VERMONT LABOR RELATIONS BOARD

VERMONT STATE COLLEGES FACULTY FEDERATION, LOCAL 3180, LOCAL 3180, VFT, AFT, AFL-CIO	)	DOCKET NO. 91-14
v.	)	
VERMONT STATE COLLEGES	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On February 8, 1991, the Vermont State Colleges Faculty Federation, VFT, AFT, AFL-CIO ("Federation"), filed an unfair labor practice charge against the Vermont State Colleges ("Colleges"). Therein, the Federation alleged that the Colleges' practice, from fiscal year 1987 to fiscal year 1991, of awarding merit bonuses to most employees who are administrative/exempt employees not represented by the Federation, and awarding bonuses to virtually no employees represented by the Federation, constituted discrimination in regard to terms and conditions of employment to discourage membership in the Federation in violation of 3 VSA §961(3).

On October 2, 1991, following an investigation and submission of memoranda of law by the parties, the Vermont Labor Relations Board issued an unfair labor practice complaint. On October 28, 1991, the Federation filed a motion to amend its unfair labor practice charge to specify the amount in merit bonuses that was awarded by the Colleges in fiscal year 1991. The Colleges did not object to the motion to amend.

A hearing was held on January 22, 1992, before Board Members Louis A. Toepfer, Acting Chairman; Catherine L. Frank and Carroll

P. Comstock in the Board hearing room in Montpelier. Attorney Richard Cassidy represented the Federation. Attorney Nicholas DiGiovanni, Jr., represented the Colleges. The Federation filed a brief on February 5, 1992. The Colleges filed a brief on February 7, 1992.

STATEMENT OF FACTS

1. The collective bargaining agreements effective between the Colleges and the Federation covering state colleges faculty members from 1982-1984 and 1984-1986 provided that, in addition to a specified percentage salary increase for all faculty members, monies would be set aside to be divided on a pro rata basis among the colleges and awarded as merit bonuses to faculty members selected by the college presidents.

2. The 1982-84 Agreement provided that, for each year of the agreement, the equivalent of 1% of total salaries would be set aside for merit bonuses. In negotiations for the 1984-86 Agreement, the Federation proposed that merit bonus monies be eliminated and that all salary monies go into the salary pool for specified percentage salary increases for all faculty members. The Colleges proposed that the merit component to the salary plan be continued. Ultimately, a compromise was reached. For 1984-85, the entire 7% increase negotiated for salaries went into a salary pool for increases for all faculty members, and there were no monies set aside for merit bonuses. For 1985-86, there was a 6.5% increase in the salary pool and, in addition, 1% of total salaries were set aside for merit bonuses (Employer Exhibit 1).

3. In negotiations for the 1986-1988 contract, the Federation again proposed that merit bonus monies be eliminated.

The Colleges initially proposed that merit bonus monies be set aside in each year of the agreement. The Colleges subsequently proposed that no monies be set aside for merit bonuses but that the Colleges be granted the discretion to award merit bonuses to faculty members. The contract negotiated for 1986-1988 is consistent with the Colleges' counter-proposal and provided as follows in pertinent part:

> Nothing shall preclude the Colleges from awarding merit bonuses to ongoing bargaining unit members selected by the College Presidents, not to be included in base salary rates . . . Distribution of merit money shall not be subject to the grievance and arbitration procedure. (Employer Exhibit 1)

4. After negotiations concluded for the 1986-1988 Agreement, Stanley Carpenter, Colleges Director of Employee Relations, met with the Council of Presidents, composed of the presidents of each of the state colleges. Carpenter informed the presidents of the newly-negotiated provisions of the agreement relating to merit bonuses. Carpenter explained to the presidents that the contract provision on merit bonuses was enabling language allowing a merit bonus award if there were some extraordinary situations under which a president wished to provide a faculty member with a merit bonus. Carpenter indicated that the Federation had proposed that merit bonus monies be eliminated, and that the parties ultimately had agreed that the Colleges retained the discretion to provide merit bonuses to faculty members but that no monies would be set aside for such purposes. Carpenter informed the presidents that any merit bonuses which they granted to faculty members would have to come from the reallocation of monies in their existing budgets.

5. In negotiations for the 1988-1990 contract, neither the Federation nor the Colleges proposed any changes in the above contract language, and the negotiated contract contained this provision. No monies were set aside for merit bonuses.

6. In negotiations for the contract to succeed the 1988-1990 contract, again neither the Federation nor the Colleges proposed any changes in the contract language with respect to the issue of merit bonuses.

7. On January 26, 1990, in preparation for mediation during negotiations for the contract to succeed the 1988-1990 contract, Federation President Timothy Sturm requested by letter that Colleges Chancellor Charles Bunting provide him with "specific salary information on all employees for the current fiscal year and the three previous fiscal years."

8. From the time the 1986-88 Agreement was negotiated until this request on January 26, 1990, the Federation did not request from the Colleges merit bonus information on either the faculty represented by the Federation or Colleges employees not represented by the Federation.

9. By letter of April 10, 1990, Carpenter provided Sturm with total dollar amounts for merit bonuses awarded to administrators and exempt staff for the last three fiscal years.

10. By letter of April 16, 1990, at which point the Federation and the Colleges were in the fact-finding stage of negotiations, Sturm requested that Carpenter provide him with a specific breakdown by colleges of merit bonus payments. Sturm specifically requested that for each college and each fiscal year

the following information be provided: 1) number of merit bonus payments awarded, 2) number of employees eligible for such payments, 3) the smallest award and the largest award, and 4) the total amount awarded in merit bonus payments.

11. On April 17, 1990, Sturm wrote a letter to Ann Gosline, the factfinder employed by the parties to resolve their negotiations impasse, in which he stated that "the Federation believes that awarding merit bonuses in the Vermont State Colleges must be discussed in our deliberations over the VSC's 'ability to pay' full-time faculty appropriate salaries."

12. On May 16, 1990, Carpenter wrote Sturm a letter which provided in pertinent part as follows:

> I am in receipt of your request for additional information regarding merit bonus payments within the VSC system.
>
> First, to my knowledge there were no merit bonus payments made to represented staff employees.
>
> As you know, we have provided a three-year history of total merit bonuses. Also, for your information, the average merit bonus payment for FY '89 was approximately $618.00. I do not believe however, that your request for a specific breakdown of merit bonus payments made by institutions is pertinent to the Collective Bargaining process. In your letter to Ann Gosline, dated April 17, 1990 you stated ". . . the Federation believes that awarding merit bonuses in the Vermont State Colleges must be discussed in our deliberations over VSC's "ability to pay . . ."
>
> It is important to remember that the VSC system is a single corporation with a unified corporate budget. Thus, the information provided you regarding total merit bonus payments made within the system for the last three years is more than adequate to respond to your request.

13. Effective September 1, 1990, the Federation and the Colleges entered into a contract covering the period September 1, 1990 - August 31, 1992. The provision on payment of merit bonuses contained in the 1986-88 and 1988-90 contracts is included in the 1990-92 contract. No monies were set aside for merit bonuses.

14. On September 25, 1990, Carpenter provided the Federation with a specific breakdown by colleges of the merit bonus payments made to administrative/exempt employees (i.e., employees ineligible to be represented by the Federation) for the previous four fiscal years. Specifically, he provided the Federation with the information requested by Sturm in his April 16, 1990, letter. The Colleges provided this information only after the Federation's attorney threatened to bring litigation against the Colleges to require disclosure. The information provided by the Colleges forms the basis for the next four statements of fact.

15. In fiscal year 1987, the Colleges awarded merit bonuses to 70% of administrative/exempt employees. The average bonus to employees who received bonuses was $747, and the total amount awarded in merit bonuses was $142,671.

16. In fiscal year 1988, the Colleges awarded merit bonuses to 77% of administrative/exempt employees. The average bonus to employees who received bonuses was $745, and the total amount awarded in merit bonuses was $165,349.

17. In fiscal year 1989, the Colleges awarded merit bonuses to 84% of administrative/exempt employees. The average bonus to employees who received bonuses was $805, and the total amount awarded in merit bonuses to administrative/exempt employees was $189,870.

18. In fiscal year 1990, the Colleges awarded merit bonuses to 91% of administrative/exempt employees. The average bonus to employees who received bonuses was $694, and the total amount awarded in merit bonuses was $219,925.

19. In fiscal year 1991, the Colleges awarded merit bonuses to 89% of administrative/exempt employees. The average bonus to employees who received bonuses was $736, and the total amount awarded as merit bonuses was $232,547 (Joint Exhibit 1).

20. During the 1987, 1988, 1989, 1990 and 1991 fiscal years, only one faculty member represented by the Federation received a merit bonus. A faculty member received a merit bonus in fiscal year 1989.

21. During these five fiscal years, the average salary increase for administrative/exempt employees and faculty, excluding merit bonus payments, was as follows:

Fiscal Year	Administrative/Exempt Employees	Faculty
1987	5.25%	5.25%
1988	5.5%	5%
1989	7%	6.25%
1990	6%	6.25%
1991	5%	7%

22. Annual wage increases for administrative/exempt employees have included a merit component since at least 1982. Each year, through fiscal year 1991, 2% of the total salaries of administrative/exempt employees on each campus has been placed into a merit bonus pool. Merit bonus awards are then given to certain administrative/exempt employees at the discretion of the individual presidents for performance above and beyond the call of duty. The 2% pool cannot be used for any other purposes than awarding merit bonuses to administrative/exempt employees.

23. The Colleges do not announce or publish merit bonuses awarded to administrative/exempt employees. The Colleges have consistently resisted inquiries for information as to the

identity of recipients and the amount of merit bonus awards received by each individual.

24. At Vermont Technical College, the Faculty Assembly in April, 1991, opposed teaching excellence awards for faculty members (Employer Exhibit 11, page 6). In 1987, faculty at Castleton State College opposed the president's proposal to establish a $1000 merit bonus fund for faculty members.

25. Faculty have opportunities for rank promotions, sabbaticals, faculty fellowships, advanced study grants and professional travel monies which generally are not available to administrative/exempt employees.

26. On or before October 10, 1990, the Colleges and the Federation entered into an agreement which, in effect, suspended any period of limitation on filing an unfair labor practice charge in this matter from that date to a date 21 days after either party gave notice to the other of the termination of settlement negotiations relating to this matter. The Colleges retained the right to contest the general untimeliness of the charge. The Colleges gave notice of termination of settlement negotiations on January 18, 1991. The Federation filed the unfair labor practice charge herein on February 8, 1991.

OPINION

At issue is whether the Colleges committed an unfair labor practice in this matter. The Federation contends that the Colleges' practice, during fiscal years 1987 through 1991, of awarding merit bonuses to most employees who are administrative/exempt employees not represented by the Federation, and awarding a merit bonus to only one employee represented by the Federation, violated 3 VSA §961(3). §961(3) makes it an unfair labor practice for an employer "by discrimination in regard to . . . any term or condition of employment to . . . discourage membership in any employee organization."

The Colleges contend that the Board should dismiss the Federation's charge in its entirety as untimely filed. In this regard, the State Employees Labor Relations Act provides that "(n)o complaint shall issue based on any unfair labor practice occurring more than six months prior to the filing of the charge with the (B)oard." 3 VSA §965(a). The six month clock begins to run at the time the charging party was aware, or reasonably should have been aware, that the alleged unfair labor practice occurred. Local 2323, International Association of Firefighters v. City of Rutland, 13 VLRB 48, 57 (1990).

We conclude that the charge is untimely with respect to allegations concerning the payment of merit bonuses in fiscal year 1987, 1988 and 1989. The Federation reasonably should have been aware of the payment of merit bonuses to administrative/exempt employees in these years shortly after such

payments were made, and similarly should have been aware during the respective fiscal years of faculty members not receiving such payments. Relevant considerations in this regard are: 1) the ready ability of the Federation to determine how many faculty members received merit bonus payments, and 2) the Federation's failure to request information of the Colleges concerning merit bonus payments to administrative/exempt employees prior to January, 1990, even though such information would have been helpful in previous rounds of contract negotiations. The Federation's failure to pursue these areas of inquiry during the respective fiscal years precluded the Federation from contesting the Colleges' actions by filing the unfair labor practice charge in February, 1991.

However, we disagree with the Colleges that the Federation's charge is untimely with respect to allegations concerning fiscal years 1990 and 1991. The Colleges contend that these years are barred from consideration because the Federation is not attacking individual merit bonus awards as much as it is attacking an underlying compensation approach taken by the Colleges - an approach which has not substantially changed since 1987 and about which the Federation should have been aware. However, there was a new occurrence of the alleged unfair labor practice every fiscal year during which the Colleges awarded merit bonus payments to administrative/exempt employees. As long as the Federation filed a charge with respect to each new occurrence within the statutory six month timeframe, which the Federation did here with respect to the allegations concerning fiscal years 1990 and 1991, the

charge is timely.

We thus turn to determine whether the Colleges violated 3 VSA §961(3) by awarding merit bonuses to a substantial majority of administrative/exempt staff during fiscal years 1990 and 1991, but awarding merit bonus payments to no faculty members during those years. Generally, at the heart of an employment action allegedly linked with anti-union discrimination is the question of employer motivation. Ohland v. Dubay, 133 Vt. 300, 302 (1975). However, if it can be reasonably concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of an anti-union motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. In re Southwestern Vermont Education Association v. Mt. Anthony Union High School Board of Directors, 136 Vt. 490, 494-495 (1978); citing NLRB v. Great Dane Trailers, 388 U.S. 26, 34 (1967) [construing §8(a)(3) of the National Labor Relations Act, 29 U.S.C. §158, which contains identical language to 3 VSA §961(3)]. The burden is upon the employer to establish that the employer was motivated by legitimate objectives. Id. The Federation contends that the payment of merit bonus payments was conduct inherently destructive of employee rights. Thus, the Board must decide whether inherently destructive conduct exists here.

The phrase "inherently destructive" is not easy to define precisely. In cases concluding that such conduct has occurred, the employer is held "to intend the very consequences which

foreseeably and inescapably flow from (the) actions . . . because (the) conduct does speak for itself - it is discriminatory and it does discourage union membership, and whatever the claimed overriding justification may be, it carries with it unavoidable consequences which the employer not only foresaw but must have intended." NLRB v. Erie Resistor Corp., 373 U.S. 221, 228 (1963). The Board has found inherently destructive conduct present when a municipal employer discharged employees engaged in a lawful strike. IBEW Local 300 v. Enosburg Falls Water and Light Department, 8 VLRB 193, 210 (1985). Affirmed, 148 Vt. 26 (1987).

The Federation cites the US Supreme Court decision in the above-cited Great Dane case for the proposition that inherently destructive conduct, discouraging membership in the Federation, occurred here. In Great Dane, the Court found inherently destructive conduct where the employer paid accrued vacation benefits to striker replacements, returning strikers and non-strikers while announcing the extinction of the same benefits to striking employees.

The Great Dane case and the case before us are readily distinguishable by the fact that the disparity in benefits was announced to the employees in Great Dane, and thus readily known to them. Id., 388 U.S. at 32. In the case before us, the Colleges made no announcement of the granting of merit bonus payments to administrative/exempt employees, and no announcement of the absence of such payments to faculty members. The disparity in merit bonus payments did not become known until the Federation requested such information well after the payments were made. We

cannot conclude that the Colleges engaged in inherently destructive conduct which they foresaw and intended when the conduct they engaged in was not disclosed or known to the Federation or employees for such a long period of time.

Since inherently discriminatory conduct is not involved here, the Federation must prove anti-union motivation to sustain its charge if the Colleges come forward with legitimate and substantial business justifications for its difference in treatment between administrative/exempt employees and faculty members. Great Dane, 388 U.S. at 34. By itself, the granting of higher wages to unorganized employees than to employees represented by unions is not sufficient to constitute an unfair labor practice, the National Labor Relations Board has concluded. Nissan Motor Corp., 263 NLRB 635, 642 (1980). Empire Pacific Industries, 257 NLRB 1425, 1426 (1980). L.M. Berry and Company, 254 NLRB 42, 44 (1981). B.F. Goodrich Co., 195 NLRB 914, 915 (1972). This is because it is only required that an employer bargain in good faith with the union representing its employees, and there is no duty to grant the same benefits to organized and unorganized employees. Empire Pacific, 257 NLRB at 1425-26. L.M. Berry, 254 NLRB at 44. An unfair labor practice may only be found in such circumstances where it is demonstrated that the disparity in treatment between represented and nonrepresented employees is unlawfully motivated. Nissan, 263 NLRB at 642. Empire Pacific, 257 NLRB at 1425-26.

The Federation has a very difficult burden to overcome to meet these standards in this case, since it negotiated contract language entitling faculty to no merit bonuses, setting aside no monies for merit bonuses and granting the Colleges total discretion as to payment of merit bonuses to faculty. This is a weighty consideration along with the fact that the Federation has presented no facts indicating unlawful employer motivation other than the awarding of merit bonus payments to nonrepresented employees and the absence of any such payments to represented employees.

The Colleges have presented legitimate and substantial business justifications for its difference in treatment with respect to the two groups of employees. Annual wage increases for administrative/exempt employees have included a merit component since at least 1982. The Colleges annually have placed 2% of the total salaries for administrative/exempt employees into a merit bonus pool, which monies cannot be used for any other purposes than awarding merit bonuses to administrative/exempt employees. The Colleges have presented the legitimate and substantial business justification for this merit component of rewarding employee performance above and beyond the call of duty. It is within the legitimate discretion of an employer to include a merit bonus component in a compensation system for its unrepresented employees under such circumstances.

The fact that the Colleges elected to continue this merit bonus component for administrative/exempt employees after the Federation successfully negotiated the elimination of merit bonus

monies for the faculty does not, without other evidence, indicate discrimination to discourage membership in the Federation. The Colleges have simply continued a legitimate management prerogative. The fact that the Colleges have granted almost no merit bonuses to faculty does not indicate discrimination to discourage membership in the Federation since no monies have been set aside for such purposes. Absent other evidence, the Federation cannot make a credible claim of discrimination when it was the Federation which successfully proposed the elimination of setting aside merit bonus monies for faculty.

In its memoranda of law filed in this matter, the Federation has cited the Board to many cases arising under the National Labor Relations Act where it was concluded that unlawful employer motivation existed due to disparity in wage increases or bonuses. However, none of the cases cited have factual circumstances remotely similar to the case before the Board. The cited cases generally involved situations where the employer either reduced employees' wages or did not grant bonuses previously granted immediately after the employees voted to be represented by a union, or increased employees' or benefits before a representation election to improperly induce them to vote against the union (i.e., the fist inside the velvet glove). The case before us is not comparable to those cases. Here, the Colleges' actions occurred at a time when the Federation and the Colleges had already negotiated many contracts, and the parties had agreed in the most recent contracts that no monies would be set aside for merit bonuses for faculty members.

In sum, the Federation has not sustained its burden of proving that the Colleges' merit bonus payments to a substantial majority of administrative/exempt employees, and no such payments to faculty members, constituted discrimination to discourage membership in the Federation.

ORDER

Now therefore, based on the foregoing findings of facts and for the foregoing reasons, it is hereby ORDERED that the unfair labor practice charge filed by the Vermont State Colleges Faculty Federation, Local 3180, VFT, AFT, AFL-CIO, against the Vermont State Colleges is DISMISSED.

Dated this 11th day of June, 1992, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Louis A. Toepfer, Acting Chairman

Catherine L. Frank

/s/Carroll P. Comstock
Carroll P. Comstock