human Resources sent an email to Grievant on May 6, 2015, in response to these questions. Morton informed Grievant that he was considered a county employee. She further stated:

. . . (A)s a Deputy Sheriff you are appointed by the Sheriff. The November 2014 (Vermont Labor Relations Board) decision clarified that the position you hold defines your status as a County employee. Therefore, were you to accept a Classified position in the Executive Branch, your pay and benefits would be processed as a new hire.

Leave payout would be based on standard operating procedure/policy at SAS. Any balance remaining after payout would lapse. You would serve an original probation and would be hired at the applicable step associated with a new hire – usually step one. (State Exhibit 25)

23. The November 2014 Labor Relations Board decision referenced by Morton arose from eight petitions for election of collective bargaining representatives filed by the Vermont State Employees’ Association under the Municipal Employee Relations Act seeking to represent deputy state’s attorneys, victim advocates, administrative secretaries and secretaries of State’s Attorney Offices in eight counties of Vermont. The Board determined that neither the State’s Attorney offices nor the Department of State’s Attorneys and Sheriffs fall within the definition of municipal employer under the Municipal Act, whether they are considered individually or collectively. The Board held that the “labor relations in the State’s Attorney offices constitute hybrid situations which do not come within the purview of any of the Vermont labor relations statutes.” The Board concluded that any statutory collective bargaining rights which would be

granted employees of the State's Attorney offices would have to come through legislative action. VSEA appealed the Board decision to the Supreme Court. Contrary to the characterization by Morton in her May 6, 2015, email, the Board did not reach any conclusions with respect to the Deputy Sheriff position held by Grievant. Vermont State Employees' Association Petitions for Election of Collective Bargaining Representative (Re: Chittenden County State's Attorney Employees, et al), 33 VLRB 119.

24. On May 11, 2015, DLC submitted a Request for Hire-Into-Range Form, seeking to hire Grievant at Pay Grade 23, Step 2. DLC could not extend a hiring offer to Grievant until the hire-into-range request confirming Grievant's hourly rate of pay was approved. Hiring into range is a process applicable to new employees whereby the appointing authority can make a request to hire an employee into a pay grade at a step higher than the first step based on the individual's knowledge, skills, abilities and experience (State Exhibit 1).

25. On May 19, 2015, John Berard, Labor Relations Director of the Labor Relations Division of the Department of Human Resources, informed Grievant by an email sent at 9:20 a.m. that Morton "correctly informed you of DHR's current understanding of the status of employees in your category – that you are considered a county employee, and therefore would be processed as a new hire upon acceptance of a position with the Department of Liquor Control" (State Exhibit 25).

26. Grievant responded to Berard that morning in an email sent at 9:40 a.m., stating in part: "You can understand my disappointment with losing my pay, vacation accrual rate and other things I have earned. I have all of my paperwork when I was hired and it all indicates state employee" (State Exhibit 26).

27. The Department of Human Resources also approved the hire-into-range request for Grievant on the morning of May 19, 2015. After DLC informed Grievant that he could log into the Department of Human Resources website to accept the job offer for the Liquor Control Investigator position. Grievant accepted the DLC offer at 10:39 a.m. (State Exhibits 14, 15, 16).

28. Grievant's employment as a State Transport Deputy ended effective May 29, 2015. His employment as a DLC Liquor Control Investigator began effective June 1, 2015 (Joint Stipulation of Facts).

29. Upon his hire by DLC, Grievant's pay changed from paygrade 20, step 9, at \$21.72 per hour, to paygrade 23, step 2, at \$20.43 per hour. Grievant's sick and annual leave accrual rates were reduced from 4.62 hours per pay period to 4.27 hours per pay period (Joint Stipulation of Facts).

30. On or about June 9, 2015, Grievant applied for a prior service credit, citing his prior service in the position of Deputy Sheriff which he indicated he had held since March 9, 2007 (State Exhibit 7).

31. Grievant served an initial probationary period for the DLC Liquor Control Investigator position. He successfully completed the probationary period on or about December 1, 2015 (Joint Stipulation of Facts).

32. In a December 9, 2015, email, Morton indicated that Grievant's application for prior service credit was not appropriate. She explained the decision as follows:

Reemployment, as per the Non-Management Collective Bargaining Agreement, allows for the length of continuous previous classified and/or exempt State service to be re-credited, so long as the service and breaks comply with the provisions of the Article. While there was a time when individuals in Michael's status were considered transfers by DHR, the former General Counsel of DHR, in response to a filing at the Vermont Labor Relations Board (VLRB) and after exhaustive analysis, opined that positions such as Michael's were more correctly characterized as county employees. This opinion has been uniformly applied since that time.

Based on Michael's previous position (Deputy Sheriff) being deemed a county position, the previous employment does not comply with the provisions of the Reemployment Article. As a result, no credit for previous county service would be appropriate. . . (State Exhibit 20)

33. In a decision issued January 8, 2016, the Vermont Supreme Court reversed the Labor Relations Board ruling that the Municipal Act did not apply to petitions filed by VSEA to seek to represent employees of State's Attorneys' offices. The Court remanded to the Board to process the petitions filed by VSEA involving State's Attorneys' offices which employ five or more employees as defined by the Municipal Act. In re Election Petitions, 2016 VT 7. The Board subsequently conducted elections in 2016 among employees in four of the State's Attorneys' offices. Employees voted to be represented by VSEA in two of the four elections.

34. Subsequent to the Vermont Supreme Court decision reversing the Board decision, Morton sent Grievant an email on January 21, 2016, stating in pertinent part:

I wanted to follow up with you regarding the recent Vermont Supreme Court decision that reversed the VLRB's decision regarding the State's Attorney's Offices. The Supreme Court concluded that the State's Attorney's Offices are not a political subdivision of the State, but are a municipal employer under the Municipal Employees Labor Relations Act.

Based on your previous position with the SAO, being deemed a municipal position, the previous employment does not comply with the provisions of the Reemployment Article. As a result, no credit of previous SAO service would be appropriate.

As a result, SAO employment will not be considered as qualifying for an adjusted service date for purposes of leave accruals and reduction in force rights.
(State Exhibit 21)

35. Effective July 1, 2017, the Vermont General Assembly amended the State Employees Labor Relations Act by passing Act 81 to grant collective bargaining rights under the Act to deputy State's Attorneys and other employees of State's Attorneys' offices, rather than provide them such rights under the Municipal Act. Act 81 further amended 3 V.S.A. § 631 to include "State's Attorneys, sheriffs, employees of State's Attorney's offices whose compensation

is administered through the State of Vermont payroll system, except contractual and temporary employees, and deputy sheriffs paid by the State of Vermont pursuant to 24 V.S.A. § 290(b)” within the definition of employees entitled to receive group hospital-surgical-medical expense insurance provided by the State. Act 81 in this respect codified the Department of Human Resources business process of considering employees of each State’s Attorney office and each Sheriff as part of the special groups which are eligible to receive insurance benefits through the State of Vermont health, dental and life plans, as well as retirement benefits from the State through defined benefit or defined contribution plans.

OPINION

VSEA alleges that the State violated Articles 30 (Annual Leave) 31 (Sick Leave), 45 (Salaries and Wages), and 62 (Reemployment) of the Contract by failing to recognize Grievant’s prior state service as State Transport Deputy Sheriff each time it issues Grievant a pay check and fails to pay him at the contractually required step, fails to credit him with leave time based on his prior service, and fails to accrue his leave benefits at the rate required by the Contract.

A threshold issue is whether Grievant was a State employee when he was employed as State Transport Deputy Sheriff. VSEA contends that Grievant was an employee of the State who was exempt from the classified services for all purposes as State Transport Deputy Sheriff, or jointly employed by the State and the Orange County Sheriff’s Department. The State contends that Grievant’s employment as State Transport Deputy Sheriff made him a county, rather than a State, employee.

VSEA contends that the following provisions of 24 V.S.A. § 290 establish that State Transport Deputy Sheriffs are employees of the State for all relevant purposes:

§ 290. County sheriff's department

(a) A sheriff's department is established in each county. It shall consist of the elected sheriff in each county, and such deputy sheriffs and supporting staff as may be appointed by the sheriff. Full-time employees of the sheriff's department, paid by the county, shall be county employees for all purposes but shall be eligible to join the State Employees Retirement System, provided the county shall pay the employer's share. The sheriff's department shall be entitled to utilize all State services available to a town within the county.

(b) Full-time deputy sheriffs whose primary responsibility is transportation of prisoners and persons with a mental condition or psychiatric disability shall be paid by the State of Vermont. The appointment of such deputies and their salary shall be approved by the Governor or his or her designee. The Executive Committee of the Vermont Sheriffs Association and the Executive Director of the Department of State's Attorneys and Sheriffs shall jointly have authority for the assignment of position locations in the counties of State-paid deputy sheriffs and shall review the county location assignments periodically for efficient use of resources.

In interpreting statutes, the Board follows the rules of statutory construction set forth by the Vermont Supreme Court. The primary objective in interpreting statutes is to give effect to the intent of the Legislature, which the Board attempts to discern first by looking to the language of the statute. Grievance of West and Cray, 165 Vt. 445, 449 (1996). Petition of Vermont State Employees' Association (re: State Police Lieutenants), 31 VLRB 331, 339 (2011). Where the meaning of a statute is plain and unambiguous, there is no need for construction and it must be enforced according to its terms. Petition of the VSEA, Inc. (Community Correctional Center Employees), 143 Vt. 636, 640-41 (1988).

In determining legislative intent, the Board looks beyond the language of a particular section, standing alone, to the whole statute. Id. Provisions that are part of the same statutory scheme must be read in context and the entire statutory scheme read together so the legislative intention can be ascertained from the whole of the enactments. In re Grievance of Danforth, 174 Vt. 231, 238 (2002). Petition of Vermont State Employees' Association (re: State Police Lieutenants), 31 VLRB at 339.

In examining subsections (a) and (b) of 24 V.S.A. § 290, it is clear that the Legislature created two distinct categories of deputy sheriffs. The first group, described in subsection (a), consisting of deputy sheriffs paid by the county, “shall be county employees for all purposes”. No such clause is included in subsection (b), describing State Transport Deputy Sheriffs “paid by the State of Vermont” and whose “appointment . . . and . . . salary shall be approved by the Governor or his or her designee”. In reading these two provisions together, it is evident that the intent of the Legislature is that State Transport Deputy Sheriffs are not “county employees for all purposes”. § 290 (b) creates a relationship between the State and the State Transport Deputy Sheriffs with respect to compensation and approval of appointment. The omission of the phrase “county employees for all purposes” in this subsection, when it is contained in subsection (a), affirms that the Legislature did not consider such deputy sheriffs county employees for all purposes. However, this does not go as far as VSEA asserts of demonstrating that State Transport Deputy Sheriffs are state employees for all relevant purposes. VSEA has not presented other evidence warranting such a conclusion being reached. The fact they are not county employees for all purposes does not mean they are state employees for all purposes.

Nonetheless, VSEA alternatively contends that Grievant was jointly employed by the State of Vermont and by the Orange County Sheriff’s Department when he was employed as State Transport Deputy Sheriff. Thus, the Board needs to examine whether a “joint employer” relationship exists here.

The “single employer” and “joint employer” concepts are distinct. NLRB v. Browning-Ferris Industries of Pennsylvania, 691 F.2d 1117, 1122 (3d Cir. 1982). Clinton’s Ditch Cooperative Co., Inc. v. NLRB, 778 F.2d 132, 137 (2nd Cir. 1985). VSCFF and Vermont State Colleges, 30 VLRB 92, 112 (2008) A “single employer” relationship exists where two nominally

separate entities are actually part of a single integrated enterprise so that, for all purposes, there is in fact only a “single employer”. Id. A “single employer” situation is present when nominally separate entities are not what they appear to be, that in truth they are but divisions or departments of a single enterprise. Id. NLRB v. Deena Artware, Inc., 361 U.S. 398, 402 (1960). In general, “single employer” status is characterized as the absence of an “arm’s length relationship” found among nonintegrated entities. Browning-Ferris Industries, 691 F.2d at 1122. Mercy Hospital of Buffalo and Communications Workers of America, Local No. 1133, AFL-CIO, 336 NLRB 1282, 1283-84 (2001). Canned Foods, Inc., d/b/a Grass Valley Grocery Outlet and United Food and Commercial Workers Union, Local 588, 332 NLRB 1449 (2000). VSCFF and Vermont State Colleges, 30 VLRB at 112.

The factors to examine to determine whether a “single employer” relationship exists are: 1) functional integration of operations; 2) centralized control of labor relations; 3) common management; and 4) common ownership. Radio & Television Broadcast Technicians Local Union 1264, International Brotherhood of Electrical Workers, AFL-CIO v. Broadcast Service of Mobil, Inc., 380 U.S. 255, 256 (1965). Mercy Hospital, supra. Canned Foods, supra. The most important factor in deciding whether a single-employer relationship exists is centralized control of labor relations. Id. Mercy Hospital, supra.

In contrast, in a “joint employer” relationship, there is no single integrated enterprise. A conclusion that employers are “joint” assumes that they are separate legal entities but that they have chosen to jointly handle certain aspects of their employer-employee relationship. Browning-Ferris Industries, 691 F.2d at 1122. Clinton’s Ditch Cooperative, 778 F.2d at 137. VSCFF and Vermont State Colleges, 30 VLRB at 113. In alleged “joint employer” situations, it is a matter of determining which of two employers, or whether both employers, control in the

capacity of employer the labor relations of a given group of workers. Browning-Ferris Industries, 691 F.2d at 1122-23. VSCFF and Vermont State Colleges, 30 VLRB at 113.

The determination whether an entity possesses sufficient control over the work of employees to qualify as a joint employer is essentially a factual issue. Boire v. Greyhound Corp., 376 U.S. 473, 481 (1964). VSCFF and Vermont State Colleges, 30 VLRB at 113. Among the factors to be considered in determining whether an employer is a “joint employer” are supervision of employees’ daily activities, authority to hire or fire or otherwise discipline employees, the promulgation of work rules and conditions of employment, and work assignments. G. Hielman Brewing Co., Inc. v. NLRB, 879 F.2d 1526, 1531 (7th Cir. 1989). Clinton’s Ditch Cooperative, 778 F.2d at 138-39. VSCFF and Vermont State Colleges, 30 VLRB at 113.

In applying these standards to this case, it is clear that the State of Vermont and the Orange County Sheriff’s Department are separate entities and are not part of a single integrated enterprise. The elected sheriff is accountable to the county electorate, employs many employees who are explicitly by statute county employees for all purposes, and is able to independently set many policies and rules. The sheriff operates separately from the State of Vermont for many purposes. Thus, we conclude that a single employer relationship does not exist.

In determining whether the Orange County Sheriff’s Department and the State of Vermont are joint employers, we examine how aspects of the employer-employee relationship are handled. Some aspects of the relationship are shared. Hiring authority is shared between the Sheriff and the Governor or Governor’s designee. The assignment of position locations of State Transport Deputy Sheriffs is under the joint authority of the Executive Committee of the

Vermont Sheriffs Association and the Executive Director of the Department of State's Attorneys and Sheriffs.

Other aspects of the relationship are handled by the Sheriff. The State Transport Deputy Sheriff works under the general supervision of the Sheriff. The Sheriff also determines the work schedule of the State Transport Deputy Sheriff.

Major components of compensation and benefits for State Transport Deputy Sheriffs are controlled by the State. They are paid by the State, and the Governor or designee must approve their salaries. They are eligible to receive insurance benefits through the State of Vermont health, dental and life plans, as well as retirement benefits from the State through defined benefit or defined contribution plans.

In addition, when Grievant was hired, he received a packet of materials from the Vermont Department of State's Attorneys and Sheriffs, a part of state government. Vermont State Employees' Association Petitions for Election of Collective Bargaining Representative (Re: State's Attorney Employees), 33 VLRB 119, 135-136 (2014). *Reversed on Other Grounds*, 2016 VT 7. Several of the materials indicated he was receiving them as a state employee or exempt state employee. The packet contained many "State of Vermont Personnel Policies and Procedures" applying to state employees, including policies and procedures on sick leave and annual leave, the employee assistance program, parental leave and family leave, military duty, sexual harassment, drug-free workplace policy, bloodborne pathogens, equal employment opportunity/affirmative action, and reasonable accommodation for disabilities.

Other evidence exists supporting a conclusion of state employment when grievant served as State Transport Deputy Sheriff. He was given a state ID card, a state employee number, and

access to the state email system. Also, the State identified itself to the Internal Revenue Service as Grievant's employer.

In sum, we conclude based on the weight of the evidence that the State of Vermont and the Orange County Sheriff constituted joint employers of Grievant when he was employed as State Transport Deputy Sheriff. They jointly shared some aspects of the employer-employee relationship, the Sheriff handled other aspects of the relationship, and the State of Vermont had control over other aspects of the employer-employee relationship.

It is most pertinent given the nature of the case before us to point out that the State controlled the compensation and benefits of State Transport Deputy Sheriffs. We conclude given these facts that Grievant was an exempt state employee with respect to compensation and benefits when he was employed as State Transport Deputy Sheriff.

The State contends that Grievant cannot be considered an exempt state employee because State Transport Deputy Sheriffs are not listed among the categories of state employees excluded from the state classified service in 3 V.S.A. § 311(a). We disagree. In addition to the specific categories listed, § 311(a) also indicates there are other categories of state employment excluded from the state classified service "as otherwise provided by law". The provisions of 24 V.S.A. § 290 relating to deputy sheriffs, taken together with the other evidence discussed above, indicate that it is otherwise provided by law that State Transport Deputy Sheriffs are exempt state employees for purposes of compensation and benefits.

We turn to examining whether the State violated Articles 30 (Annual Leave) 31 (Sick Leave), 45 (Salaries and Wages), and 62 (Reemployment) of the Contract by failing to recognize Grievant's prior state service as a State Transport Deputy Sheriff in paying him and setting his annual leave and sick leave accruals. We first address Grievant's contention that Article 45 of the

Contract was violated because his pay was not set at the promotional rate when he moved from the State Transport Deputy Sheriff position to employment as Liquor Control Investigator. Article 45, Section 9, of the Contract provides: “(U)pon 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 into 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”.

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. Grievance of Cronan, et al, 151 Vt. 576, 579 (1989). A contract must be construed, if possible, to give effect to every part, and from the parts to form a harmonious whole. In re Grievance of VSEA on Behalf of "Phase Down" Employees, 139 Vt. 63, 65 (1980). The contract provisions must be viewed in their entirety and read together. In re Stacey, 138 Vt. 68, 72 (1980).

A contract will be interpreted by the common meaning of its words where the language is clear. Id. at 71. 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).

If analysis of the contract language results in a determination that the language is clear and unambiguous, extrinsic evidence under such circumstances should not 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). 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. In re Stacey, 138 Vt. at 71.

Ambiguity exists where the disputed language will allow more than one reasonable interpretation. In re Grievance of Vermont State Employees' Association and Dargie, 179 Vt. 228, 234 (2005). In such cases, it is appropriate to look to the extrinsic evidence of bargaining history, custom or usage, and established past practices 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). Grievance of Cronan, 151 Vt. at 579. Burlington Area Public Employees Union, Local 1343, AFSCME, AFL-CIO v. Champlain Water District, 156 Vt. 516, 520-521 (1991).

In applying these standards to the language of Article 45, it is necessary to refer to the “Definitions” appendix of the Contract. The first pertinent definition is “promotion”. It is defined as “a change of an employee from a position of one class to a different position of another class assigned to a higher pay grade”. The other pertinent definition is “classified position”. This is defined as “a position in the state classified service which is assigned to a class and appointment to which is made in accordance with merit principles”. It is clear and unambiguous under these definitions that, in order to be promoted pursuant to Article 45 of the Contract, an employee must move from one position in the classified service to another position in the classified service of a higher pay grade.

This is not what happened when Grievant left the State Transport Deputy Sheriff position to become Liquor Control Investigator. The State Transport Deputy Sheriff was not a position in the state classified service. As alleged by VSEA and agreed to by us as detailed earlier in this

Opinion, Grievant was an exempt state employee with respect to compensation and benefits when he was employed as State Transport Deputy Sheriff. The Article 45 promotional rate did not apply to him because he was moving from a position exempt from the classified service to a classified service position.

Grievant next contends that Articles 30, 31 and 62 of the Contract was violated when, upon his assuming the Liquor Control Investigator position, the State did not grant him prior service credit for his State Transport Deputy Sheriff employment for the purpose of leave accrual. Article 62 provides in pertinent part that, “an employee who . . . (a)fter termination . . . of employment as . . . exempt employee with a satisfactory rating; and . . . is reemployed by the State within two years after such termination; and . . . upon successful completion of any required probationary period, shall have the length of continuous previous . . . exempt service re-credited for the purpose of subsequent leave accrual”.

As discussed above, we conclude that Grievant was an exempt state employee for purposes of compensation and benefits when he was employed as State Transport Deputy Sheriff. Accordingly, the State should have granted him prior service credit for his employment as State Transport Deputy Sheriff for the purpose of annual and sick leave accrual as set forth in Articles 30 and 31 of the Contract when he completed Liquor Control Investigator probationary period. The State failed to do so, and thereby violated Articles 30, 31 and 62 of the Contract.

We turn to deciding an appropriate remedy. Grievant requests that we order the State to restore Grievant’s prior service and make him whole for all losses. To make Grievant whole is to place him in the position he would have been in had the contractual violation not occurred.

Grievance of Relyea, 21 VLRB 115, 127 (1998). Grievance of Lowell, 15 VLRB 291, 339-340 (1992).

If the contract violation had not occurred, Grievant would have been granted prior service credit for his State Transport Deputy Sheriff employment for the purpose of annual and sick leave accrual as set forth in Articles 30 and 31 of the Contract when he completed his probationary period as Liquor Control Investigator. The appropriate remedy to make Grievant whole is to ensure that Grievant's annual and sick leave balances are adjusted retroactively to the time he completed his probationary period as Liquor Control Investigator, and prospectively, to reflect prior service credit for his State Transport Deputy Sheriff employment.

ORDER

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

1. The Grievance of Michael Welch is sustained in part and dismissed in part as set forth in the Opinion; and
2. The State of Vermont shall retroactively adjust Grievant's annual and sick leave balances to the time he completed his probationary period as Liquor Control Investigator, and prospectively adjust such balances, to reflect prior service credit for his employment as State Transport Deputy Sheriff.

Dated this 24th day of January, 2019, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Richard W. Park

Richard W. Park, Chairperson

/s/ Alan Willard

Alan Willard

/s/ David R. Boulanger

David R. Boulanger