VERMONT LABOR RELATIONS BOARD

MOUNT ABRAHAM EDUCATION ASSOCIATION v. MOUNT ABRAHAM UNION HIGH SCHOOL BOARD OF SCHOOL DIRECTORS	))))	DOCKET NO. 80-93

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On December 23, 1980, the Mount Abraham Education Association (hereinafter "Association") filed an unfair labor practice charge with the Vermont Labor Relations Board. The charged alleged the Mount Abraham Union High School Board of Directors (hereinafter "School Board") violated 21 VSA §1726 (a)(1) and (5) when it refused to bargain with the Association over a change in school policy which prohibited smoking in the teachers' lounge.

A hearing was held in the Board hearing room in Montpelier on April 23, 1981. William G. Kemsley, Sr. and James S. Gilson were present for the Board, as was Board counsel Peter Monte. Chairman Kimberly B. Cheney did not participate in the proceeding. The School Board was represented by Attorney Mark L. Sperry. Norman P. Bartlett represented the Association.

Briefs were filed by the School Board and Association on May 12 and 14, 1981, respectively.

FINDINGS OF FACT

1. Mount Abraham Union High School is a public union high school located in Bristol, Vermont. The school serves as the public high school for the towns which make up the Addison Northeast Supervisory Union School

District. The school is operated by an elected Board of School Directors. Martin F. Kamencik is currently the chairman of the Board of School Directors.

2. Keith Hall is the superintendent of schools of the Addison Northeast Supervisory Union School District. Mount Abraham Union High School is a part of that school district.

3. The certificated teachers who are employed by the Mount Abraham Union High School District are represented by the Mount Abraham Education Association. The Association is the legal collective bargaining representative for all such certificated teachers. Paul E. Spurlock is currently the president of the Association.

4. The Association and the School Board have negotiated and executed a Procedural Agreement and a Negotiated Contract. The Procedural Agreement was signed by the parties on October 10, 1978, and is effective until October 9, 1981 (Joint Exhibit #1). The Negotiated Contract (hereinafter "Contract") between the parties was signed on May 15, 1979, and it continues up to and including June 30, 1981 (Joint Exhibit #2).

5. On May 6, 1980, the School Board adopted a policy which prohibited smoking in the high school building as of July 1, 1980 (Joint Exhibit #3). In considering the adoption of this policy, the School Board at no time discussed it with the Association.

6. At the May 6, 1980, School Board meeting, when the School Board adopted its no smoking policy, George Tighe spoke in opposition to the change of the policy, and stated he felt it was a matter of negotiation with the Association. Tighe, a teacher and chairperson of the Association's negotiations committee, was speaking as an individual and not as a representative of the Association.

7. Prior to adoption of this policy, teachers had always been permitted to smoke in a teachers' lounge located within the building pursuant to a provision in the school handbook. With the new no-smoking policy, teachers would no longer be allowed to smoke in the lounge.

8. The new policy affected the employees of the high school - teaching and non-teaching staff - and the general public. Students had not been allowed to smoke on school grounds since the beginning of the 1979-80 school year.

9. The Association filed a Step I grievance on May 16, 1980, alleging that the change in policy was a "unilateral, unnegotiated change" in the teachers' working conditions. As a remedy, the grievance asked that the School Board vote be rescinded and working conditions be allowed to remain the same (Joint Exhibit #4). The grievance was processed through the steps of the grievance procedure, and it was rejected by the principal, superintendent, and the School Board (Joint Exhibit #4-8, 10). Throughout the grievance procedure, management took the position that the claim made by the Association did not constitute a violation of the Agreement and/or a grievance as defined by the Agreement.

10. On June 18, 1980, the Association requested binding arbitration of the unresolved grievance (Joint Exhibit #9).

11. On June 25, 1980, Martin Kamencik, Chairman of the School Board, in response to the above request, took the position that the Board was not bound to go to arbitration on the issue because there was no jurisdiction under the Agreement. He indicated, however, he was willing to submit the jurisdictional issue to binding arbitration to determine whether the matter was subject to the Agreement (Joint Exhibit #10).

12. The parties submitted the issue to Arbitrator John McCrory. The matter was submitted on a stipulated record without a hearing. The only issue before the arbitrator was that of arbitrability. On October 4, 1980, McCrory held: "The grievance makes no reference to the collective bargaining agreement...the claim or protest stated by the Association in the grievance is not an arbitrable grievance under the provisions of the collective bargaining agreement between the parties. The grievance is therefore denied." (Joint Exhibit #11).

13. On July 1, 1980, the no-smoking policy went into effect as scheduled. School was not in session at this time and classes did not resume until the first week of September. The full impact of the policy change was not felt until late August, 1980, when the teachers returned for orientation.

14. The normal workday for teachers during the school year is as follows: teachers are required to be in the school building at 8:00 a.m. and remain until 3:30 p.m. During each day, teachers have an unassigned preparation period of approximately 42 minutes, a lunch period of approximately 18 minutes, and unassigned time before or after school of approximately 50 minutes.

15. Prior to the implementation of the no-smoking policy, teachers who smoked were able to smoke during their unassigned time in the teachers' lounge and do preparatory work for classes at the same time.

16. With the implementation of the no-smoking policy, teachers who smoked were now required to smoke outside the school building. Teachers "followed the sun" in good weather in choosing a spot to smoke, and in inclement weather smoked in their cars.

7. The result of the no-smoking policy was that some of the time the teachers who smoked previously spent in the teachers' lounge doing their preparatory work (and smoking) now was spent smoking outdoors. The outdoors was not conducive to doing classwork. Work which had previously been done during preparation periods in the lounge now was done at home.

OPINION

I. Timeliness

The School Board argues this complaint should be dismissed because it was not issued within the statutory time limit. 21 VSA §1727(a) provides:

> No complaint shall issue based on any unfair labor practice occurring more than six months prior to the filing of the charge with the board...

The School Board contends the six-month period is geared to the date the Labor Board issues a complaint, not the date the charge is filed by the Association. Thus, they feel this complaint should be dismissed since the Labor Board complaint was issued March 13, 1981, more than six months after the date of the School Board vote (May 6, 1980) or the date the policy became effective (July 1, 1980). We disagree with the School Board. The six-month period clearly relates to the alleged unfair practice and the subsequent filing of the charge; not the alleged unfair practice and the issuance of the complaint (See VLRB Rules of Practice, Article 43).

A question also arises as to when the alleged unfair labor practice actually occurred; and, thus, when the six-month clock began running. Was it May 6, 1980, when the School Board voted to adopt the no-smoking policy? Was it July 1, 1980, when the policy actually became effective?

The charge made by the Association was that "the unilateral change

in the teacher's working conditions which resulted from the Board's adoption of a no-smoking policy is an unfair labor practice..."

The "unilateral change in the teachers' working conditions" occurred upon implementation of the no-smoking policy July 1, 1980; not upon its adoption May 6, 1980. During the period May 6, 1980, to July 1, 1980, there was no effective change in the school's smoking policy; teachers were still permitted to smoke in the lounge. It was only upon implementation of the policy that a change in "working conditions" had been effected.

Thus, we find the conduct alleged to be an unfair labor practice occurred on July 1, 1980. The Association filed its charge on December 23, 1980; within the six-month period. We do not dismiss this complaint on the basis of timeliness.

II. Deferral to Arbitrator's Award

The School Board moves that this case be dismissed because the dispute is a matter of contractual interpretation which has been resolved by an arbitrator through the grievance procedure. They contend the decision by the arbitrator here is binding, and thus, the Association is prohibited from proceeding any further on the no-smoking issue. The School Board holds we have no jurisdiction over the matter; that it is res judicata. Article III, contract, provides:

> Decisions of the arbitrator in matters of grievance shall be final, and shall not be subject to appeal by either party.

We are asked to defer to the arbitrator's award. In Local 881, International Association of Firefighters, AFL-CIO-CLC v. City of Barre, Vermont, 2 VLRB 81, we stated the criteria that must be met in order for us to defer to an arbitrator's award. One of the criteria is that the arbitrator clearly decided the unfair labor practice dispute.

Here, the arbitrator was limited to determining whether the grievance was an arbitrable grievance under the provisions of the contract. Article III, Contract, provides:

> ...the arbitrator shall have no power to add to, delete from, amend, or in any manner alter the contract.

Thus, the jurisdiction of the arbitrator here was restricted to interpreting the contract. He determined that the grievance was not arbitrable under the contract.

The issue of arbitrability before the arbitrator is not the issue before us in the unfair labor practice charge. The Association, in the charge before us, is not claiming the School Board violated the contract. The Association charges that the implementation of the no-smoking policy was a unilateral change in working conditions which, under 21 VSA §1726(a)(1) and (5), constitutes 1) interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by statute; and, 2) refusal to bargain collectively in good faith with the exclusive bargaining agent.

The charge made by the Association involves an issue central to the system of collective bargaining. In these instances, we will apply our own principles of interpretation of the collective bargaining statute we are empowered to administer. Our mandate is to enforce a statutorily-determined system of collective bargaining; this duty differs from that of the arbitrator who looks to contract interpretation alone. Our Supreme Court has consistently found the authority of the arbitrator limited to contract interpretation. Fairchild v. West Rutland School District, 135 Vt. 282, 376 A2d 28 (1977). Woodstock Union High School Board of Directors v. Woodstock Union High School Teachers' Organization, 136 Vt. 256, 388 A2d 392 (1978).

The decision by Arbitrator McCrory is binding on the Association. However, since his decision is limited to contract interpretation and the issue raised before the arbitrator is not the one raised in the unfair labor practice charge, we do not defer to the arbitrator's decision. We are called to make a statutory determination; a determination not considered by the arbitrator.

III. Refusal to Bargain

As a preliminary note, the parties have a clear obligation to negotiate during the term of a collective bargaining agreement. The fact that a matter has been omitted from a labor agreement and has not been discussed in negotiations does not, in and of itself, constitute a waiver of the parties' right to bargain over a particular subject unless the parties have explicitly waived that right. This is particularly true where an established past practice is concerned. Vermont State Employees' Association v. State of Vermont, 2 VLRB 26 (1979). Firefighters v. City of Barre, 2 VLRB 81 (1979). Vermont State Employees' Association v. State of Vermont, et. al, 2 VLRB 155 (1979).

In the case before us, a no-smoking policy was never included in a labor agreement between the parties or even the subject of negotiations. An established past practice permitting smoking in the teachers' lounge existed and was included in the school handbook. Clearly, the Association did not waive its rights to negotiate over the subject.

Nonetheless, the School Board claims it had no obligation to bargain over the policy since the Association did not request negotiations on the subject. We disagree. The evidence is clear that the Association sought to negotiate over the change in policy.

The grievance submitted by the Association is evidence of its desire to bargain. Although we do not support the grievance procedure as the forum for initiating bargaining, its invocation by the Association was a clear sign of its objection to the unilateral adoption of a no-smoking policy. The School Board was well aware of the Association's desire to discuss the change; however, they refused to discuss it with the Association and implemented the new policy. Unilateral changes by an employer without discussion with the union during the course of a collective bargaining relationship concerning matters which are proper subjects of bargaining are normally regarded as per se refusals to bargain. NLRB v. Katz, 369 US 726, 50 LRRM 2177 (1962). Putting aside for a moment whether a no-smoking policy is a required subject of bargaining, the unilateral action by the School Board of implementing such a policy constituted a refusal to bargain.

IV. Required Subject of Bargaining

The Association contends the implementation of a no-smoking policy changed the working conditions of a number of teachers, and those working conditions are mandatory subjects of bargaining. They argue refusal of the School Board to negotiate the policy constituted an unfair labor practice under 21 VSA §1726(a)(1) and (5), which provides:

> (a) It shall be an unfair labor practice for an employer:
>
> (1) To interfere with, restrain or coerce employees in the exercise of their rights guaranteed by this chapter or by any other law, rule, or regulation.
>
> ...(5) to refuse to bargain collectively in good faith with the exclusive bargaining agent.

The School Board's duty to bargain is established in 16 VSA §2004:

> The school board...shall upon request, negotiate with representatives of the recognized organization on matters of salary, related economic conditions of employment, procedures for processing complaints and grievances relating to employment, and any mutually agreed upon matters not in conflict with the statutes and laws of the State of Vermont.

In other jurisdictions, courts and labor relations boards have generally held that implementation of a no-smoking policy related to "terms and/or conditions of employment" and was, thus, a mandatory subject of bargaining. Chemtronics, Inc. and Local 42, Industrial Production Employees Union, National Labor Relations Board, 236 NLRB No. 21 (1978). Steuben-Allegany Boces and Steuben-Allegany Boces Unit, New York Public Employment Relations Board, Case No. U-4259 (1980). Pine Hill Board of Education, New Jersey Public Employment Relations Commission, 1 NPER 31-10108 (1979). Seattle, Washington, Local, American Postal Workers Union, AFL-CIO v. US Postal Service, USDC WD Wash, GERR814:29.

The case before us is distinguished from the cases cited because here we have more restrictive statutory language. The applicable statutes in the cited cases require bargaining over "wages, hours, and conditions of employment" or "terms and conditions of employment." 16 VSA §2004 requires bargaining over salary and related economic conditions of employment.

We must determine whether implementation of the no-smoking policy related to "related economic conditions of employment". The Association contends the policy impacts on the working hours of the teachers who smoke and is, thus, an economic condition of employment. As a result of the policy, some of the time the teachers who smoked previously spent in the teachers' lounge doing their preparatory work (and smoking)

was now spent smoking outdoors where it was almost impossible to do preparatory work. Work which had previously been done during preparation periods in the lounge now was done at home.

The Association asks us to construe the statutory language on required subjects of bargaining broadly. In cases involving State employees, our Supreme Court and this Board have held the statute required a broad scope of bargaining. However, the statutory language applicable there required bargaining over "working conditions". Vermont State Colleges Faculty Federation v. Vermont State Colleges, 138 Vt. 451, 418 A2d 34 (1980). VSEA v. State of Vermont. 2 VLRB 26 (1979). VSEA v. State of Vermont, et. al, 2 VLRB 155 (1979). Here, the statutory language is more restrictive.

We would find a no-smoking policy to be a required subject of bargaining if we were satisfied that the effect of its implementation had any substantive economic impact on the teachers who smoked. We do not find any such impact here. The policy undoubtedly causes personal inconvenience to the teachers who smoke and affects "working conditions" because it abolishes a past practice that has previously been condoned. However, the restrictive statutory language means we must find it an economic condition of employment. We do not find the Association's "impact on working hours" argument persuasive. The teachers who smoke have voluntarily adopted a habit, and it is within their power to nullify any adverse economic impact resulting from the no-smoking policy through adjusting their smoking routine. In any event, teachers are not required to work any additional time as a result of the policy. If teachers choose to smoke during school hours, they simply rearrange the time spent working; they work no additional hours.

Accordingly, we do not find the implementation of the no-smoking policy to be a required subject of bargaining under 16 VSA §2006. Thus, the School Board did not commit an unfair labor practice by refusing to bargain over implementation of the no-smoking policy.

ORDER

Now, therefore, based on the foregoing findings of fact and for all the foregoing reasons, we find the Mount Abraham Union High School Board of School Directors did not violate 21 VSA §1726(a)(1) and (5), and, accordingly, the unfair labor practice complaint issued in this matter is ordered DISMISSED and is DISMISSED.

Dated this 25th day of June, 1981.

VERMONT LABOR RELATIONS BOARD

William G. Kemsley, Sr.

James S. Gilson