

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	DOCKET NO. 20-27
MARC ABBEY, et al.)	

FINDINGS OF FACT, OPINION AND ORDER

On May 20, 2021, VSEA filed a Grievance on behalf of Marc Abbey, Jessica Blake, Malcolm Brown, Joshua Choiniere, Steven Glover, Tyrel Kerr, Joseph LaRose, Christopher Mandigo, Darik Messier, Joseph Millet, Michael Moore, Nathan Morin, Dana Stevens, and Sirena Zahn (collectively referred to as “Grievants”) alleging that the employer, State of Vermont Department of Corrections (“Employer” “DOC”), violated Article 19 of the Collective Bargaining Agreement (“Contract”) when it removed the competitive recruitment posting for the Corrections Services Specialist I (“CCSI”) position at the Northern State Correctional Facility (“NSCF”) before the expiration of the posting duration requirement, ten (10) workdays, and administratively appointed an employee to the position.

On April 29, 2021, the Labor Relations Board conducted a video hearing through the Microsoft Teams platform before Board Members Robert Greemore, Acting Chairperson; David Boulanger, and Karen Saudek. VSEA Staff Attorney Kelly Everhart, Esq., represented Grievants. Assistant Attorney General Alison Powers, Esq., represented the Employer. The Employer and VSEA filed post-hearing briefs on May 17, 2021.

FINDINGS OF FACT

1. Grievants were all employed by the State of Vermont, Department of Corrections (“DOC”), as correctional officers at Northern State Correctional Facility (“NSCF”), on February 1, 2020, and members of the Corrections Bargaining Unit.

2. Article 19 of the Contract, provides in pertinent part:

When management decides to fill a permanent, vacant bargaining unit position through competitive procedures, notice shall be posted for ten (10) workdays prior to the application deadline, statewide in the case of a state promotional or open competitive procedure, agency-wide when only an agency promotional procedure is being utilized. If a change is made in the minimum qualifications after the announcement is posted, the new vacancy shall be posted for a period of five (5) workdays.

VSEA Exhibit 1; Employer Exhibit 3, pp. 10-11.

3. Article 66 of the Contract provides in pertinent part:

ARTICLE 66

REEMPLOYMENT RIGHTS (RECALL RIGHTS)

1. MANDATORY REEMPLOYMENT RIGHTS

An employee with permanent status who has received an official notice of layoff, and who is about to be laid off under the Reduction in Force Article, shall have the following mandatory reemployment rights:

- (a) Beginning thirty (30) days immediately prior to the effective date of the layoff and continuing for two (2) years beyond such effective date, such employee will have mandatory reemployment rights to any vacant classified bargaining unit position when management intends to fill it, provided:
 - (1) Such position is at the same or lower pay grade as the position from which the employee was laid off, or up to the highest position in classified service from which such employee was laid off or from which such employee exercised vertical displacement rights with the two (2) year period prior to the next scheduled effective date of layoff; and
 - (2) The employee meets the minimum qualifications for the position; and
 - (3) The employee has indicated a desire and willingness for the job by stating so in "parameters" established before implementation of these reemployment rights (e.g., full-time, part-time, limited service, permanent, type of position, department, occupation, etc.) During the period of mandatory reemployment rights an employee may at any time change these reemployment parameters for the remainder of the period.
- (b) Notwithstanding subsection (a), above, management shall have the right to first fill vacant classified bargaining unit positions by promotion, demotion, or lateral transfer of classified employees from within the Department, so long as such actions produce a different vacant bargaining unit position which management intends to fill.

VSEA Exhibit 2; Employer Exhibit 3, pp. 12-13.

4. According to the Employer, the sections of Article 1, must be read together and apply together. If 1(a) is involved for the whole process, then 1 (b) is involved for the whole process.
5. Stephanie Moly (“Moly”) and Benjamin Mallery (“Mallery”) were both correctional officers at the Northeast Correctional Complex (“NECC”) on February 1, 2020, and members of the Corrections Bargaining Unit.
6. The Department of Human Resources Personnel Policy 5.2, Conflicts of Interest Arising from Employment, provides in pertinent part:

All requests for wavier shall be submitted to the Commissioner of Human Resources or designee *prior to the extension of an offer of employment* (including the approval of transfers, promotions, reclassifications, reallocations, management level re-designations, or any other change in position or any change in position or permanent workplace assignment)

. . . .

Any waiver which is approved applies *only* to the circumstances identified in the request. A further waiver *must* be requested for any change in employment status including promotion of the person subject to a waiver.

Employer Exhibit 2 (emphasis in original).

7. Moly and Mallery executed a nepotism waiver on August 12, 2019. The conditions of the nepotism waiver provide in pertinent part:

DOC must attempt to create separation by moving one member of the couple into a different facility or field office, so long as the pay grade and position are comparable to the employee’s current pay grade and position. Until such transfer occurs, the employees must work on separate shifts at all times, including overtime, and have entirely separate reporting relationships and may not, under any circumstances, supervise each other.

Employer Exhibit 1.

8. On February 2, 2020, Mallery was promoted to Shift Supervisor at NECC, which is a supervisory position over correctional officers, including Moly.

9. A request for a waiver of Personnel Policy 5.2 was submitted to the Commissioner of Human Resources' designee in January 2020 concerning Moly and Mallery related to Mallery's promotion to Shift Supervisor at NECC.
10. No updated waiver was put in place prior to the extension of the promotional job offer to Officer Mallory, or at any time after he assumed the position.
11. On February 7, 2020, DOC posted for competitive recruitment a CSSI position at NSCF. The deadline to apply for this position was February 23, 2020.
12. CSSI positions offer regular work schedules and are not required to work as much overtime as correctional officer positions. CSSI positions are typically considered more desirable positions within a correctional facility.
13. Grievants had either already applied, or intended to apply, for the CSSI position at NSCF prior to the application deadline.
14. As a result of the February 7, 2020, posting for recruitment of the vacant CSSI position, Moly applied for the CSSI position through the competitive process and met the minimum qualifications.
15. On February 10, 2020, NECC Superintendent Norah Quinn emailed DHR Administrator Chris Cadorette asking if Moly could "RIF" into the available CSSI position at NSCF.
16. On February 13, 2020, Department of Human Resources Administrator Chris Cadorette emailed DOC Facilities Executive Alan Cormier, advising him of the active nepotism waiver for Moly and Mallery that required DOC to attempt to create a separation between the parties. Cadorette further advised of the CSSI position available at NSCF that satisfied the requirements of a comparable pay grade and position for Moly, that Moly was qualified and applied for the CSSI position, and that DOC could request an administrative appointment, as long as

Moly's correctional officer position at NECC was left vacant to be filled when she moved. (Stipulated Facts)

17. Moly's correctional officer position at NECC was not subject to a layoff pursuant to Article 65 "Reduction in Force" of the Contract.
18. Neither Moly nor VSEA received official notice of layoff of Moly's correctional officer position at NECC.
19. On February 13, 2020, DOC and DHR approved Moly's administrative appointment into the CSSI position at NSCF.
20. On February 14, 2020, the job posting to fill the CCSI position at NSCF via competitive recruitment was cancelled, four days short of the ten workdays posting requirement of Article 19. No competitive interviews were conducted for the position.
21. Moly was administratively appointed into the CSSI position at NSCF effective March 1, 2020, and vacated her position on or about that time.
22. Moly's vacated correctional officer position at NECC was posted for competitive recruitment and filled by a candidate through the competitive recruitment process effective March 1, 2020.
23. The VSEA has never rejected the nepotism waiver provision.
24. The State is not required to fill every vacant position through competitive procedures.
25. If management decides not to fill a position through competitive procedures, it can administratively appoint someone to the position.

OPINION

VSEA grieves the Employer's decision to remove the job posting notice for the CSSI position at NSCF prior to the ten-day notice requirement of the Contract. VSEA claims the Employer breached Article 19 of the Contract which provides that "notice shall be posted for ten (10) workdays prior to the application deadline," when it removed or failed to maintain the job posting for ten workdays, and instead administratively appointed an employee to the position.

The Grievant bears the burden of proving the Employer breached the Contract. Grievance of Sharp, 1 VLRB 412, 414 (1978). Resolution of this Grievance depends on the construction of the Contract. When construing a collective bargaining agreement, like any other contract, the VLRB follows the rules of contract construction developed by the Vermont Supreme Court. The fundamental principle is to give effect to the intention of the contract drafters. Grievance of Cronan, et al., 151 Vt. 576, 579 (1989). A contract must be interpreted, where possible, to give effect to the entire contract, and its provisions read together to form a harmonious whole. The Board will assume the drafters of the contract chose the language deliberately and will not interpret a contract to render portions of it meaningless. See In re West, 165 Vt. 445, 450 (1996).

If the language of the contract is clear and unambiguous, the provisions of a contract must be given force and effect and be taken in their plain, ordinary, and popular meaning. In re Kelley, 2018 VT 94, ¶ 14, 208 Vt. 303, 308. If analysis of the contract language results in a determination that the language is clear and unambiguous, extrinsic evidence should not be considered as it would alter the understanding of the parties embodied in the language chosen to 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 68, 72 (1980). It is the duty of the Board to construe contracts, not make or remake them for the

parties. Vermont State Colleges Faculty Federation v. Vermont State Colleges, 141 Vt. 138, 144 (1982).

Ambiguity exists only 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). If the analysis of the contract language leads to a conclusion that the language is ambiguous because it allows more than one reasonable interpretation, 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).

The Contract language at issue in this Grievance is Article 19, which provides in pertinent part.

When management decides to fill a permanent, vacant bargaining unit position through competitive procedures, notice shall be posted for ten (10) workdays prior to the application deadline, statewide in the case of a state promotional or open competitive procedure, agency-wide when only an agency promotional procedure is being utilized. If a change is made in the minimum qualifications after the announcement is posted, the new vacancy shall be posted for a period of five (5) workdays.

VSEA Exhibit 1 (emphasis added).

Both the Employer and VSEA agree that the Employer decided to fill the CSSI position through competitive appointment and posted the position. The Employer claims it can change its mind after posting the position. VSEA maintains that when the Employer decides to fill a position through competitive procedures, and posts the position, the employer must comply with the ten (1) workday posting duration requirements and cannot change its mind on how it will fill the position.

The language of Article 19 is clear and unambiguous and does not require resort to external evidence to explain or give meaning to the drafters' intent. Article 19 requires that when management decides to fill a position "through competitive procedures, notice shall be posted for ten (10) workdays prior to the application deadline." Article 19. The only exception to the posting requirement is when "a change is made in the minimum qualifications after the announcement is posted." Only when this exception applies, "the new vacancy shall be posted for a period of five (5) workdays." Article 19.

The language in Article 19 does not support more than one reasonable interpretation. The Employer apparently agrees as it has not argued that the phrasing supports more than one interpretation. Instead, the Employer maintains that Article 19 must be read in conjunction with Article 66, and that the latter modifies the former. The Employer suggests that because management can make an administrative appointment under Article 66, it can also make an administrative appointment after choosing to make a competitive appointment and posting the position under Article 19. Article 66, however, governs reemployment rights for an employee "who has received an official notice of layoff, and who is about to be laid off under the Reduction in Force Article." Article 66.

Although referencing contract interpretation principles, management ignores the clear and unambiguous language of Article 66 itself. Section 66 is titled "Reemployment Rights (Recall Rights)" and is applicable only when dealing with employees who have been laid off. The section outlines the recall rights of employees and carves out management's ability, in these reemployment situations, to "have the right to first fill vacant classified bargaining unit positions by promotion, demotion, or lateral transfer . . . so long as such actions produce a different vacant bargain unit position which management intends to fill." This right, however, is limited to when "[a]n employee with permanent status [] has received an official notice of layoff, and who is

about to be laid off under the Reduction in Force Article.” Article 66. That right is not outlined in Article 19, and does not modify the obligations of the employer in Article 19.

The provisions of Section 66, apply only when the predicate condition exists, that an employee has received an official notice of layoff and is about to be laid off. The predicate condition for application of Article 66, however, did not occur in this case. Moly was not subject to a layoff or a reduction in force. The provisions of Section 66 apply as a unit. If 1 (a) does not apply to the hiring scenario, the remaining provisions of Section 66 also do not apply.

Exhibits and testimony about a settlement agreement on reemployment rights are not probative of the issue before the Board. Moly did not suffer a reduction in force and was not laid off. Whether or how an agreement was reached regarding an employee’s reemployment rights does not impact or amend the requirements of Article 19 and will not influence the outcome here. Testimony suggesting the history related to the phrase “through competitive appointment” in Article 19, is also irrelevant. The phrase and its import are not in dispute. The employer may elect to fill a position through appointment or competitive recruitment. When it elects to recruit through competitive appointment, however, it must adhere to the posting requirements.

The employer decided to fill the vacant CSSI position through competitive procedures. Having elected that appointment process, it was required to adhere to the requirements of Article 19. Although it could have elected to administratively appoint the position, it elected not to do so. Having chosen the competitive process and posted the position, it was required to adhere to the requirements of Article 19 and post the position for the requisite time. When it made an administrative appointment and removed the posting prior to the expiration of ten (10) workdays, it violated the requirements of Article 19 of the Contract.

The Employer must comply with Article 19 and post the CSSI position and maintain the posting for ten (10) workdays. The Order is intended to make whole the Grievants and to preserve the status quo ante before the posting was improperly terminated and an administrative appointment made. Ms. Moly was appointed to the CSSI position in March 2020. Although the Board anticipates the employer will safeguard the interests of Ms. Moly, it cannot direct or order how that is to occur. The Board cannot usurp the employer's inherent management function and direct how it should adapt its workforce, including Ms. Moly, to comply with the Order. Instead, the Employer, exercising its "retained lawful and customary management rights, powers and prerogatives" will determine how to allocate and utilize personnel, including Ms. Moly, in the most appropriate manner possible, when adhering to the Board Order. See Contract Article 2.

ORDER

Based on the foregoing Findings of Fact and Opinion, it is Ordered:

1. The Grievance of VSEA is sustained. The Employer violated Article 19 of the Contract when it failed to maintain the notice for the requisite ten (10) workdays.
2. The Employer shall comply with Article 19, and all other terms of the Contract.
3. The Employer shall post and fill the CSSI position according to the terms of the Contract, including, but not limited to, Article 19.

Dated this 9th day of November 2021, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Robert Greemore

Robert Greemore, Acting Chair

/s/ Karen D. Saudek

Karen D. Saudek

/s/ David R. Boulanger

David R. Boulanger