VERMONT LABOR RELATIONS BOARD

INTERNATIONAL UNION OF PUBLIC EMPLOYEES, HARTFORD POLICE UNION	)	
	)	DOCKET NO. 13-13
v.	)	
TOWN OF HARTFORD	)	

MEMORANDUM AND ORDER

The issue before us is whether to grant the request of the Town of Hartford ("Town") in this unfair labor practice case to defer this matter to the grievance and arbitration procedure in the collective bargaining agreement between the Town and the International Union of Public Employees, Hartford Police Union ("Union"). The Union filed an unfair labor practice charge on May 24, 2013, contending that the Town interfered with employee rights and refused to bargain in good faith in violation of 21 V.S.A. §1726a(a)(1) and (5) by unilaterally changing a police officer's hours and wages without bargaining with the Union. The Town filed a response to the charge on June 17, 2013, requesting that the Board defer this matter to the grievance procedure. The Union, in a July 17, 2013, response requested that the Board decline to defer this matter to the grievance procedure and that instead the Board issue an unfair labor practice complaint.

Board Executive Director Timothy Noonan had a conference call with the parties on September 24, 2013, to discuss the Town's contention that the Board should defer this matter to the grievance procedure. Subsequently, the Union filed a brief on October 4, 2013, in further support of its position that this matter not be deferred to the grievance procedure. The Town filed a response to the Union's brief on October 15, 2013.

Factual Background

The pertinent factual background for the purpose of deciding whether to defer this matter to the grievance procedure is based on the materials filed by the parties and the information gathered during the September 24 conference call. The collective bargaining agreement between the Town and Union provides in pertinent part as follows:

> **Article II – Management Rights**
> . . .
> Except as specifically limited by the express provisions of this Agreement, the Employer retains all of the traditional rights as historically existed prior to the first agreement, to manage and direct the affairs of the employer in all of its various aspects and to manage and direct its employees including but not limited to the following: . . . to schedule and assign work; . . . to assign overtime . . .
> . . .
> **Article IV – Working Conditions**
> . . .
> Section 403 – Work Day
> . . .
> B. Effective July 1, 2004, the schedule shall be as determined/approved by the Chief. Such schedules shall be 40 hours per week . . .
> . . .
> Section 404 – Shift Schedules
> . . .
> Notice shall be given 21 days in advance for all shift and day off changes, except for changes required due to illness or injury. . .
> . . .
> **Article V – Compensation**
> . . .
> Section 502 – Overtime
> . . .
> It is acknowledged that it is a primary management function to maximize the fiscal resources of the Department; therefore every effort will be made to fill manpower needs using straight time and/or part-time officers.
> . . .
> **Article VIII – Personnel Actions**
> . . .
> Section 808 – Grievance and Binding Arbitration Procedure
> For the purpose of this Agreement, the term "grievance" means any dispute between the Town and the Union or any employee covered by this Agreement, concerning the interpretation, application or violation of this Agreement. . .
> . . .

> Section 812 – Separability Clause
> This Agreement constitutes the entire and only agreement between the parties with respect to terms and conditions pertaining to employee benefits.
> . . .

Section 808 of the collective bargaining agreement sets forth a five-step grievance procedure culminating in binding arbitration.

In May 2010, the Town Police Department's fingerprint technician resigned from his position. The Town police chief asked employee Brandon Dyke whether he would be interested in assuming fingerprint technician duties. Dyke indicated he would accept the additional job responsibilities if his work hours remained 7 a.m. to 3 p.m., except on Tuesdays when he would work 7 a.m. to 5 p.m., resulting in two hours of overtime each week. The Town and Dyke agreed to this arrangement. The Union was not involved in this agreement.

Dyke continued to work this schedule, including the two hours of overtime, for the next three years. On March 26, 2013, Deputy Police Chief Leonard Roberts sent Dyke a memorandum which provided in pertinent part as follows:

> After reviewing your current work schedule; hours, parking enforcement operations, and civil fingerprint schedule, it has become necessary to change your working hours from 07:00 to 15:00 to 08:00 to 16:00.
>
> It is apparent that having you report to work at 07:00 is not conducive to your job functions when you can't start your duties until 08:00. It is reasonable and cost effective to have you working 08:00 to 16:00, Monday through Friday. This change will become effective on May 6, 2013.
>
> I would also suggest the three days set aside for civil fingerprints run as follows:
> - Monday and Wednesday from 08:15 until 11:00
> - Friday from 12:45 until 15:30
>
> This schedule will allow you the time needed to attend to parking enforcement from 11:00 until 15:30 on the two days you are doing fingerprints in the morning, and then from 08:00 until 12:30 on the day you are doing afternoon prints. As you

> can see this will leave you plenty of time to do your other duties, as needed. This will also eliminate the two hours of overtime that you have to work every week.
> . . .
> As I think you'll agree, I have given you ample time to readjust your duty time as needed. This change also meets the 21 day notice required by the CBA to change your schedule.
> . . .

Neither Dyke nor the Union filed a grievance pursuant to the collective bargaining agreement with respect to the schedule change and elimination of overtime.

Discussion

The Town requests that this matter be deferred to the parties' five-step grievance procedure, culminating in binding arbitration. The Town contends that this dispute is about a change in Brandon Dyke's scheduled hours and a loss of overtime, which matters are addressed by the collective bargaining agreement and as such should be resolved using the grievance procedure. The Town further asserts that the arrangement made in 2010 without the involvement of the Union concerning Dyke's work schedule and duties should not be acknowledged as a legitimate agreement between the Town and the Union, cannot supersede the collective bargaining agreement, and cannot be used to create an obligation to bargain with the Union over changes to the arrangement.

The Union contends that the Town committed an unfair labor practice by unilaterally changing Dyke's hours and wages without negotiating with the Union. The Union asserts that, even assuming that the collective bargaining agreement provides the Town with the right to take the action it did here of changing an employee's work schedule by providing at least 21 days advance notice, the impact of the Town's decision to change Dyke's work schedule affected his conditions of employment, including but not limited to his overtime pay. The Union maintains that the collective bargaining

agreement does not address the Town's guarantee of overtime which was provided to Dyke in the 2010 agreement. In such circumstances, the Union contends that the Town had a duty to bargain in good faith over the impact of such change and that the Board should not defer this matter to the grievance procedure. The Union cites the Board decision, VSEA v. State of Vermont (Re: Implementation of 6-2 Schedule at Vermont State Hospital)[1], in support of this argument.

The Board has decided in many unfair labor practice cases whether to defer to a contract's grievance procedure in lieu of issuing an unfair labor practice complaint. The Board has not ruled on unfair labor practice charges where the Board believed the dispute involved the interpretation of a collective bargaining agreement and employees had an adequate redress for the alleged wrongs through the grievance procedure.[2] Parties to a collective bargaining agreement are required to exhaust available contractual remedies before a statutory unfair labor practice complaint will lie.[3]

The Board begins its analysis by considering if the issue contained in the charge is subject to arbitration, irrespective of whether it might also be an unfair labor practice.[4] If the issue is subject to arbitration, the contract grievance procedure should be applied,

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[1] 5 VLRB 303 (1982).
[2] Burlington Education Association v. Burlington Board of School Commissioners, 1 VLRB 335 (1978). AFSCME Local 490 v. Town of Bennington, 9 VLRB 195 (1986). Fair Haven Graded School Teachers Association, Vermont-NEA v. Fair Haven Board of School Directors, 13 VLRB 101, 109-110 (1990). Winooski Police Employees' Association v. City of Winooski, 28 VLRB 102 (2005).
[3] Burlington Area Public Employees Union, Local 1343, AFSCME, AFL-CIO v. Champlain Water District, 156 Vt. 516, 518 (1991).
[4] Id. at 519.

barring an overriding statute or deferral policy.[5] The rationale underlying deferral to the grievance procedure was stated by the Board in an early case:

> If this Board hears as an unfair labor practice a complaint which is a grievance without first requiring the complainant to utilize the dispute resolution procedures agreed to in the collective bargaining agreement, the collective bargaining process would be undermined . . . (A)n exhaustion of contract remedies doctrine . . . insures the integrity of the collective bargaining process by requiring the parties to collective bargaining agreements to follow the procedures they have negotiated to resolve contract disputes. This policy also encourages the parties to negotiate grievance procedures to resolve contract disputes which is sound labor relations policy. Labor relations stability depends on the parties working together to resolve disputes which directly affect them.[6]

Abstention cannot be equated with abdication of the Board's statutory duty to prevent and remedy unfair labor practices; instead the parties are directed to seek resolution of their disputes under the provisions of their own contract, thus fostering the collective relationship and the policy favoring voluntary arbitration and dispute settlement.[7] Where contract interpretation may resolve the dispute, deferral to the arbitration procedure is "merely the prudent exercise of restraint, a postponement of the use of the Board's processes to give the parties' own dispute resolution machinery a chance to succeed."[8] The exhaustion doctrine does not bind the parties if the issue raised before the Board does not qualify as a matter of contract interpretation.[9]

In applying these precedents to this case, we first discuss an underlying issue which significantly affects the Board's consideration whether to defer to the grievance procedure. This issue is what effect to give the 2010 agreement between Brandon Dyke

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[5] Id.
[6] Burlington Education Association v. City of Burlington, 1 VLRB 335, 340 (1978).
[7] Champlain Water District, 156 Vt. at 519-520. National Radio Co., 198 N.L.R.B. 527, 531 (1972).
[8] Milton Education and Support Association v. Milton Board of School Trustees, 171 Vt. 64 (2000).
[9] Champlain Water District, 156 Vt. at 520.

and the Town setting forth Dyke's work schedule, including two hours of overtime a week. In taking the position that the Town had the duty to bargain with the Union over the impact of changes to this work schedule, the Union is asking us to conclude that an individual agreement supersedes a collective bargaining agreement.

The 2010 agreement is an individual agreement because it was entered into by an employee and the Town without the involvement of the Union. We would be giving this individual agreement establishing a work schedule with built-in overtime precedence over the collective bargaining agreement if we were to hold that the Town had to bargain with the Union over the impact of the changes to the work schedule resulting from this individual agreement. This is because the collective bargaining agreement contains explicit provisions addressing management's discretionary authority to change schedules and overtime work.

Article II, Management Rights, provides that "(e)xcept as specifically limited by the express provisions of this Agreement, the Employer retains . . . the rights to . . . schedule . . work; . . . to assign overtime". Article IV, Section 403, Work Day, provides: "(T)he schedule shall be as determined/approved by the Chief. Such schedules shall be 40 hours per week". Section 404, Shift Schedules, provides: "Notice shall be given 21 days in advance for all shift and day off changes, except for changes required due to illness or injury." Article V, Section 502, Overtime, states: "It is acknowledged that it is a primary management function to maximize the fiscal resources of the Department; therefore every effort will be made to fill manpower needs using straight time and/or part-time officers." These are specific provisions on the same matters covered by the 2010 individual agreement.

The Board and the Supreme Court have indicated that they will not recognize an individual contract inconsistent with the collectively bargained agreement. This is because "(t)he very purpose of a collective bargaining agreement is to supersede individual contracts with terms which reflect the strength and bargaining power and serve the welfare of the group."[10] Thus, we reject the Union's contention that the 2010 agreement between Dyke and the Town may be relied on to support a determination that the Town was required to bargain with the Union over the impact of the changes to the work schedule resulting from the 2010 agreement.

The Union's reliance on the Board decision in VSEA v. State of Vermont (Re: Implementation of 6-2 Schedule at Vermont State Hospital) is similarly misplaced. There was a provision in the collective bargaining agreement in that case stating: "In any department or institution, prior to the establishment of a new shift . . . or a new workweek . . . the appointing authority shall notify the Association and shall negotiate the impact of that decision to the extent required by law."[11] It was in the context of this contract language that the Board held that the parties must negotiate the impact of the management decision to implement a work schedule change through the completion of statutory dispute resolution procedures or until they reach agreement.[12]

There is no such language in the collective bargaining agreement in this case. Instead, there are explicit provisions addressing management's discretionary authority to change schedules and overtime work without any reference to negotiating the impact of such decisions. Given these provisions, the dispute over the change in Dyke's scheduled

[10] Morton v. Essex Town School District, 140 Vt. 345 (1982). Grievance of McFarland, 10 VLRB 220, 227 (1987).
[11] VSEA v. State, *supra*, 5 VLRB at 324-25.
[12] *Id.* at 328-29.

hours and a loss of overtime for him involves interpretation of the collective bargaining agreement. There is an adequate redress for any alleged wrongs under the collective bargaining agreement through the grievance procedure culminating in binding arbitration. In such a case, we will not rule on the merits of the unfair labor practice charge without first requiring the Union to use the dispute resolution procedures agreed to in the collective bargaining agreement. Thus, we conclude that it is appropriate to defer this matter to the parties' grievance procedure.

This deferral would not necessarily bar the Board's later consideration of the matter if a grievance was pending on the issue underlying the unfair labor practice charge. If the Board does decide to defer to a grievance arbitration procedure under a contract, the Board may retain jurisdiction solely for the purpose of entertaining a motion that the grievance arbitration has failed to meet the following criteria necessary for the Board to defer to an arbitrator's award: 1) fair and regular arbitration proceedings; 2) agreement by all parties to be bound; 3) the decision is not repugnant to the purpose and policies of the Act; 4) the arbitrator clearly decided the unfair labor practice issue; and 5) the arbitrator decided issues within his or her competency.[13]

However, the Union's actions in this case preclude our retention of jurisdiction. The Union was required to exhaust available contractual remedies pursuant to the grievance procedure before any remedy could be obtained through the unfair labor practice route. The Union failed to exhaust available contractual remedies here as it did not file a grievance.

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[13] AFSCME Local 490, Bennington Department of Public Works and Police Units v. Town of Bennington, 9 VLRB 195 (1986).

This means an important step has been omitted in our consideration whether to issue an unfair labor practice complaint. In post-arbitration deferral cases, the Board has decided whether arbitrators have clearly decided unfair labor practice issues. The Board has decided that an unfair labor practice issue effectively was decided once an arbitrator determined that an action by an employer is specifically covered and permitted by the contract. Once this determination was made, the Board reasoned that same action could not be determined to be an improper unilateral action in violation of unfair labor practice provisions of the Act.[14] However, where the contract did not specifically cover the action taken by the employer, the Board concluded that the arbitrator had not decided the unfair labor practice issue.[15]

The Union's failure to pursue a grievance over this matter means that the Union inappropriately has not sought resolution through the mechanism established by the parties to decide contract interpretation disputes, and the benefit of an arbitrator's determination whether the Town's action is specifically covered and permitted by the contract has been lost. Thus, we are left without a basis to retain jurisdiction in this matter.

Based on the foregoing reasons, it is ordered:

1. This matter is deferred to the grievance procedure in the collective bargaining agreement between the Town of Hartford and the International Union of Public Employees, Hartford Police Union; and

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[14] AFSCME Local 1201, Castleton Employees v. Town of Castleton, 25 VLRB 140, 141-42 (2002). BED IBEW, Local 300, Unit Six v. Burlington Electric Department, 23 VLRB 245, 250 (2000).

[15] Milton Education and Support Association v. Milton Board of School Trustees, 23 VLRB 301, 306 (2000); *Affirmed*, 175 Vt. 531 (2003).

2. The unfair labor practice charge filed in this matter is dismissed.

Dated this 26th day of November, 2013, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Richard W. Park

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Richard W. Park, Chairperson

/s/ James C. Kiehle

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James C. Kiehle

/s/ Gary F. Karnedy

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Gary F. Karnedy