VERMONT LABOR RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 490	)	
v.	)	DOCKET NO. 82-36
TOWN OF BENNINGTON	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On June 22, 1982, the American Federation of State, County and Municipal employees, Local 490 ("Union"), filed an unfair labor practice charge with the Vermont Labor Relations Board against the Town of Bennington ("Town"). The charge alleged the Town committed an unfair labor practice in denying its employee, Edward St. John, representation by the Union in the Town's discharge of St. John.

On September 16, 1982, the Board issued an unfair labor practice complaint. The complaint stated the Town may have committed an unfair labor practice in violation of 21 VSA §1726(a)(1) and (3) by denying St. John, Fire Alarm Superintendent, Union representation because the exclusion of the position Fire Alarm Superintendent from coverage of the 1980-83 collective bargaining agreement may be illegal since it is contrary to the June 30, 1978, order of the Board placing the position in the bargaining unit and, thus, St. John may be covered by the Contract.

A hearing was held before the full Board on November 4, 1982. An additional hearing was held in the absence of Member James Gilson

on February 17, 1983. Mr. Gilson has not subsequently participated in the decision of the case. Edward Ryan represented the Union, and the Town was represented by Attorney Bennett Greene.

The Town filed Requested Findings of Fact and a Memorandum of Law on March 9, 1983. The Union filed no briefs.

FINDINGS OF FACT

1. The July 1, 1977 - June 30, 1980, collective bargaining agreement between the Town and Union ("1977-80 Contract", Board Exhibit 1) provided:

> The Employer... pursuant to all applicable provisions of Title 21 VSA §1721 et al., Chapter 20, as amended, recognizes the Union as the sole and exclusive bargaining agent for all non-probationary or part-time employees of the Highway Department, Sewer Department, Water Department and Recreation Department, with the exception of supervisory personnel (including the assistant or deputy treasurer), working foremen and confidential employees.
>
> This clause shall be amended to include any excluded employees who are determined by the Vermont State Labor Board to have unit status in Local 490 under the pending certification proceeding before the State Labor Board.

2. The Town Fire Alarm Superintendent is not and has not been an employee of the Highway, Sewer, Water or Recreation Departments.

3. On June 30, 1978, the Board issued a decision concerning the appropriate composition of the bargaining unit for Town employees. The position of Fire Alarm Superintendent was included in the bargaining unit. AFSCME v. Town of Bennington, 1 VLRB 239. At all times relevant, no petition was ever subsequently filed with the Board to amend that order or otherwise change the composition of the bargaining unit.

4. Negotiations for the current collective barganing agreement between the Town and the Union, effective July 1, 1980 - June 30, 1983 ("1980-83 Contract", Bennington Exhibit 1) began in late Fall, 1979 - early winter 1980. Robert Matteson, Town Manager, was the principal negotiator for the Town. Patrick Bull, employee for the Town Highway Department, and Richard Knapp were members of the Union negotiations committee.

5. During the early part of negotiations for the 1980-83 Contract, the Union negotiations committee told Matteson that all employees the Board put in the bargaining unit in its June 30, 1978, decision should be covered under the Contract. The Fire Alarm Superintendent was specificall mentioned. Matteson refused to discuss including the Fire Alarm Superintende under that particular contract because the contract covered employees paid on an hourly basis, and the Fire Alarm Superintendent was a salaried employee.

6. Matteson asked the Union negotiations committee how they proposed to work out an agreement for the Fire Alarm Superintendent. Bull told Matteson a separate contract would have to be negotiated.

7. At one point during negotiations, the Union attempted to discuss a separate contract for the Fire Alarm Superintendent. Matteson refused to discuss it.

8. The Union never presented proposals during negotiations concerning wages, hours and conditions of employment for the Fire Alarm Superintendent.

9. The Union did not vigorously pursue negotations over the Fire Alarm Superintendent position because the occupant of the position at that time, Hank White, was not interested in the Union.

10. The day of the signing of the 1980-83 Contract, Knapp told members of the Union negotiations committee he was not happy about signing the Contract because, among other things, the portion of the recognition clause of the 1977-80 Contract providing "this clause shall be amended to include any excluded employees who are determined by the Vermont State Labor Board to have unit status in Local 490 under the pending certification proceeding before the State Labor Board", was left out of the Contract. Then, Knapp, with all the members of the negotiations committee present, told Matteson he was not ready to sign the Contract because that language was left out of the 1980-83 Contract. Matteson told Knapp there would be a "rider" adding that language to the Contract. Knapp believed Matteson and signed the Contract.

11. The Fire Alarm Superintendent was not included under the coverage of the 1980-83 Contract.

12. At no time has the Union agreed to exclude the Fire Alarm Superintendent position from the Town employees bargaining unit.

13. The Recognition clause of the 1980-83 Contract, Article I, provides:

> The employer... pursuant to all applicable provisions of Title 21 VSA, 1721 et al., Chapter 22, as amended, recognizes the Union as the sole and exclusive bargaining agent for all non-probationary employees within the bargaining unit consisting of employees of the Highway Department, Sewer

Department, Water Department, and Recreation Department, with the exception of supervisory personnel, working foremen, and confidential employees.

14. The 1980-83 Contract provides for call-back pay (Article XIII) and overtime pay (Article XIV). As a salaried employee, the Fire Alarm Superintendent has never received call-back pay or overtime pay.

15. Article XV, Section 2 of the 1980-83 Contract provides that an employee shall not be discharged "without just cause". Article XVI establishes a grievance procedure to settle "any grievance or dispute which may arise between the parties involving the application, meaning or interpretation of this Agreement". The last step of the grievance procedure is final and binding arbitration.

16. Edward St. John began employment as Fire Alarm Superintendent in October, 1981.

17. Beginning in January, 1982, St. John had various meetings with Matteson and Lloyd Winter, Assistant to Matteson, where purported deficiencie in St. John's performance were discussed. Bull was present at these meetings, but Matteson informed Bull the Town did not recognize St. John as covered by the 1980-83 Contract.

18. Matteson and Winter decided prior to May 1982 to discharge St. John if he did not resign.

19. In early May 1982, St. John became a member of the Union.

20. Matteson and Winter had two meetings in May 1982, with St. John at which they advised St. John he "was not going to work out". They offered St. John the option of resigning in the absence of which

they told him he would be discharged. Bull was present at these meetings which occurred prior to May 26, 1982.

21. On May 17, 1982, St. John received two letters from Matteson; one requesting his resignation and the other accepting his resignation.

22. Subsequent to May 17, 1982, but prior to May 26, 1982, St. John filed a grievance to protest the fact that he was going to be fired. Matteson responded to the grievance by stating St. John was not covered by the Contract.

23. At that point, Bull arranged a meeting between Edward Ryan, a Union representative, and Matteson for May 26, 1982, in the afternoon. Matteson told Bull he would discuss coverage of employees for the present contract or future contracts at the meeting. Ryan understood the meeting was to be between St. John and Matteson with Ryan present. Ryan and Matteson did not discuss the purpose of the meeting with each other.

24. Matteson scheduled a separate meeting for 9:30 a.m., May 26, 1982, between him and St. John. Matteson told St. John the time had come for St. John to make up his mind whether to resign or be discharged, and informed him the purpose of the meeting was to receive St. John's decision.

25. St. John did not show up for the 9:30 meeting with Matteson, but called and said he would not make the meeting. Matteson told St. John they would have to meet that day.

26. At 2:00 p.m. on the afternoon of May 26, 1982, St. John, accompanied by Bull and Ryan, went to Matteson's office.

27. St. John, who believed he was covered by under the 1980-83

Contract, wanted Ryan and Bull with him to protect his rights concerning discharge and as witnesses. St. John wanted to ask Matteson why he was being discharged, and he hoped to convince Matteson not to fire him or to give him a lateral transfer.

28. Matteson met St. John, Ryan and Bull in the hallway outside his office. Ryan, who believed St. John was covered under the 1980-83 Contract, told Matteson he was present to represent St. John whom he referred to as "the grievant". Ryan was aware St. John had not been discharged at that time, but he wished to represent him concerning the "threatened" discharge. Matteson told Ryan he did not consider St. John to be covered under the 1980-83 Contract, but he would discuss anything with him except the discharge of St. John. Matteson then told St. John he wanted to meet with him alone. St. John declined to meet with Matteson alone. St. John, Bull and Ryan then left.

29. Later that afternoon, Matteson drafted a letter informing St. John he was dismissed. The letter was sent to St. John by certified mail at 5:00 p.m. that afternoon. The letter provided, in pertinent part:

> On Wednesday, May 5, 1982, and subsequently, Lloyd Winter and I met with you about your work as Fire Alarm Superintendent to indicate that the job performance deficiencies discussed with you December 22, 1981, January 14, 1982, and February 16, 1982, have not been satisfactorily resolved and that consequently your employment with the Town could not continue. In general, as our personnel file documents, these deficiencies include a lack of necessary electrical ability, insufficient initiative, unsatisfactory workmanship, and need for excessive supervision.
>
> In an effort to avoid adverse impact on you, a matter of personal concern only, we offered you then and again later the

option of resigning. However, per our conversation today, you have decided against this course, and thus make it necessary for us to end your employment by dismissal. Since the safety of the community is directly dependent on the fire alarm system, we cannot accept the undue risks implicit in unsatisfactory maintenance of the system.

Therefore, be advised that for reasons indicated above, your Town employment will be terminated effective at the close of business Friday, June 11, 1982.

(Bennington's Exhibit 2)

30. St. John received the dismissal letter May 28, 1982.

31. Neither St. John nor the Union subsequently filed a grievance concerning the dismissal.

OPINION

In the unfair labor practice complaint issued in this matter, the Board stated the Town may have committed an unfair labor practice in violation of 21 VSA §1726(a)(1) and (3) by refusing to permit St. John to use the procedural and substantive rights available under the contractual grievance procedure..

It is clear the position of Fire Alarm Superintendent was excluded from coverage of the Contract. It is also clear the Board placed the Fire Alarm Superintendent in the bargaining unit in 1978, AFSCME v. Town of Bennington, 1 VLRB 239, and there has been no subsequent action taken by the Board to remove that position from the bargaining unit.

A review of the provisions of the Municipal Employee Relations Act (MERA) and applicable case law convinces us the exclusion of the Fire Alarm Superintendent from the coverage of the Contract is illegal, and

the Fire Alarm Superintendent should be considered as covered by the Contract since the Board placed the position in the bargaining unit.

In effect, the parties have bargained (or acquiesced) to change the composition of the bargaining unit in direct violation of a Board order. In In re Liquor Control Department Non-Supervisory Employees, 135 Vt 623 (1978), the Supreme Court, in rejecting the Board's authority to amend a bargaining unit on its "own motion" after election of a bargaining representative, stated:

> There is no indication in the State Employees Labor Relations Act (3 VSA §901 et seq.) that the Board may tinker with the constitution of a bargaining unit after it has been elected. Furthermore, such action by the Board would probably contravene the mandate of 3 VSA §941(h) that a newly-elected bargaining representative shall be the exclusive representative of all employees in the bargaining unit for at least one year.

The Board has the similar responsibilities of determining appropriate bargaining units, conducting representation elections, and certifying bargaining representatives under both the State Employees Labor Relations Act, 3 VSA §927, 941, and MERA, 21 VSA §1723-1724. We believe the parties as well as the Board are precluded from "tinkering" with the constitution of the bargaining unit after it has been established by requisite legal procedures under MERA.

We have looked to experience under the National Labor Relations Act (NLRA) for guidance in determining whether the parties are bound by the Board's unit decision once a bargaining representative has been certified unless the unit is amended by the Board pursuant to a

properly-filed petition. Resort to federal precedent is a practice that has been approved by the Supreme Court in construing MERA's unfair labor practice provisions which reflect similar provisions in NLRA. Burlington Fire Fighters Association v. City of Burlington, ___ Vt. ___ (February 7, 1983). Ohland v. Dubay, 133 Vt. 300 (1975).

In Douds v. International Longshoremen's Association, 241 F2d 278 (2nd Cir., 1957), at 282-283, the Court stated:

> The parties cannot bargain meaningfully about wages or hours or conditions of employment unless they know the unit of bargaining. That question is for the Board to decide... and its decision is conclusive on the parties... although the decision may subsequently be changed...
>
> The process of change not permitted by the Act is one that denies the Board this ultimate control of the bargaining unit and disrupts the bargaining process itself. This is precisely what occurs when, after the Board has decided what the appropriate bargaining unit is, one party over the objection of the other demands a change in that unit.

The Court in Hess Oil and Chemical Corporation v. NLRB, 415 F2d 440 (5th Cir., 1969), at 445, held:

> An issue concerning the construction of an appropriate unit so as to exclude certain members from that unit is not a subject for bargaining and an insistence upon it constitutes a violation of 8(a)(5).

This was reiterated by the Court in Newport News Shipbuilding and Dry Dock Co. v. NLRB, 602 F2d 73 (1979), at 76:

> It is well settled that insistence on a change in the scope of the unit certified by the Board violates §8(a)(5) of the Act. This is so because §8(a)(5) makes it unlawful for an employer to refuse to bargain collectively with his employees and §9(a) provides that the representatives elected

> by the majority of the employees in the unit found appropriate by the Board... shall be the exclusive representative of all employees in the unit.

In negotiations for the 1980-83 Contract, the Town Manager insisted the Fire Alarm Superintendent be excluded from coverage of the Contract, and did not give the incumbent of the position any rights under the Contract even after telling one of the members of the union negotiations team there would be a "rider" on the Contract which would effectively do so.

These actions by the Town were against the law in various respects. First, the actions were in direct violation of a Board order, which constituted State law since it was not appealed and no petition was filed with the Board to amend the bargaining unit. See 21 VSA §1725(c). The Board's order thus has the force of State law and takes precedence over any conflicting provision of a negotiated agreement. Also, the employer's actions caused a violation of 21 VSA §1722(8), which provides:

> "Exclusive bargaining agent" means the employee organization certified by the Board or recognized by the employer as the only organization to bargain collectively for all employees in the bargaining unit, including persons who are not members of the employee organization. (emphasis added)

In our view, these statutes require contracts to cover all employees in the bargaining unit under its terms.

We do not find these actions unreviewable pursuant to 21 VSA §1727(a) even though the unfair labor practice charge was filed more than six

months after the Contract was signed. A continuing unfair labor practice exists as long as the Contract in its present form exists excluding the Fire Alarm Superintendent from its coverage. The rights of the Fire Alarm Superintendent to coverage of a contract negotiated on behalf of all bargaining unit employees pursuant to §1722(8) and 1725(a) are being interfered with as long as he is excluded from coverage of the Contract. Thus, the employer is in violation of 21 VSA §1726(a)(1) by interfering with St. John's rights and of 21 VSA §1726(a)(3) by discriminating against St. John "in regard to hiring or tenure of employment or by any term or condition of employment".

Moreover, the acquiescence of the Union to exclusion of the Fire Alarm Superintendent position from coverage of the Contract does not absolve the Town of misconduct since the position was excluded by insistence of the Town, not the Union. Newport News Shipbuilding and Dry Dock Co. v. NLRB, supra.

A great deal of testimony was presented on the May 26, 1982, "confrontation" at which Town Manager Matteson did not allow St. John to be represented at a meeting with Matteson by Union representative Edward Ryan and Pat Bull, and on whether St. John had actually been discharged at the time of the confrontation. Much of the testimony is irrelevant to the disposition of this case. What is relevant though is the fact that Matteson mentioned at the confrontation he did not consider St. John to be covered by the 1980-83 Contract.

As a result, the Union never formally requested a grievance hearing over the subsequent discharge, which occurred after the May 26 confrontation. To do so would have been a useless act since it was clear the Town did not consider St. John to be covered by the Contract.

However, given the disposition of this case, we believe it an appropriate remedy to grant St. John his appeal rights as they existed under the 1980-83 Contract. We believe this remedy necessarily follows from 21 VSA §1727(f), which provides:

> No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged or the payment to him of any back pay, if such individual has recourse to binding arbitration under a labor contract grievance procedure for such suspension or discharge.

ORDER

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

1. CEASE AND DESIST from violating 21 VSA §1726(a)(1) and (3) by excluding Edward St. John, Fire Alarm Superintendent, from the coverage of the July 1, 1980 - June 30, 1983, collective bargaining agreement between the Town and AFSCME, Local 490, AFL-CIO ("1980-83 Contract"); and

2. TAKE THE AFFIRMATIVE ACTION of recognizing St. John as covered by the 1980-83 Contract and granting him his rights to utilize the grievance procedure contained in it to review his May 26, 1982, discharge.

Dated this 19th day of May, 1983, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney, Chairman

William G. Kemlsey, Sr.