

## Definition of Grievance

The VLRB has such adjudicatory jurisdiction as is conferred on it by statute.<sup>1</sup> In deciding grievances the VLRB is limited by the statutory definition of grievance, which provides:

"Grievance" means an employee's, group of employees', or the employee's collective bargaining representative's expressed dissatisfaction, presented in writing, with aspects of employment or working conditions under a collective agreement or the discriminatory application of a rule or regulation, which has not been resolved to a satisfactory result through informal discussion with immediate supervisors.<sup>2</sup>

In cases where grievants claim a “discriminatory application of a rule or regulation”, the Board has followed the Supreme Court guidance that discrimination in this instance simply means unequal treatment of individuals in the same circumstances under the applicable rule.<sup>3</sup> Dissimilar treatment due to dissimilar circumstances does not constitute discriminatory treatment.<sup>4</sup>

Failure of an employer to apply a binding rule is sufficient to require a finding of discrimination.<sup>5</sup> Employer regulations governing procedures, or guidelines mandating procedures for management, constitute binding rules or regulations.<sup>6</sup>

In deciding grievances, the VLRB has concluded that past practices are encompassed within the statutory definition of grievance.<sup>7</sup> The Board has recognized that day-to-day practices mutually accepted by the parties may attain the status of

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<sup>1</sup> In re Grievance of Brooks, 135 Vt. 563, 570 (1977).

<sup>2</sup> 3 V.S.A. §902(14).

<sup>3</sup> Nzomo v. Vermont State Colleges, 136 Vt. 97, 102 (1978). Grievance of Imburgio, 11 VLRB 168 (1988).

<sup>4</sup> Grievance of Imburgio, 11 VLRB at 172. Grievance of Findlay, 33 VLRB 166, 172-74 (2015).

<sup>5</sup> Id. Grievance of Gobin, 158 Vt. 432, 434 (1992). Grievance of Roll, 2 VLRB 228, 233 (1979).

<sup>6</sup> Grievance of Gobin, 158 Vt. at 435. Grievance of Cochran, 24 VLRB 54, 62 (2001).

<sup>7</sup> Grievance of Cronin, 6 VLRB 37, 67-69 (1983).

contractual rights and duties, particularly where they are significant, long-standing and not at variance with contract provisions.<sup>8</sup>

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.<sup>9</sup> 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 of understanding.<sup>10</sup> Past practice cannot change the meaning of a contract; it may, however, “give meaning to, supplement, or qualify” the contract.<sup>11</sup>

In holding its view that the contractual relationship between the parties in labor relations normally consists of more than the specific contract provisions and encompasses existing practices, the Board cited with approval the statement of the U.S. Supreme Court that there are “too many people, too many problems, too many unforeseeable contingencies to make the words of the contract the exclusive source of rights and duties.”<sup>12</sup> 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.<sup>13</sup> The

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<sup>8</sup> Grievance of United Academics, AAUP/AFT, 35 VLRB 211, 220 (2019). 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).

<sup>9</sup> Grievance of United Academics, (AAUP/AFT), 35 VLRB at 220.

<sup>10</sup> Id. Grievance of Cronin, 6 VLRB at 68-69.

<sup>11</sup> Grievance of United Academics, (AAUP/AFT), 35 VLRB at 220; *citing* In re Grievance of Kelley, 2018 VT 94, ¶ 20.

<sup>12</sup> Grievance of Allen, 5 VLRB 411, 417-418 (1982); *citing* United Steelworkers of America v. Warrior and Gulf Navigation Co., 363 U.S. 574 (1960).

<sup>13</sup> Cronin, 6 VLRB at 68-69.

Board has indicated that it will not find a binding past practice when it conflicts with statutory provisions.<sup>14</sup>

In deciding grievances, the Board has deemed it appropriate to look to Constitutional law where language in a collective bargaining agreement imports a Constitutional standard and the Board must interpret that portion of the agreement.<sup>15</sup> However, absent that circumstance, the term "grievance" is not so infinitely expandable as to include every Constitutional right.<sup>16</sup> In one case involving the dismissal of a State manager not covered by a contract, the VLRB cited the merit system principle, contained in statute<sup>17</sup>, which "assure(s) fair treatment of . . . employees in all aspects of personnel administration . . . with proper regard for their . . . Constitutional rights as citizens"; to decide a Constitutional claim concerning free speech rights.<sup>18</sup>

Also, statutory provisions are not encompassed within the definition of "grievance" unless they are incorporated into a collective bargaining agreement, rule or regulation.<sup>19</sup> For instance, the Board has held that it did not have jurisdiction over alleged violations of the Vermont Fair Employment Practices Act. The Board stated: "Just as the Vermont General Assembly has specifically conferred on us exclusive original jurisdiction to resolve alleged violations of the specific labor relations statutes which we administer, so too has the Legislature specifically conferred exclusive original jurisdiction on the Attorney General, State's Attorneys and the superior courts to address alleged violations of (the Fair Employment Practices

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<sup>14</sup> Grievance of Beyor, 5 VLRB 222, 238-240 (1982).

<sup>15</sup> Grievance of Sypher and the Vermont State Colleges Faculty Federation, Local 3180, AFL-CIO, 5 VLRB 102, 125 (1982). Cronin, supra. Grievance of Roy, 6 VLRB 163 (1983).

<sup>16</sup> Grievance of Russell, 7 VLRB 60, 80-81 (1984).

<sup>17</sup> 3 V.S.A. §312(b)(5).

<sup>18</sup> Grievance of Morrissey, 7 VLRB 129, 169-171 (1984); *Affirmed*, 149 Vt. 1 (1987).

<sup>19</sup> Boynton v. Snelling, 147 Vt. 564 (1987). In re McMahon, 136 Vt. 512 (1978). Grievance of VSCSF and Laflin, 16 VLRB 276 (1993).

Act.)”<sup>20</sup> The Board reached the same conclusion with respect to alleged violations of the state and federal family and medical leave acts,<sup>21</sup> and alleged violations of the federal Fair Labor Standards Act.<sup>22</sup>

If statutory provisions are incorporated into a collective bargaining agreement, rule or regulation, the Board follows the rules of statutory construction set forth by the Vermont Supreme Court in interpreting statutes. 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.<sup>23</sup> 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.<sup>24</sup>

In determining legislative intent, the Board looks beyond the language of a particular section, standing alone, to the whole statute.<sup>25</sup> 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.<sup>26</sup>

Further, individuals generally may file grievances under the State Employees Act only if they are considered “employees” within the meaning of the Act. For

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<sup>20</sup> Grievance of B.M., et al, 15 VLRB 503 (1992). *See also* Grievance of VSCSF and Laflin, 16 VLRB 276, 280281 (1993); Grievance of Kennedy, 18 VLRB 19 (1995); Grievance of McIsaac, 26 VLRB 24, 92 (2003).

<sup>21</sup> Grievance of VSCSF and Laflin, 16 VLRB 276, 280-281 (1993). Grievance of Woolaver, 21 VLRB 219 (1998). Grievance of UE and Bruley, 22 VLRB 167, 182 (1999). Grievance of McIsaac, 26 VLRB 24, 91 (2003).

<sup>22</sup> Grievance of Rosenstreich, 34 VLRB 329 (2018). Grievance of VSEA, Gibney, et al, 32 VLRB 256, 273 (2013).

<sup>23</sup> Grievance of Welch, 35 VLRB 19, 33 (2019). 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).

<sup>24</sup> Welch, 35 VLRB at 33. Petition of the VSEA, Inc. (Community Correctional Center Employees), 143 Vt. 636, 640-41 (1988).

<sup>25</sup> Id.

<sup>26</sup> Welch, 35 VLRB at 33. In re Grievance of Danforth, 174 Vt. 231, 238 (2002). Petition of Vermont State Employees’ Association (re: State Police Lieutenants), 31 VLRB at 339.

instance, temporary employees are not considered “employees” under the Act, and the Board has no jurisdiction over the grievances of temporary State employees.<sup>27</sup> Also, employees exempt from the state classified service are not considered “employees” under the Act eligible to appeal grievances to the Board.<sup>28</sup> Classified state employees in their original probationary period also are not eligible to file grievances with the Board.<sup>29</sup> An exception to this standard is that the Legislature amended the State Employees Act in 2008 to provide that the Board shall hear and make final determination on grievances of UVM retirees relating to compensation and benefits accrued during employment but received after retirement.<sup>30</sup>

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<sup>27</sup> 3 V.S.A. Sections 311(a)11), 902(5)(A). Grievance of McCluskey, 7 VLRB 359 (1984).

Emerson v. Vermont Department of Forests, Parks and Recreation, 20 VLRB 41 (1997).

<sup>28</sup> 3 V.S.A. §902(5)(A). Grievance of Woolaver, 21 VLRB 219 (1998).

<sup>29</sup> Grievance of Peplowski, 6 VLRB 16 (1983). Grievance of Cole, 6 VLRB 204 (1983).  
Grievance of Barrows, 8 VLRB 82 (1985).

<sup>30</sup> Act No. 107 (2007 Adj. Session), 3 V.S.A. § 926(b).