VERMONT LABOR RELATIONS BOARD

VERMONT STATE EMPLOYEES' ASSOCIATION	)	
v.	)	DOCKET NO. 15-28
JUDICIARY DEPARTMENT OF THE STATE OF VERMONT	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

The Vermont State Employees' Association ("VSEA") filed an unfair labor practice charge on July 2, 2015, contending that the Judiciary Department of the State of Vermont ("Judiciary") refused to engage in collective bargaining, as requested by VSEA, prior to the commencement of the budgetary processes that would be required to fund any contractual items, in violation of 3 V.S.A. §§ 1026(5) and 1036(e). The Judiciary filed a response to the charge on July 22, 2015.

Labor Relations Board Executive Director Timothy Noonan met with the parties on August 4, 2015, in furtherance of the Board's investigation of the charge. He had another meeting with the parties on August 14, 2015, in an attempt to informally resolve issues in dispute. The issues were not resolved. The Labor Relations Board issued an unfair labor practice complaint on August 24, 2015, and scheduled the case for a September 3, 2015, hearing.

The Labor Relations Board held a hearing on September 3, 2015, in the Board hearing room in Montpelier before Board Members Gary Karnedy, Chairperson; Richard Park and James Kiehle. VSEA General Counsel Timothy Belcher represented VSEA. Attorney Joseph Farnham of McNeil, Leddy & Sheahan represented the Judiciary. VSEA and the Judiciary filed post-hearing briefs on September 17 and 21, 2015, respectively.

FINDINGS OF FACT

1. VSEA represents approximately 200 Judiciary employees in the Judiciary Unit. VSEA also represents Executive Branch employees in the Non-Management Unit and the Supervisory Unit.

2. VSEA and the Judiciary entered into their first collective bargaining agreement covering Judiciary Unit employees on March 26, 2003, effective retroactive to July 1, 2001. The subsequent agreement, effective July 1, 2003 to June 30, 2005, included Article 24, entitled "Procedure for Negotiating Successor Agreement". Article 24 provided: "The parties agree to meet not later than February 1, 2005 to commence negotiations concerning the successor agreement to commence July 1, 2005." Every successor agreement to the present has included the same language into similarly-titled articles, providing that the parties will meet "not later" than February 1of the year the contract expired to commence negotiations (VSEA Exhibit 13, Employer Exhibits A – G).

3. Article 31 of the collective bargaining agreement between the VSEA and the Judiciary effective from July 1, 2014 to June 30, 2016, provides:

> The duration of this Agreement shall be from July 1, 2014 to midnight, June 30, 2016. The parties agree to meet not later than February 1, 2016 to commence negotiations concerning the successor agreement to commence July 1, 2016.
> (Employer Exhibit G)

4. The Judiciary Employees Labor Relations Act provides in pertinent part as follows with respect to collective bargaining negotiations:

- **3 V.S.A. § 1016 -** "The employer and representative of the employees shall bargain collectively, which for the purposes of this chapter means performing the mutual obligation to meet at reasonable times and confer in good faith with respect to all matters bargainable under the provisions of this chapter."

- **3 V.S.A. § 1018** – "(a) If after a reasonable period of negotiation, the representative of a collective bargaining unit and the employer reach an impasse, the board . . . may

authorize the parties to submit their differences to mediation. Within five days after receipt of the petition, the board shall appoint a mediator . . .
(b) If, after a minimum of 15 days after the appointment of a mediator the impasse is not resolved, the mediator shall certify to the board that the impasse continues.
(c) Upon the request of either party the board shall appoint a fact finder who has been mutually agreed upon by the parties. . .
(d) The fact finder shall conduct hearings . . .
. . .
(g) Upon completion of the hearings, the fact finder shall file written findings and recommendations with both parties.
. . .
(i) If the dispute remains unresolved 15 days after transmittal of findings and recommendations, each party shall submit to the board its last best offer on all disputed issues as a single package. Each party's last best offer shall be certified to the board by the fact finder. . . Within 30 days of the certifications the board shall select between the last best offers of the parties, . . . The decision of the board shall be final and binding on the parties."

- **3 V.S.A. § 1019 –** "(a) Notwithstanding section 1018 of this title or any other law, the parties may agree in advance to a mediation and arbitration procedure.
(b) The parties may jointly select a mediator. . .
(c) The mediator shall encourage the parties to reach a voluntary settlement of the dispute, but may, after a reasonable period of mediation, as determined by the mediator, certify to the board that the impasse continues and end mediation efforts.
(d) If the impasse remains unresolved for 15 days after the mediator's certification to the board, either party may petition the board to appoint an arbitrator who has been mutually agreed upon by the parties. . .
(e) A hearing before the arbitrator shall be informal . . .
. . .
(g) The arbitrator shall submit a report, including its costs, to the parties and to the board no later than 30 days after the termination of the hearing, unless the time is extended by agreement of both parties. The determination by the arbitrator on all issues shall be final and binding on the parties . . ."

- **3 V.S.A. § 1036(c) –** "An agreement between the employer and the employees' exclusive bargaining representative, after ratification or an agreement imposed on the parties pursuant to section 1018 or 1019 of this title shall be submitted to the court administrator who shall request sufficient funds from the general assembly to implement the agreement. If the general assembly appropriates sufficient funds, the agreement shall become effective at the beginning of the next fiscal year. If the general assembly appropriates a different amount of funds, the terms of the agreement affected by that appropriation shall be renegotiated based on the amount of funds actually appropriated by the general assembly, and the agreement with the negotiated changes shall become effective at the beginning of the next fiscal year."

- **3 V.S.A. § 1036(e) –** "Upon request of either party, negotiations for a new agreement to take effect upon the expiration of the preceding agreement shall be commenced at any time during the year preceding the expiration date of the agreement. Negotiations may be commenced at any time before that time with the consent of both parties.

5. The State government budget is established annually, with fiscal years beginning on July 1 and ending on the following June 30. The budget process begins with the issuance of budget instructions by the Secretary of Administration generally in September of the year preceding the start of the budget year. The budget instructions are provided to each department and agency in State government. The Judiciary Department receives such instructions.

6. The Judiciary Department is not bound to comply with the budget instructions since it is a separate branch of State government from the Executive Branch. It follows an internal review process to determine needs and priorities. The Chief of Finance and Administration for the Judiciary Department gathers funding requests and needs from various sources within the Department. The Vermont Supreme Court considers budget requests and other funding pressures. The Court provides instructions on budget requests and priorities to the Court Administrator and the Chief of Finance and Administration. Representatives of the Judiciary then meet with the Secretary of Administration and Commissioner of Finance and Management in October and/or November on the Judiciary's funding needs. The Governor includes a funding request for the Judiciary in the Governor's proposed budget which is submitted by the Governor to the Legislature in January.

7. There are certain costs in the Judiciary's budget which are not known by the Judiciary until the Governor's administration reveals them in late fall or early winter of each budget year. Included among these cost times are fee for space, health benefits, information technology charges, financial system operation costs, and various insurance charges.

8. Once the Legislature receives the Governor's proposed budget, the Appropriations Committee of the House of Representatives holds hearings on the proposed budget for each department and agency. The full House generally approves a budget around Town Meeting Day in early March. The budget bill then moves to the Senate where the Senate Appropriations Committee considers the bill. The full Senate generally passes its version of the budget bill in May. A conference committee made up of members from the House and Senate negotiates to resolve the differences between the two chambers. The revised budget bill is then acted on by the full House and Senate, generally at some point in May, and the Legislature adjourns for the session shortly after the bill is approved by both chambers.

9. In addition to the budget process, the Legislature also considers and adopts a Pay Act. This primarily funds increases in wages, benefits and other human resource costs for state employees that are negotiated through collective bargaining.

10. During legislative consideration of the Pay Act in 2014, VSEA and the Judiciary had not entered into a collective bargaining agreement. A "placeholder" amount was included in the Pay Act estimating the anticipated increases in wages and benefit and other human resources costs for Judiciary employees represented by VSEA. This was consistent with what had been done in past bargaining cycles.

11. VSEA Representative Kelly Burns hand-delivered a letter dated January 17, 2014, to Patricia Gabel, Court Administrator, "requesting that, prior to February 1, 2014, the Judiciary and VSEA mutually agree on a meeting date to address potential ground rules, informational needs, and a bargaining schedule" for a collective bargaining agreement to succeed the July 1, 2012 to June 30, 2014 collective bargaining agreement. Burns indicated that VSEA was available to meet on January 31, 2014 (Employer Exhibit M).

12. VSEA and the Judiciary met in February 2014 to discuss negotiation groundrules. They met on March 7, 2014, to sign agreed-upon groundrules and exchange bargaining proposals.

13. There were no proposals during negotiations leading to the July 1, 2014 – June 30, 2016 agreement to make substantive changes to the article in the collective bargaining agreement providing the parties will meet "not later" than February 1 of the year the contract expired to commence negotiations.

14. During negotiations leading to the 2014 – 2016 collective bargaining agreement, VSEA requested increases in tuition reimbursement, the employee development fund, longevity pay and training stipend. The Judiciary agreed to tuition reimbursement, training stipend and employee development fund increases. The parties also agreed to a 2.5% cost of living wage increase, the same as received by Executive Branch employees represented by VSEA.

15. The Judiciary and VSEA entered into a collective bargaining agreement on July 8, 2014, retroactive to July 1, 2014. This was after the Legislature had adjourned for the year.

16. The bargaining timeline followed by the parties in 2014 leading to the 2014 – 2016 agreement was not unusual based on their historical experience. Negotiations historically did not commence until after the beginning of the calendar year in which the agreement expired. Also, it was not unusual for agreements to be entered into after the expiration date of the existing agreement. The effective dates of these collective bargaining agreements and the date each agreement was entered into by the parties follows:

Effective Dates of Agreement	Date Parties Entered into Agreement
July 1, 2003 – June 30, 2005	July 1, 2003

July 1, 2005 – June 30, 2007	May 11, 2006
July 1, 2007 – June 30, 2008	July 2, 2007
July 1, 2008 – June 30, 2010	May 30, 2008
July 1, 2010 – June 30, 2012	unknown
July 1, 2012 – June 30, 2014	October 22, 2012
July 1, 2014 – June 30, 2016 (VSEA Exhibit 13)	July 8, 2014

17. In March 2014, VSEA members of the Judiciary Unit voted to amend the Judiciary Unit Bylaws to extend the terms of current Judiciary Unit Officers, Executive Committee members and Bargaining Team members by one year until the VSEA Annual Meeting in September 2016. An impetus for the amendment was a desire of the Judiciary Unit to shift its bargaining schedule to coincide with the Executive Branch This amendment was approved by the VSEA Board of Trustees. Prior to the amendment, the terms of the involved positions would have ended at the September 2015 VSEA Annual Meeting.

18. The VSEA Judicial Unit Executive Committee sent a letter dated May 29, 2015, to Court Administrator Patricia Gabel, stating:

> This letter is a professional courtesy to provide notice that (VSEA) intends to provide formal notice of its desire to bargain a successor collective bargaining agreement during the month of July. While VSEA is aware that historically the VSEA and the State of Vermont ("Judiciary") begin negotiations after February, the VSEA Judicial Unit has overwhelmingly voted in favor of shifting its bargaining schedule to coincide with the Executive Branch in order to coordinate bargaining on mandatory subjects of bargaining including, but not limited to health insurance and our cost of living increase.
>
> Pursuant to the Judicial Employees Labor Relations Act, "The employer and representative of the employees shall bargain collectively, which for the purposes of this chapter means performing the mutual obligation to meet at reasonable times and confer in good faith with respect to all matters bargainable under the provisions of this chapter." We believe the law supports our position that we begin bargaining prior to the Pay Act

being approved to ensure that any agreement we negotiate can be fully funded and thus lend to the notions of good-faith negotiations.

Additionally, beginning to bargain in the late summer or early fall of this year will be in accordance with Article 30 of the Collective Bargaining Agreement. This requires the parties to meet no later than February 1, 2016 to commence negotiations.

Please be advised that Union Representative Brian Morse shall serve as VSEA Negotiator and any questions regarding this professional courtesy can be directed either to Unit Chair Margaret Crowley or to Brian.
(Employer Exhibit H)

19. Gabel responded by letter dated June 24, 2015, addressed to Crowley. The letter provided:

Thank you for the letter dated May 29, 2015. I apologize for the delay in responding. I was out of the office when it arrived.

Your letter explained the VSEA's desire to begin bargaining a successor agreement in July of 2015, while acknowledging that negotiations have historically begun in February and that our collective bargaining agreement provides that the parties will meet no later than February 1st to begin bargaining.

The Judiciary must respectfully decline the invitation to commence negotiations in July, and we also respectfully disagree with the suggestion that a vote by VSEA to change the bargaining schedule can unilaterally affect an amendment to the parties' collective bargaining agreement. This would be equivalent to the Judiciary determining unilaterally to start later than February because of the press of other business, or perhaps to unilaterally adjust pay rates or leave accruals without advance negotiations. VSEA would rightfully object to the assertion of such rights.

I am advised that this topic was a specific subject of our negotiations in the last round of negotiations, with VSEA proposing an earlier start date, the Judiciary opposing it, and the contract ultimately remaining unchanged. Both parties are, of course, fully entitled to the benefit of their bargain.

In addition, we do not agree with the VSEA's assertion that §1016 of the Judicial Employees Labor Relations Act, providing for the parties to collectively bargain, requires or even allows for a unilateral change to the negotiated date by which the parties must commence negotiation for the successor contract.

The Judiciary is facing a number of pressing matters in the next several months to which it must devote its attention. Also, much of the data that the Judiciary relies upon in its negotiations preparation is not even available to us until the late fall and early winter. As a result, the Judiciary must respectfully decline your request to begin bargaining in July.

At the same time, we note your desire to begin earlier than we did the last time around. We will take this into account once we have received and been able to review data related to negotiation preparation. Absent an extraordinary change in circumstances, you should expect that we will follow past practice for scheduling.

Once again, I want to thank you for providing me with this courtesy communication. (Employer Exhibit I)

20. Upon receipt of Gabel's June 24 letter, Crowley sent a response by email which provided:

I would like to clarify the content of the notice that was sent to you by the Judiciary Unit's Executive Committee. The letter that you received was to put the CAO on notice that our "Letter of Request to Bargain" would be sent to you at the end of July. We do not intend to bargain in July but within the same time frame as the Executive Branch which complies with "not later than February 1, 2016". Our bargaining team will begin meetings to prepare for our intended bargaining time line and this initial notice was to make sure that management was aware that these meetings would begin prior to our request to bargain. Up to this point some supervisors within the Judiciary have been unwilling to give Union leave time for some of the bargaining team members for trainings and meetings that are directly related to bargaining.

I understand your position on the intentions of the Unit to bargain earlier than in the past. I will share your letter with my fellow unit officers on the Executive Committee. We will be sending our letter of request to you at the end of July.
(Employer Exhibit J)

21. VSEA Representative Brian Morse sent a letter to Gabel dated July 1, 2015. It provided:

Please accept this letter as a demand to commence bargaining in August of this year for a successor to the current collective bargaining agreement, which expires June 30, 2016. While you have already made clear that the Judiciary will not agree to commencing negotiations in August, VSEA is exercising its right, pursuant to 3 V.S.A. §1036(e), to initiate bargaining without mutual consent at any time during the year preceding expiration. As noted in previous correspondence, this timetable will permit the parties to submit cost items to the General Assembly in the manner contemplated in 3 V.S.A. §1036(c). In light of your previously announced position, and since time is critical to this process, VSEA will go ahead and seek review by the VLRB. If you are willing to commence negotiations in August as requested, please let me know as soon as possible. (Employer Exhibit K)

22. Gabel sent a letter to Crowley dated July 8, 2015. It provided in pertinent part:

> Thank you for your email dated June 24, 2015 explaining the VSEA's intent to send its "Letter of Request to Bargain" at the end of July and its desire to have bargaining team members released from work to prepare for bargaining consistent with VSEA's intended bargaining time frame.
>
> I believe my letter of June 24, 2015 explains the Judiciary's position regarding beginning bargaining in August. On July 2, 2015 we received the VSEA's Unfair Labor Practice on this issue, and on July 6, 2015, we received the VSEA letter requesting that bargaining commence in August. As the issue of when bargaining will commence is before the VLRB, I will defer to that process on that issue.

23. VSEA and the Judiciary have not commenced negotiations for a successor collective bargaining agreement to the 2014 – 2016 agreement.

24. VSEA and the State begin negotiations for collective bargaining agreements covering Executive Branch employees in the Non-Management Unit, Supervisory Unit and Corrections Unit in August of the year preceding the expiration of the agreements. They seek to conclude negotiations in October. This negotiations timeframe is consistent with collective bargaining agreement provisions.

MAJORITY OPINION

VSEA contends that the Judiciary has refused to engage in collective bargaining, as requested by VSEA, prior to the commencement of the budgetary processes that would be required to fund any contractual items, in violation of 3 V.S.A. §§ 1026(5) and 1036(e). §1026(5) of the Judiciary Employees Labor Relations Act makes it an unfair labor practice for the employer to "refuse to bargain collectively with a representative of its employees." §1036(e) provides: "Upon request of either party, negotiations for a new agreement to take effect upon the expiration of the preceding agreement shall be commenced at any time during the year preceding the expiration date of the agreement. Negotiations may be commenced at any time before that time with the consent of both parties."

VSEA asserts that the duty to bargain pursuant to these provisions of the Judiciary Act includes an obligation to make prompt arrangements to meet upon request of one party during the final year of the agreement. VSEA maintains that it did not waive this statutory right to initiate bargaining in August of 2015 by agreeing to Article 31 of the collective bargaining agreement, which provides: "The parties agree to meet not later than February 1, 2016, to commence negotiations concerning the successor agreement to commence July 1, 2016." VSEA contends that the "not later than February 1" language of the agreement simply is an acceptance by VSEA that it would need to rely on its reserved statutory rights, rather than a contractual right, to compel an earlier start to negotiations. VSEA further maintains that the parties are not bound by a practice of delaying bargaining until the calendar start of the expiration year of the agreement; that this does not constitute a practice that has been mutually accepted by the parties as a part of the agreement.

The Judiciary contends to the contrary that its refusal to bargain in August 2015 was reasonable because VSEA's demand to bargain was an effort to unilaterally renegotiate a term of the collective bargaining agreement. The Judiciary asserts that the unfair labor practice charge should be denied because the dispute here presents a question of contract interpretation, and should have been grieved under the grievance process provided for in the collective bargaining agreement. The Judiciary Department relies on the provision of the collective bargaining agreement which states that "(t)he parties agree to meet not later than February 1, 2016 to commence negotiations concerning the successor agreement to commence July 1, 2016." The Judiciary further asserts that there is an established past practice of the parties to begin negotiations after the first of the calendar year. The Judiciary maintains that the Board may consider this practice as bolstering an interpretation of the contract that the parties agreed to not begin negotiations until February, and

also to conclude that the past practice of the parties constitutes an implied part of the collective bargaining agreement.

The Judiciary further maintains that, even if this matter was subject to review as an unfair labor practice, the unfair labor practice charge filed by VSEA was premature. This is because, the Judiciary asserts, VSEA filed the charge without waiting for a response to the demand to bargain upon which the unfair labor practice charge is premised.

In considering these contentions of the parties, the Board looks to case law precedents of the Board and the Vermont Supreme Court. We begin by considering the provision of the collective bargaining agreement which states that "(t)he parties agree to meet not later than February 1, 2016 to commence negotiations concerning the successor agreement to commence July 1, 2016." The Board examines this term of the contract to determine whether the VSEA has waived its right to invoke the statutory provision of the Judiciary Act which states that "(u)pon request of either party, negotiations . . . shall be commenced at any time during the year preceding the expiration date of the agreement." IBEW Local 300 v. Town and Village of Ludlow, 27 VLRB 92, 93 (2004; *citing*. NLRB. v. C & C Plywood, 385 U.S. 421 (1967).

In determining whether a party has waived its 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 (1982). Mt. Abraham Education Association v. Mt. Abraham Union High School Board of School Directors, 4 VLRB 224, 231 (1981). 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). The burden of establishing the waiver is on the party asserting it. Id.

In applying these standards here, we conclude that the Judiciary has not established that VSEA has waived the statutory right to request the commencement of negotiations at any time during the year preceding the expiration date of the collective bargaining agreement by agreeing to the "not later than February 1, 2016" provision of the agreement. The "not later than" wording sets the outer limit date at which negotiation will commence, but does not preclude commencement of negotiations at an earlier date within the year preceding the expiration date of the collective bargaining agreement.

The collective bargaining agreement does not set a limit on how early negotiations can be initiated. If the parties intended to set such a limit, they could have used language to the effect of negotiations being commenced "no sooner than" a certain date. We will not read terms into a contract unless they arise by necessary implication, In re Stacey, 138 Vt. 68, 71 (1980). It is not necessarily implied that the parties intended February 1 as the earliest required date for negotiations by use of the "not later than" language of the agreement.

We also are not persuaded by the contentions of the Judiciary that: 1) the practice of the parties to begin negotiations after the first of the calendar year bolsters an interpretation of the contract that the parties agreed to not begin negotiations until February; and 2) the past practice of the parties constitutes an implied part of the collective bargaining agreement. The fact that a party has not invoked a right to request an earlier start to negotiations than the latest start date set forth in the agreement is not sufficient to indicate a party has waived its right for an earlier start date. More evidence than this would be necessary for us to conclude that VSEA waived an important statutory right for earlier negotiations.

Moreover, the practice of the parties does not rise to the level necessary to conclude that it constitutes an implied part of the collective bargaining agreement. The Board has recognized that

day-to-day practices mutually accepted by the parties may attain the status of contractual rights and duties, particularly where they are significant, longstanding and not at variance with contract provisions. Grievance of Hanifin, 11 VLRB 18, 27 (1988). Grievance of Cronin, 6 VLRB 37, 67-69 (1983). Grievance of Allen, 5 VLRB 411, 417 (1982). Grievance of Beyor, 5 VLRB 222, 238-39 (1982). The practice of the parties to begin negotiations after the first of the calendar year is not sufficient to demonstrate that one of the parties mutually agreed to waive a statutory right to seek an earlier start date to negotiations. The non-exercise of the right without more does not demonstrate waiver of the right.

Our conclusion that the Judiciary has not established that VSEA has waived the statutory right to request the commencement of negotiations at any time during the year preceding the expiration date of the collective bargaining agreement does not mean that VSEA has the unilateral right to decide the commencement date of negotiations. Section 1016 of the Judiciary Act provides: "The employer and representative of the employees shall bargain collectively, which for the purposes of this chapter means performing the mutual obligation to meet at reasonable times and confer in good faith with respect to all matters bargainable under the provisions of this chapter."

The bilateral nature of the obligation to meet at reasonable times and negotiate in good faith set forth in this provision necessarily implies a joint discussion on establishing negotiation meetings. The National Labor Relations Board has long held that the obligation to bargain collectively encompasses the affirmative duty to make expeditious and prompt arrangements within reason to meet for bargaining. Professional Transportation, Inc. and International Brotherhood of Teamsters Local 512, 362 NLRB No. 60 (2015). J.H. Rutter-Rex Mfg. Co., 86

NLRB 470, 506 (1949). We concur, and adopt this general standard adapted to the provisions of the particular labor relations statute applicable to the negotiations.

It is necessary to examine the provisions of the Judiciary Act relating to dispute resolution procedures and funding of collective bargaining agreements to establish the "mutual obligation to meet at reasonable times and confer in good faith". Section 1036(c) of the Act provides:

> An agreement between the employer and the employees' exclusive bargaining representative, after ratification or an agreement imposed on the parties pursuant to section 1018 or 1019 of this title shall be submitted to the court administrator who shall request sufficient funds from the general assembly to implement the agreement. If the general assembly appropriates sufficient funds, the agreement shall become effective at the beginning of the next fiscal year. If the general assembly appropriates a different amount of funds, the terms of the agreement affected by that appropriation shall be renegotiated based on the amount of funds actually appropriated by the general assembly, and the agreement with the negotiated changes shall become effective at the beginning of the next fiscal year."

This provision contemplates that the parties will complete negotiations in a timeframe that allows the Court Administrator to request sufficient funds from the Legislature to implement the agreement so that the Legislature may appropriate such funds before its adjournment. The citation to Section 1018 and Section 1019 in this provision refers to the sections of the Judiciary Act containing the dispute resolution procedures of mediation, fact-finding and selection by the Labor Relations Board between the parties' last best offers; or alternatively to the procedures of mediation and arbitration.

It is "reasonable" in establishing a negotiations timeframe under the Judiciary Act to account for the possibility of invoking these dispute resolution procedures and still have negotiations completed in a timely manner. A timely manner means allowing the Court Administrator to request sufficient funds from the Legislature, and for the Legislature to appropriate funds, to implement the agreement reached by the parties or the terms imposed on

the parties by the Labor Relations Board or an arbitrator. It would not be unreasonable under this statutory scheme for either party to seek to begin negotiations prior to February 1.

We turn to applying these standards to the facts before us. VSEA took action on the first day "during the year preceding the expiration date of the collective bargaining agreement" to initiate negotiations. VSEA Representative Brian Morse sent a letter dated July 1, 2015, to Court Administrator Patricia Gabel expressing "a demand to commence bargaining in August of this year for a successor to the current collective bargaining agreement, which expires June 30, 2016". The following day, on July 2, VSEA filed the unfair labor practice charge in this matter.

In filing the unfair labor practice charge one day after making a "demand to commence bargaining", VSEA acted inappropriately by failing to wait for a response to the demand to bargain upon which the unfair labor practice charge is premised. It is well established that a violation of the duty to bargain cannot be found unless there is an appropriate request to bargain. Lori-Ann of Miami, Inc., et al and Local 415, International Ladies Garment Workers Union, AFL-CIO, 137 NLRB 1099 (1962). David Klain, et al and Local 716, International Brotherhood of Teamsters, 127 NLRB 776, 784-785 (1960).

We cannot find there was an appropriate request to bargain here where the demand to bargain and the unfair labor practice charge charging a refusal to bargain were initiated within a day of each other. It necessarily follows from the bilateral nature of the obligation to meet at reasonable times and negotiate in good faith that a party cannot be found to have committed an unfair labor practice premised on the failure to bargain when the party did not have sufficient time to respond to a request to bargain.

Nonetheless, VSEA seeks to excuse its actions on the grounds that Court Administrator Patricia Gabel had made it clear in a June 24, 2015, letter to VSEA that the Judiciary would not

negotiate prior to 2016, and any unfair labor practice case would take a substantial amount of time to litigate. It is true that Gabel, in response to a May 29, 2015, letter from the VSEA Judicial Unit Executive Committee that VSEA "intends to provide formal notice of its desire to bargain a successor collective bargaining agreement during the month of July", stated that the "Judiciary must respectfully decline the invitation to commence negotiations in July". Gabel further indicated that, "absent an extraordinary change in circumstances, you should expect that we will follow past schedule for scheduling."

However, this does not result in a conclusion that VSEA was entitled to bypass required steps of the Judiciary Act with respect to requesting commencement of negotiations. The Board has dismissed cases in other contexts where employees bypass earlier steps of the grievance procedure and seek to bring an issue directly to the Board. Grievance of McCort, 19 VLRB 319 (1996); *Affirmed*, Sup.Ct.Dock.No. 96-540, Unpublished decision, 1997.Vermont State Employees' Association and Barney v. Department of Public Safety, 21 VLRB 224 (1998). Employees may not bypass required steps of the grievance procedure on the grounds that it would have been futile to achieve a resolution at those steps. McCort, 19 VLRB at 322-325. VSEA and Barney, 21 VLRB at 228.

Similarly here, VSEA was required to adhere to the requirements of the Judiciary Act with respect to requesting bargaining during the year preceding the expiration date of the collective bargaining agreement and providing sufficient time for the Judiciary to respond to the request. Failure to do so means VSEA has improperly omitted a necessary step for the Board to conclude that the Judiciary violated its duty to bargain. By its premature filing of an unfair labor practice charge without providing the Judiciary with an opportunity to respond to the request for

bargain, VSEA has set into motion what it contends it was seeking to avoid – a substantial delay in negotiations.

Our conclusion is bolstered by the conflicting signals VSEA sent the Judiciary concerning the request to negotiate. Upon receipt of the above-discussed June 24 letter from Gabel, Judiciary Unit Chair Margaret Crowley notified Gabel that day in writing to "clarify" that VSEA's letter requesting bargaining "would be sent to you at the end of July". Despite this clarification, VSEA sent its demand to bargain on July 1, followed by the filing of the unfair labor practice charge on July 2. As discussed above, the bilateral nature of the obligation to meet at reasonable times and negotiate in good faith necessarily implies a joint discussion on establishing negotiation meetings. VSEA's actions demonstrated a failure to engage in consistent and bilateral communications. This has contributed to the delay in the joint commencement of negotiations. We cannot conclude the Judiciary violated its duty to bargain given VSEA's failings to appropriately request bargaining. Thus, we conclude that the unfair labor practice charge in this matter should be dismissed.

/s/ Richard W. Park

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Richard W. Park

/s/ James C. Kiehle

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James C. Kiehle

CONCURRING OPINION

I concur with my colleagues that the unfair labor practice charge should be dismissed, but disagree with their reasoning. Unlike the majority, I conclude that by agreeing to the term of the collective bargaining agreement providing that "(t)he parties agree to meet not later than

February 1, 2016 to commence negotiations concerning the successor agreement to commence July 1, 2016", VSEA has waived its right to invoke the provision of the Judiciary Act which states that "(u)pon request of either party, negotiations . . . shall be commenced at any time during the year preceding the expiration date of the agreement."

In determining whether a party has waived its rights, it must be demonstrated that 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 (1982). Mt. Abraham Education Association v. Mt. Abraham Union High School Board of School Directors, 4 VLRB 224, 231 (1981). The parties have explicitly addressed the starting date of negotiations in the collective bargaining agreement by providing for February 1 as the agreed upon date by which negotiations will be commenced. In so acting, they essentially have mutually defined the "reasonable" time to meet to negotiate pursuant to Section 1016 of the Judiciary Act. In agreeing to this contract language, VSEA has in my view consciously and explicitly waived its right under the Judiciary Act to request the commencement of negotiations at any time during the year preceding the expiration date of the collective bargaining agreement.

I concur with the majority opinion to the extent that the "not later than" wording of the collective bargaining agreement does not preclude commencement of negotiations at an earlier date within the year preceding the expiration date of the collective bargaining agreement. However, I disagree with them that one party over the objection of the other can mandate an earlier start date for negotiations. Terms should not be read into a contract unless they arise by necessary implication. In re Stacey, 138 Vt. 68, 71 (1980). It is not necessarily implied under the contract language that one party may unilaterally mandate an earlier negotiations beginning date.

Instead, the contract provision results in the parties having to mutually agree to earlier commencement of bargaining.

My views in this regard are reinforced by the historical practice of the parties to begin negotiations after the first of the calendar year. Although this practice standing by itself would not be sufficient to indicate a party has waived its right to an earlier start date for negotiations, taken together with the contract language it demonstrates to me that VSEA waived the statutory right to earlier negotiations. VSEA intentionally relinquished a known right. In re Grievance of Guttman, 139 Vt. 574 (1981). The practice is consistent with the contract language.

In sum, I conclude that VSEA's unilateral demand that negotiations begin earlier than the agreed-upon February 1 date essentially was an attempt to alter the terms of the collective bargaining agreement without the Judiciary's consent. This was contrary to Section 1036(a) of the Judiciary Act which provides that a collective bargaining agreement "may not be . . . supplemented or renegotiated during the term of the agreement unless both parties consent in writing". Accordingly, the Judiciary's refusal to commence bargaining at an earlier date did not constitute an unfair labor practice. Any change to the required start date of negotiations would have to result either from mutually-agreed upon negotiations during the term of the existing collective bargaining agreement or negotiations over the terms of a successor agreement.

/s/ Gary F. Karnedy

Gary F. Karnedy, Chairperson

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered that the unfair labor practice charge filed by the Vermont State Employees' Association in this matter is dismissed.

Dated this 16th day of October, 2015, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Gary F. Karnedy

Gary F. Karnedy, Chairperson

/s/ Richard W. Park

Richard W. Park

/s/ James C. Kiehle

James C. Kiehle