VERMONT LABOR RELATIONS BOARD

ARLINGTON STAFF ASSOCIATION/ VERMONT-NEA	)	
v.	)	DOCKET NO. 15-49
ARLINGTON BOARD OF SCHOOL DIRECTORS	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

The Arlington Staff Association/Vermont-NEA ("Association") filed an unfair labor practice charge on November 24, 2015, contending that the Arlington Board of School Directors ("School Board') committed an unfair labor practice, in violation of 21 V.S.A. §1726(a)(1) and (5), by unilaterally contracting out the bargaining unit work of food service employees during the term of a collective bargaining agreement. The School Board filed a response to the charge on December 16, 2015.

Labor Relations Board Executive Director Timothy Noonan met with the parties on February 4, 2015, in furtherance of the Labor Relations Board's investigation of the charge and to informally attempt to resolve issues in dispute. The issues were not resolved. The Labor Relations Board issued an unfair labor practice complaint on May 10, 2016, and scheduled the case for a June 30, 2016, hearing.

The June 30 hearing was continued by agreement of the parties, and the hearing was rescheduled to September 22, 2016. The parties ultimately agreed to submit to the Labor Relations Board a signed stipulation of facts, and a request for a decision by the Board without an evidentiary hearing, pursuant to Section 35.12 of Board *Rules of Practice*. The parties filed mutually agreed upon exhibits on September 20, 2016, and a Stipulated Statement of Facts on

September 21, 2016. These stipulated facts constitute the Findings of Fact contained in this decision.

The Association filed a brief in support of its position on October 6, 2016. The School Board filed a brief on October 11, 2016. The School Board brief was postmarked a day after the deadline for postmarking briefs. The School Board filed a motion for an extension of time to file a brief. The Association did not oppose the motion, and the Labor Relations Board granted it.

FINDINGS OF FACT

1. Arlington School District is in Bennington County. It has two schools, an elementary school and a high school. The elementary school has 215 students, and the high school has 215 students, for a total of 430 students in the district.

2. The Association and the School Board, pursuant to 21 V.S.A. Chapter 22, have engaged in collective bargaining periodically over the years, and have entered into several successive collective bargaining agreements for non-teacher employees.

3. At no time did any previous collective bargaining agreement between the Association and School Board entitle the School Board to subcontract bargaining unit work, including kitchen work.

4. The 2013-2015 collective bargaining agreement between the Association and School Board was effective from July 1, 2013, through June 30, 2015 (Exhibit 1).

5. During the 2013-2015 collective bargaining agreement, the School Board employed four to five food service employees. The food service employees have been covered by the terms of past and current collective bargaining agreements (Exhibits 1 and 2).

6. The School Board was discussing the food service program in 2014 and into 2015. On November 5, 2014, the minutes of the School Board meeting show that costs were mounting in the program because of, among other things, new changes in the federal regulations governing food service in schools. On December 3, 2014, the School Board again discussed concerns about the financial viability of the food service program. The minutes for the January 28, 2015, meeting demonstrate that food service contracts had been reviewed by the State and that they were being sent out for bids (Exhibits 19, 20, 21).

7. On February 5, 2015, the parties exchanged bargaining proposals for the successor collective bargaining agreement. The School Board made no mention of subcontracting food service personnel in its proposals (Exhibit 3).

8. On February 11, 2015, Superintendent Judith Pullinen informed the Arlington School Board that, pursuant to earlier School Board discussions, she sent a request for bids to private providers. Those bids would be followed by a presentation to the School Board by the private contractors. Brian Howe, Arlington Education Association President, was present at the meeting and did not raise any concerns (Exhibit 17).

9. On March 11, 2015, Superintendent Pullinen presented food service proposals to the School Board from two food service contractors, The Abbey Group and Café Services. Pullinen asked the Board to review the proposals and have questions ready for the April 8, 2015, School Board meeting, when The Abbey Group and Café Services were scheduled to make presentations to the School Board. Association representation was present during the discussion concerning the potential food service contractors. Neither the Association nor the School Board discussed whether the matter should be collectively bargained (Exhibit 4).

10. On March 19, 2015, the School Board and Association exchanged bargaining counterproposals for the successor collective bargaining agreement. Neither party mentioned subcontracting food service personnel in its counterproposals (Exhibit 5).

11. On April 2, 2015, the Association and School Board reached a tentative agreement for a successor collective bargaining agreement covering the period July 1, 2015 through June 30, 2018 (Exhibit 6).

12. On April 8, 2015, School Board held a board meeting during which The Abbey Group and Café Services made presentations regarding their companies and services. Again, Association representation was present and there was no discussion on either side of the need to collectively bargain the food service contract issue (Exhibit 7).

13. On April 22, 2015, the School Board held a board meeting during which it discussed subcontracting food service personnel. Brian Howe, President of the Arlington Education Association, was present at the board meeting and inquired into who would be staffing the employees for the food service companies. Superintendent Pullinen stated that the School Board could RIF (reduction in force) the employees and subcontract the work to either The Abbey Group or Café Services. Howe disagreed, and informed the School Board that the current food service workers were represented by the Vermont-NEA and the Arlington Support Staff Association (Exhibit 8).

14. Having learned that contracting out the food services without attempting to negotiate with the Association could be an unfair labor practice, the School Board instructed the Superintendent to initiate a negotiation and did not vote to authorize a contract with a private food service.

15. On April 29, 2015, Superintendent Pullinen emailed the Association that she would like to discuss outsourcing food service. Pullinen again emailed the Association on May 1, 2015, for the same purpose (Exhibits 18, 22).

16. Pullinen and the Association had a short meeting on May 4 in which Pullinen indicated that the School Board wanted to subcontract the food service program, thereby eliminating bargaining unit positions. Pullinen requested that the Association meet with the School Board to negotiate this elimination of positions. Pullinen followed up the meeting with an email dated May 13, 2015, where she requested dates for negotiations (Exhibit 16).

17. On May 13, 2015, the School Board discussed contracting with Café Services in executive session (Exhibit 9).

18. On May 14, 2015, Superintendent Pullinen emailed Deborah Roberts, President of the Support Staff Association, to request a meeting to discuss contracting food service workers (Exhibit 11).

19. On May 14, 2015, Brian Howe informed Pullinen that the Association represented the food service employees, and it was committed to protect them and their employment. For these reasons, Howe stated that the Association would not negotiate or agree to the subcontracting of these bargaining unit positions (Exhibit 11).

20. On May 15, 2015, Roberts informed Superintendent Pullinen that the Support Staff Association did not agree to open formal negotiations regarding the School Board's attempt to subcontract food service work to an outside company. In this letter, the Association reiterated that it represented the food service employees and that it was committed to protect them and their continued employment (Exhibit 12).

21. On May 22, 2015, Superintendent Pullinen again requested by letter that the Association engage in negotiations. The Association never responded to the letter (Exhibit 13).

22. On May 27, 2015, the School Board held a meeting wherein it laid off its food service personnel in order to contract with Café Services. It subsequently entered into a contract with Café Services (Exhibit 14).

23. The Association filed a timely grievance under the collective bargaining agreement challenging the layoffs of these bargaining unit members.

24. On May 28, 2015, the School Board sent reduction in force notifications to all four food service workers employed by the School Board (Exhibit 15).

25. In fiscal year 2013, the food service program for the District ran a deficit of $11,556. The operating deficit rose to $40,771.92 in fiscal year 2014 and $81,491.31 in fiscal year 2015. Eventually, the School Board awarded a food service contract to Café Services. In the first year of contracted food services, fiscal year 2016, there was a program surplus of $13,499.43. Café Services workers earn less in wage and have reduced benefits compared to the former unionized employees.

26. On July 9, 2015, the School Board and the Association ratified the 2015-2018 collective bargaining agreement. The recognition clause of the 2015-2018 agreement continues to include food service personnel (Exhibit 2).

OPINION

The issue before us is whether the School Board committed an unfair labor practice, in violation of 21 V.S.A. §1726(a)(1) and (5), by unilaterally contracting out food service work

which previously had been performed by members of the bargaining unit represented by the Association.

The Association contends that the School Board violated its duty to bargain in good faith, and interfered with, restrained and coerced employees in the exercise of their bargaining rights, by instituting a unilateral change in the mandatory bargaining subject of the subcontracting of food services. This was done, the Association maintains, by making no proposals concerning such subcontracting while the parties were engaged in contract negotiations, and then seeking to discuss this singular issue after the parties had reached a tentative agreement for a successor collective bargaining agreement. The Association asserts that it was under no obligation to negotiate over new terms and conditions of employment on this single issue outside of the formal negotiation process. The Association contends that it never waived its ability to contest the ability to contest the subcontracting of food service positions either through the terms of the collective bargaining agreement or by refusing to agree to what amounted to impact bargaining over a *fait accompli*.

The School Board contends that it is only when a school board abandons its duty to negotiate and unilaterally subcontracts bargaining unit work that an unfair labor practice occurs, and that is not the case here. The School Board asserts that it did not act unlawfully under circumstances where it notified the Association that it was considering subcontracting the bargaining unit food service work, it sought to negotiate on the issue prior to committing to a third-party contract, and the Association failed to take advantage of the opportunity to negotiate. The School maintains that it fulfilled its duty to negotiate in good faith through its repeated attempts to negotiate with the Association, and the Association refused outright to engage in any negotiation whatsoever.

We are on well-trod ground in deciding this issue. The Board has issued decisions in three unfair labor cases under the Municipal Employee Relations Act ("MERA") where unions have alleged that employers committed unfair labor practices by unilaterally contracting out the work of bargaining unit employees.

The Board ruled in a 1992 decision that contracting out custodial work previously performed by bargaining unit employees of a school constituted a mandatory subject of bargaining, and that a school board committed an unfair labor practice by acting unilaterally to subcontract work without negotiating with the union. The independent contractors did the same work previously done by bargaining unit employees, and the contracting out decision related primarily to conditions of employment rather than formulation or management of public policy. Middlebury Union High School Educational Support Personnel Unit v. Middlebury Union High School Board of Directors, 15 VLRB 397 (1992). As a remedy for the unfair labor practice, the Board ordered the employer to: 1) cease and desist from implementing its contracting out decision, 2) negotiate in good faith on this issue with the union; and 3) reinstate the terminated custodians with back pay and benefits. 15 VLRB at 416.

The second case involving contracting out resulted in two Board decisions and two Supreme Court decisions. Milton Education and Support Association v. Milton Board of School Trustees, 20 VLRB 114 (1997; *Affirmed in part, Reversed in part*, 171 Vt. 64, (2000). 23 Vt. 301 (2000); *Affirmed*, 175 Vt. 531 (2003). The Board ultimately determined, and the Supreme Court affirmed, that the unilateral action by the School Board of contracting out custodial work during the time it was under a legal duty to bargain in good faith violated its duty to bargain, and the Union did not waive its right to bargain over this issue. The Board ordered the employer to cease and desist from implementing its contracting out decision, negotiate in good faith with the

Association on the issue, and reinstate the affected custodians with back pay and benefits. 23 VLRB at 312-13.

In the third contracting out case, the issue decided by the Board was whether school boards committed unfair labor practices by imposing terms providing for contracting out of driver education work, and paying for that work at an hourly rate instead of at the salary rate. The Board determined that the employers acted lawfully under circumstances where: 1) contracting out driver education work, and compensating certain driver education work by an hourly rate of pay instead of salary, were matters in dispute during collective bargaining negotiations for a successor collective bargaining agreement; 2) there was no contention by the union that the employers did not bargain in good faith over these matters prior to the unilateral imposition; and 3) the timing of the employers' unilateral imposition was appropriate as it occurred more than 30 days after issuance of the fact finder's report. Barre Town Education Association v. Board of School Commissioners of the City of Barre and the Spaulding High School Union District Board of School Directors, 31 VLRB 323 (2011).

The circumstances of the case before us align more closely with the first two cases than the third one, and we ultimately conclude that the School Board committed an unfair labor practice by its actions. 21 V.S.A. §1726(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively in good faith with the exclusive bargaining agent". The statutory duty to bargain under MERA is violated when an employer, without first engaging in discussions with a union with which it is carrying on bonafide contract negotiations, institutes a unilateral change in a mandatory subject of bargaining. Burlington Fire Fighters v. City of Burlington, 142 Vt. 434, 436-437 (1983). Middlebury, 15 VLRB at 414. The unilateral imposition of terms of employment during the time the employer is under a legal duty to bargain

in good faith is the very antithesis of bargaining and is a *per se* violation of the duty to bargain. Id.

Absent a waiver, the employer has a duty to bargain changes in mandatory bargaining subjects. VSCFF v. Vermont State Colleges, 149 Vt. 546, 549 (1988). Milton, 20 VLRB at 127. Burlington Firefighters Association, Local 3044, IAFF v. City of Burlington, 10 VLRB 53, 59 (1987). Mt. Abraham Education Association v. Mt. Abraham Union High School Board, 4 VLRB 224, 231-232 (1981). In determining whether a party has waived its bargaining rights, the Board has required that it be demonstrated that a party consciously and explicitly waived its rights. Milton, 20 VLRB at 127. Middlebury, 15 VLRB at 411. 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, 4 VLRB at 231. A party can intentionally relinquish a known right by failing to assert it in a timely manner. VSEA v. State of Vermont, 6 VLRB 217 (1983).

Subcontracting work performed by bargaining unit employees goes to the heart of a union's ability to protect bargaining unit employees, and thus involves an issue central to the system of collective bargaining. Milton, 20 VLRB at 124, 128. Absent provisions of a collective bargaining agreement permitting subcontracting, a school board commits an unfair labor practice by acting unilaterally to subcontract work without negotiating with the union. Milton, 20 VLRB at 128. The burden is on a school board to initiate subcontracting negotiations, and a school board operates at its own peril by not proceeding carefully in such situations. Id.

The School Board here failed in these affirmative responsibilities. The collective bargaining agreement did not entitle the School Board to subcontract bargaining unit work, including that of food service employees explicitly covered by the agreement. Prior to the beginning of negotiations, the School Board had concerns about the financial viability of the

food service program and was in the process of soliciting bids from private food service companies to replace food service employees in performing the work. During the period of negotiations, the School Board actively explored subcontracting the work, reviewed proposals from two prospective food service contractors, and planned for the prospective contractors to make presentations to the School Board.

Given these circumstances, the School Board should have indicated during negotiations for the 2015-2018 collective bargaining agreement that consideration was being given to subcontracting food service work and initiated bargaining on the issue along with other subjects of bargaining. Instead, the School Board was silent on this issue during negotiations and waited until after a tentative agreement was negotiated with the Association to announce to the Association it was considering subcontracting food service work.

The School Board's disregard of the collective bargaining process is a particular problem given the importance of what was at issue - i.e., the removal of work from the bargaining unit by giving the work to a private contractor. Milton, 20 VLRB at 130. The precedents in Vermont are clear and long-standing on the responsibility of employers to engage in collective bargaining with unions before subcontracting bargaining unit work. The School failed to meet this obligation here.

The School Board points out in its brief that Association representatives were present at School Board meetings in February, March and April, 2015, wherein the School Board discussed requesting bids from private contractors and subcontracting the food service work, and that the Association representatives never raised any concerns or relayed that the matter be collectively bargained. As set forth above, the burden is on a school board to initiate subcontracting negotiations, and a school board operates at its own peril by not proceeding carefully in such

situations. The School Board needed to directly raise the issue with the Association by initiating subcontracting negotiations, and cannot rely on the School Board meetings at issue as evidence that the Association somehow waived its rights to contest the subcontracting.

The School Board also did not cure its deficiencies by belatedly seeking to discuss the subcontracting of food service work after it already had reached a tentative agreement with the Association on a successor collective bargaining agreement. An employer must inform the union of its proposed actions under circumstances which at least afford a reasonable opportunity for counter arguments or proposals. Middlebury, 15 VLRB at 414. Such reasonable opportunity would have existed during negotiations on the successor collective bargaining agreement. This was the obvious and logical time to discuss the issue. The Association was under no obligation to negotiate over new terms and conditions of employment on this single issue outside of the negotiations for a successor collective bargaining agreement. It would not be appropriate to require the Association to negotiate over this issue separately given the failure of the School Board to properly and diligently initiate bargaining on such an important issue.

The School Board contends that the Board of School Commissioners of the City of Barre and the Spaulding High School Union District Board of School Directors decision summarized above, in which the Labor Relations Board concluded that the employers did not commit unfair labor practices, had comparable circumstances to the case now before us. We disagree. In that case, the contracting out of bargaining unit work was a matter in dispute during collective bargaining negotiations for a successor collective bargaining agreement. Here, the School Board improperly failed to initiate negotiations on subcontracting during bargaining for a successor collective bargaining agreement.

We view the actions of the School Board in this matter as detrimental to good faith labor relations and precluding meaningful negotiations. When this case is reduced to its essence, the School Board did not meet its burden to negotiate in a timely manner and the Association did not waive its right to contest the subcontracting of food service work. Milton, 20 VLRB at 130. There being no waiver of bargaining rights by the Association, the unilateral action by the School Board of contracting out food services work during a time it was under a legal duty to bargain in good faith was a violation of the duty to bargain.

In deciding what remedy to apply because of the School Board's unfair labor practice, we look to section 1727d) of MERA, which authorizes the Labor Relations Board to require a party committing an unfair labor practice "to cease and desist from the unfair labor practice and to take such affirmative action as the Board shall order". This requires the School Board at the least to cease and desist from implementing the subcontracting decision. However, this remedy would be incomplete since it would not make the laid off food service employees "whole" for the School Board's unfair labor practice. The appropriate remedy to make the employees whole is to order them reinstated with back pay and benefits. Middlebury, supra. Milton, supra.

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered:

1. The Arlington Board of School Directors ("School Board") shall cease and desist from the subcontracting of food services in the Arlington School District;

2. The food service employees of the Arlington School District who were laid off due to the subcontracting of food services shall be reinstated to their bargaining unit positions as food service employees;

3. The food service employees shall be awarded back pay and benefits from the date commencing with their layoff until their reinstatement to bargaining unit positions for all hours of their regularly assigned shift, minus any income (including

unemployment compensation received and not paid back) received by the food service employees in the interim. The benefits provided to employees shall be identical to the benefits they would have received but for their layoffs;

4. The interest due employees on back pay shall be computed on gross pay, shall be at the rate of 12 percent per annum, and shall run from the date each paycheck was due during the period commencing with the layoff of employees, and ending on the date of their reinstatement to bargaining unit positions. Such interest for each paycheck date shall be computed from the amount of each paycheck minus income (including unemployment compensation) received by the food service employees during the payroll period;

5. The parties shall submit to the Labor Relations Board by December 1, 2016, a proposed order indicating the specific amount of back pay and benefits due the food service employees; and if they are unable to agree on such proposed order, shall notify the Board in writing that date of specific facts agreed to by the parties, specific areas of factual disagreement and a statement of issues which need to be decided by the Labor Relations Board. Any hearing necessary on the amount of back pay and benefits shall be held on December 8, 2016, at 1 p.m., in the Labor Relations Board hearing room, 13 Baldwin Street, Montpelier, Vermont; and

6. Copies of this Order shall be posted by the School Board at places in the Arlington School District normally used for employer-employee communications.

Dated this 4th day of November, 2016, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Gary F. Karnedy

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Gary F. Karnedy, Chairperson

/s/ Edward W. Clark, Jr.

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Edward W. Clark, Jr.

/s/ Robert Greemore

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Robert Greemore