

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	DOCKET NO. 18-36
UNITED ACADEMICS (AA/UP/AFT))	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On August 30, 2018, United Academics (AAUP/AFT) (“Union”) filed a grievance with the Vermont Labor Relations Board, contending that the University of Vermont (“University”):

1) violated Article 21 of the collective bargaining agreement by failing and refusing to make increased professional development funds available to departments prior to the end of fiscal year 2018, and 2) failed to follow the University’s consistent past practice of notifying bargaining unit members of the increased professional development funds available to each of them under the collective bargaining agreement.

The Union and the University stipulated to facts and agreed to submit this to the Board for decision with no further facts presented beyond the stipulation and accompanying exhibits. The parties filed the Stipulation of Facts and accompanying exhibits on February 27, 2019. The parties filed briefs on April 4, 2019.

The following Findings of Fact are based on those stipulated to by the parties and consistent with the exhibits accompanying the stipulated facts.

FINDINGS OF FACT

1. The Union is the exclusive bargaining representative for full-time faculty at the University in Burlington, Vermont, as defined in the May 2, 2001, Order of the Vermont Labor Relations Board (Docket No. 00-75).

2. The Union and the University have negotiated six collective bargaining agreements since the Union's certification. The current agreement has been in effect since May 29, 2018, and continues through June 30, 2020 (Joint Exhibit 1).

3. The first five contracts were settled either at the bargaining table prior to impasse or in post-impasse mediation. All five of these contracts between the parties were for a term of three years. The sixth and current contract was settled by the parties following a factfinding hearing on February 12, 2018, and the factfinder's decision on May 7, 2018. The sole issue in factfinding was the amount and distribution of salary increases for the three years. All other issues had been tentatively resolved by the parties prior to factfinding, with the understanding that none of them would take effect until the entire contract was ratified. The one exception was a Memorandum of Understanding reached by the parties on June 20, 2017, which provided for the payment of promotion increases before ratification of the contract. These raises were reflected in paychecks as of September 2017. The Memorandum of Understanding reflected the practice of the parties concerning the payment of promotion increases in the preceding three contracts.

4. One of the issues that the parties tentatively agreed upon prior to factfinding was an amendment to Article 21.2 of the collective bargaining agreement to increase the professional development funds available to bargaining unit members each fiscal year for the life of the contract. The money allocated for this fund is calculated by multiplying the number of full-time equivalent ("FTE") bargaining unit members by a negotiated dollar amount. Professional development funds were to increase from \$1,500 in Fiscal Year 2017 to \$1,575 in Fiscal Year 2018. In addition, the Union and the University also agreed to increase the negotiated dollar amount to \$1,675 in Fiscal Year 2019 and \$1,775 in Fiscal Year 2020. The tentative agreement

on professional development funds was reached on December 13, 2017, but was not effective until full ratification of the collective bargaining agreement.

5. Professional development funds support various activities of the full-time faculty, including travel for professional purposes and other purposes that support the teaching, research and community service mission of the University.

6. Increasing the amount of professional development funds for FTE faculty from one year to the next was a common pattern in negotiations between the parties over their history, albeit the amount of the increase would vary from one year to the next.

7. In each of five prior rounds of negotiations, final agreement on a new contract was not reached until after the commencement of the first fiscal year of the three-year contract. Up until a final settlement, the parties would utilize the FTE amount for professional development funds from the preceding year and then adjust it accordingly after the final ratification of the complete agreement. Prior the current contract, the latest ratification date was February 6, 2003, for the first contract between the parties.

8. Under Article 21 of the collective bargaining agreement, professional development funds are not automatically awarded to the individual faculty members. Instead, the funds are made available on a department basis and each individual request must be approved by the department chair. The process for distribution of professional development funds is delineated in Article 21 of the agreement.

9. For the round of negotiations leading up to the current contract, the parties bargained into the fall of 2017 and then used mediation in an attempt to reach agreement. Failing to secure an agreement, the parties agreed to move on to factfinding in accordance with the statutory provisions of the State Employees Labor Relations Act. Michael Ryan was selected as

the impartial factfinder, and he conducted a hearing on February 10, 2018, to resolve the remaining issue of salary. Ryan issued his factfinding report on May 7, 2018. His recommended salary increases were accepted by the parties and an agreement was finally reached on a complete contract and then ratified by the Union on May 29, 2018.

10. Article 21 of the contract ratified on May 29, 2018, and effective through June 30, 2020, provides in pertinent part as follows:

ARTICLE 21 – PROFESSIONAL DEVELOPMENT FUNDS

...

21.2

Each department shall have a professional development fund to support faculty travel for professional development or for use in other professional development activities. The amount of money allocated for this fund for FY 18 shall be equal to \$1575 per general fund FTE bargaining unit member in that department and \$1575 per Extension FTE that may be spent on professional development (\$1675 in FY 19 and \$1775 in FY 20). The fund will be recalculated each Fall and be based on the membership of the unit per the list that has been prepared by the University in accordance with Article 9.5 of this Agreement.

... Faculty members including those on Sabbatical or Professional Development leave, shall have the right to apply for such funds for authorized expenses incurred in travel for professional development or for other professional development purposes. There shall be written guidelines in each department that make explicit the criteria and procedures for the distribution of these funds. Faculty seeking such funds shall apply in writing to their Chair who shall make final decisions on faculty applications as to whether to approve funds or not, taking into account the department guidelines; the availability of funds; competing applications for support, and the relevance and benefit, short and long term, of the proposed travel or other professional purpose to the faculty member and department. No proposal can be denied solely because of the status or rank of the faculty member making the proposal. The Chair shall make final decisions on the applications for such funds.

...

21.5

All funds not formally encumbered or expended by May 1st of each academic year shall become part of a resource pool for re-distribution by the Chair to other faculty who demonstrate special needs, including un-reimbursed professional expenses. No funds may be rolled over into the next fiscal year.

...

(Joint Exhibit 1)

11. All members of the bargaining unit were notified that a new collective bargaining agreement had been negotiated and was ratified.

12. Faculty members applied for and used professional development funds all throughout fiscal year 2018, which began on July 1, 2017, while the parties were locked into the impasse procedures. The same pool calculation used for fiscal year 2017 was used to calculate the fiscal year 2018 pool while the parties were negotiating a successor agreement. The final resolution of the current collective bargaining agreement added an additional \$75 per FTE to the fiscal year 2018 pool, raising the FTE multiplier from \$1500 to \$1575.

13. When the agreement was ratified on May 29, 2018, faculty were still able to apply to their department chairs for professional development funds. Faculty are not precluded from making requests for professional development funds at any time during the fiscal year, which begins July 1 and ends June 30.

14. Departments did not notify faculty in writing of the increase in professional development funds for fiscal year 2018 by email or otherwise.

15. The following faculty members applied for faculty development funds after May 29, 2018:

- a. Sarah Alexander applied for \$925.12 from the English Department Business Manager and was reimbursed.
- b. Daniel DeSanto applied for \$272.85 from the Library Business Manager and was reimbursed.
- c. Andrea Fine applied for \$921.99 from John Dorris, UVM Travel and Expense Specialist, and was reimbursed.

All of these faculty applications for professional development funds were made between May 30, 2018, and June 30, 2018.

16. No faculty member was denied professional development funds after May 29, 2018.

17. No faculty member was told that they could not apply for professional development funds after May 29, 2018.

18. There was no evidence that any faculty member who sought professional development money was denied such funds.

19. The amount of professional development funds in any given year is information that is stated and contained within Article 21 of the collective bargaining agreement. In terms of any additional communication from department chairs or supervisors to their faculty about the amount of professional development funds available in a given year, some departments have reminded their faculty about the funds available in some years but not in others. Some departments notify their faculty of the availability of professional development funds in writing, via email or orally in department meetings. Other departments do not communicate at all about the amount of money available for professional development (Joint Exhibit 2).

20. While most requests for professional development funds are processed and spent prior to May 1, Article 21.5 of the collective bargaining agreement provides that any professional development funds not encumbered or expended by May 1 may still be applied for and redistributed by the Chair to other faculty in need (Joint Exhibit 1).

21. The amount of professional development funds available for faculty and the amount not expended in the last three fiscal years are set forth as follows:

FY 2016	Budgeted	\$837, 526	
	Balance unspent	\$ 92,554	11.05% unexpended

FY 2017	Budgeted	\$1,003,658	
	Balance unspent	\$ 137,440	13.69% unexpended
FY 2018	Budgeted	\$1,046,511	
	Balance unspent	\$ 188,335	18.00% unexpended

OPINION

The Union contends in the grievance filed with the Board that the University: 1) violated Article 21 of the collective bargaining agreement by failing and refusing to make increased professional development funds available to departments prior to the end of fiscal year 2018, and 2) failed to follow the University’s consistent past practice of notifying bargaining unit members of the increased professional development funds available to them under the collective bargaining agreement.

We first address the Union’s contention that the University violated Article 21 of the collective bargaining agreement. Article 21.2 provides that “(e)ach department shall have a professional development fund to support faculty travel for professional development or for use in other professional development activities”, and that the “amount of money allocated for this fund for FY 18 shall be equal to \$1575 per . . . (full-time equivalent) bargaining unit member in that department . . . that may be spent on professional development”. Faculty members “have the right to” seek such funds according to Article 21.2 pursuant to “written guidelines in each department that make explicit the criteria and procedures for the distribution of these funds” by applying “in writing to their Chair who shall make final decisions on faculty applications as to whether to approve funds”.

Article 21.5 states that “(a)ll funds not formally encumbered or expended by May 1st of each academic year shall become part of a resource pool for re-distribution by the Chair to other

faculty who demonstrate special needs, including un-reimbursed professional expenses.” It further provides that “(n)o funds may be rolled over into the next fiscal year.”

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 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).

In applying these contract construction standards to the facts of this case as stipulated by the parties, we conclude the University did not violate the clear and unambiguous provisions of Article 21 of the collective bargaining agreement. The University made the professional development funds available on a department basis, and the process for the distribution of professional development funds with approval by the department chair occurred, consistent with Article 21 of the agreement. The same pool calculation used for fiscal year 2017 was appropriately used to calculate the fiscal year 2018 pool while the parties were negotiating a successor agreement.

The final resolution of the current collective bargaining agreement added an additional \$75 per full-time equivalent faculty member to the fiscal year 2018 pool, raising the full-time

equivalent multiplier from \$1500 to \$1575. When the agreement was ratified on May 29, 2018, faculty were still able to apply to their department chairs for professional development funds. Faculty were not precluded from making requests for professional development funds at any time during the fiscal year, which began on July 1, 2017, and ended June 30, 2018.

All members of the bargaining unit were notified that a new collective bargaining agreement had been negotiated and was ratified. There is evidence of three faculty members applying for professional development funds between May 30, 2018, and June 30, 2018., and their applications were approved. There is no evidence that any faculty member was denied professional development funds after May 29, 2018. No faculty member was told that they could not apply for professional development funds after May 29, 2018. In light of these facts, there is no evidence that the University did not make the increased professional development funds for fiscal year 2018 available to departments as required by Article 21 of the collective bargaining agreement. Thus, we conclude that the University did not violate Article 21 of the collective bargaining agreement.

We next address the assertion of the Union that the University failed to follow the University's consistent past practice of notifying bargaining unit members of the increased professional development funds available to each of them under the collective bargaining agreement. This issue has to do with an alleged past practice, not as an issue of contract construction, but as an implied contractual obligation separate from the terms of the contract. The Union alleges that, even if there is no violation of a contract here, the grievance should be sustained because the University violated a past practice of failing to notify faculty members that the additional \$75 of professional development monies were available either in writing or otherwise.

In deciding grievances, the VLRB 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 of Allen, 5 VLRB 411, 417 (1982). Grievance of Beyor, 5 VLRB 222, 238-239 (1982).

An implied contractual provision may arise through established past practices, where the conduct of the parties encompassed a continuity, interest, purpose and understanding which elevates a course of action to an implied contractual status. Gallipo v. City of Rutland, 163 Vt. 83, 88 (1994). 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. Past practice cannot change the meaning of a contract; it may, however, “give meaning to, supplement, or qualify” the contract. In re Grievance of Kelley, 2018 VT 94, ¶ 20, ___ Vt. ___ (2018).

The Board would have to conclude that there was a consistent past practice of the University notifying employees of the availability of additional professional development funds, on occasions when the negotiations extend into the fiscal year in which the increase is effective, for the Union to prevail on its past practice claim. The evidence does not support such a conclusion. There is no evidence of a department ever notifying faculty during prior rounds of negotiations that there has been an increase in negotiated professional development funds when the negotiations extend into the fiscal year in which the increase is effective.

Moreover, in examining the communications by departments to faculty regarding professional development funds, there is no consistent practice of how the various departments of the University communicate with faculty members or what they communicate. Departments have had various practices with regard to communicating with faculty members concerning professional development funds. Some departments have reminded their faculty about the funds available in some years but not in others. Some departments notify their faculty of the availability of professional development funds in writing, via email or orally in department meetings. Other departments do not communicate at all about the amount of money available for professional development.

In sum, the evidence falls well short of establishing a binding past practice of the University notifying employees of the availability of additional professional development funds. The Union has failed to establish its contention that the University failed to follow a consistent past practice of notifying bargaining unit members of the increased professional development funds available to them under the collective bargaining agreement.

The Union raised an additional issue in its brief that was not raised in the grievance filed with the Board. The Union contends that, under the doctrine of equitable estoppel, the University has forfeited the right to use Article 21.5 of the collective bargaining agreement as a back door to violate its promise in Article 21.2 to provide the additional professional development funds in fiscal year 2018. The Union contends that, given the University's promise to increase professional development funds in fiscal year 2018 and its common practice of notifying and reminding bargaining unit members of the existence of additional funding, the University was obligated to inform the Union and the bargaining unit members prior to May 1, 2018, if it wished to rely on Article 21.5 to renege on its promise in Article 21.2.

Under the doctrine of equitable estoppel, a party to a contract may lose the right to assert a term of the contract by estoppel. Grievance of Vermont State Colleges Faculty Federation, AFT Local 3180, AFL-CIO (Re: Adrienne Lioce), 19 VLRB 1, 17 (1996). 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 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.

The equitable estoppel claim of the Union fails on timeliness grounds. The Union did not raise the equitable estoppel claim in the grievance filed with the Board. The Board has declined to resolve issues that were not raised in the grievance filed with the Board pursuant to the Board Rules of Practice, which requires that a grievance contain a concise statement of the nature of the grievance and specific references to the pertinent section of the collective bargaining agreement and/or rules and regulations. Grievance of Regan, 8 VLRB 340, 364 (1985). The Board will not reach the merits of an issue not raised in the grievance filed with the Board Grievance of Shockley and VSCFF, 5 VLRB 192, 202-203 (1982). The Union did not raise the equitable estoppel claim in the grievance that it filed with the Board. Accordingly, the Union waived the right to pursue this issue.

Even assuming that the estoppel issue was timely raised, the Union would not prevail on the merits of this claim. The Union's claim is based on its contentions that the University

reneged on its promise to provide additional professional development funds in fiscal years 2018 and that a binding past practice existed of the University notifying and reminding bargaining unit members of the existence of additional funding. The Union has established neither a binding past practice nor that the University reneged on its promise to provide additional professional developments funds in fiscal years 2018.

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered that the Grievance of United Academics (AAUP/AFT) is dismissed.

Dated this 30th day of May, 2019, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Richard W. Park

Richard W. Park, Chairperson

/s/ Karen F. Saudek

Karen F. Saudek

/s/ Roger A. Donegan

Roger A. Donegan