

VERMONT LABOR RELATIONS BOARD

VERMONT STATE EMPLOYEES')	
ASSOCIATION)	
)	
v.)	DOCKET NO. 83-4
)	
STATE OF VERMONT, DEPARTMENT)	
OF PUBLIC SAFETY)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On January 14, 1983, the Vermont State Employees' Association ("VSEA") filed an unfair labor practice charge against the State of Vermont, Department of Public Safety, alleging that the unilateral discontinuance of the practice of allowing delayed reporting time to new duty stations in the event of involuntary transfer of State Police members, without charge to their accrued annual leave, constituted a violation of 3 VSA §961(1), and that the refusal of the State to bargain that issue constituted a violation of 3 VSA §961(5). On March 10, 1983, the Labor Relations Board issued an unfair labor practice complaint, taking the verified allegations contained in the charge as true.

A hearing was held before the full Board on May 26, 1983. The State was represented by Special Assistant Attorney General Scott Cameron. Michael Zimmerman, VSEA Staff Attorney, represented VSEA. Prior to the hearing, the parties stipulated to various facts, and the Board has adopted those as facts found by the Board. The hearing was limited to taking the testimony of State Police member Glenn Cutting. Requested Findings of Fact and Memoranda of Law were filed by VSEA and the State on June 27, 1983 and July 11, 1983, respectively.

1. VSEA is an "employee organization", as that term is defined by 3 VSA §902(6), and has been certified by the Vermont Labor Relations Board as the sole bargaining representative for "state employees", as that term is defined by 3 VSA §902(5), including members of the State Police Bargaining Unit and the Supervisory Bargaining Unit.

2. Uniformed members of the Vermont State Police who may collectively bargain (i.e., Troopers, Corporals, Sergeants and Lieutenants) are members of either the State Police Bargaining Unit or the Supervisory Bargaining Unit. Such uniformed members are hereinafter referred to as "members".

3. At all times relevant herein, members have been employed by the State of Vermont, Department of Public Safety.

4. For the period from approximately 1947 to April 13, 1976, the Rules and Regulations promulgated by the Commissioner of the Department of Public Safety included a provision (i.e., Article 18, Section 2) which provided that members who were involuntarily transferred from one duty location to another duty location would be allowed a delay of not more than four (4) days to report to their new duty locations, and that such delay (hereinafter referred to as "moving time") would not be charged to such members' annual leave time (Exhibit A).

5. On April 13, 1976, new Rules and Regulations promulgated by the Commissioner of the Department of Public Safety went into effect, and the pre-existing Rules and Regulations rescinded. Article XII of the new Rules and Regulations dealt with the subject of transfers, but was silent on the subject of moving time for involuntarily transferred members (Exhibit B).

6. At no time since the advent of collective bargaining for members has there been a provision in a State Police or Supervisory Unit agreement providing for moving time for members involuntarily transferred.

7. Between April 13, 1976, and December 1981, 41 members were granted moving time for periods ranging from one day to five days.

8. On February 28, 1980, Paul R. Philbrook became the Commissioner of the Department of Public Safety, and has, since then, continuously served in that capacity.

9. Sometime in December of 1981, Commissioner Philbrook learned, for the first time since he became Commissioner, that involuntarily transferred members had been given moving time. Philbrook, after a review of statutes and departmental rules, as well as the collective bargaining contract, determined that there was no authority for the allowance of moving time. Philbrook directed Major James Ryan, Vermont State Police, to issue a memorandum to all members announcing that moving time would no longer be granted to involuntarily transferred members. In accordance with that directive, Major Ryan issued a memorandum, dated December 17, 1981, announcing the discontinuance of moving time (Exhibit C). That memorandum was distributed to members, but was not sent to VSEA.

10. On November 22, 1981, Gloria Danforth was promoted to the rank of Corporal, and, shortly thereafter, received orders transferring her from Middlesex to St. Johnsbury, Vermont. The effective date of her transfer was January 18, 1982. Sometime in January 1982, but before January 18, 1982, Danforth spoke with Major Ryan on the subject of

moving time, and requested that Ryan "waive" the December 17th memorandum with respect to her in order that she could be granted moving time. Ryan refused Danforth's request. Danforth did not grieve the denial of her moving time request. Until January 14, 1982, Danforth was not a member of VSEA. On January 14, 1982, Danforth executed a payroll deduction form authorizing the deduction of union dues from her bi-weekly pay, and on January 28, 1982, VSEA dues were, for the first time, deducted from her pay. VSEA records indicate that Danforth became a union member on January 28, 1982.

11. During the period from July 1981 to November 1981, bargaining took place between the State of Vermont and VSEA on the contract (including the State Police Unit agreement and the Supervisory Unit agreement) in effect from July 1, 1982, to June 30, 1984. In late October or early November 1981, impasse was declared, and a mediator was called in to assist the parties. On November 13, 1981, after mediation, the parties reached a tentative agreement. On December 14, 1981, December 15, 1981, December 16, 1981, and December 17, 1981, VSEA ratification meetings were held at various locations throughout the State, and, as a result of those meetings, the tentative contract was ratified by VSEA members. Thereafter the contract was funded by the Legislature, which adjourned in April of 1982. The Contract contains no provision for moving time for members involuntarily transferred.

12. Prior to the end of January 1982, member Glenn Cutting, Chairman of the State Police bargaining unit, brought the contents of Ryan's December 17, 1981, memorandum to the attention of VSEA Executive Director Judy Rosenstreich and VSEA Field Representative Steven Janson.

13. Article 2 of the July 1, 1981 - June 30, 1982, State Police Unit Contract provided for the establishment of a departmental labor-management committee consisting of the Commissioner or his designee(s) and representatives of the State Police bargaining team to meet periodically for the purpose of discussing departmental rules and other professional matters of mutual concern. On May 27, 1982, the first State Police Labor-Management Committee meeting of 1982 was held. Prior to that meeting, Cutting requested, by Memorandum dated May 18, 1982, to Commissioner Philbrook (Exhibit D), that the subject of moving time be discussed at that meeting. At the meeting, Philbrook advised the members that the subject of moving time would be appropriate for bargaining at negotiations for a successor agreement to the 1982-84 contract, and that, in his view, he lacked the authority to grant moving time absent contractual language to that effect.

14. By letter dated August 4, 1982, Rosenstreich requested that Commissioner Philbrook bargain the issue of moving time as soon as possible (Exhibit E). By letter dated August 6, 1982, Philbrook informed Rosenstreich that he lacked the authority to bargain with VSEA (Exhibit F).

15. By letter dated August 19, 1982, to the Secretary of Administration, Rosenstreich requested that the State and VSEA bargain the issue of moving time (Exhibit G). By letter dated September 14, 1982, the Commissioner of Personnel, Jacquelin-Ann Chouinard, acting on behalf of the Secretary of Administration, informed Rosenstreich that the State declined to bargain the sole issue of moving time, and that the matter would be more appropriate to bargain during negotiations for a successor agreement to the 1982-84 contract (Exhibit H).

16. Since December 17, 1981, no member has been granted moving time. Specifically, 28 involuntarily transferred members have not been granted (nor have they requested) moving time between December 17, 1981, and June 19, 1983.

OPINION

The first issue is whether this unfair labor practice charge was timely filed. VSEA has alleged two separate violations of statute: 1) the unilateral discontinuance by Public Safety Commissioner Paul Philbrook of the practice of allowing delayed reporting time to new duty stations in the event of an involuntary transfer of State Police members, without charge to their accrued annual leave, constituted a violation of 3 VSA §961(1); and 2) the refusal to bargain the issue was a violation of 3 VSA §961(5).

With regard to the first alleged violation, it is clear the charge was untimely filed. 3 VSA §965(a) provides no unfair labor practice shall be found based on any unfair labor practice occurring more than six months prior to the filing of the charge with the board. The unilateral discontinuance of the so-called moving time policy, the first alleged violation, occurred December 17, 1981, and VSEA was aware of the unilateral change at the very latest, in late January, 1982. Yet, they did not file an unfair labor practice charge with the Board until almost 12 months later, in January, 1983; clearly well beyond the six-month period provided in the statutes. Champlain Valley Union High School Teachers Association v. Champlain Valley Union High School Board of School Directors, 4 VLRB 315 (1981).

VSEA contends the Board should not dismiss that portion of the charge on timeliness grounds in light of the Board's recent recognition of the notion of a continuing unfair labor practice in American Federation of State, County and Municipal Employees, Local 490 v. Town of Bennington, 6 VLRB 88 (1983). We do not believe our ruling in Bennington preserves the timeliness of the charge here. The action complained of in Bennington, denying an employee union representation and coverage of the collective bargaining agreement upon his discharge, occurred less than six months before the filing of the unfair labor practice charge. The fact that the employee's position had been illegally excluded from the coverage of the collective bargaining agreement two years earlier in violation of a Board order, the "continuing" unfair labor practice referenced by the Board, did not prevent the employee from asserting his valid rights to union representation and coverage of the Contract since he did not realize he was excluded from coverage of the contract until the time he was discharged (See Findings of Fact #27 and 28, Bennington, *supra*). This is unlike the situation here where VSEA knew the Commissioner of Public Safety had unilaterally discontinued the moving time policy, yet failed to assert its statutory rights in a timely manner.

Turning to the second alleged violation, the refusal to bargain the moving time issue, VSEA contends this portion of the charge was timely-filed since the event which started the clock ticking on the refusal to bargain portion of the charge was Personnel Commissioner Chouinard's September 14, 1982, letter, wherein she, on behalf of the State, declined to enter into mid-term bargaining on the issue of moving time, and that refusal occurred less than six months prior to filing the charge.

The issue to be decided here is whether a bargaining duty survives after a failure to assert it for over a period of six months. VSEA did not request negotiations on the moving time policy until August 4, 1982, more than six months after discovering Commissioner Philbrook's unilateral action. While the topic of moving time had been discussed about two months earlier at a Labor-Management Committee meeting between Commissioner Philbrook and members of the State Police bargaining unit, no evidence before us indicates the Commissioner was actually being asked to bargain the issue.

The State contends VSEA has waived its right to bargain over moving time during the term of the 1982-84 Contract by knowingly failing to timely assert its rights. VSEA asserts the State had a duty to engage in mid-term bargaining since the rules of waiver stated by the Board in VSEA v. State of Vermont, 2 VLRB 26 (1979), have not been met. Therein, the Board stated:

We believe that the statutory provisions of 982(a)... preclude mid-term bargaining over terms and conditions which are either included in the agreement or which are discussed during the negotiations for the Agreement. 2 VLRB 35.

VSEA claims that since moving time provisions are not included in the Contract and were not discussed during negotiations for the Contract, there was no waiver of the right to mid-term bargaining.

In our view, the "rules" we established in VSEA v. State, supra, are still applicable, but in and of themselves, they are not determinative of the timeliness issue here. Those principles were enunciated in the context of whether the State had an obligation to bargain during the term of the Contract at all, while the issue here is whether the now-established

right of State employees to bargain during the term of a contract, VSEA v. State of Vermont, 2 VLRB 26 (1979), VSEA v. State of Vermont, 2 VLRB 155 (1979), VSEA v. State of Vermont, (re: Implementation of 6-2 Schedule), 5 VLRB 303 (1982), has been asserted in a timely manner.

We have looked to National Labor Relations Board (NLRB) decisions for guidance in this matter. The NLRB administers the National Labor Relations Act, which like 3 VSA §961(a)(5), makes it an unfair labor practice for the employer to refuse to bargain collectively with the representative of the employees. See 29 USC §158(a). In Motoresearch Company and Kerns Corporation and UAW Local 1195, AFL-CIO, 138 NLRB 1490 (1962), the NLRB found the employer had not committed an unfair labor practice by refusing to negotiate with the union concerning the transfer of work from one plant to another because despite the union's knowledge of the transfer, it made no request to bargain nor did it protest the employer's action until filing an unfair labor practice charge more than six months after becoming aware of the action. Similarly, in Justesen's Food Stores, Inc. et al. and Butchers Union Local 193, et al., 160 NLRB 687 (1966), the NLRB found no employer violation of its duty to bargain in good faith where the union did not protest the employer's December 1964 unilateral installation of a wrapping machine and resultant layoff of two employees until June 1965 when it filed an amended unfair labor practice charge.

We believe the failure of VSEA to protest the unilateral change in the moving time policy within the six month period for filing an unfair labor practice charge over the unilateral action likewise means they have

waived their right to bargain over it during the term of the present contract. VSEA has intentionally relinquished a known right by failing to assert it in a timely manner, In re Grievance of Guttman and Minaert, 139 Vt. 574 (1981), and under the circumstances we cannot conclude the State failed to bargain in good faith. To find an unfair labor practice here would be contrary to the purpose and policy of the State Employees Labor Relations Act to "provide orderly and peaceful procedures" for resolving disputes, 3 VSA §901, by permitting VSEA to dredge up an "old" alleged unfair labor practice when the State had been led to believe by VSEA's inaction that its action was not a source of dispute.

ORDER

Now, therefore, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED:

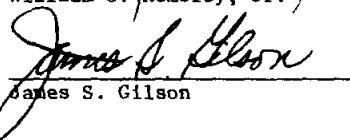
The unfair labor practice complaint issued in this matter is DISMISSED.

Dated this 18th day of August, 1983, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Kimberly B. Cheney, Chairman


William G. Kemsley, Sr.


James S. Gilson