Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2005-052

SEPTEMBER TERM, 2005

In re Grievance of Ronald Berwanger	}	APPEALED FROM:
	}	
	}	
	}	Labor Relations Board
	}	
	}	
	}	DOCKET NO. VLRB # 04-18

In the above-entitled cause, the Clerk will enter:

Grievant appeals an order of the Labor Relations Board dismissing his grievance, which alleges that Johnson State College unlawfully terminated his benefits when he was unable to return to work after sustaining a disabling back injury during his employment. We affirm.

On August 8, 2002, while grievant was employed full-time as a maintenance worker for the College, he injured his back lifting a bag of cement. He received worker=s compensation benefits as a result of his injury. On February 14, 2003, the College sent grievant a letter asking when he would be able to return to work. A week later, grievant=s attorney responded in a letter stating that there was no definite timetable for grievant=s return. In April 2003, a rehabilitation center cleared grievant to return to his job at a medium-heavy work level. In late May 2003, grievant returned to work on a modified schedule. On his fourth day back, he experienced back problems and left work immediately without contacting anyone at the College. On June 5, 2003, the College received a note from grievant=s doctor stating that grievant had re-injured his back and was unable to work through June 27, 2003. On June 19, 2003, the College sent grievant a letter stating that it had decided to post his position, but that it would be willing to discuss his return to work either before or after the posted position was filled. On July 14, 2003, not having received a response from grievant, the College sent him a letter stating that it was terminating his employment.

In May 2004, the Vermont State Employees= Association (VSEA) filed a grievance on behalf of grievant, contending that the College had violated Article 36, Section 2 of the collective bargaining agreement between VSEA and the College by failing to continue to provide grievant all of the benefits listed in the agreement after he became permanently disabled as the result of an injury sustained during his employment with the College. Following a hearing, the Labor Relations Board dismissed the grievance, ruling that the College had not violated the agreement. On appeal, grievant argues that the Board ignored relevant testimony concerning the bargaining history of the agreement and instead relied on a non-existent past practice to support its erroneous interpretation of the agreement.

Article 36, Section 2 of the collective bargaining agreement provides as follows: AIn the event of disability of an employee, the College shall continue to pay the benefits listed in this Agreement.@ The term Adisability@ is not defined in the agreement. Nor, apparently, is there any provision in the agreement for establishing the existence of a disability. Based on the testimony of the College=s Chancellor and Director of Human Resources, the Board found that since at least 1984: (1) the practice of the Vermont State Colleges has been that employees must apply and qualify for long-term disability benefits provided by the employer through the employer=s insurance carrier to be eligible for continued benefits under Article 36, Section 2 of the agreement; (2) no employee has received continued benefits pursuant to this section unless they have applied for long-term disability benefits; and (3) approximately ten employees have received continued benefits by applying for long-term disability benefits. To apply for long-term disability

benefits, the employee and the employee=s doctor must submit the required paperwork and medical information to the insurance carrier, who, in consultation with the employee=s doctor, determines whether the employee qualifies for the benefits. Employees are not eligible to receive long-term disability benefits until they have been continuously disabled for a period of at least 180 days. If the insurance carrier qualifies the employee for long-term benefits, the employer provides continued benefits to the employee under Article 36, Section 2 of the agreement.

The Board determined that, given the complex and varied legal definitions of the term Adisability,@ the spare use of that term in Article 36, Section 2 creates an ambiguity that requires extrinsic evidence to interpret the provision. In examining the extrinsic evidence, the Board gave little weight to the testimony of a VSEA witness who was on the bargaining unit team in 1979 when the first contract containing the disputed provision was negotiated. When asked what was meant by the term Adisability,@ she stated: ANot being able to continue with their job.@ She further stated that there was no discussion of allowing an insurance company to determine whether someone had become disabled. The Board concluded that because this testimony did not suggest that there had been a specific understanding communicated between the parties on the meaning of the disputed term, it was too general and self-serving to provide any guidance on construing Article 36, Section 2. The Board found far more probative the evidence that, for at least two decades, employees had to apply and qualify for long-term disability benefits through the employer=s insurance company before they could be eligible for continued benefits under Article 36, Section 2. In light of this past practice, the Board concluded that the provision had to be interpreted to require employees to apply and qualify for long-term disability benefits before they could obtain continued benefits. See Nzomo v. Vt. State Colls., 136 Vt. 97, 101 (1978) (observing that meaning of contractual language can be explained or interpreted through evidence of usage or custom). According to the Board, because grievant never applied for long-term disability benefits, his disability was never established while he was employed by the College, and thus he was not entitled to continued benefits under Article 36, Section 2.

Grievant argues on appeal that the Board abused its discretion and committed reversible error by relying on a non-existent past practice while ignoring relevant testimony on the meaning of the disputed contractual language. In appeals from the Labor Relations Board, we give the Board substantial deference and presume that Aits actions are correct and reasonable.@ Milton Educ. & Support Ass=n v. Milton Bd. of Sch. Trustees, 171 Vt. 64, 69 (2000).

Grievant first contends that the Board abused its discretion in deeming the testimony of the bargaining unit negotiator too general and self-serving. We disagree. The witness=s cursory statement that the term Adisability@ meant not being able to work provided little guidance for the Board in determining how the parties to the agreement intended to determine whether an employee had become disabled. As the Board indicated, the witness=s testimony did not amount to evidence of specific communications between the parties regarding the ambiguous term. The Board acted within its discretion in determining that the witness=s testimony was not dispositive on the intended meaning of the disputed provision. See Chittenden S. Educ. Ass=n v. Hinesburg Sch. Dist., 147 Vt. 286, 292 (1986) (recognizing that Board, in exercising its special competence and expertise, may consider credibility of witnesses and determine weight of their testimony).

Grievant also argues that the Board erroneously relied upon a non-existent past practice to determine the meaning of the disputed provision. In making this argument, grievant reasons as follows. There was no evidence of a past practice of disallowing continued benefits to employees who had failed to apply for long-term disability benefits. Rather, there was only evidence of continued benefits being given to employees who had applied for disability benefits. Therefore, according to grievant, the union could not have been aware of a past practice requiring employees to apply and qualify for long-term disability benefits before obtaining continued benefits under Article 36, Section 2. See Nzomo, 136 Vt. at 102 (noting that before contractual provision can be modified based on custom or usage, sufficient ambiguity and adequate notice must be established).

We do not find this argument persuasive. The Board concluded that use of the term Adisability@ in the disputed provision, without any definition of the complex legal term or any procedure for establishing the existence of a disability, created an ambiguity that required an examination of extrinsic evidence. The evidence presented to the Board demonstrated that over a period of twenty years the employer had given continued benefits only to employees who had applied and qualified for long-term disability benefits through consultation between the employer=s insurer

and the employee=s doctor. The fact that no employee before grievant had ever sought continued benefits without first applying for long-term disability benefits does not demonstrate that there was no past practice sufficient to put the union on notice that employees had to qualify for disability benefits during their employment in order to obtain continued benefits following their employment. In any event, the Board relied on evidence of past practice to construe an ambiguous provision rather than to modify the agreement. See In re Verderber, 173 Vt. 612, 615-16 (2002) (mem.) (concluding that Board did not find that parties were bound by past practice that was at variance with terms of original agreement, but rather cited past practice as extrinsic evidence that aided its interpretation of ambiguous contractual provision). AWhere the meaning of a writing is uncertain and extrinsic evidence is introduced in aid of its interpretation, the question of its meaning is one of fact to be decided by the fact finder.@ Gardner v. West-Col, Inc., 136 Vt. 381, 385 (1978). Here, the evidence of past practice was sufficient to support the Board=s interpretation of the disputed provision. See Milton Educ. & Support Ass=n, 171 Vt. at 69 (as long as evidence supports Board=s findings, and findings justify its ultimate conclusion, this Court will uphold Board=s orders).

Finally, grievant argues that he was disabled under any definition of the term, including the one established by employer=s insurance carrier. This argument is without merit. Because grievant did not apply for long-term disability benefits, the employer=s insurer never had an opportunity to determine whether he was eligible for such benefits. Further, even if we were to assume that the Board or this Court was the proper forum to determine eligibility for such benefits, grievant failed to argue before the Board that he was entitled to long-term benefits under the insurance carrier=s plan. Accordingly, that argument has not been preserved for review. See In re McMahon, 136 Vt. 512, 514 (1978) (stating that party may not raise issues that were not previously presented to Board for its consideration).

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Marilyn S. Skoglund, Associate Justice

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Brian L. Burgess, Associate Justice