VERMONT LABOR RELATIONS BOARD

VERMONT STATE EMPLOYEES' ASSOCIATION, INC. Complainant	)	
v.	)	
	)	#78-106S
STATE OF VERMONT, Honorable Richard A. Snelling in his official capacity as Governor of the State of Vermont, Richard Surles, in his official capacity as Commissioner of the Vermont Department of Mental Health, George Brooks, in his official capacity as Superintendent of the Waterbury State Hospital Respondents	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of the Case

On November 22, 1978 the Vermont State Employees' Association (hereinafter "VSEA") filed an unfair labor practice charge against the State of Vermont (hereinafter "State"). The charge alleged that the State had committed an unfair labor practice by refusing to bargain with VSEA over proposed work schedule changes for seven unit nurses at the Waterbury State Hospital (hereinafter "Hospital"). The State filed an answer to the charge on December 8, 1978. On December 12, 1978 the VSEA filed a request to add the position of activity therapist at the Hospital as a party to the charge. The addition was consented to by the State.

The matter came for a hearing on December 21, 1978. Commissioners Cheney and Brown were present. The VSEA was represented by Alan S. Rome, Esquire and the State was represented by Louis P. Peck, Chief Assistant Attorney General. The VSEA submitted requested findings and conclusions of law on the date of the hearing. At the close of the hearing the Board ordered briefs and additional memos due on or before December 26, 1978. On

January 11, 1978 the Board issued a notice of decision finding an unfair labor practice had been committed.

FINDINGS OF FACT

1. The State of Vermont employs seven unit nurses at the Waterbury State Hospital. The hours worked by the unit nurses are 8:00 a.m. to 4:00 p.m. Monday through Friday. These positions were in existence prior to July 6, 1976, the effective date of the Non-Management Unit Agreement Between the State of Vermont and the VSEA (hereinafter "Agreement").

2. The State employs one activity therapist at the Hospital who, until recently, worked Monday through Friday from 7:30 a.m. to 4:00 p.m. This position was also in existence prior to the date of the effective date of the Agreement.

3. Jane Grace is currently employed as a unit nurse supervisor at the Hospital. Prior to accepting this position two years ago she was employed as an assistant supervisor and her schedule for that position required that she work every other weekend.

4. In the spring of 1977, notices were posted in the Hospital announcing anticipated vacancies for positions as unit nurses. The notices specified that the work schedule for the positions would be Monday through Friday 8:00 a.m. to 4:00 p.m. (Complainant's 1 through 3).

5. In reliance on the job specifications as to work schedules and on the assurances of Dr. Brooks, Superintendent of the Hospital, that she would not have to work on weekends, Ms. Grace applied for and accepted one of the positions as unit nurse. One of her major reasons for changing jobs was so that she would no longer have to work on weekends.

6. On November 1, 1978, the Hospital informed Ms. Grace along with six other unit nurses that their work schedules for unit nurses would be changed as of January 14, 1979. The new work schedules would require unit nurses to work every other weekend with alternate Thursdays and Fridays off.

7. Ms. Lucia Griffith is currently employed as an activity therapist at the Hospital. Prior to accepting that position she worked as a psyciatric technician at the Hospital for 11 years. Her hours for that position were 6:00 a.m. to 2:30 p.m. with every other weekend off.

8. In the spring of 1977 notices were posted in the Hospital announcing for openings for activity leaders A/B. The notices specified that the work schedules for those positions would be 7:30 a.m. to 4:00 p.m. Monday through Friday.

9. In reliance on the job specifications on the notices Ms. Griffith applied for and was hired for one of these positions. Her sole reason for changing jobs was so that she would not have to work on weekends.

10. As of December 11, 1978 Ms. Griffith's schedule was changed and she was required to work every other weekend.

11. The reason for the proposed work schedule changes was to correct the United State Government Medicare surveyor's findings that the Hospital's direct supervision nursing was deficient, especially during evening and weekend hours.

12. Dr. George Brooks, Superintendent of the Hospital, stated that the improvement in nursing service had to be achieved within stringent budgetary requirements.

13. On November, 1978 Richard Surles, Commissioner of the Department of Mental Health, wrote Ms. Grace a letter in which he confirmed that the reasons for the work schedule changes were to satisfy the recommendations of the Medicare surveyors who were surveying the Hospital for recertification as a provider of in-patient psychiatric care. Such certification makes the Hospital eligible for Medicare/Medicaid reimbursement. The Commissioner further outlined his own efforts in assuring himself that the recommendations were accurate and necessary. He further stated that the Hospital's limited resources made it impossible for the Hospital to achieve an adequate level of nursing staff coverage without changing the work schedules of the unit nurses. (Complainant's 5).

14. The cost to the State of achieving adequate nursing coverage which would satisfy the Medicare surveyors' recommendations without changing the work schedules of the unit nurses is estimated at $18,000 per year.

15. It is the normal and customary practice of other area hospitals and many hospitals in other states to have nurses work on weekends. (Employer's A)

16. On November 13, 1978 Robert S. Babcock, Jr., Executive Director of the VSEA, wrote to Governor Richard A. Snelling urging that the State bargain the work schedule changes with the VSEA prior to implementing those changes.

17. The State of Vermont has refused to bargain those schedule changes with the VSEA.

18. It was stipulated by both parties that the charge of the VSEA would be treated as a complaint issued by the Board pursuant to the statutory requirements in 3 VSA §965(a).

OPINION

The current Agreement between the State and the VSEA contains no provision concerning the work schedules of the complainants as they relate to which days of the week they are required to work. The evidence indicates that the work schedules for the complainants' positions has in the past always been Monday through Friday and that the complainants accepted the positions in full reliance that this schedule would remain the same in the future. It is also apparent, however, that the State's decision to change the complainants' schedules by requiring that they work alternate weekends, is based on sound financial reasons relating to the Hospital's continued eligibility for Medicare/Medicaid reimbursements. The issue is whether the State is required to bargain with the VSEA as the exclusive bargaining representative of the complainants prior to implementing the proposed changes during the term of the Agreement. Thus this case requires us to consider for the first time certain aspects of the requirements for "mid-term" bargaining involving State employees.

The VSEA contends that work schedules are a mandatory bargaining subject and that since the right to bargain the schedules has never been waived, the State is under an obligation to bargain the issue prior to making any unilateral changes during the term of the contract. The State, on the other hand, argues that work schedules are not a mandatory bargaining subject under Vermont

law and that requiring the State to bargain the proposed changes would be contrary to its rights as an employer under the State Employees Labor Relations Act.

The State bases its authority for unilaterally changing the complainants' schedules on Article II of the Agreement which authorizes the State as the employer to "utilize personnel, methods and means in the most appropriate manner possible". The language in the contract is almost identical to the statutory language of 3 VSA §905(b)(1). While it can be argued that changing the complainants' schedules is the most appropriate means of utilizing personnel in view of the substantial cost to the State of maintaining their current schedules, this does not alter the fact that legally both the provisions of Article II and §905(b)(1) are "subject to" the rights guaranteed by the State Employees Labor Relations Act. The Act mandates in 3 VSA §904(a) that certain matters relating to the relationship between the employer and the employee be the subject of collective bargaining.

Prior to being amended in 1977, §904(a) specifically listed "work schedules relating to assigned hour and days of the week" and "general working conditions" as mandatory subjects of bargaining. In 1977 the Legislature eliminated "work schedules relating to assigned hours and days of the week" and substituted "minimum hours per week", §904(a)(3). The State argues that the effect of this amendment was to eliminate "work schedules" as a mandatory subject of bargaining.

We view the 1977 amendments from a slightly different perspective. The amendments to §904 were contained in Section 5 of

Public Act No. 109 of the 1977 Legislature. When the Section 5 is read in pari materia with the other provisions of that Act a slightly different interpretation of the legislative purpose behind the amendments presents itself. Section 1(d) of Act 109 provided that all employees work 40 hours per week through June 1977, after which date minimum hours per week would be the subject of collective bargaining. We believe the legislative intent in substituting "minimum hours per week" for "work schedules" in §904(a)(2) was to make Section 5 of the Act consistent with Section 1(d) by indicating through the use of specific language that the 40 hour minimum work week would be a mandatory subject of bargaining in any new agreement which would take effect after June 30, 1979.

The State contends that the inclusion of both "work schedules relating to hours and days of the week" and "general working conditions" in the earlier version of §904(a) indicates a narrow interpretation of "working conditions" which excludes "work schedules". The State urges that the present use of "working conditions" in the amended version of §904(a) should be given the same narrow interpretation. We do not concur.

The term "working conditions" has generally been interpreted in labor management relations to have a broad meaning which encompasses "the panoply of the incidents of the employment relationship". [Independent Oil Workers U., Local 117 v. American Oil Co. 296 F. Supp. 650, 658 (1969)]. Under Federal law, mandatory subjects of bargaining are "wages, hours and other terms and conditions of employment" 29 USCA §158(d). While work schedules as they relate to hours have generally been viewed as a distinct

category, work schedules as they relate to days of the week have been viewed as a "condition of employment" (cf Willamette Industries, infra). Thus by amending the subsections under §904(a) so that the first subsection dealt with wages, the second with "minimum hours" and the third with "working conditions", the 1977 Legislature brought the Vermont Employees Labor Relations Act into closer compliance with the mandatory bargaining provisions of the NLRA. The purpose of eliminating "work schedules as they relate to days of the week" from subsection 2 was to eliminate superfluous language since this subject is already covered under "working conditions" in subsection 3.

Having found that the complainants' work schedules are a mandatory bargaining subject, we are still faced with the question of whether the State has a duty to bargain mandatory subjects during the term of the Agreement. While this Board is not bound by decisions of Federal courts or the NLRB, they have been recognized by this Board and the Vermont Supreme Court as having significant value as precedent when Vermont's statutory provisions parallel the provisions of the NLRA:

> "The particular thicket of labor law in which we presently find ourselves is one through which our own cases have laid out few trails. But we have looked to Federal decision, under parallel legislation, for guidance on other occasions and that procedure seems appropriate here." In re Southwestern Vermont Ed. Assoc. and Mt. Anthony Union High School, Vt. Sup. Ct., June Term, 1978.

In Willamette Industries, Inc. et al.,1975-6 CCH NLRR No. 16283, the National Labor Relations Board ruled that the employer could not unilaterally change the work schedules of its

jitney drivers from a Monday-Friday schedule with overtime for weekend driving, to a consecutive five day work schedule without regard for Saturday or Sunday overtime. The change had been instituted for financial reasons without negotiating with the union representing the drivers. The Board affirmed the Administrative Law Judge in ruling that:

> "It is entirely unimportant that the employer had economic reasons for changing the work schedule unilaterally. Under section 8(d), the employer was explicitly forbidden to modify the terms of the agreement." Willamette Industries, Inc. supra at No. 16283

29 USCA §158(d) cited above in Willamette states that neither the employer nor the employees or their representatives shall be required:

> "to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract." 29 USCA §158(d)

We believe that this provision of the NLRA is significantly similar to 3 VSA §982(a) which states in pertinent part:

> "Collective bargaining agreements...shall not be subject to cancellation or renegotiation during the term except with the mutual consent in writing of both parties..."

In NLRB v. Jacobs 196 F 2d 680 (2nd Cir. 1952) the court held that while §158(d) of the NLRA precluded renegotiation of terms and conditions already provided for in the terms of the agreement, it did not:

> "relieve an employer of the duty to bargain as to subjects which were neither discussed nor embodied in any of the terms and conditions of the contract." id at 684.

The duty to bargain during the term of the contract was again addressed in NL Industries 536 F 2d 786 (8th Cir. 1976) where the court held that:

> "Absent a waiver manifested either by the terms of contract or by actual negotiation, the Act requires bargaining upon request on a mandatory subject during the term of a contract." id at 789.

The State contends that since the work schedules of the complainants were not reduced in writing as a term of the Agreement, the VSEA has waived any right to bargain the issue during the term of the contract. We disagree with this analysis. We believe that the statutory provisions of 982(a), like its federal counterpart in §158(d), preclude mid-term bargaining over terms and conditions which are either included in the Agreement or which are discussed during the negotiations for the Agreement. In this particular case, however, the complainants' schedules are not provided for in the Agreement, nor is there any evidence to suggest that they were discussed during the negotiations for the Agreement in the Fall of 1976.

When the Agreement was negotiated both parties foresaw that the work schedules for certain groups of employees would be subject to change during the term of the Agreement and terms were negotiated which specifically provided for the schedules of those employees (cf for eg. Articles XXXIII and XXXV). No provisions were made, however, for the schedules of the majority of employees covered by the contract because their schedules were well established and neither party contemplated that any necessity would arise which would require changing them.

The Non-Management Unit Agreement covers many thousands of employees in State Government and it would be unreasonable to

require that provisions be negotiated for the work schedule of every group of employees affected by it if at the time the contract is negotiated neither party foresees that the schedules are likely to be changed. If such were the case, the negotiating process would indeed be endless. A collective bargaining agreement cannot cover every aspect of the working relationship between management and its employees. To a large extent that relationship is governed by past practices which are too numerous to be included in the Agreement but which are relied on as much by the employer as by the employee.

The Monday-Friday work schedules of the complainants were well established prior to the negotiations for the current agreement and we are persuaded that it was not unreasonable for the VSEA to expect that they would continue in effect during the term of the Agreement. In short, because the schedules were a past practice, the union could not reasonably have anticipated any necessity to insure their continuation through a specific provision in the Agreement. While we do not believe, nor has the VSEA argued, that the work schedules are embodied in the Agreement as past practices and are therefore unalterable during the term of the contract, we do find the right to bargain them during the term of the Agreement was not waived by the VSEA's failure to anticipate that they might be changed. We also think it worthy of note as set forth in the findings that the positions involved had been specifically posted as weekday positions, and that the employees had taken their positions in reliance on that posting.

Any other result would be productive of distrust and suspicion between the parties. Instead of relying on the good faith of the employer not to make changes without prior consultation, the union would be forced to regard every minute aspect of employment as an item to be bargained or else deemed to have waived its right to bargain at a later date. Bargaining sessions would then turn into competitions to determine which party could have the longest (and perhaps the most trivial) list of bargainable items.

In NLRB v. Jacobs supra, the Second Circuit Court of Appeals recognized that the purpose of §158(d) was to give stability to agreements governing labor management relations. They also recognized however, that this purpose conflicts with the general purpose of the NLRA which is to require employers and employees to bargain collectively "to the end that industrial disputes be resolved peacefully." id at 684. In the belief that the general purpose of the Act should be given effect whenever possible, they resolved this conflict by applying §158(d) only to terms and conditions which were either included in the contract or had been discussed during negotiations.

We believe that the purposes of 3 VSA §982(a) must also be similarly interpreted in order to give effect whenever possible to the general purpose of the State Employees Labor Relations Act which is "to provide orderly and peaceful procedures for preventing the interference by either (the State of Vermont or the State employees) with the legitimate rights of the other" 3 VSA §901

In concluding that the Vermont Legislature intended to require mid-term bargaining in circumstances such as these we have in mind the important differences between the Federal Act and our own State Employees Act. Under the NLRA private sector employees have the right to strike, a weapon which is unavailable to State employees. Furthermore, in the event that the parties are unable to reach agreement, the State Employees Act, unlike the NLRA, provides management with the last word. 3 V.S.A. §982(f) applies when there is impasse, and "there is not an existing agreement in effect". While this section clearly governs expired contracts, [See VSEA v. State 134 Vt 195, 199 (1976)], we believe it also governs this case because there is no agreement concerning it in effect.

In view of the power the Legislature has bestowed upon the Secretary of Administration through §982(f), and having made strikes illegal, we would hesitate to find that the Legislature also intended to deprive the union of the right to negotiate in good faith to impasse.

For the foregoing reasons we find that the State has committed an unfair labor practice in violation of 3 V.S.A. §961(5) by refusing to bargain the proposed changes in the complainants' work schedules during the term of the Agreement with the VSEA as the complainants exclusive bargaining representative.

(continued, ORDER)

ORDER

In view of our authority to prevent unfair labor practices under 3 V.S.A. §965(d), it is hereby ORDERED that the Respondents, 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 changes in work schedules of the Unit Nurses and the Activity Therapist at the Waterbury State Hospital.

   (b) Unilaterally altering the Monday through Friday work schedule of the Activity Therapist until such time as the matter is resolved consistent with this Opinion.

2. Take the following affirmative action:

   (a) Bargain collectively in good faith with the Vermont State Employees Association concerning the proposed changes in work schedules of the Unit Nurses and the Activity Therapist at the Waterbury State Hospital.

Dated this 2nd day of ~~January~~ February, 1979 at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney

Kimberly B. Cheney, Chairman

Robert H. Brown

Robert H. Brown

Appeal dismissed as Moot - Sept 17, '80