VERMONT LABOR RELATIONS BOARD

VERMONT STATE EMPLOYEES' ASSOCIATION	)	
	)	DOCKET NO. 90-41
v.	)	
STATE OF VERMONT	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On July 3, 1990, the Vermont State Employees' Association ("VSEA") filed an unfair labor practice charge against the State of Vermont ("State"). Therein, VSEA alleged that a memorandum issued by Stephen Dale, Social Services Division Director, Department of Social and Rehabilitation Services ("SRS"), constituted an unfair labor practice in violation of 3 VSA §961(1) because Dale 1) invited District Directors to bypass VSEA and bargain directly with employees, 2) blamed VSEA for the necessity of finding cost-effective ways of providing call-out services, and 3) invited District Directors to contract out such services. VSEA also claimed that the State violated 3 VSA §961(5) by refusing to rescind this memorandum, and refusing to bargain with VSEA.

The Vermont Labor Relations Board issued an unfair labor practice complaint on August 14, 1990. A hearing was held before Board Members Charles McHugh, Chairman; Catherine Frank and Louis Toepfer on October 4, 1990. Michael Seibert, Assistant Attorney General, represented the State. Michael Zimmerman, VSEA Staff Attorney, represented VSEA. The parties filed Memoranda of Law on October 11, 1990.

FINDINGS OF FACT

1. VSEA and the State entered into a collective bargaining agreement for the Non-Management Unit, effective for the period July 1, 1988 - June 30, 1990; and entered into a successor agreement effective for the period July 1, 1990 - June 30, 1992 (hereinafter collectively referred to as the "Contracts"). The Contracts have provided in pertinent part as follows:

> ARTICLE 2
> MANAGEMENT RIGHTS
>
> 1. Subject to law, rules and regulations, ... (and) terms set forth in this Agreement, nothing in this Agreement shall be construed to interfere with the right of the Employer to carry out the statutory mandate and goals of the agency, to restrict the State in its reserved and retained lawful and customary management rights, powers and prerogatives, including the right to utilize personnel, methods and means in the most appropriate manner possible...
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> 2. Consistent with statutory authority the State may contract out work as provided in paragraph 3 of this Article and may discontinue services or programs, in whole or in part. ...
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> 3. No employee will be laid off or otherwise be removed from employment as a result of contracting out except in circumstances where the work is beyond the capacity of State employees, or that the work or program can be performed more economically under an outside contract, or that an outside contractor has management techniques, equipment or technology which will result in better public service and increased productivity.
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> ...
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> 5. With respect to any dispute under paragraphs 2, 3... the parties agree that they have fully bargained and any disputes thereunder will be processed according to the grievance procedure.
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> ARTICLE 32
> ON CALL, STANDBY DUTY AND AVAILABLE STATUS
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> SECTION 1. ON CALL
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> "On Call" is defined as a requirement that an employee remain confined, during off-duty hours, at the employer's

premises, at the employee's home or at some other location designated by the employer in order to be able to report for duty immediately after being called (excluding normal commuting time between the employee's home of record and duty station). "On Call" duty is compensated as overtime worked under Article 29.

SECTION 2. STANDBY

"Standby" is defined as a requirement that an employee, during off-duty hours, be reachable by phone or "beeper" within one hour of being called, and report for duty where needed within one hour of being reached, or normal commuting time between the employee's home of record and duty station, whichever is greater. "Standby" duty is paid at one-fifth the regular hourly rate for each hour of such duty (rounded to the nearest whole cent)...

SECTION 3. AVAILABLE

"Available" is defined as a requirement that an employee, during off-duty hours, leave word at home or with the employer where the employee may be reached. Such employee is not subject to any other restriction specified under sections 1 or 2 and is neither "on call" nor on "standby" and shall not receive additional compensation therefore.

(VSEA Exhibit 1).

2. Social workers employed by the Social Services Division in SRS district offices are required to provide emergency services during the hours SRS offices are not open. The services provided include intervening in child abuse situations and domestic disputes, and transporting children taken into custody. At all times relevant prior to July 22, 1990, SRS district offices assigned social workers to be on "standby" status to provide these services during all hours the district office was not open.

3. In late 1987, the Social Services Division of SRS instituted an Emergency Services Program ("ESP") which was designed to reduce the number of calls to social workers on "standby", reduce the number of times they would be called out to provide emergency services, and provide a more consistent after hours service. The

ESP program has remained in place at all times since late 1987. Under the ESP program, all after hours emergency telephone calls to the 12 SRS district offices throughout the State have been referred, for screening, to the ESP central switchboard, manned by trained Social Workers in Burlington, Vermont. The ESP worker attempts to resolve the situation, but if the ESP worker cannot handle a situation (for example, if a child must be taken into custody because of abuse), then the ESP worker will telephone a social worker on "standby" status (or since July 22, 1990, on "availability" status) in the pertinent district. That worker would then be "called out" in order to handle the particular emergency (VSEA Exhibits 4, 9).

4. The ESP program has reduced calls to social workers on "standby" status by 94 percent, and reduced "call outs" of such staff by 73 percent (VSEA Exhibit 9).

5. Beginning in 1989, after the success of the ESP program in reducing the workload of workers on "standby" status was fully realized, the Social Services Division of SRS, under the direction of Division Director Stephen Dale, began looking for ways to reduce the cost of paying social workers in all 12 districts for being on "standby" status for all off-duty hours.

6. In the Fall of 1989, Social Services Division management considered the idea of "regionalizing" after hours emergency services, whereby a social worker on "standby" status generally would cover two districts. This would have substantially reduced the number of social workers on "standby" status at any one time in the state. By November 3, 1989, Division management decided that "regionalization" was not a good plan for statewide implementation (State's Exhibits C, D).

7. After the "regionalization" idea was rejected, Division management considered the contracting out of after hours emergency services. At some point in the Spring of 1990, Division management decided that contracting out such services was not a realistic plan for statewide implementation (State's Exhibits E, F, G, H and I).

8. The State, during bargaining for the Non-Management Unit Contract for 1990-92, proposed reducing the "standby" compensation from one-fifth to one-eighth the employee's hourly rate. However, the State and VSEA eventually agreed that the rate remain at one-fifth the hourly rate. That Contract was agreed upon in March or April, 1990.

9. At some point prior to June 4, 1990, Social Services Director Stephen Dale, after the Vermont General Assembly had decided the SRS appropriation for the 1991 fiscal year (i.e. July 1, 1990 - June 30, 1991), decided that the cost of after hours emergency services would have to be reduced early in the 1991 fiscal year due to a reduced level of appropriations for that year. On June 4, 1990, Dale wrote a memorandum to all District Directors, which memorandum provided in its entirety as follows:

> Introduction
>
> As you know, the Department is currently spending large amounts of money ($154,000) to have 12 staff available for call-out at all times district offices are closed. Under any circumstances, that is not a responsible way of spending taxpayer dollars. During many of these hours that we pay for standby, we have few or no calls during the entire year (See Attachment A). Especially as we face substantial financial problems, we must

take action to reduce these costs. We strongly considered a statewide plan, but felt this issue could best be worked out within each district to best tailor the change to needs and desires of staff and to best take advantage of available resources within the community.

We know that any change that reduces the potential for overtime earnings is difficult. On the other hand, this must be seen as the second step in dealing with the previous standby nightmare. ESP was implemented to reduce the stress of standby and to provide a more consistent after-hours service. It has done that, reducing the calls to standby staff by 94 percent and reducing call-outs by 73 percent over FY '87, the last year when the old system was in effect. Part of the original plan was to fund ESP through standby savings. What has happened is that standby costs have gone up 75 percent because of State employee contract negotiations. We now must find a cost-effective way of providing call-out services.

Expectations of Each District Director

- Assure the district can respond to any call-out situation when the office is closed.
- Achieve this goal within given allocations for dollars and State employee hours (Attachment C).
- Any plan must be approved by the Chief of Operations prior to implementation.

Three basic options are suggested:

Option #1

Use your dollar allocation to contract out for the complete service, using the attached memo (Attachment B) from Fred Ober as a guideline. I assume that even if you choose this option, you would not be able to implement immediately and may need to choose another option as an interim measure.

Option #2

Have staff on standby during the hours below (85 percent of all call-outs occur during these hours) and assure the availability of call-out service at all other times.

Standby Hours

Weekdays	6 p.m. to Midnight
Weekends	Noon to Midnight
Holidays	Noon to Midnight

Total hours available: 2,886

Option #3

Collaborate with other districts to use your available dollars and/or hours to get the job done in the best way possible. (Standby in all districts may be required only during the very busiest hours, freeing dollars to allow one person in a region to be the absolute back-up).

Timetable

June 29, 1990	District plans must be submitted to the Chief of Operations no later than June 29, 1990.
June 29 to July 5	Negotiations/approval period
July 22, 1990 (Sunday)	First date of implementation of new plan.

(VSEA Exhibit 9)

10. This memorandum produced a common pattern in the District Offices. Generally, the District Director distributed the memorandum to the social workers in the office, either before or during a staff meeting. The memorandum was then discussed at a staff meeting. The District Director sought input from the social workers concerning the desirability and feasibility of the three options for after hours emergency services set forth in the June 4, 1990, memorandum from Dale.

11. On July 22, 1990, the Social Services Division implemented Option #2 set forth in the memorandum from Dale on a statewide basis. Under this option, a social worker is on "standby" status in each district office during the "standby hours" set forth in the memorandum, and a social worker is assigned to "availability" status at all other times the office is not open (VSEA Exhibits 10, 13, 15, 19 and 20).

12. A social worker on "standby" status or "availability" status is paid a minimum of four hours wages at the overtime rate if called out to provide emergency services.

OPINION

VSEA contends that the State violated 3 VSA §961(1) and (5) in this matter through the June 4, 1990, memorandum issued by Stephen Dale, SRS Division of Social Services Director, concerning the providing of after hours emergency services.

VSEA's primary contention is that Dale, through his memorandum, committed an unfair labor practice by inviting the District Directors to discuss three options for reducing the cost of providing after hours emergency services directly with affected social workers. This, VSEA contends, improperly bypassed VSEA, and deprived employees of the opportunity to present a unified response to the State's proposed change in working conditions.

We would agree with VSEA if any improper unilateral changes in conditions of employment were contemplated by Dale's memorandum. The unilateral imposition of terms of employment during a contract term when the employer is under the legal duty to bargain in good faith is the very antithesis of bargaining and is a per se violation of the duty to bargain. VSEA v. State, 5 VLRB 303, at 324-329 (1982). The duty to bargain with respect to a proposed change in a condition of employment applies to the exclusive bargaining representative of employees, in this case VSEA, and management cannot negotiate directly with employees concerning such a proposed change. VSEA v. State, 2 VLRB 155, 167 (1979).

However, no improper unilateral changes in conditions of employment are contemplated by Dale's memorandum. Under Article 2 of the Contracts, the State has the "right to utilize personnel... in the most appropriate manner possible", and may contract out work. Article

32 permits the State to "utilize" employees by requiring them to be placed, during their off-duty hours, on "on-call", "standby" or "available" status.

The options discussed by Dale in his memorandum concerned the possibilities of contracting out emergency services, reducing the hours employees are on "standby" status, and placing "employees" on available status for certain hours. Each of these options is within management's authority to unilaterally impose pursuant to the Contract, as long as in so doing management abides by the Contract's requirements. On its face, there is nothing in Dale's memorandum to indicate that any of the options he discussed violated the Contract's provisions relating to contracting out, "standby" status, or "available" status. Thus, no improper unilateral changes in conditions of employment is contemplated by his memorandum. If, upon implementation of any of the options, contractual provisions are violated, then employees and VSEA have adequate redress through the contractual grievance procedure.

Since no improper unilateral change was contemplated by Dale's memorandum, he did not improperly bypass VSEA by inviting District Directors to discuss the options directly with employees. Pursuant to the Contracts, the State could have implemented the various options unilaterally, without any input or negotiations. Under such circumstances, Dale cannot be faulted for seeking employee input and thereby attempting to develop a consensus for the imposition of what, in any case, were undesirable options.

We recognize that VSEA was placed in an unenviable position as a result of Dale's memorandum, since employees were faced with undesirable options which caused them to place pressure on VSEA.

However, in attempting to deal with a budgetary crisis, the State was simply exercising the authority it had pursuant to the Contract.

VSEA also has contended an unfair labor practice occurred because Dale, in his memorandum, blamed VSEA for the necessity of finding cost effective ways of providing emergency services, even though the State has agreed in bargaining to contractual language concerning such services. We do not believe that a fair reading of Dale's memorandum indicates he was "blaming" VSEA for the problem. Instead, Dale simply was noting the fact that the compensation of social workers on "standby" status had substantially increased pursuant to the Contracts while their workload had substantially decreased. No "blame" is attached by Dale to this situation.

ORDER

Now therefore, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED that the unfair labor practice charge filed by the Vermont State Employees' Association in this matter is DISMISSED.

Dated this 20th day of December, 1990, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Charles H. McHugh, Chairman

Catherine L. Frank

Louis A. Toepfer