VERMONT LABOR RELATIONS BOARD

LOCAL 2787, AFSCME	)	
	)	
v.	)	DOCKET NO. 91-41
	)	
CITY OF MONTPELIER	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On July 3, 1991, Local 2787, AFSCME ("Union") filed an unfair labor practice charge against the City of Montpelier ("City"). The Union represents various members of the Montpelier Police Department. The charge alleged that the City violated 21 VSA §1726(a)(1) and (5) by making a unilateral change from a weekly to a biweekly payroll system.

On September 26, 1991, the Vermont Labor Relations Board issued an unfair labor practice complaint against the City. A hearing was held before Board Members Charles H. McHugh, Chairman; Catherine L. Frank and Leslie G. Seaver on November 14, 1991. Attorney Alan Biederman represented the Union. Attorney Dennis Wells represented the City. The City filed a brief on November 22, 1991. The Union filed a brief on November 25, 1991.

FINDINGS OF FACT

1. The Union is the collective bargaining representative of certain employees of the City Police Department.

2. On January 24, 1990, Ryan Cotton, City Manager, distributed a memorandum to all City employees in their paychecks. This memorandum informed City employees that the City

intended to convert from a weekly to a biweekly payroll system as of June 1, 1990. Cotton informed the employees that they would be allowed to exercise a one-time option to cash in accrued paid leave time (vacation and compensatory time earned from working overtime) in an amount equal to 40 hours. The stated purpose of this "cash in" was to assist employees in making the transition from being paid once every week to once every two weeks (Employer Exhibit 3).

3. All City employees previously were paid on a weekly basis. Under the weekly payroll system, employees in the Police Department were paid every Thursday for work done for the seven days commencing two Tuesdays prior to payday and ending the Monday before payday.

4. At the time of the January 24, 1990, memorandum, the City and the Union were parties to a collective bargaining agreement which was effective from July 1, 1989 to June 30, 1991 ("1989-91 Agreement"). The 1989-91 Agreement contained a grievance procedure which culminated in binding arbitration for "any dispute concerning the interpretation or application of this Agreement" (Union Exhibit 2).

5. Article XXV, Section 1, of the 1989-91 Agreement provided:

> Notwithstanding any contrary provision, this Agreement represents the full and complete agreement between the parties and it is understood and agreed that any subject matter whether or not referred to in this Agreement shall not be open for negotiations during the term of this Agreement except as the parties hereto mutually agree (Union Exhibit 2).

6. At all times relevant, City employees in the Public Works Department have been represented by a union and City Fire Department employees also have been members of a union.

7. Shortly after the January 24 memorandum, many individual employees raised both questions and objections to the biweekly payroll conversion. Some employees of the Public Works Department submitted a petition in March, 1990, to the City objecting to the conversion. Although some Police Department employees signed the petition initiated by Public Works employees, Cotton was not aware Police Department employees had signed the petition until the hearing in this matter. Also, union representatives for Public Works employees and union representatives for Fire Department employees approached Cotton with concerns regarding the conversion.

8. On May 25, 1990, Cotton addressed a memorandum to all City employees, which memorandum was posted, and which stated:

> After conversations with numerous employees, I have learned some employees may not be able to take advantage of the one-time opportunity to cash in up to forty (40) hours of accrued vacation or comp time when we collectively make the transition to a bi-weekly payroll. This is due to either lack of sufficient accrued time or, because with vacation season coming up, there is a pressing need to use the accrued time in its intended manner.
>
> In an effort to prevent undue hardship on any employee due to the change to a bi-weekly payroll, I will extend the transition date from June 1st, 1990, to the first week of February, 1991.
>
> This new date will allow each employee to be able to more easily accrue up to forty (40) hours of vacation or comp time to cash in in February, if they so choose (Employer Exhibit 5).

9. Discussions between Cotton and the union representing Public Works employees resulted in a Memorandum of Understanding signed by the parties October 5, 1990. Therein, the parties agreed that the City may change from a weekly to a bi-weekly pay

period effective February 1, 1991, and provided for employees to cash in accrued vacation time or compensatory time, and/or borrow money from the City, to assist employees in making the transition to the bi-weekly payroll system (Employer Exhibit 6).

10. Discussions between Cotton and the union representing Fire Department employees resulted in an unwritten agreement as to the method of making the conversion to a biweekly payroll for the Fire Department effective February 1, 1991.

11. The leaders of the Union, representing Police Department employees, were fully aware throughout 1990 of developments concerning conversion to the biweekly payroll system. The issue was discussed at union meetings, including discussion concerning the other City unions agreeing to the conversion to a biweekly payroll system.

12. At no time during 1990 did any representatives of the Union approach Cotton, or any other City official, to express objections or concerns regarding the announced biweekly payroll conversion. At no time during 1990 did Cotton communicate with Union representatives directly concerning the payroll conversion. Cotton assumed that the Union had no objections to the conversion that was scheduled for February 1, 1991.

13. Negotiating teams for the City and the Union began to meet on or about November 15, 1990 to negotiate a successor agreement to the 1989-91 Agreement. The City proposed that the parties agree to certain groundrules for negotiations. The Union and the City ultimately reached agreement on a groundrule requiring that all new proposals be presented at the bargaining table no later than December 18, 1990. This date was changed to December 20, 1990 by agreement of the parties.

14. At no time prior to or on December 20, 1990, did the City raise the issue of changing the pay period from weekly to biweekly during contract negotiations between the parties.

15. For the week ending December 21, 1990, the Chief of Police, Douglas Hoyt, distributed to all members of the Police Department the December edition of a regular monthly newsletter concerning various issues entitled "Chief's Notes". Among other issues in these Notes, Chief Hoyt stated:

> I would like to take this opportunity to re-remind you of the planned conversion to a biweekly payroll. It appears that the most advantageous time will be in the beginning of February as that will follow a five paycheck month for January. For those desirous of an additional option, you are allowed to cash in 40 hours of vacation which would be paid during the first week of February. The second week of February would be the first biweekly check. The next check would arrive on or about the 28th of February. Should you have any questions or concerns, please bring them to the Chief now rather than waiting (Union Exhibit 1).

16. As a result of the reference to the "biweekly payroll" in the Chief's Notes, Union president Mark Moody met with Chief Hoyt to voice the Union's objection to the planned conversion. Moody explained that it was the Union's intention to initiate a grievance once the conversion took place. Hoyt recommended to Moody that the Union file a grievance prior to the conversion to the biweekly system; that otherwise it would be awkward to deal with the issue after the change had already been implemented.

17. Moody filed a grievance on the issue on January 8, 1991. The grievance stated in pertinent part:

> The City plans to change the bargaining units method of payment of compensation by changing from a one week pay period to a two week pay period which was made known as a definite change for this unit by Chief Douglas Hoyt to unit members Mark Moody and Michael

> Long on 01-04-91 Friday. This is an unfair labor practice by unilaterally changing a working condition/past practice which also affects several sections of the present or current contract between the City of Montpelier and the Montpelier Police Local 2787 bargaining unit...

Attached to the grievance was a sheet listing seven articles of the 1989-91 Agreement allegedly violated by the City (Employer Exhibit 1).

18. On January 30, 1991, representatives of the City and the Union met in a negotiating session. During this negotiating session, the City stated its desire to include the biweekly payroll conversion issue as part of negotiations for a successor agreement to the 1989-91 Agreement. The Union responded by stating that the parties had agreed upon a December 20 deadline for the introduction of new issues and the Union did not wish to modify that deadline to allow for the negotiation of the biweekly payroll issue.

19. On January 31, 1991, Cotton sent Moody a letter in response to the January 8, 1991, grievance. The letter stated:

> This is to inform you that the City will not be implementing the change to the payroll period that is the subject of the Union's grievance. As such, it is my understanding that the grievance is resolved.
>
> The City does wish to make the change in the payroll period for the Police Department, however, so that the City can maintain a uniform payroll policy. As such, I would like to discuss this issue with you in hopes of developing an implementation method which would be more acceptable to the Union.
>
> Since you have stated that the Union does not wish this issue to be considered as part of the negotiations currently taking place for the terms of a successor to the current collective bargaining agreement, I am asking that you discuss this matter with me as an issue separate and apart from those negotiations. In this

> vein, I am enclosing with this letter an alternative method of converting to the new payroll system. As you can see, this is the approach that was utilized for the Public Works Department. As you review this document, I hope that you will agree with me that this approach would allow the City to make the conversion that it feels is appropriate while having a minimal disruptive effect on your members.
>
> I will be contacting you in the next couple of days in hopes of scheduling a meeting to discuss this issue. If you have any questions before then, please contact me (Employer Exhibit 7).

20. In February, 1991, the City did convert all City employees other than Police Department employees to a biweekly payroll system.

21. During February and March, 1991, Cotton met with Moody on various occasions to discuss the biweekly payroll issue. During these meetings and through memoranda addressed to Moody, Cotton suggested various options for making the conversion to a biweekly system acceptable to Union members. Moody did not accept any of the various options, and consistently maintained that the Union had no duty to negotiate concerning the payroll period change since the City had not raised the issue prior to the December 20, 1990, cutoff date for new proposals (Employer Exhibits 8-12).

22. By memoranda of March 12, 1991, Cotton informed Moody that the City would be converting the Police Department to the biweekly payroll schedule, thus resulting in a uniform payroll system for the City. Cotton informed Moody of the schedule for the transition, but indicated that, if the Union preferred other options which had been discussed, or another option, the Union should contact Cotton (Employer Exhibits 13, 14).

23. The conversion of the Police Department to a biweekly payroll schedule began with the paychecks issued on April 4, 1991. The conversion was accomplished through a phase-in approach which gradually moved the pay dates back one or more days per pay cycle until a two-week interval was reached. As a result, the conversion was finalized with the paychecks issued on June 6, 1991 (Employer Exhibit 14).

24. As a result of the change to a biweekly payroll period, employees represented by the Union have had to adjust their planning of family finances, and payments to them have been delayed, as follows:

a) Employees who have loan payments and monthly bills must plan to pay those bills differently due to the change in payroll period.

b) Employees who have certain loan payments deducted from their paychecks, through a direct loan payment system, may now be required to have such direct payments made more than a week before their due date to insure that they will not be late or that they will not incur late charges. One employee has negotiated changes in the direct deduction and payment with her creditors.

c) The change delays the date when employees are actually paid for the work they have done, including overtime work. There is a significant amount of overtime worked generally by Police Department employees.

25. The Union did not initiate a grievance regarding the biweekly payroll conversion that was implemented in April 1991.

26. On May 24, 1991, the City and the Union reached a tentative agreement regarding the terms for a successor agreement to the 1989-91 Agreement. This successor Agreement was signed in its final form on June 27, 1991, to be effective July 1, 1991, through June 30, 1993 (Employer's Exhibit 15).

27. The City had a legitimate business reason to make a uniform change from a weekly to a biweekly payroll system.

MAJORITY OPINION

The Union contends that the City committed an unfair labor practice, pursuant to 21 VSA §1726(a)(1) and (5), by unilaterally implementing a change from a weekly to a biweekly payroll period. The Union contends that the City violated two separate precepts of collective bargaining: 1) unilaterally implementing a non-bargained change in the payroll period during the term of an existing collective bargaining agreement between the parties; and 2) breaching its duty to bargain in good faith with respect to a successor collective bargaining agreement to the then-existing contract by unilaterally implementing the payroll period change during negotiations after failing to comply with a negotiations groundrule, which created a deadline for introducing new bargaining proposals.

At the outset, we conclude that a change from a weekly to a biweekly period is a mandatory subject of bargaining under the Municipal Employee Relations Act, 21 VSA §1721, et seq ("MERA"). Under MERA, "wages, hours and conditions of employment" are mandatory bargaining subjects. 21 VSA §1722(4), 1725(a). "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). In IBPO, Local 475 v. City of Burlington, 7 VLRB 356, 357 (1984), the Board concluded that a change in the day on which employees are paid for a week's work is a mandatory subject of bargaining since it is a "condition of employment directly affecting the

economic circumstances... or convenience of employees". The Board recognized that the day an employee gets paid obviously affects household economic planning. Id. Similarly, the change from a weekly to a biweekly payroll period is a "condition of employment directly affecting the economic circumstances... or convenience of employees" since receiving a paycheck every two weeks, instead of every week, affects household economic planning.

In determining whether the change from a weekly to a biweekly pay period was an unfair labor practice, the Board must make two determinations: 1) whether unilaterally implementing the change during the term of the 1989-1991 Agreement was an unfair labor practice, and 2) whether it was an unfair labor practice to unilaterally implement the change with respect to the successor agreement to the 1989-1991 Agreement. We discuss each of these issues in turn.

The general rule is that, absent a waiver, the unilateral imposition of changes in mandatory bargaining subjects during the term of an agreement is an unfair labor practice. Burlington Fire Fighters 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).

The City unilaterally implemented the change from the weekly to the biweekly payroll period during the term of the 1989-91 Agreement, since the conversion began on April 4, 1991, nearly three months before the June 30, 1991, expiration date of the

1989-1991 Agreement. The Union waived no rights it had to contest a unilateral change during the term of the 1989-1991 Agreement with respect to the mandatory bargaining subject of whether employees are paid weekly or biweekly. In fact, the Union had no obligation to bargain the issue since the 1989-91 Agreement provided that it is "agreed that any subject matter whether or not referred to in this Agreement shall not be open for negotiations during the term of this Agreement except as the parties hereto mutually agree". The Union was entitled to, and did, rely on this provision to prevent any changes to the existing weekly payroll system during the term of the 1989-1991 Agreement.

The Board decision in IBPO, Local 475 v. City of Burlington, 7 VLRB 356, 357 (1984), does not change our conclusion in this regard. The City relies on this decision to support the City's contention that the City committed no unfair labor practice. In Burlington, the employer unilaterally rotated the pay day, Thursday, back one work day each month for a five-month period. Id, at 356. At the end of the five-month period, employees again were paid every Thursday, but there was a one-week withholding of wages, where previously employees were paid for work performed the same week they performed the work. Id. The Board concluded that, while the change involved a mandatory subject of bargaining, the City did not take any action which warranted the issuance of an unfair labor practice complaint. Id, at 357-358. The Board so concluded because the actual impact on workers of the gradual method of transition to the new pay system appeared

to be of minimal harm to the employees and de minimus, the payday change was part of an overall city plan to establish a fiscally sound and uniform payroll system which was a legitimate business need, and the City invited comments from employees regarding the pay day change prior to implementing the change. Id.

There are some similar circumstances existing in the case before us. It is undisputed that the City had a legitimate reason to make a uniform change from a weekly to a biweekly payroll system. Further, the City invited comments from employees and, after discussions with employees and representatives of two other unions representing City employees, the City met expressed concerns of employees by providing for a "cash in" of leave time, rescheduling the conversion to a later date and providing loans to employees.

These accommodations to employees certainly lessened the impact of the change on them. However, we conclude, unlike Burlington, that the change was not de minimus. The impact on employees was somewhat greater than existed in the Burlington case, since those employees ultimately continued to be paid every week, whereas here the change resulted in employees being paid every two weeks instead of every week. A change from a weekly to a biweekly system has an impact on employees' planning of household finances. The circumstances of this case are sufficiently distinct from Burlington so that we do not rely on the Burlington holding to diverge from the general rule that, absent a waiver, the unilateral imposition of changes in mandatory bargaining subjects during the term of an agreement is

an unfair labor practice. Thus, we conclude that the City committed an unfair labor practice by unilaterally implementing the new pay system during the term of the 1989-1991 Agreement.

However, we conclude that the City did not commit an unfair labor practice by unilaterally implementing the change with respect to the successor agreement to the 1989-1991 Agreement. It is significant to our determination that the City did not in fact implement the change on the planned February 1, 1991, implementation date. Rather, the City attempted to negotiate with the Union concerning the issue as part of negotiations for the successor collective bargaining agreement to the then-existing Agreement, once the Union asserted its objections to the announced change by filing a grievance on January 8, 1991. The Union contends that, by this time, the City had waived its right to bargain the issue since the City had allowed a December 20, 1990, deadline to pass for submission of proposals in negotiations for the successor agreement, and thus was justified in refusing to bargain with the City over the issue. The City unilaterally implemented the change to the biweekly system after six weeks of the Union consistently refusing to bargain over the issue.

We believe that the Union position that the City had waived its right to bargain over the issue inappropriately elevates form over substance under the circumstances of this case. At the time of the December 20 submission of proposals deadline, the Union had not approached the City regarding its objection to the conversion to the biweekly system even though the Union had been aware of the planned conversion for nearly a year, and knew two

other City unions had reached agreement with the City on the issue.

Under these circumstances, we cannot conclude that the City waived its right to bargain concerning the issue with respect to negotiations for a successor agreement to the 1989-1991 Agreement. 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, 5 VLRB 303, 326. In such matters, the Board is 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).

Prior to January 8, 1991, the City, not unreasonably, assumed by the Union's silence and inaction that the planned conversion to a biweekly payroll system was not a source of dispute. The City's failure to raise an issue based on a reasonable belief that the issue was not in dispute does not constitute the intentional relinquishment of a known right. Given the circumstances, it would be contrary to good labor relations, and reasoned judgment, to create a situation where one party could so use its own inaction to prevent the parties from negotiating concerning a mandatory subject of bargaining.

Thus, we conclude that the City did not waive its right to bargain over the issue during negotiations for the successor agreement. The Union should have bargained the issue with the City. By refusing to do so, the Union waived its rights to bargain the issue and created a situation where the City then

acted within its rights to make the unilateral change upon the effective date of the successor agreement.

Thus, the City committed an unfair labor practice, but for a limited time period. The conversion to the biweekly payroll period was an improper unilateral change for the period when conversion to the new system began on April 4, 1991, until the expiration of the 1989-1991 Agreement on June 30, 1991. However, the unilateral change was permitted upon the successor agreement becoming effective on July 1, 1991. Given the inevitable implementation of the plan on the effective date of the successor agreement, we conclude that there is no appropriate affirmative remedy to grant for the City's inappropriate failure to wait a few months before implementing the plan.

/s/ Catherine L. Frank
Catherine L. Frank

/s/ Leslie G. Seaver
Leslie G. Seaver

DISSENTING OPINION

I agree with the majority opinion for the reasons stated therein that the City committed an unfair labor practice by unilaterally implementing the biweekly payroll system during the term of the 1989-91 Agreement. However, I dissent from the conclusion of my colleagues that the City did not commit an unfair labor practice by unilaterally implementing the change with respect to the successor agreement to the 1989-1991 Agreement.

I conclude that the City failed to bargain in good faith with respect to the successor agreement by implementing the unilateral change after waiving its right to negotiate the issue during negotiations for the successor agreement. The parties agreed that December 20, 1990, was to be the final date on which new proposals for negotiations for the successor agreement could be raised. By failing to raise the issue of the change to a biweekly payroll period by December 20, 1990, the City consciously and explicitly waived its right to negotiate over that issue. Local 98, IUOE, AFL-CIO v. Town of Rockingham, 7 VLRB 363 (1984). A party can intentionally relinquish a known right by failing to assert it in a timely manner. VSEA v. State of Vermont, 6 VLRB 217, 226 (1983); and that is precisely what the City did here.

While this result may seem unduly harsh to the City, since the City did not know as of December 20 that the Union objected to the conversion to the biweekly plan yet now would be barred from raising the issue until negotiations for the successor agreement to the 1991-93 Agreement, the chain of events leading to this result began with the City announcing an improper unilateral change in a mandatory subject of bargaining. It was the City's obligation to raise an issue resulting in a change in a mandatory subject of bargaining, and the Union was well within its rights to insist that the City do so by the deadline for submitting bargaining proposals.

Finally, I would reject the City's contention that the Board should defer this matter to the grievance procedure negotiated by

the parties. The Union did, in fact, use the grievance process concerning this issue, and the City granted the grievance and informed the Union that it would "not be implementing the change to the payroll period that is the subject of the Union's grievance". Nonetheless, six weeks later the City announced the change was being implemented. Under the circumstances, it was appropriate for the Union to file an unfair labor practice charge on this issue, rather than seeking to pursue it through the grievance procedure.

Charles H. McHugh, Chairman

ORDER

Now therefore, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED that the City of Montpelier committed an unfair labor practice by unilaterally implementing a biweekly payroll system during the period April 4, 1991 to June 30, 1991, and that the unfair labor practice charge filed by Local 2787, AFSCME, in this matter is DISMISSED in all other respects.

Dated this 26th day of May, 1992, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Catherine L. Frank
Catherine L. Frank

/s/ Leslie G. Seaver
Leslie G. Seaver