VERMONT LABOR RELATIONS BOARD

VERMONT STATE EMPLOYEES
ASSOCIATION, INC.

v. DOCKET NO. 78-65S

STATE OF VERMONT, et al

FINDINGS OF FACT, OPINION AND ORDER

Statement of the Case

On April 10, 1978 the Vermont State Employees Association, Inc. (hereinafter "VSEA") filed an Unfair Labor Practice Charge against the State of Vermont (hereinafter "State") alleging that the State had violated 3 V.S.A. §961(5) by refusing to bargain certain proposed changes in the work schedules of approximately 260 nursing service employees at the Waterbury State Hospital. On the same date the VSEA filed a Motion for Preliminary Injunctive Relief in Washington Superior Court, and on April 13, 1978 the VSEA filed a Memorandum in Support of Motion for Injunction and Unfair Labor Practice Charge with the Washington Superior Court and the Labor Relations Board.

The Labor Relations Board held a hearing on the matter on April 21, 1978 at which time the State informed the Board that the implementation of the work schedule changes had been delayed. The parties agreed to an indefinite continuance on the matter until further action by either party, and a stipulation to that effect was filed with the Board and with the Washington Superior Court.

On April 26, 1979, following decision by the State to implement changes in the work schedules of 36 of the original 270 nursing service employees

at the Waterbury State Hospital, the matter again came for a hearing before the Labor Relations Board in Montpelier, Vermont. Chairman Kimberly B. Cheney, Member William G. Kemsley, Sr., and Member Robert H. Brown were present for the Board. The VSEA was represented by Alan S. Rome, Esquire and the State was represented by Louis P. Peck, Chief Assistant Attorney General. A Supplemental Memorandum of Law was filed by the VSEA on May 1, 1978 and Requests for Findings of Fact and Conclusions of Law and a Memorandum of Law and Argument were filed by the State on May 2, 1979.

FINDINGS OF FACT

1. At the hearing the parties stipulated to the following facts:

   a) The work schedules of 36 paraprofessional or nursing service employees at the Hospital will be changed if the proposed changes are implemented. The names of the 36 employees are listed in State's Exhibit A.

   b) Under the proposed work schedule changes, the 36 employees will work seven days straight, have two days off, work eight days straight, have four days off.

   c) The VSEA requested the State to bargain the proposed work schedule changes; the State declined to do so.

   d) The Board has not issued a formal complaint. The State has waived a complaint and the parties agree that the charges filed by the VSEA would be used by the Board in lieu of a complaint.

   e) Because no complaint was issued, no answer has been filed by the State. The Board has ruled that the absence of an answer will not prejudice the State.

2. The Board takes judicial notice of the Non-Management Unit Bargaining Agreement between the VSEA and the State of Vermont. (Board's Exhibit 1)

3. The present work schedule of the 36 paraprofessional employees allows them to have every second weekend off. Under the proposed work schedule change, the employees would have every third weekend off.

4. The proposed work schedule changes were originally scheduled for implementation on April 23, 1979, but the State agreed to defer implementation pending a decision by the Board on the issue of bargainability.

5. All 36 of the paraprofessionals whose work schedules are to be changed have been employed by the Hospital since the original unfair labor practice charges were filed.

6. Thirty five of the 36 paraprofessional employees to be affected by the proposed work schedule changes were interviewed for employment by either Mrs. Louis Sabin or Mrs. Edith Barney. Mrs. Louis Sabin is Nursing Administrator at the Hospital, and Mrs. Edith Barney is Staff Instructor at the Hospital. Both Mrs. Sabin and Mrs. Barney customarily interview applicants for paraprofessional positions at the Hospital as part of their duties.

7. On May 1, 1978 the Hospital implemented a policy that all job applicants would be advised that new schedules were being planned by the Hospital and when the changes were implemented their original schedules would be changed. Agreement to such schedule changes by a job applicant was established as a condition of employment. All the subject paraprofessional employees interviewed for employment by Mrs. Sabin and Mrs. Barney (35 of the 36) were advised in accordance with the Hospital policy. There were no objections stated by any of the 35. (State's Exhibits R - Z, A-1 and A-2)

8. Since December 1, 1978, in addition to the advice relating to changes in work schedules, applicants for paraprofessional positions at the Hospital had been asked to sign a prepared statement indicating their understanding that as a condition of employment, they may be required to work any shift and/or work schedule assigned to meet the needs of the Hospital. The subject paraprofessional employees who commenced work after December 1, 1978 (10) signed such statements. (State's Exhibit B - P)

9. The primary reasons given by the employer for the proposed schedule changes are the reduction of overtime and overtime payments and some improvement in weekend coverage which will result therefrom. The minimum number of paraprofessional employees needed to provide acceptable coverage at the Hospital on weekends is 130. Under presently existing conditions and work schedules it is necessary to assign overtime work to an average of 18 paraprofessionals for each of the two weekend days, in order to have the 130 paraprofessionals needed to maintain the minimum acceptable coverage. Minimum acceptable coverage at the Hospital means that only the bare necessities of the patients can be handled.

10. The 18 overtime assignments needed for each weekend day results from the following:

a) Eleven are needed due to the absence of employees who now have regular weekend schedules. These absences are due to employees calling in sick, vacations, etc.

b) Three paraprofessionals are regularly assigned for weekend overtime work.

c) Four are needed to meet special emergency situations such as suicidal patients.

11. The proposed changes in work schedules will require regularly scheduled weekend work by the subject employees and will enable the Hospital to reduce overtime weekend assignments by five per weekend day.

12. A. James Walter, Jr., Deputy Commissioner for Mental Health, estimated that $75,000 is presently spent per year to cover weekend overtime costs. Implementation of the proposed work schedule changes would reduce the Hospital's overtime costs by $20,800 per year, by reducing the number of employees working overtime by five per weekend day.

13. The Hospital has recently employed six additional paraprofessionals who are on the seven days on, two days off, eight days on, four days off schedule. These additional employees do not alter the need to change the schedules of the 36 subject employees, since the six are already in place and are part of the "presently existing conditions and work schedules" referred to in Paragraph 9 above.

14. Recommendations resulting from Hospital certification inspections and Medicare/Medicaid eligibility investigations conducted by the U. S. Department of Health, Education and Welfare include, among other things, better coverage on weekends.

15. Employment which requires employees to work on weekends is less desirable than work accomplished Monday through Friday and the more weekend work that is required during the year, the less desirable the employment.

16. No evidence was introduced concerning collateral costs which might occur, such as absenteeism or grievances, if the proposed schedule is implemented.

OPINION

The issue in this case is whether the State has committed an unfair labor practice in violation of 3 V.S.A. §961(5) by refusing to negotiate with the VSEA concerning changes in the work schedules of 36 paraprofessional or nursing service employees at Waterbury State Hospital during the term of the collective bargaining agreement. In many respects the factual pattern in this case is identical to a case recently decided by this Board, VSEA v. State of Vermont et al, #78-106S, Jan. 1979. That case involved proposed work schedule changes for the unit nurses and an activity therapist at Waterbury State Hospital. In that case, as in this one, the proposed schedule changes involved an increase in the number of weekends the employees would be required to work, and in both cases the State's decision to change the employees' weekend schedules was based on claimed substantial financial savings for the State and the necessity to increase patient care at the Hospital on weekends.

In the Nurses case we ruled that the State had committed an unfair labor practice by refusing to bargain the proposed work schedule changes on the grounds that work schedules constitute working conditions which are mandatory bargaining subjects under 3 V.S.A. §904(a)(3); and that, absent a waiver either by the terms of the agreement or by actual negotiation, the employer has a duty to bargain changes in mandatory subjects during the term of the contract under 3 V.S.A. §982(a). We further held that the waiver must be in clear and unmistakeable language. The mere absence of a

provision in the agreement dealing with a mandatory subject does not constitute a waiver; nor does the fact that the issue was raised by the union during the negotiations for the contract when neither party could have realistically foreseen that changes in past practices would become necessary during the term of the agreement. While these principles are based on precedents from the NLRB, other public employee boards have also adopted them. [cf. Florida PERC, John Palowitch in Orange County Classroom Teachers Association v. Orange County School Board, 2 FPER 280 (Case #8H-CA-764-1124, 77U-455, 1977) and Massachusetts Labor Relations Commission, City of Boston and Local 718, IAF and Boston Police Patrolmens' Association (MUP 2646 & 2647, 1977)]

The State has raised three issues which it argues distinguishes this case from the Nurses case. The first two issues involve the management rights provision in Article II of the Agreement and the overtime provision in Article XIV of the Agreement. The third issue involves the agreements which were entered into either orally or in writing by individual employees as a condition of their hiring, acknowledging that the State had the right to change their work schedules. After carefully considering each of these issues, we are not persuaded that any one of them constitutes a waiver of the State's duty to bargain with the VSEA over the changes in work schedules.

Management Rights

In our opinion in the Nurses case we dealt briefly with the issue of management rights guaranteed to the State both in Article II of the Agreement and by statute in 3 V.S.A. §905 (b)(1). (See Nurses Opinion, page 6) However, since the State has again raised the issue in this case as a contractual and statutory justification of management's right to unilaterally change work schedules, and since we believe the issue of management

rights versus bargaining rights is one of the key issues in public sector labor relations, we will consider it again in more detail here.

While labor law in the public sector has been able to rely on precedents established by the private sector in many areas, the scope of bargaining is one area in which new considerations have emerged in the public sector which are not applicable to the private sector. In the private sector the scope of bargaining is simply defined by statute as "wages, hours and other terms and conditions of employment. In many states, like Vermont, however, the scope of bargaining in the public sector is limited not just by a statute setting forth mandatory subjects of bargaining but also by a statute setting forth the managerial prerogatives of the employer. Conceptually, the right of employees to bargain with management over conditions of employment and the right of the employer to make decisions relating to managerial policy without consulting the union, are not mutually exclusive rights and yet at the same time they are inherently opposed to each other. As the Florida Public Employees Relations Commission has so aptly phrased it:

> "Conceptually the scope of bargaining can be viewed as a continuum. The management rights of a public employer are at one pole; the bargaining rights of the employees are at the other. Each proposed provision for the collective bargaining agreement falls somewhere along that continuum." Duval Teachers United, FEA-AFT, AFL-CIO v. Duval County School Board, 3 FPER 96, 101 (8H-CA 764-3134, 77U-202, 1977)

While some issues may clearly fall at one end of the continuum or the other, some issues will inevitably fall somewhere in the middle where management rights and bargaining rights overlap each other. For example, in public education decisions concerning class size, curriculum or the school calendar year are usually viewed as the prerogative of management since they are matters of educational policy; however, since

changes in any one of these areas may have an impact on the terms and conditions of employment of the school teachers, it has been argued that they are also bargainable. Some states which have considered the issue in depth have developed tests to be applied on a case-by-case basis which measure the scope of bargaining by balancing the rights of the employer to determine managerial policy against the rights of the employees to bargain the impact of that policy on their conditions of employment. [cf. for example Pennsylvania Labor Relations Board v. State College Area School, Penn., 337 A.2nd 262; Board of Education of the City of Englewood v. Englewood Teachers Association, 64NJL, 331 A.2nd 729; New York PERB, The City of White Plains and Professional Firefighters Association of White Plains, 5 PERB 3013 (Case No. U-0445, 1972); Florida PERC, Duval Teachers United, FEA-AFT, AFL-CIO v. Duval County School Board, supra; National Education Association of Shawnee Mission, Inc. v. Board of Education of Education of Shawnee Unified School District No. 512 Kansas, 512 P. 2nd 426 (1973)]

We believe that in the instant case the issue of work schedule changes unquestionably falls on the bargaining rights pole of the continuum. Not only do we believe that work schedules are a condition of employment and thus a mandatory bargaining issue, but furthermore we do not interpret the management rights provision of the statute or the Agreement as giving management the right to determine when employees must work as a matter of managerial policy. Both the statute and Article II, Sec 1.a. provide that management shall have the right to: "utilize personnel, methods and means in the most efficient manner possible." In our opinion "personnel" means that management has the right to decide who and how many shall work at a given time and in a given place; "methods" means that management may decide how or in what way work shall be performed; and "means" connotes the right to decide what shall be used in order to get the work done. None of these terms, however,

gives management the exclusive right to determine when each employee shall perform the work, and when is precisely the issue which is involved in determining work schedules. Prior to 1979, the bargaining law for federal employees had a similarly worded management rights provision. The Federal Labor Relations Commission analyzed the provision in a similar fashion with regard to the negotiability of work schedules and this analysis was upheld on appeal by the Federal District Court. (See Kheel, 18I Labor Law §53:04 (4) Page 53-48,49; Naval Public Works Center, Norfolk, Virginia FLRC #71A-56, 1 FLRC 431 (1973); National Boiler Council, Inc. v. FLRC 382 F.Supp. 322, 327 (1974).

Overtime Provision

The State argues that unlike the Nurses case, the decision to change the work schedules of the paraprofessional employees was for the purpose of reducing the amount of overtime work performed by paraprofessional employees at the Hospital in order to provide minimal patient coverage at the Hospital on weekends. The State argues that the parties have already bargained the subject of overtime and based on the negotiated provisions of Article XIV management has the right to minimize overtime by changing work schedules. VSEA, on the other hand, argues that Article XIV specifically prevents the State from altering work schedules. After carefully analyzing the relevant provisions of the Article we have concluded that neither argument is persuasive on the grounds that the language of Article XIV is not dispositive of the issue of work schedules.

Initially an interpretation of Article XIV requires the definition of three terms: "work", "work week", and "work schedules". In our opinion "work" as it is used in the Agreement refers to the tasks to be performed by an employee during regular working hours. "Work week" refers to the seven consecutive days of the week during and in which an employee's forty hours

of work are scheduled. "Work schedules" refers to the actual days (and hours) within the work week on which an employee is required to work.

Section 1.b. of Article XIV provides:

> "Each appointing authority shall schedule and assign regular work in a manner which will minimize the need for overtime work, and shall require compliance with reasonable standards of performance before requiring employees to work overtime."

The State argues that this provision specifically gives management the right to alter work schedules in order to minimize overtime. We disagree. Applying the definition of "work" to this provision, our interpretation is that appointing authorities have a duty to assign and schedule tasks during an employee's regular working hours in such a way that the employee will not have to work overtime in order to complete the tasks on time. The employee has a concurrent duty to schedule tasks which are assigned to him in such a way as to complete them on time during regular working hours. This does not, however, give the appointing authority the unilateral right to reschedule the regular working hours of an employee in order to minimize overtime.

Section 2.a. of Article XIV states:

> "Appointing authorities. . . shall not change or alter the regular work week of an employee for the purpose of avoiding payment of overtime."

While the VSEA has argued that this provision prevents management from changing work schedules in order to reduce overtime, we disagree with this analysis also. Applying the definition of "work week" to this provision, we interpret it, as does the State, to mean that the employer cannot change the days on which the seven consecutive days begin in which an employee's forty hours of regular work is scheduled in order to avoid paying overtime. In other words, if an employee completed the forty hours of regular work on the sixth day, the employer could not alter the work week by deciding

that it began on the sixth day in order to avoid paying the employee overtime. Again this provision does not pertain to what days within the work week will be worked, i.e. work schedules.

While the terms "work week" and "work" are specifically referred to in Article XIV, there is no specific reference to "work schedules". There is, however, evidence elsewhere in the Agreement that when the parties wished to bargain over the work schedules of other groups of employees, they did so in explicit terms, and agreed that "work schedules" would change only after bargaining. (See Articles XXXV and XXXVI) Based on this evidence of the intent of the parties, we believe that had the parties intended Article XIV to include work schedules, there would have been specific mention of "work schedules" as opposed to "work" or "work week".

The only remaining provision of Article XIV which could be construed as giving management the right to alter work schedules in order to reduce overtime is Section 1.a. which provides: "The State and the Association agree that overtime work for all employees is to be held to a minimum consistent with efficient and sound management of State government." The State argues that the budgetary savings that would be realized as a result of minimizing overtime is "consistent" with efficient State government. While we do not necessarily disagree with this conclusion, we believe that in evaluating whether a decision to minimize overtime is "consistent" with efficient government, budgetary concerns must be balanced against other personnel concerns such as "the potential for improved performance, reduced turnover, fewer grievances" etc. Corps of Engineers, Little Rock Dist., Little Rock, Ark. F.L.R.C. No. 71A-46, 1 F.L.R.C. 219 (1972), cited in Kheel, 18I Labor Law §53:04(4) p. 53-47. There is no evidence in this case

that any of these factors were considered. Furthermore, while Section 1.a. can be construed to give management the right to determine that costs need to be minimized by increasing the number of employees who perform regular work rather than overtime work at the Hospital on the weekends, we do not believe that absent any specific reference in the Article to the subject of work schedules, Section 1.a. should be so broadly construed as to render the impact of that decision on the work schedules of present employees non-negotiable.

Individual Waivers

The third issue raised by the State in an attempt to distinguish the instant case from the Nurses case, is the fact that as a condition of hiring, all the employees in this case either orally or in writing, indicated their understanding that they might be required to work any shift and/or work schedule assigned to them to meet the needs of the Hospital. The State argues that the employees thus waived their right to require that the State bargain work schedule changes in the future. We believe that these waivers are ineffectual as a defense in this case. Just as management cannot take away an employee's statutory right to become a member of a collective bargaining unit by requiring an employee to sign a "yellow dog contract" as a condition of hiring, it cannot take away the employee's statutory right under 3 V.S.A. §903(a) to negotiate with the employer on a mandatory subject through his collective bargaining representative by requiring the individual employee to waive that right as a condition of employment. Nor can management thereby avoid its own statutory duty to bargain exclusively with the employee's representative under 3 V.S.A.§961(5). In our view the results of such practices run absolutely contrary to the purpose of the State Labor Relations Act to provide orderly and peaceful procedures for preventing the interference of management with the rights of State employees.

Conclusion

In conclusion we believe that our ruling in the Nurses case is also dispositive of the instant case. While some of the facts are different, the basic pattern is the same and our legal conclusions concerning the duty to bargain changes in work schedules of the State employees during the term of the Agreement are as applicable here as they were in the Nurses case.

While the State has urged us to reconsider our opinion in the Nurses case based upon what it believes to be "grave errors", we are even less inclined to do so in view of the precedents cited both in this opinion and in the Nurses opinion. As we stated in our opinion in the Nurses case (page 13), we believe that in view of the prohibition against strikes, the scope of mandatory bargaining must be broadly construed in the public sector so as to effectuate the purposes of resolving labor disputes through negotiations. The Minnesota Supreme Court earlier came to the same conclusion: International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 320 v. City of Minneapolis, Minn. 2025 N.W. 2nd 254, 257 (1975). We concur with the statement of Archibald Cox, on the duty to bargain in good faith contained in his article which was recently cited by the U.S. Supreme Court Ford Motor Co. etc. v. NLRB 47 L.W. 4498, 4502 (May 14, 1979). That statement is particularly applicable to this case:

> "Participation in debate often produces changes in a seemingly fixed position either because new facts are brought to light or because the strengths and weaknesses of the several arguments become apparent. Sometimes the parties hit upon some novel compromise of an issue which has been thrashed over and over. Much is gained even by giving each side a better picture of the strength of the other's convictions. The cost is so slight that the potential gains easily justify the legal complusion to engage in the discussion." Cox, The Duty to Bargain in Good Faith 71 Harvard Law Review 1401, 1412 (1958) See also International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 320 v. City of Minneapolis, supra.

The duty to bargain does not require the State to alter its decision that the work schedules of the employees needs to be changed. There are, however, many ways to manipulate work schedules in order to achieve the desired result of minimizing overtime and increasing hospital care. (See N.Y. PERB City of White Plains and Professional Firefighters Assn. of White Plains, supra at 3015) A mutual decision based on the give and take of discussion is not only more beneficial to labor relations but potentially may provide a better solution which will satisfy not only the needs of management but the needs of the employees as well.

ORDER

In view of our authority to prevent unfair labor practices under 3 V.S.A. §965(d), it is hereby ORDERED that the Respondent, the State of Vermont, et al, shall:

1. Cease and desist from:

   (a) Refusing to bargain collectively in good faith with the Vermont State Employees Association concerning the proposed work schedule changes of 36 nursing service or paraprofessional employees at Waterbury State Hospital.

   (b) Unilaterally altering the present work schedules of the nursing service or paraprofessional employees at Waterbury State Hospital until such time as the matter is resolved consistent with this opinion.

2. Take the following affirmative action:

   Bargain collectively in good faith with the Vermont State Employees Association concerning the proposed changes in work schedules of the nursing service or paraprofessional employees at Waterbury State Hospital.

Dated this 29th day of June, 1979 at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney, Chairman

William G. Kemsley, Sr.

Robert H. Brown

Sup. Ct. dismissed as moot as contract had expired 9/17/80