VERMONT LABOR RELATIONS BOARD

CASTLETON EDUCATION ASSOCIATION, PARAPROFESSIONAL UNIT	)	
v.	)	DOCKET NO. 89-74
CASTLETON-HUBBARDTON BOARD OF SCHOOL DIRECTORS	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On October 23, 1989, the Castleton Education Association, Paraprofessional Unit, Vermont-NEA ("Association") filed an unfair labor practice charge against the Castleton-Hubbardton Board of School Directors ("School Board"). The charge alleged that the School Board violated 21 VSA §1725(a) and §1726(a)(5) by making a unilateral change in related economic conditions of employment without consultation or negotiation with the Association by unilaterally taking away the paid lunch "hour" from two teacher aides and by shortening their work day.

On November 21, 1989, after investigation of the charge, the Labor Relations Board issued an unfair labor practice complaint against the School Board. On March 29, 1990, a hearing was held before Labor Relations Board members Charles McHugh, Chairman; William Kemsley, Sr. and Catherine Frank. Donna Watts, Associate General Counsel for Vermont-NEA, represented the Association. Alan Keyes, Attorney with Ryan, Smith and Carbine, represented the School Board. Requested Findings of Fact and Memoranda of Law were filed by the parties on April 6, 1990.

FINDINGS OF FACT

1. The Castleton-Hubbardton School District ("School District") is comprised of two schools, the Castleton Elementary School, which contains Grades K through 6, and the Castleton Village School, which contains Grades 7 and 8. Daniel Collins has been the Principal of the Castleton Schools since July, 1988.

2. The School District is a member of the Addison-Rutland Supervisory Union, and is administered by the Superintendent of Schools, Raymond Pentkowski.

3. The Association is the exclusive bargaining agent for all paraprofessionals of the Castleton Elementary School. The bargaining unit is comprised of teacher aides who are employed by the Castleton School District for at least 20 hours per week, and at least 100 days per year. Approximately ten to 12 members of the bargaining unit are teacher aides at the Castleton Elementary School (Association Exhibit 7).

4. The School District and the Association were parties to a collective bargaining agreement, covering the periods from July 1, 1987 to July 20, 1989 ("Agreement").

This Agreement provides, in relevant part:

> ARTICLE III GRIEVANCE PROCEDURE
>
> It is recognized by both parties, the School Board and the Paraprofessional(s), that this grievance procedure is the formal avenue for the reparation of grievance(s) held by any or both parties. . .
>
> A grievance shall be any claim by a paraprofessional, a group of paraprofessionals or the paraprofessional organization that there had been a violation, misrepresentation, or misapplication of the terms of this Agreement.

ARTICLE IV PARAPROFESSIONAL EMPLOYMENT

. . . B. Working Conditions

> Paraprofessionals are normally on duty only when schools are in session plus professional days. Normally, a working year shall be 180 days. The number of hours worked by an individual paraprofessional shall be determined annually by the administration...

ARTICLE VI RIGHTS OF THE BOARD

> In recognition of the fact that the laws of the State of Vermont vest responsibility in the Board for the quality of education in, and the efficient and economic operation of the Castleton School District, it is hereby agreed that, except as specifically and directly modified by express language in a specific provision of this contract, the Board retains all rights and powers that it has or may hereafter be granted by law and may exercise such powers at its discretion without such exercise being made the subject of a grievance (Association Exhibit 7.

5. During July of 1989, the parties began negotiations for a successor to the 1987-89 Agreement. The Association initially proposed the following addition to Article IV(B) of the Agreement:

> Each paraprofessional shall be entitled to one 15-minute break during each day, to be scheduled by agreement between the employee, the teacher and the principal (Association Exhibit 8).

6. The proposed addition to Article IV(B) was rejected by the School Board. On July 28, 1989, the Association presented a counter-proposal to the School Board, in which the addition to Article IV(B) was deleted. The addition to Article IV(B) was dropped by the Association bargaining committee in hopes of making the counter-proposal more attractive to the School Board (Association Exhibit 8).

7. During negotiations, neither party proposed a change in the length of the teacher aides' work day, or any provisions relating to paid or unpaid lunch time for aides.

8. The parties declared an impasse in negotiations on September 5, 1989. At the time of the hearing before the Labor Relations Board, a successor agreement had not been negotiated.

9. There is no uniform number of hours worked by all teacher aides employed at the elementary school. Rather, teacher aides have been hired to meet specific needs over the years, and the number of hours worked has varied from individual to individual.

10. It has been customary for the School Board to enter into individual contracts annually with each of the teacher aides. These contracts define the total daily hours each aide is to work, the rate of pay and the term of employment. The daily hours for teacher aides are 6, 6 1/2 or 7 hours.

11. Rose LaRose is a teacher aide employed at the Castleton Elementary School, and has been a member of the paraprofessional bargaining unit at all times relevant herein.

12. LaRose first was hired in 1985 as a teacher aide. At the time of LaRose's hiring, then-Principal Davis told LaRose that her hours would be from 8:30 a.m. to 3:00 p.m. Davis asked that whenever possible LaRose arrive at school at 8:15 a.m., so that she would be available in case of an emergency. The request was not a requirement. Although LaRose did arrive most days at 8:15 a.m., she began her work day at 8:30 a.m. She spent the intervening 15 minutes in the teachers' lounge having a cup of coffee.

13. At the time of her hiring in 1985, LaRose understood that she was to take a one-half hour lunch period daily during the period between 8:30 a.m. and 3:00 p.m. LaRose was not told by Principal Davis that she was to be paid for the one-half hour lunch time. At

the time of her hiring, LaRose did not know whether she was or was not to be paid for lunch time. In fact, from the time of her hiring in 1985, through June of 1989, LaRose was paid for the one-half hour lunch time.

14. LaRose continued to be employed as a teacher aide at the Castleton Elementary School through the 1988-89 school year, and her hours and lunch period remained the same. From the time of her hiring in 1985, through June of 1989, LaRose was paid for six and one-half hours daily, which included her one-half hour lunch time, for her work as a teacher aide.

15. For the 1988-89 school year, LaRose's job as teacher aide was confirmed by a special contract covering the period August 31, 1988 to June 15, 1989. The Contract provided in part: "This (salary) represents $5.94 per hour x 6 1/2 hours per day x 180 days" (Association Exhibit 3).

16. From December 17, 1987, to June 15, 1989, LaRose performed a second job assignment as a Morning Supervision Aide at the Castleton Elementary School. The assigned hours for this job were from 8:00 a.m. to 8:30 a.m. daily, and she was paid for one-half hour daily for this duty. For the 1987-88 and the 1988-89 school year, this second job assignment was also confirmed by special contracts. These contracts each provided, in relevant part: "This (salary) represents (the hourly rate) per hour x 1/2 hour (per day)..." (Association Exhibits 1 and 2).

17. Marguerite Cole is a teacher aide employed at the Castleton Elementary School, and has been a member of the paraprofessional bargaining unit at all times relevant herein.

18. During the period from December 17, 1987, to June 15, 1989, Cole was employed as a Morning Supervision Aide at the Castleton Elementary School. The assigned hours for this job were from 8:00 a.m. to 8:30 a.m. daily, and she was paid for one-half hour of work time for this duty. For the 1987-88 and 1988-89 school years, this job assignment was confirmed by special contracts. These contracts each provided, in relevant part, "This (salary) represents (the hourly rate) per hour x 1/2 hour (per day)...", (Association Exhibits 3 and 4).

19. During the 1988-89 school year, Cole was also employed as a teacher aide. Her hours for this job assignment were from 8:30 a.m. to 3:00 p.m. Cole was told that she was to take a one-half hour lunch break daily during this time. This assignment was confirmed by a special contract, which provided, in relevant part, "This (salary) represents $5.94 per hour x six and one-half hours per day x 180 days". Cole was paid for six and one-half hours daily, which included her one-half hour lunch time, for her work as a teacher aide (Association Exhibit 6).

20. Other than LaRose and Cole, no employees in the Castleton Hubbardton School District were paid for their lunch time. It is not known how the arrangement whereby Cole and LaRose were paid for their lunch time developed. Principal Collins discovered this practice sometime during the 1988-89 school year, concluded it was an error, and decided to correct it for the ensuing 1989-90 school year. It was not explained to LaRose and Cole during the 1988-89 school year that the payment for their lunch time was a mistake by the administration, nor that Principal Collins had decided that it would be corrected.

21. At the time Collins discovered the paid lunch time practice, he was attempting to resolve a problem involving inadequate supervision of students. During the 1987-88 and 1988-89 school years, it was the practice of arriving students to be supervised in their classrooms from 8:00 to 8:30 a.m. This supervision was performed by a staff of four teacher aides, who were responsible for overseeing 20 classrooms at the elementary school. During the 1987-88 school year, an altercation between some of the students during the pre-school period occurred in one of the classrooms, which resulted in legal proceedings.

22. In order to resolve the supervision problem within the existing school budget, Principal Collins proposed that all available teacher aides at the Castleton Elementary School share in early morning supervision of students. The plan also involved a change of schedule for teachers at the elementary school. Principal Collins discussed his proposal with Superintendent Pentkowski and with the School Board sometime during the 1988-89 school year, and the change was approved to take effect at the beginning of the 1989-90 school year.

23. On May 11, 1989, Principal Collins discussed the change for the 1989-90 school year with the teachers at Castleton Elementary School. At that time, Collins did not discuss the change with LaRose or Cole, with the other teacher aides, or with the Association.

24. In August, 1989, approximately one week before school started, Collins called a meeting of the teacher aides. LaRose, Cole and the other aides were told of the change for the 1989-90 school year. Principal Collins announced that LaRose, Cole and many of the

other aides would be required to start work at 8:00 a.m. to help with morning supervision, instead of starting at 8:30 a.m. as was previously required. The number of work hours would remain the same, however, with the work day for teacher aides other than LaRose and Cole ending one-half hour earlier than the previous ending time.

25. Collins told LaRose, Cole and all other teachers aides that a one-half hour lunch period would be scheduled during the work day, but that the lunch time was not included in the time for which they were paid. Collins stated that those who had previously been paid for lunch time would not be paid for that time any longer.

26. Collins also told LaRose and Cole at this time that the special contract they had during 1987-88 and 1988-89 for morning bus duty would not be renewed. Their contracts were not renewed because, due to the change in the morning supervision plan, there was no need for special contracts for morning supervison. Thus, in effect their hours were reduced by one-half hour each day.

27. As a result, LaRose and Cole are paid for 6 1/2 hours a day during the 1989-90 school year. They work from 8:00 a.m. to 3:00 p.m., minus one-half hour for an unpaid lunch period. During the previous school year, when both their morning supervision and teacher aide positions are considered, they worked from 8:00 a.m. to 3:00 p.m., which included a one-half hour paid lunch period, and were paid for 7 hours a day.

28. The teacher aides expressed general discontent with the change in the aides' work day. LaRose asked Collins to speak with Superintendent Pentkowski to see if she could retain the morning supervision contract.

29. On or about August 31, 1989, LaRose and Cole notified Phillip Becker, UniServ Director for the Vermont-NEA, that they had lost their paid lunch period and their morning supervision contracts.

30. Both Principal Collins and Becker spoke with Superintendent Pentkowski concerning this issue. Pentkowski brought the matter before the School Board on or about September 11, 1989, and on September 12, 1989, informed Becker that the School Board would not rescind its action. Pentkowski explained that the School Board believed the change was necessary to ensure adequate morning supervision.

31. No grievance was filed by or on behalf of teacher aides with respect to the new schedules and duties of aides for the 1989-90 school year.

OPINION

At issue is whether the School Board committed an unfair labor practice by violating the duty to bargain in good faith pursuant to 21 VSA §1725 and §1726(a)(5). The Association contends the School Board violated this duty through the following unilateral changes in conditions of employment: 1) discontinuing the practice of providing two teacher aides with a paid lunch break; and 2) not renewing special contracts for the same two aides to perform early morning bus supervision.

The unilateral imposition of terms of employment during the time an employer is under a legal duty to bargain in good faith is the very antithesis of bargaining and is a per se violation of the duty to bargain. Burlington Firefighters Association v. City of Burlington, 142 Vt. 433, 435-436 (1983). Absent a waiver of bargaining rights, an employer is required to bargain changes in mandatory bargaining

subjects during the term of an agreement if contract negotiations are ongoing or not ongoing. Burlington Firefighters Association, Local 3044, IAFF v. City of Burlington, 10 VLRB 53, 59 (1987). Mt.Abraham Education Association v. Mt. Abraham Union High School Board, 4 VLRB 224, 231 (1981).

Under the Municipal Employee Relations Act, "wages, hours and other conditions of employment" are mandatory bargaining subjects. "Wages, hours and other conditions of employment" means "any condition of employment directly affecting the economic circumstances, health, safety or convenience of employees but excluding matters of managerial prerogative" 21 VSA §1722(17).

We first address whether the School Board was required to bargain with the Association before discontinuing the practice of providing two teacher aides with a paid lunch break. We look to experience under the National Labor Relations Act ("NLRA"), 29 US §141-187, for guidance in determining whether a paid lunch period is a mandatory subject of bargaining. Resort to Federal precedent is a practice that has been approved by the Vermont Supreme Court in construing MERA's provisions which reflect similar provisions in NLRA. Burlington Firefighters Association, supra, at 435. Both MERA and NLRA, 29 U.S.C. 158(d), mandate bargaining over "wages, hours and other conditions of employment".

Under the NLRA, paid lunch breaks have been found to constitute "conditions of employment" and, thus, mandatory subjects of bargaining. Van Dorn Plastic Machinery Co. v. National Labor Relations Board, 736 F2d 343 (6th Cir., 1984). Van Dorn Plastic Machinery Co. and District 54, International Association of Machinists

and Aerospace Workers, AFL-CIO, 286 NLRB No. 117 (1987). We, too, conclude that a paid lunch break constitutes a mandatory subject of bargaining as defined in §1722(17) of MERA because it is a "condition of employment directly affecting the economic circumstances... of employees".

However, the School Board contends that it was within its rights at the commencement of the 1989-90 school year to eliminate a paid lunch period for two teacher aides because there never was any intent or authorization to pay aides for a duty-free lunch period; that the two aides were paid for their lunch break for a period of time due to confusion, misunderstanding or administrative error.

As the initiator of the unfair labor practice charge, the Association has the burden of demonstrating whether any improper unilateral change was effected. Burlington Firefighters Association v. City of Burlington, 4 VLRB 379, 389 (1981). Rev'd In Part On Other Grounds, 142 Vt. 434 (1983). To meet that burden here, the Association must demonstrate that the School Board changed an established practice. VSEA v. State of Vermont (re: Involuntary Transfer of Gonvaw, 7 VLRB 8, 31-32 (1984). An established practice is one that management has accepted and employees have relied upon for a significant period of time. Id, at 31. Local 98, IUOE v. Town of Rockingham, 7 VLRB 363, 375 (1984).

We conclude that the Association has demonstrated that such an established practice was changed here. Provisions relating to paid or unpaid lunch time for aides have not been contained in collective bargaining contracts between the Association and the School Board. Also, during negotiations ongoing at the time the unilateral change

was made here, neither party had made any proposals relating to paid or unpaid lunch time. However, a practice existed of paying one aide for her one-half hour duty-free lunch time for four years, and paying another aide for a lunch period for one year. That practice was discontinued by unilateral action of the school administration at the commencement of the 1989-90 school year. Even accepting that this practice was a mistake by school administrators, the fact that the practice existed for such a long period of time, and could have been changed well before by even a minimum degree of diligence by management, leads us to conclude that the practice was one that management had accepted and employees had relied upon for a significant period of time.

Nonetheless, the School Board contends that, even if the practice of paying the aides for their lunch period had some official sanction at one point in time, the School Board reserved to its sole and unilateral discretion, under Article VI of the collective bargaining contract, the power to make changes in this practice. We disagree. Article VI provides in pertinent part that "except as specifically and directly modified by express language in a specific provision of this contract, the (School Board) retains all rights and powers that it has or may hereafter be granted by law". As already discussed herein, the School Board has no right to make a unilateral change in a condition of employment without bargaining with the Association. Thus, the School Board lacked the "rights and powers... by law" under Article VI to unilaterally discontinue the practice of paying the two aides for their lunch period.

In sum, we conclude that the School Board made a unilateral change in a condition of employment in violation of its duty to

bargain in good faith, pursuant to 21 VSA §1725 and §1726(a)(5), by discontinuing the practice of providing two teacher aides with a paid lunch period.

We conclude otherwise with respect to the School Board not renewing special contracts for the same two aides to perform early morning bus supervision for one-half hour each day. Given that management had instituted a plan for early morning supervision whereby special contracts for such work no longer were needed, and given that the collective bargaining contract provided that the "number of hours worked by an individual paraprofessional shall be determined annually by the administration", the School Board made no improper unilateral change by reducing the aides' workday by one-half hour in not renewing the bus supervision contracts.

We turn to deciding what remedy to apply for this unfair labor practice. 21 VSA §1727(d) provides that, if the Board decides that an employer is engaging in any unfair labor practice, then the Board "shall issue and cause to be served on the person an order requiring him to cease and desist from the unfair labor practice and to take such affirmative action as the Board shall order".

The Union requests that the Board issue an order requiring the School Board to restore the one-half hour paid lunch period to the two teacher aides, and directing the School board to cease and desist from bad faith bargaining. We believe the remedy requested is within the range of appropriate remedies.

ORDER

Now therefore, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED:

1. The Castleton-Hubbardton Board of School Directors shall cease and desist from not paying Rose LaRose and Marguerite Cole, teacher aides at the Castleton Elementary School, for their one-half hour lunch periods; and

2. The School Board forthwith shall restore the one-half hour paid lunch period to LaRose and Cole.

Dated this 31st day of May, 1990, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Charles H. McHugh

Charles H. McHugh, Chairman

William G. Kemsley, Sr.

William G. Kemsley, Sr.

Catherine L. Frank

Catherine L. Frank