VERMONT LABOR RELATIONS BOARD

FAIR HAVEN GRADED SCHOOL TEACHERS ASSOCIATION, VERMONT-NEA	)	
v.	)	DOCKET NO. 89-83
FAIR HAVEN BOARD OF SCHOOL DIRECTORS	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On December 6, 1989, the Fair Haven Graded School Teachers Association, Vermont-NEA ("Association") filed an unfair labor practice charge against the Fair Haven Board of School Directors ("School Board"). The charge alleged that the School Board violated 21 VSA §1726(a)(5), and 16 VSA §2001 and §2004, by making a unilateral change in related economic conditions of employment without consultation or negotiation with the Association by unilaterally extending the length of the teachers' work day.

On January 16, 1990, after investigation of the charge, the Labor Relations Board issued an unfair labor practice complaint against the School Board. On February 20, 1990, a hearing was held before Board members Charles McHugh, Chairman; Catherine Frank and Leslie Seaver. Donna Watts, Associate General Counsel for Vermont-NEA, represented the Association. John Zawistoski, Attorney with Ryan, Smith and Carbine, represented the School Board. Requested Findings of Fact and Memoranda of Law were filed by the Association on March 27, 1990. The School Board postmarked its brief one day past the deadline established by the Board for postmarking briefs, and it has not been considered by the Board.

FINDINGS OF FACT

1. The Fair Haven School District is comprised of one school, the Fair Haven Graded School, which contains Grades K through 8. The School District is governed by the School Board. Wayne Cooke has been the Principal of the Fair Haven Graded School since approximately 1985. Raymond Pentkowski is the Superintendent of the School District.

2. The Association is the exclusive bargaining agent for all teachers of the Fair Haven Graded School.

3. The School Board and the Association were parties to a collective bargaining agreement, covering the periods from July 1, 1988, to June 30, 1989 ("1988-89 Agreement"). The 1988-89 Agreement provides, in relevant part:

> ... II Grievance Procedure
> A. Definitions
> 1. A grievance shall be any claim by a teacher, a group of teachers or the Association that there has been a violation, misinterpretation or misapplication of the written and presently operative terms of this Agreement.
>
> ...III Teacher Employment
> ... B. Working Conditions
> ... 4. Preparation Time. All teachers shall be provided a minimal (30) thirty consecutive minutes duty free preparation period on four (4) teaching days per week...
> 5. Duty Free Lunch. All teachers will be provided a daily duty free lunch period of a minimum of 30 consecutive minutes.
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> 6. No teachers shall.. be... reduced in... compensation... except for just and sufficient cause.
>
> ... C. Teacher Responsibilities
>
> 1. Teachers will continue to be available for work after school with students who need help, or to perform professional duties. The work day

> shall consist of 15 minutes before the beginning of the school day and 20 minutes after the school day ends, except for bus duty and scheduled meetings, not to exceed three per week.
>
> ... 4. Teacher participation in extra-curricular activities for which no additional compensation is paid shall be normally voluntary, except for subject-related clubs. At the same time, teachers recognize their responsibilities to their students and that their profession requires the performance of duties that involve the expenditure of time beyond that of the normal working day.

4. During February of 1989, the parties began negotiations for a successor to the 1988-89 Agreement. Among the proposals made by the Association were the following changes to the 1988-89 Agreement: 1) that bus duty for teachers be eliminated; and 2) that the following sentence be added to the existing provision of Section III(c)(1) of the Agreement:

> Except for extraordinary circumstances, the school day for teachers shall not exceed seven hours (Association Exhibit 3).

This proposed change to Section III(c)(1) of the Agreement is the only provision relative to the length of the teachers' workday that was a subject of bargaining for the 1989-90 Agreement. No changes were proposed by either party to the teachers' daily duty-free lunch period or to their four-day per week preparation time.

5. On May 22, 1989, an impasse in negotiations was declared. The parties entered into mediation on August 21, 1989, but failed to reach a full agreement. On December 15, 1989, a fact-finding hearing was held. The fact-finding report had not been issued as of the date of hearing before the Board.

6. During negotiations for the successor agreement, the Association's proposal to limit the teachers' school day to seven hours has remained an unresolved subject of bargaining between the parties.

7. During the 1988-89 school year, the school day began at 8:20 a.m. This was the time that students were required to be in the building. The school day ended at 3:00 p.m., when students were permitted to leave the building for the day. Pursuant to the 1988-89 Agreement, teachers were required to be on site at 8:05 a.m. - 15 minutes prior to the start of the school day - and were generally permitted to leave at 3:20 a.m. - 20 minutes following the end of the school day.

8. Sometime prior to the start of the 1989-90 school year, two new curriculum changes for Grades 7 and 8 were made by the Public School Approval Board. Two courses, called Technical Education and Living Arts, became additional required components of the 7th and/or 8th grade curriculums.

9. Grades 7 and 8, which are included in the Fair Haven Graded School, are generally subject to more stringent curriculum standards than are Grades K through 6. For example, certain subjects, such as social studies and mathematics, must be taught a minimum of 200 minutes each per week.

10. Prior to and during the 1988-89 school year, it had also been the practice to take students out of courses, such as social studies and math, to allow them to participate in band practice. During their absence from the classroom, no new material could be offered to the other students. Principal Cooke and the teachers

believed that this practice inhibited the student's learning. A means of providing time for special subjects without taking students out of other courses had been the subject of discussions between Principal Cooke and the teachers for a number of years.

11. To meet the requirements of the new curriculum additions, to continue providing the required number of minutes per week in other mandatory subjects, and to eliminate the practice of taking students out of class for special subjects such as band, it was deemed necessary to extend the school day. Sometime during the Spring of 1989, Principal Cooke and the School Board announced that, beginning with the 1989-90 school year, the school day would begin at 8:15 a.m.

12. At a faculty meeting in May of 1989, Principal Cooke told the teachers of the proposed change in the start of the school day for the 1989-90 school year. The teachers were aware that they would be expected to be on site at 8:00 a.m. - five minutes earlier than previously required - beginning with the 1989-90 school year. The school day would continue to end at 3:00 p.m. Teachers would generally be free to leave at 3:20 p.m., 20 minutes after the end of the school day, as was the practice during the previous school year.

13. Within a few days after the meeting, the Association objected to the extension of the length of the teachers' workday in a letter to Principal Cooke. Cooke did not respond to the letter.

14. Phillip Becker, Vermont-NEA UniServ Director, called Superintendent Pentkowski on August 31, 1989, to ask if the School Board would reconsider extending the length of the teachers' workday. Pentkowski told Becker that the School Board would not be reconsidering the extension.

15. The Association filed no grievance over the extension of the workday.

OPINION

Before addressing the merits of this unfair labor practice charge, we first address two preliminary issues.

At the hearing, the Association requested to amend its charge to reduce the alleged amount the workday was extended unilaterally from 10 minutes to five minutes. The School Board objected to this amendment on the grounds that it was untimely. At the hearing, the Board allowed the amendment subject to the right of the School Board to renew its objection. The School Board has renewed its objection.

Section 32.10 of the Vermont Labor Relations Board Rules of Practice allows for liberal amendment of pleadings. Section 32.7 encompasses the principles of Vermont Rules of Civil Procedure 15, and offer litigants considerable latitude in that a variance between pleadings and proof is not material unless it substantially prejudices the proceedings. Hanson v. Town of Springfield, 2 VLRB 146, 152 (1979). Grievance of Madru, 2 VLRB 203, 210 (1979). The amendment does not change the nature of the allegation the Association is making against the School Board, but simply clarifies the amount of the alleged change in the teachers' workday. Whether the change was 10 minutes as alleged originally, or five minutes as alleged in the amendment, does not change the nature of the allegation that an improper unilateral change in the length of the workday occurred. The School Board had fair notice of the nature of the claim, and the amendment in no way prejudiced the ability of the School Board to defend against the claim. Thus, we grant the request of the Association to amend the charge.

Nonetheless, the School Board contends that the charge filed by the Association should be dismissed as untimely. 21 VSA §1727(a) provides that a charge is untimely if filed more than six months after the alleged unfair labor practice occurred. The School Board contends the charge here is untimely since the Association had been advised of the decision to extend the length of the workday in May, 1989, yet did not file the charge protesting the change until more than six months later, on December 6, 1989. We disagree. The change in the length of the teachers' workday occurred upon implementation of the change at the beginning of the 1989-90 school year in September, not upon the notification to teachers in May that a change was to occur. Mt. Abraham Education Association v. Mt. Abraham Union High School Board of School Directors, 4 VLRB 224, 229 (1981). Thus, we conclude that the conduct alleged to be an unfair labor practice occurred in September, 1989. The Association filed its charge on December 6, 1989, within the six-month period. We do not dismiss this complaint on the basis of timeliness.

The Association contends that the School Board violated 21 VSA §1726(a)(5) and 16 VSA §2001 and §2004 by making a unilateral change in related economic conditions of employment without consultation or negotiation with the Association by unilaterally extending the length of the teachers' workday.

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 if the employer seeks any changes in mandatory bargaining subjects during the time an agreement is in effect 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, supra, at 231 (1981).

Under case precedent, it is clear that the length of the teachers' workday is a mandatory subject of bargaining. Under the Labor Relations for Teachers Act, "matters of salary, related economic conditions of employment and procedures for processing complaints and grievances relating to employment" are mandatory bargaining subjects. 16 VSA §2004. The length of the teachers' workday is a mandatory subject of bargaining pursuant to 16 VSA §2004 because it is a "related economic condition of employment" to salary; salary being established dependent partly on the number of hours a teacher works. North Country Education Association v. Board of School Directors of North Country School District, 5 VLRB 395, 408 (1982).

There also is no issue whether the length of the teachers' workday actually changed. It is clear that it was lengthened by five minutes at the beginning of the 1989-90 school year. The central issue is whether the provisions of the collective bargaining agreement in effect at the time the workday change was implemented, the 1988-90 Agreement, constituted a waiver of the rights of the Association to bargain concerning the lengthening of the teachers' workday by five minutes.

In determining whether a party has waived its bargaining rights, the Board has required that it be demonstrated a party consciously and explicitly waived its rights. Local 98, IUOE, AFL-CIO v. Town of Rockingham, 7 VLRB 363 (1984). VSEA v. State of Vermont (re: Implementation of "6-2" Schedule at Vermont State Hospital), 5 VLRB 303, 326 (1982). Mt. Abraham Education Association v. Mt. Abraham Board of School Directors, 4 VLRB 224 (1981). In such matters, we are further guided by the Vermont Supreme Court, which defines a waiver as the "intentional relinquishment of a known right". In re Grievance of Guttman, 139 Vt. 574 (1981).

We conclude that the Association consciously and explicitly waived its right to bargain concerning the five minute lengthening of the workday through the provisions of the 1988-89 Agreement. The Board has not ruled on unfair labor practice charges where the Board believed the dispute involved the interpretation of a collective bargaining agreement and employees had an adequate redress for the alleged wrongs through the grievance procedure. Burlington Education Association v. Burlington Board of School Commissioners, 1 VLRB 335 (1978). AFSCME Local 490 v. Town of Bennington, 9 VLRB 195 (1986).

We believe such a dispute exists here. Article III(c) of the 1988-89 Agreement clearly governs the length of the teachers' workday, in providing that "(t)he workday shall consist of 15 minutes before the beginning of the school day and 20 minutes after the school day ends". A dispute concerning the length of the workday involves an interpretation of this and other provisions of the Agreement. An adequate redress for the alleged wrong which occurred here existed through filing a grievance, which is defined under the Agreement as "a

violation, misinterpretation or misapplication of the written and presently operative terms of this Agreement". The Vermont Supreme Court has expressed a strong preference for grievance arbitration as "a reasonably amicable method of resolving disputes in the least expensive and most expeditious manner possible". Morton v. Essex Town School District, 140 Vt. 345, at 349 (1981).

In Morton, where the contract provided for binding grievance arbitration, the Court added:

> This Court has repeatedly supported the right of a teacher to pursue, through bargained for grievance procedures, arbitration of any claim of breach of contract in lieu of an action at law. Bellows Falls Union High School District No. 27 v. Rodia, 139 Vt. 262, 428 A2d. 1094 (1981); Brattleboro Union High School, supra; Fairchild v. West Rutland School District, 135 Vt. 282, 376 A2d 28 (1977); Danville School Directors, supra. Id, at 349.

Given the strong preference for grievance arbitration, and by extension the grievance procedure, as a policy matter, we conclude that filing a grievance over the interpretation of the 1988-89 Agreement was the appropriate route for the Association to pursue here. The Association waived its bargaining rights over the five minute extension of the workday, and we find no unfair labor practice was committed.

ORDER

Now therefore, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED that the unfair labor practice complaint in this matter is DISMISSED.

Dated this 31st day of May, 1989, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Charles H. McHugh, Chairman

Catherine L. Frank

Leslie G. Seaver