Vermont Labor Relations Board

VERMONT STATE COLLEGES FACULTY FEDERATION, AFT, LOCAL 3180, AFL-CIO	)	
	)	DOCKET NO. 79-2S
v.	)	
VERMONT STATE COLLEGES	)	

FINDINGS OF FACT, OPINION AND ORDER

STATEMENT OF THE CASE

On January 29, 1979, the Vermont State Colleges Faculty Federation (hereinafter "Federation") filed a petition with the Vermont Labor Relations Board (hereinafter "Board") alleging that the Vermont State Colleges (hereinafter "Employer") violated Article XXXVIII of the collective bargaining agreement between the parties, as extended by Secretary of Administration Richard W. Mallary, by not allocating and making subsequent disbursements from a faculty development fund for the 1978-79 academic year.

An answer to the petition was filed by the Employer on February 8, 1979.

On July 19, 1979, a hearing on this matter was held before Board Members Kimberly B. Cheney, William G. Kemsley, Sr., and Robert H. Brown. The Employer was represented by Nicholas DiGiovanni, Jr., Esq. The Federation was represented by Stephen T. Butterfield, Federation grievance chairperson.

Briefs requesting findings of fact and conclusions of law were filed by the Petitioner on August 1, 1979, and by the Employer on August 2, 1979.

FINDINGS OF FACT

1. The Federation is the exclusive bargaining representative of the Vermont State Colleges faculty.

2. The Federation and the Colleges entered into a collective bargaining agreement, effective December 18, 1976 and was renewed through April 30, 1979 setting forth the terms and conditions of employment for the faculty at the colleges.

3. Article XXXVIII of the agreement, in relevant part, provides that:

> "Funds shall be established for the purpose of providing advanced study grants and sabbaticals. For each year of the contract, the advanced study loan fund, which shall be distributed to each College on a pro-rata basis, shall be $35,000."

4. Collective bargaining between the parties had not resulted in a new agreement as the September 1, 1978, contract termination date approached.

5. On August 18, 1978, Secretary of Administration Richard W. Mallary sent a letter to Chairman Kimberly B. Cheney of the Vermont Labor Relations Board stating:

> ". . . pursuant to Title 3 V.S.A., section 982(f), I am hereby extending all the provisions of the present agreement between the Vermont State Colleges and the Vermont State Colleges Faculty Federation which is, at present, due to expire on September 1, 1978 to be in full force and effect through December 1, 1978 or until such time as a new agreement between the parties is signed and ratified, whichever comes sooner."
> Grievant's Exhibit #1, p.2

6. On October 20, 1978, a faculty member at Lyndon State College was denied money from the Faculty Development Fund, on the grounds that none was available.

7. On November 6, 1978, the Federation filed a grievance at Lyndon State College for failure to make disbursements from the Faculty Development Fund for 1978-79, therefore violating Article XXXVIII of the collective

bargaining agreement, as extended by Secretary Mallary. (Grievant's Exhibit #4)

8. On November 29, 1978, Secretary Mallary again sent a letter to the Chairman of the Board with copies to the Employer and the Petitioner and their representatives, which further extended the agreement between the parties, stating:

> ". . . pursuant to Title 3 V.S.A. 982(f), I am hereby extending all the provisions of the present agreement between the Vermont State Colleges and the Vermont State Colleges Faculty Federation which is, at present, due to expire on December 1, 1978, to be in full force and effect through April 30, 1979, or until such time as a new agreement between the parties is signed and ratified, whichever comes sooner." (Grievant's Exhibit #2, p.2)

9. Secretary Mallary testified at the hearing on this matter, in extending the original agreement it was his intent to maintain the "status quo" relationship between the parties as long as negotiations on a new agreement continued.

10. On December 4, 1978 , the step one grievance was denied (Grievant's Exhibit #5) followed by a denial at the step two level on January 4, 1979. (Grievant's Exhibit #7)

11. No funds for the advanced study loan fund as provided for in Article XXXVIII of the original agreement were allocated by the Employer for the 1978-79 academic year.

12. In executing a successor agreement on May 1, 1979, the parties agreed to the following provision for the Faculty Development Fund, Article XXXVIII:

> "Funds shall be established for the purpose of providing advanced study grants and sabbaticals. For contract year 1979/80, the advanced study loan fund, which shall be distributed to each college on a pro-rata basis, shall be $35,000; furthermore, the same funding will be made for advanced study loans for contract year 1978/79 if, and but only if, it is determined by the Vermont Labor Relations Board that such funding should

have taken place in its final resolution of Case No. 79-2S, 'Faculty Development Fund Grievance'."

OPINION

This case requires us to review, in the context of binding arbitration stipulated to by the parties, the Secretary of Administration's exercise of the authority, granted him in 3 V.S.A. section 982(f), to extend working conditions of State employees after expiration of a negotiated contract. That statute provides:

> "In the event the employer and the collective bargaining unit are unable to arrive at an agreement and there is not an existing agreement in effect, the secretary of administration, with the approval of the governor may make such temporary rules and regulations as may be necessary to ensure the uninterrupted and efficient conduct of state business. Such rules and regulations shall terminate and be of no further force and effect, except for any rights arising thereunder, as soon as an agreement is reached."

Our Supreme Court has held in Vt. State Employees Assn., Inc. v. State, 134 Vt 195, 199 (1976):

> "The only enforceable arrangements relating to employment practices after termination of a collective bargaining agreement and before the agreement upon a new one are those established under the authority of 3 V.S.A. section 982(e) by the Secretary of Administration and the Governor." [Now section 982(f)]

We note in passing that the Secretary's powers under 3 V.S.A. section 982(f) are in conflict with the State's duty to bargain in good faith established by 3 V.S.A. section 961(5); and at some point, imposition of unilateral terms would violate that duty, being inherently destructive of the duty to bargain. See Cardinale v. Andersen, 75 Misc. 2d 210, 347 NYS 2d 284 (1973). That court held:

> "Conceivably there may be circumstances in the field of public employment where during the inter-contract period an employer's abrupt curtailment of employee benefits customarily enjoyed would be so drastic as to influence or

> undermine materially and deliberately the pending collective bargaining process." Cardinale v. Andersen, supra at 2272.

That problem, however, is not an issue now before us in an unfair labor practice context. Accordingly, we look to Secrtary Mallary's letter to determine whether or not the advance study loan fund existed for the 1978/79 academic year.

The Employer invites us to apply NLRB v. Katz, 369 U.S. 736 (1962) reasoning. There, the U.S. Supreme Court analysed employment benefits in the private sector which must be maintained during bargaining to preserve the status quo. We are then asked to determine that maintenance of the fund was not necessary to preserve the "status quo", and hence that benefit was terminable.

We have embarked on this analysis in the past, Chester Educ. Assn. v. Chester-Andover School Bd. of Dir. , 1 VLRB 476 (1978). It is a road with many conflicting decisions. Compare Board of Coop. Educ. Services v. PERB 41 NY 2d 753, 395 NYS 2d 439 (1977) where the New York Court of Appeals reached the opposite result from Chester, with Galloway Tp. Bd. of Educ. v. Galloway Tp. Educ. Assn. , 78 NJ 25, 393 A.2d 218 (1978) where the New Jersey Supreme Court reached the same result. Many of the conflicting applications of Katz as applied in the public sector are outlined in Blue Mtn. Community College Faculty Assn. v. Blue Mtn. Community College, Oregon PERB Case No. C-179-77 (1978) [On filed in VLRB office.] There, the majority, over a vigorous dissent, held the employer did not commit an unfair labor practice by unilaterally terminating college sabbatical leaves during a contract hiatus before impasse.

In the present case, however, we are faced with a statute construed by our Supreme Court to permit the employer to impose unilateral interim terms. Thus we are not entirely governed by cases construing the duty to bargain in

good faith, and we do not think such analysis is helpful. We are particularly inclined to this view since the Vermont Supreme Court in Vt. State Employees Assn., Inc. v. State, supra, expressly repudiated this Board's attempts to apply those principles.

We believe the proper analysis is to give effect to the Secretary's letter as a "temporary rule. . .to ensure the uninterrupted and efficient conduct of state business". The problem before us then, is to ascertain the intent of the letter as a "rule", rather than to determine whether abolition of the fund ravaged the "status quo" and undermined bargaining.

The Employer concedes Secretary Mallary had no subjective intent to decide this issue one way or the other. We are told, "he did not review the collective bargaining agreement article-by-article when he extended it and did not specifically intend to force the Employer to create another $35,000 pool of money." (Employer Brief, page 4). Conversely, we assume, he did not consciously intend to deprive the employees of the fund either.

The Colleges next argue that, whatever Mr. Mallary's subjective intent, an extension of the contract by letter for 90 days cannot possibly revive a benefit which by its terms is annual. While it is true that the contract provision creating this fund, unlike other benefits, was to exist "for each year of the contract", it is also true that Secretary Mallary extended "all" terms of the contract. Also, the contract was extended a second time until April, and no new contract executed until May 1, 1979. Thus, almost an entire academic year elapsed under the two extensions. Moreover, the argument seems more ingenious than fair. The advanced study loan fund existed from 1974 to 1978 and was renegotiated to exist for the 1979/80 year. The Employer would deprive the employees of this undoubted benefit to themselves and the colleges by resorting to legalistic scrutiny of correspondence

which was written, according to Mr. Mallary, to be fair. We are inclined, then, not to construe it to delight grammarians. At the time Secretary Mallary granted the second extension of "all" terms, a grievance on this very issue was pending, and undoubtedly negotiations concerning it were ongoing. Surely he could have at that time, unilaterally terminated the fund by expressly doing so in his letter. Equally surely, such action would have had unpleasant repercussions at the bargaining table.

We do not think the Employer should now have the retroactive benefit of an action it was unwilling to take at an earlier time, especially when there was clear authority for the Employer to terminate this benefit at that time. Contract rights such as are here disputed are better established by hard and frank collective bargaining than the vicissitudes of litigation.

On this state of facts, given the considerable power vested in the Secretary under 3 V.S.A. section 982(f), which flirts with infringement of good faith bargaining rights guaranteed the employees under 3 V.S.A. section 961, we do not think it unreasonable to ask the Secretary to be specific, and to require him to identify precisely any benefit which is to terminate with the contract. Since the State had the power and authority to make this unilateral change we think it had the responsibility to use it. Accordingly, we hold that since neither of the Secretary's two extension letters specifically sounded the demise of the advance study loan fund for 1978/79, it should be recognized as being in existence.

ORDER

For the foregoing reasons it is hereby ORDERED: The Vermont State College shall establish the fund specified in Article XXXVIII of the 1976-1978

collective bargaining contract and add the sum of $35,000 to the fund established for the 1979-1980 academic year.

Dated and filed this 20th day of September, 1979 at Montpelier, Vermont.

Kimberly B. Cheney, Chairman

William G. Kemsley, Sr.

Robert H. Brown