VERMONT LABOR RELATIONS BOARD

BURLINGTON FIRE FIGHTERS ASSOCIATION v. CITY OF BURLINGTON	)))	DOCKET NO. 80-72

FINDINGS OF FACT, OPINION, AND ORDER

Statement of Case

This matter came before the Board on September 5, 1980, when the Burlington Fire Fighters Association ("Association") filed an unfair labor practice charge against the City of Burlington ("City"), alleging that the unilateral adoption of rules and regulations during the course of contract negotiations was a refusal by the City to bargain in good faith with the Association. On July 10, 1981, upon request of the Board, the Association submitted a list of those sections of the rules and regulations which they claim constitute unilateral imposition of working conditions which are proper subjects of collective bargaining. The Association cited the sections concerning commissioner's hearings, uniforms, promotion, reward, and disability and sick leave. On August 12, 1981, the Board issued an unfair labor practice complaint.

A hearing was held September 10, 1981, at the Board hearing room in Montpelier. The full Board was present. Attorney William Sorrell represented the City. The Association was represented by Attorney Gilbert Myers. Requested Findings of Fact and Memoranda of Law were filed by the Association and the City on October 5 and 28, 1981, respectively.

FINDINGS OF FACT

1. The Burlington Fire Department issued revised Rules and Regulations in 1974 ("1974 Regulations") (City's Exhibit G). The 1974 Regulations were unilaterally adopted by the City.

2. On July 30, 1979, the Association and the City entered into a collective bargaining agreement ("Agreement") effective for the period July 1, 1979, through June 30, 1980, with the Agreement remaining in effect until it was replaced by a succeeding Agreement (Joint Exhibit #1).

3. Article III of the Agreement, City Functions, gives the City the sole right to "establish and require observance of reasonable rules and regulations".

4. Article III also gives the City sole right to "schedule and assign work to employees".

5. Article IV of the Agreement, Grievance Procedures, provides that if a grievance is not settled at Step II, the Step III appeal is to the Board of Fire Commissioners. If the grievance is not resolved here, it may be submitted to final and binding arbitration pursuant to Article V of the Agreement. Grievances regarding just cause for suspensions, demotion, discipline or discharge as well as disputes between the parties as to the meaning or application of specific provisions of other articles of the Agreement may be arbitrated.

6. Article IX of the Agreement, Rates of Pay, sets a wage scale for covered employees, such scale remaining in effect until a succeeding agreement is reached.

7. Article XIII of the Agreement, Health and Welfare, provides the disability leave policy provided by the City shall remain in effect for the term of the Agreement except as set forth in that article. Such exceptions are listed. Article XIII, Paragraph (E), further provides:

> Any man absent from duty due to illness for a period in excess of three (3) days shall provide the City with written verification of illness from a physician of his choice. In any case where the City questions said verification, it may request an examination.

8. Article XVIII of the Agreement, Miscellaneous Provisions, provides in Paragraph (H):

> The current practice of permitting firefighters to change out of their work uniforms after 4:00 p.m. provided that they do not appear either on the apparatus floor or outdoors not in the assigned uniform shall be continued throughout the duration of this contract.

9. Statements of Policy of the Agreement provide the wearing of baseball hats (sic) by firefighters shall be optional after 6:00 p.m.

10. Negotiations for a successor agreement to the Agreement commenced in March, 1980.

11. Among the proposals of the Association at the commencement of negotiations were:

a. to amend Article IV of the Agreement to provide for the deletion of the Step III appeal of grievances to the Board of Fire Commissioners;

b. to amend Article IX to increase wage rates;

c. to amend Article XIII, Paragraph (E) so that "three (3) days" becomes "three (3) work days. Also, the Association sought the deletion of the sentence "In any case where the City questions said verification, it may request an examination;"

d. to amend Article XVIII, Paragraph (H) by adding the sentence: "Firefighters shall be allowed to wear any casual apparel when reporting prior to roll call."

(City's Exhibit B)

12. The Association made no proposal concerning promotion.

13. The City unilaterally revised the Rules and Regulations of the Burlington Fire Department on May 19, 1980 ("1980 Regulations"). The 1980 Regulations were printed and distributed to members in July of 1980 (Joint Exhibit #2). They were effective at the time of their distribution.

14. In June, 1980, the Association declared negotiations with the City had reached an impasse and asked Joel Cherington, Commissioner of Labor and Industry, to appoint a mediator.

15. At the time the 1980 Regulations were made effective, the parties were engaged in mediation in their contract negotiations.

16. Article III of the 1980 Regulations, Disability Leave, (Pg. 10-12) is the disability leave policy provided by the City referred to in Article XIII of the Agreement (see Finding #7). This disability leave policy was not contained in the 1974 Regulations.

17. Section 201 (Pg. 2) and Chapter 13, Section 27 (Pg 30) of the 1980 Regulations are identical. They provide:

> The fire commissioners shall have full power to try and determine all complaints against any member of said department, and to remove them, or any of them summarily, or on conviction of insubordination, neglect of duty, incompetency or violation of the rules, regulations or ordinances governing said department. The fire commissioners shall also have the power, upon the recommendation of the chief engineer, to make such changes in the positions held by any member of the department, either to remove him or place him in a subordinate position, as they may deem for the best interests of the department.

This language is taken from Section 201 of the Burlington City Charter (City's Exhibit A), and was contained in Section 192 of the 1974 Regulations (Page 5).

18. Chapter 19, Section 8 (Pg. 39) of the 1980 Regulations provides:

> Outside of quarters the cap shall be worn straight upon the head. Uniform coats shall be kept clean and pressed and shall be kept buttoned; the pants shall be kept pressed and the shoes polished. The wearer of the uniform shall keep his hands out of his pockets.

This same provision was contained in the 1974 Regulations (Pg. 29, Section 9).

19. Chapter 19, Section 11 (Pg. 39) of the 1980 Regulations provides:

> (a) Members may wear their class "B" uniform in full when reporting for duty at their respective stations and when leaving after completing their tour of duty.
> (b) Members shall be in full class "B" uniform for roll call.
> (c) They may change out of their class "B" or work uniforms after 4:00 p.m. provided they do not appear either on the apparatus floor or outdoors not in the assigned uniform.

No such language was contained in the 1974 Regulations. The 1974 Regulations provided: 'class "B" uniforms at all times in station.' (Pg. 29, Section 10).

20. The concluding paragraph (Pg. 40) of the 1980 Regulations provides:

> NOTE WELL
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> Members of the force will understand that these rules and regulations are not intended to cover every case which may arise in the discharge of their duty: Something must necessarily be left to individual judgment and discretion and according to the degree in which they show themselves possessed of these qualities, and to their zeal, activity and judgment on all occasions, will be their claims to future promotion and reward.

The same paragraph was contained in the 1974 Regulations (Pg. 33).

21. The parties were unable to resolve their negotiations dispute at either the mediation or fact-finding stage. The parties did, however, agree with the fact-finder to amend Article XIII, Paragraph (F) by changing "three (3) days" to "three (3) calendar days" (City's Exhibit D).

22. The City has authorized labor disputes to be resolved by binding arbitration pursuant to 21 VSA §1733.

23. The parties submitted their dispute to final and binding arbitration. In its report, issued April 7, 1981, the arbitration panel determined:

> a. the request by the Association to eliminate Step III of the grievance procedure was denied; and
>
> b. firefighters would be given an 8 percent across-the-board increase retroactive to July 1, 1980.
>
> (City's Exhibit C)

24. Further changes proposed by the Association that are listed in Finding #11 were not incorporated into a final Agreement.

OPINION

The issue before us is whether the City violated its duty to bargain in good faith through its 1980 promulgation of revised Fire Department Rules and Regulations, and thus committed an unfair labor practice under 21 VSA §1726(A)(5).

At the outset, we address whether this issue is moot since, subsequent to the filing of this charge, the parties have had their negotiations dispute resolved through final and binding arbitration. Nonetheless, we believe it is important to decide this issue since there is a continuing dispute between the parties over the right of management to promulgate

Rules and Regulations during the course of negotiations. We believe this is the type of case which is "capable of repetition yet evading review", In re J. S. Juvenile, 139 Vt 6 (1980); Board of School Commissioners of Rutland, 2 VLRB 250 (1979); and thus should not be dismissed as moot. Moreover, this is the first negotiations dispute we have had before us where the parties have voluntarily submitted a dispute to final and binding interest arbitration. Interest arbitration has gained increased acceptance in the public sector, although it is not without its critics (e.g. "Interest Arbitration in Public Employment: An Arbitrator Views the Process", Tim Bornstein, Labor Law Journal, February 1978, pg. 77-86. "Arbitration and the Law: A better way", Arvid Anderson, Labor Law Journal, May, 1979, pg. 259-67). Thus, resolution of the underlying issues here is important to give the instant parties and other parties using interest arbitration guidance for the future.

In Chester Education Association, 1 VLRB 426 (1978), we determined that it is an unfair labor practice for the employer, in the guise of issuing "regulations", to unilaterally change conditions of employment during the course of negotiations prior to the exhaustion of mandated statutory impasse procedures.

In the case before us, the City makes a two-pronged argument. First, they state they have the right to promulgate Rules and Regulations at any time if they do not change conditions of employment. There were no such changes, the City argues, made through promulgation of the 1980 Regulations, and thus the issuance of the 1980 Regulations was proper. Second, even if it is found the 1980 Regulations changed conditions of employment, the City contends its issuance was proper because "impasse"

had been declared by the Association. The Association declared impasse in June, 1980, and asked the Commissioner of Labor and Industry to appoint a mediator. The 1980 Regulations were promulgated in July, 1980. Thus, claims the City, they were well within their rights.

We treat this second argument of the City first. The City's position concerning its rights after "impasse" is contrary to our holding in Chester, supra. There we decided mandated statutory impasse procedures must be exhausted before management can make unilateral changes in conditions of employment. An "impasse" in the public sector has a significantly different meaning than it does in the private sector. Under the Municipal Employees' Law declaration of "impasse" simply means a unilateral determination to utilize statutory dispute resolution procedures. Declaration of impasse under our statute, in contrast to private sector cases, does not mean the parties have reached a genuine deadlock; that they have irreconcilable differences. Instead, it merely represents a realization that third-party assistance is needed to continue productive bargaining.

The New York Public Employment Relations Board has, in a series of cases which we find pertinent to our law, clearly drawn the distinction between an "impasse" and a "deadlock" in determining when management may make a unilateral change. The New York Board has ruled management must negotiate in good faith to the point of deadlock before making any unilateral changes in an expired agreement. Deer Park Union Free School District, 14 PERB 3028 (1981). Hilton Central School District, 14 PERB 3038 (1981). A "deadlock" occurs after mediation, fact-finding, and conciliation have failed to produce a resolution of the dispute. In Deer Park, supra, for example, the Board decided no genuine deadlock

existed between the parties when the statutory fact-finding process had been initiated but not completed, and found management had committed an improper practice by unilaterally contracting out driver education positions.

The parties in the instant case submit negotiations disputes to binding arbitration pursuant to 21 VSA §1733. This procedure has been adopted by a vote of the City, and thus is a mandatory process. 21 VSA §1730(2) prohibits strikes once the parties have submitted a dispute to final and binding arbitration. Similarly, our Chester rationale prohibits management from ever making unilateral changes in conditions of employment where a mandatory procedure exists culminating in binding arbitration. In such a system there is never a legal "deadlock".

Accordingly, the City promulgated the 1980 Regulations at a time when the City was not permitted to implement unilateral changes in conditions of employment. The actual act of promulgating the 1980 Regulations was not in itself an unfair labor practice. Management has the right to issue such regulations as long as their content does not affect required subjects of bargaining. e.g. Murphy Diesel Co. v. NLRB, 454 F2d 303, 78 LRRM 2993 (CA7, 1971).

We now must determine whether the 1980 Regulations changed conditions of employment. The Association contends that sections of the 1980 Regulations dealing with the following subject areas constituted unilateral changes in conditions of employment: commissioners' hearings, disability and sick leave, promotion and reward, and uniforms.

We have examined the areas of commissioners' hearings, disability and sick leave, promotion and reward, and it is evident the promulgation of the 1980 Regulations resulted in no changes of conditions of employment

in these areas. The 1980 Regulations are simply republications of what was contained in the 1974 Regulations or of work rules validly existing elsewhere, and did not result in any changes in conditions of employment.

The remaining issue before us is whether the 1980 Regulations do change conditions of employment with regard to wearing of uniforms. The first question to be resolved is whether the wearing of uniforms is a subject management was required to negotiate. The Municipal Employee Relations Act seems sufficiently identical to the Federal Act to require that a distinction be drawn between negotiable and non-negotiable subjects. See Vermont State Colleges Faculty Federation v. Vermont State Colleges, 138 Vt. 451 (1980). 21 VSA §1725 requires the parties to "bargain in good faith with respect to wages, hours, and conditions of employment as:

> any condition of employment directly affecting the economic circumstances, health, safety, or convenience of employees but excluding matters of managerial prerogative...

Managerial prerogative is defined in 21 VSA §1722(11), as "any non-bargainable matters of inherent managerial policy".

The wearing of uniforms may directly affect the "convenience" of employees by lessening their personal comfort and impacting on their off-duty time if they have to wear uniforms to and from work. Also, wearing uniforms may affect the "economic circumstances" of employees if employees are required to pay the cost of cleaning and repairing the uniforms. Thus, the wearing of uniforms is a required subject of bargaining.

We will find the City engaged in an unfair labor practice if the 1980 Regulations do change conditions of employment with regard to wearing of uniforms or if the City refused to bargain on the subject.

The 1974 Regulations provided firefighters shall wear their class "B" (or work) uniforms at all times in the station. Subsequent to this, in negotiations for the 1979-80 Agreement, the parties negotiated a provision permitting firefighters to change out of their work uniforms after 4:00 p.m. provided they do not appear either on the apparatus floor or outdoors not in their work uniforms. In negotiations for the successor agreement, the Association sought to add the following sentence to the Agreement: "Firefighters shall be allowed to wear any casual apparel when reporting prior to roll call." The City, without negotiating with the Union, included the following language in the 1980 Regulations;

> (a) Members may wear their class "B" uniform in full when reporting for duty at their respective stations and when leaving after completing their tour of duty.
>
> (b) Members shall be in full class "B" uniform for roll call.

It is unclear whether this language resulted in any change in conditions of employment for the firefighters. There is no evidence before us indicating any change. It is true the language represents a change from the language in the 1974 Regulations. However, it may be simply a verbalization of an established procedure, and represent no change in conditions. In any event, nothing in the record substantiates a change occurred. The Association, as the initiator of the unfair labor practice charge, has the burden of demonstrating whether any change was effected. They have failed to do so.

Also, we cannot find the City refused to bargain on the subject of uniforms. The Association made a proposal on the subject in negotiations, and it was not included in the final agreement. This, standing alone,

is not evidence that the City refused to bargain on the subject. The burden is on the Association to demonstrate the City refused to bargain. There is insufficient evidence to establish this fact. Thus, we do not find the City engaged in an unfair labor practice.

This controversy, does, however, demonstrate that whenever management promulgates Rules and Regulations during the course of negotiations the employees' representatives may regard the action as undercutting bargaining. Management should be sensitive to the impact implementing new rules during negotiations will have, and at a minimum should advise the Association concerning the necessity and substance of the promulgation of the Rules and Regulations prior to their implementation.

ORDER

Now, therefore, based on the foregoing findings of fact and for all the foregoing reasons, we find the City of Burlington did not violate 21 VSA §1726(a)(5), and, accordingly, the unfair labor practice complaint in this matter is ordered DISMISSED and is DISMISSED.

Dated this 10th day of December, 1981, at Montpelier, Vermont.

Reversed & Remanded by Sup. Court. Docket # 571-81 Nov 1982 (Recd 2/7/83)

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney, Chairman

William G. Kemsley, Sr.

James S. Gilson