VERMONT LABOR RELATIONS BOARD

LOCAL 98, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO	)	
v.	)	DOCKET NO. 84-37
TOWN OF ROCKINGHAM	)	

FINDINGS OF FACT, OPINION AND ORDER

On July 23, 1984, Local 98 of the International Union of Operating Engineers, AFL-CIO ("Union"), filed an unfair labor practice charge against the Town of Rockingham ("Town"). The charge alleged the Town committed an unfair labor practice by issuing an order cutting the workweek of Town Highway Department employees from 43 hours to 40 hours per week and increasing the employees' salaries by 3 percent while the Town and the Union were in the process of negotiating a collective bargaining contract. On September 7, 1984, the Labor Relations Board issued an unfair labor practice complaint, accepting the verified allegations made in the charge and stating the Town may have committed an unfair labor practice in violation of 21 VSA §1726(a)(1) and/or (5).

A hearing was held before the full Board on October 25, 1984. Attorney Allan Drachman represented the Town and Attorney Charles Blitman represented the Union. Chairman Kimberly B. Cheney missed the latter portion of the hearing. The Board ruled that Chairman Cheney would participate in determining the facts of the case only if the other Board members disagreed on the facts. If the other Board members agreed on the facts, the Board ruled Chairman Cheney would participate in deciding legal matters. Members Kemsley and Gilson have agreed on the

facts, and Chairman Cheney has participated only in deciding legal matters based on those facts.

At the hearing, the Union amended its unfair labor practice charge to allege the Town committed an unfair labor practice by making unilateral changes in the coffee break and lunch time. The Town expressed no objection to the Union so amending its charge.

Requested Findings of Fact and Conclusions of Law were filed by both the Union and the Town on November 13, 1984. The Town filed a Reply Brief on November 26, 1984. The Union filed no Reply Brief.

FINDINGS OF FACT

1. The Board of Selectmen is the top policy-making body of the Town of Rockingham. The Board meets regularly every other Monday and holds special meetings as required.

2. Lawrence McAuliffe, Town Manager, is the Chief Administrative Officer of the Town of Rockingham.

3. Effective July 1, 1979, the Board of Selectmen implemented a reduction of the work week for Highway Department employees from 45 to 43 hours. Prior to the reduction, the employees worked 40 hours at straight time and five hours at time and one-half, thereby receiving 47.5 hours' pay for 45 hours' work. Effective with the reduction, the employees worked 43 hours and received pay for 44.5 hours.

4. On October 24, 1983, the Board of Selectmen adopted Personnel Rules. Under that document the Highway Department employees are defined as hourly employees whose regular work week is the period Monday through Friday, with hours set by the Department and with payment of time and

one-half in wages for hours worked over 40. No specific number of hours of work for Highway Department employees is established by the Personnel Rules (Town Exhibit 2).

5. From July 1, 1979 through June 30, 1984, Highway Department employees continued to work 43 hours per week and to receive 44.5 hours pay for such work. The employees' work schedule consisted of working 7:00 a.m. to 4:06 p.m. with one-half hour lunch time, Monday through Friday. Employees were paid for eight hours a day at straight time pay plus 36 minutes overtime paid at time and one-half. Additionally, the employees received paid coffee breaks from 9:00 a.m. to 9:15 a.m. and from 3:00 p.m. to 3:15 p.m. every day. Non-paid lunch time for bargaining unit employees was from 12:00 p.m. to 12:30 p.m. every day.

6. In early November, 1983, McAuliffee presented to the Board of Selectmen his proposed written budget for the fiscal year commencing July 1, 1984.

7. The proposed budget continued in force the regular work week for Highway Department employees and also recommended a 3 percent general increase for all Town employees.

8. At its regular meeting on January 16, 1984, the Board voted approximately $28,000 in budget cuts. The Board specifically voted to reduce the regular work week of the Highway Department employees from 43 hours to 40 hours, effective July 1, 1984 (Town Exhibit 1, page 4). As a result, Highway Department employees would receive 40 hours pay for 40 hours work, instead of receiving 44.5 hours pay for 43 hours work, thereby reducing the budgeted overtime by $12,000. No Highway Department employees were present at the meeting.

9. At some point before January 16, 1984, the Board of Selectmen voted to give all Town employees a 3 percent increase in their hourly rate of pay for the fiscal year commencing July 1, 1984.

10. As of January 16, 1984, the Board of Selectmen and the Town Manager had neither knowledge nor reason to know of any protected, concerted activity or union activity by Highway Department employees, and there was no such activity.

11. On January 17, 1984, during the regular work day, Town Manager McAuliffe met with the Highway Department employees then working. He told them the selectmen voted to reduce the employees' work week from 43 to 40 hours effective July 1, 1984. He also told them that they and all other Town employees were budgeted to receive a 3 percent raise. It is unclear whether all Highway Department employees were present at the meeting, although at least a majority of employees were present.

12. On January 27, 1984, at 5:00 p.m., the Board of Selectmen appeared at a special meeting called for a limited purpose. Thirteen Highway Department employees also appeared, unannounced and unscheduled, to present complaints to the Board of Selectmen. Such complaints included a complaint about the cut in pay resulting from the reduced work week (Union Exhibit 1). The employees informed the Board they were opposed to a reduction in their hours worked, but would agree to no increase in their hourly rate of pay if their hours were kept the same and there were no layoffs. The Board of Selectmen reviewed each complaint but tabled the matter until they could look into each item further (Union Exhibit 5, page 2). The Board of Selectmen told the employees they would notify them of their position.

13. At its meeting on February 6, 1984, the Board of Selectmen agreed to wait until the full Board was present before making any decision on the 40 versus 43 hour work week for the Highway Department employees (Union Exhibit 6, page 3).

14. The Board of Selectmen again discussed the reduction in hours issue at its meeting of February 22, 1984. The Minutes of that meeting, which accurately reflect the discussion at the meeting, provide in pertinent part:

> Sandra Beaudry stated that she is still in favor of cutting back to 40 hours even though the men would rather give up their pay raises but feels that they should be compensated for it with possibly a 5 percent increase. They would still get their overtime in the winter.
>
> Albert White suggested obtaining payroll figures from the League as to how much other employees in other towns are getting paid.
>
> John Cook stated the Town is in the process of obtaining questionnaires from all of the businesses in Town on skills, salaries, etc. Since this should be back within a reasonable length of time, it should be helpful to the Board.
>
> It was the consensus of the Board to put this on hold for now.
>
> Lloyd Smith addressed the Board and asked for an explanation as to why the Highway budget is always cut. Board members explained their reasons for reducing and eliminating some items.
>
> John Benson requested that the employees have an answer before July 1st on the employee hours to be worked.
>
> (Union Exhibit 7, page 3)

Beaudry, White and Cook are members of the Board of Selectmen. Smith and Benson are Highway Department employees.

15. On March 5, 1984, Town voters voted at the Town Meeting to approve the budget as presented with $12,000 eliminated from the proposed budget for

Highway Department labor cost in accordance with the January 16 vote. The budget approved by the voters neither identified nor provided information upon which a voter or others could determine that hours of the Highway Department employees were reduced from 43 hours worked to 40 hours worked per week, although a person reviewing the budget could determine that the budget for Highway Department labor cost had been reduced.

16. The Highway Department employees began talking amongst themselves in February 1984 about organizing into a union. On March 29, 1984, Robert Clark, Vice President and Business Agent of the Union, filed a petition on behalf of the Union with the Vermont Labor Relations Board to represent the Highway Department employees.

17. The Town was notified of the Union's interest in becoming the collective bargaining representative of the Highway Department employees on approximately March 29, 1984 (Union's Exhibit 4).

18. On April 18, 1984, three members of the Board of Selectmen met with certain Highway Department employees for a further airing of their complaints. The reduction in work hours was one of the matters discussed. The Highway Department employees continued to take the position they wanted no reduction in their hours worked. The Selectmen told the employees no decision had been made by the Selectmen on the reduction in work hours and they would get back to the employees once they decided what action they would take. The Selectmen did not tell the employees they could not reverse their January 16 vote because of the pending petition filed by the Union.

19. On May 15, 1984, the Highway Department employees voted to be represented by the Union. The Labor Relations Board certified the Union as the bargaining representative of all maintenance and service

employees of the Highway Department with the exception of the Superintendent on May 28, 1984.

20. At the end of May, Union Representative Clark met twice with Town Manager McAuliffe. The first meeting was a "social" meeting and ground rules were discussed for the upcoming negotiations. The second meeting was to discuss certain grievances. The first bargaining session was scheduled for June 28.

21. On June 25, 1984, McAuliffe posted a memorandum which provided in pertinent part:

> The following schedule of regular daily hours worked Monday - Friday will be effective July 1, 1984, in compliance with the January 16, 1984, motion of the Board of Selectmen reducing the number of hours worked weekly from 43 hours to 40 hours.
>
> | | |
> |---|---|
> | Start Work | 7:00 a.m. |
> | Coffee Break | 9:00 - 9:15 a.m. |
> | Lunch Break | 11:30 - 12:00 noon |
> | End of work | 3:30 p.m. |
>
> (Union Exhibit 3)

22. The contents of the June 25, 1984, memorandum were not discussed or negotiated by McAuliffe with the Union at any time before June 28, 1984.

23. At the previously scheduled negotiations meeting on June 28, 1984, Clark requested that the Town not implement the June 25, 1984, memorandum. The Board of Selectmen ultimately decided to implement the June 25 memorandum (Union Exhibit 1 and 8).

24. The Town implemented the provisions of the June 25, 1984, memorandum on July 1, 1984. In addition, Highway Department employees received a 3 percent wage increase effective that date. Such wage increase was not negotiated with the Union on or before July 1, 1984.

25. The parties met for a further negotiations session on July 12, 1984. At that meeting, Clark requested the Town go back to a 43-hour work week for Highway Department employees with no increase in pay. The Town refused the Union's request on the following day.

26. The Union filed the unfair labor practice charge at issue here on July 23, 1984.

27. On August 12, 1984, the parties agreed to hold further contract negotiations in abeyance pending resolution of this proceeding.

28. From July 1, 1984 to the time of the hearing, the Town unilaterall implemented its June 25, 1984 memorandum. Such implementation results in the elimination of an afternoon coffee break, a change in the time of the lunch break, and a reduction in weekly hours worked from 43 to 40. As a result of the reduction in hours, employees receive approximately $30 less per employee per week, even when considering the 3 percent raise the Town implemented.

29. McAuliffe unilaterally decided to eliminate the Highway Department employees' afternoon coffee breaks and to change the lunch break without the advice or counsel of the Board of Selectmen.

30. At the meetings of June 28 and July 12, there was no specific mention or discussion by the parties of the change in the time of the lunch break or the elimination of the afternoon coffee break.

31. The Highway Department employees at all times material received vacation benefits based upon the Town's Personnel Rules (Town Exhibit 2). Between July 1, 1979 and July 1, 1984, paid vacation was 44 and one-half hours straight time pay, based upon Highway Department employees working 43 hours per week. Since July 1, 1984, Highway Department

employees have received only 40 hours pay for each week of paid vacation.

32. Highway Department employees' pensions are based upon their final average salary which is affected by their receiving less weekly pay after July 1, 1984 than they received before that date.

33. Highway Department employees receive a death benefit of $1,000 for every $1,000 earned per year. Employees' death benefits since July 1, 1984, have been less than they were before that date in that employees will be earning less money per year than they did working 43 hours per week.

OPINION

At issue is whether the Town of Rockingham committed an unfair labor practice through the following unilateral actions which became effective on July 1, 1984: 1) reducing the hours of work of Highway Department employees from 43 hours per week to 40 hours per week; 2) granting the employees a 3 percent increase; 3) changing the time employees take a lunch break; and 4) eliminating a paid coffee break. At the time these unilateral actions became effective, the Union was the collective bargaining representative of the Highway Department Employees.

The statutory duty to bargain under the Municipal Employee Relations Act (MERA) is violated when an employer, without first consulting 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 (1983). 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. Under MERA, it is a unfair labor practice for an employer to unilaterally change conditions of employment during the course of negotiations prior to the exhaustion of mandated statutory impasse resolution procedures. Chester Education Association, 1 VLRB 426 (1978).

It is clear the Town unilaterally made the changes without negotiating them with the Union. Also, the changes were made in areas which constitute mandatory subjects of bargaining. Under MERA, "wages, hours and conditions of employment" are mandatory subjects of bargaining. 21 VSA §1725. "(W)ages hours and other conditions of employment" means any condition of employment directly affecting the economic circumstances, health, safety or convenience of employees but excluding matters of managerial prerogative. 21 VSA §1722(7). Managerial prerogative means any nonbargainal matter of inherent managerial policy. 21 VSA §1722(11). The number of hours employees work, the wages they are paid, and the provision for paid coffee breaks obviously fall within this definition. However, the Town contends that the time to exercise a lunch break, so long as it is within the normal range of time for eating lunch, and so long as there is no evidence of impact on conditions of employment, is not a mandatory bargaining subject. We disagree. The time an employee takes a lunch break is a "condition of employment directly affecting the... convenience of employees," 21 VSA §1722(17), and is integrally related to the hours employees work.

We turn then to the central issue at dispute here; whether the Town instituted or imposed these conditions of employment at a time when it was under a legal duty to bargain in good faith over these matters with the Union.

We first consider the reduction in weekly hours of the Highway Department employees from 43 to 40 and the 3 percent wage increase granted the employees. The Town contends that the Town Board of Selectmen made these decisions before the employees unionized, that these decisions become the "status quo" on wages and hours or employment; and that effectuation of the changes on July 1, 1984, after the Union was certified as bargaining representative, was not a unilateral change in conditions of employment but rather implementation of the status quo. The Town claims that MERA does not restrain a municipality from effectuating previously-planned changes in wages, hours and working conditions because unionization, certification and collective bargaining intervened between the date of the decision and the planned date of change.

The Union contends that the Board of Selectmen had not legislated the reduction of the regularly-scheduled hours of work for Highway Department employees or an increase in their pay prior to the Union being certified as bargaining representative of the employees on May 28, 1984, and that the Town thus violated MERA by unilaterally changing working conditions of the employees on July 1, 1984.

It is evident by the facts we have found in this case that the Town made no final decisions on reducing the hours of Highway Department employees and increasing their hourly rate of pay prior to the Union being certified as bargaining agent. It is true the Board of Selectmen voted on January 16, 1984, to reduce the employees' weekly hours and before that date voted to increase their hourly rate of pay. However, when employees subsequently complained about the reduction in hours and told Selectmen they would agree to no increase in their hourly

rate of pay if their hours were kept the same and there were no layoffs, the Selectmen informed the employees they would consider their complaint and get back to them. At Board of Selectmen meetings on January 27, 1984; February 6, 1984; and February 22, 1984; the Selectmen discussed the reduction in hours and reached no final decision on whether the employees' request to forego a 3 percent pay increase in return for their hours not being reduced would be granted. The last time the Selectmen discussed the matter with employees, on April 18, 1984, the Selectmen told the employees no decision had been made on the reduction in work hours and they would get back to employees once they decided what action to take.

Given these facts, the June 25, 1984, memorandum posted by Town Manager McAuliffe announcing a reduction in hours, which was approved by the Board of Selectmen and implemented on July 1, 1984, represented the first notification by the Town to the employees that these conditions of employment were actually going to be changed. At that time, the Union had been certified as bargaining agent and the parties were going to meet in three days for their first negotiations session. The Town did not negotiate with the Union over the terms of the June 25, 1984, memorandum. Under such circumstances, the Town's actions constituted the unilateral imposition of terms of employment during the time the employer was under a legal duty to bargain in good faith and was a per se violation of the duty to bargain. Burlington Fire Fighters' Association v. City of Burlington, supra.

Nonetheless, the Town contends that, under the Town's Personnel Rules, the Highway Department employees are hourly workers who are not

guaranteed any number of overtime or straight time hours of work; and that absent such guarantee, the termination of a past practice of working and being paid for regular overtime does not constitute a unilateral change in the status quo on wages, hours and working conditions. We disagree. The 43-hour workweek was an established practice of five years. An employer is required to negotiate before changing an established practice. VSEA v. State of Vermont, (Re: Involuntary Transfer of Fish and Game Warden Ronald Gonyaw), 7 VLRB 8, 31-32 (1984). That is the case here.

Along with the reduction in hours and pay increase, Town Manager McAuliffe also instituted a change in the time of the employees' lunch break and eliminated their afternoon coffee break on July 1, 1984. These changes in conditions of employment were made without the approval of the Board of Selectmen and without negotiations with the Union.

However, the Town contends that the Union waived its right to bargain over those issues by not raising them at any time during negotiations or otherwise after June 25, 1984, the date they received notification by the Town that these changes had been made.

In determining whether a party has waived it bargaining rights, we have required that it be demonstrated a party consciously and explicitly waived its rights. VSEA v. State of Vermont (re: Implementation of "6-2" Schedule at Vermont State Hospital), 5 VLRB 303, 326 (1982). In such matters, we are further guided by our Supreme Court, which defines a waiver as the "intentional relinquishment of a known right". In re Grievance of Guttman, 139 Vt. 574 (1981). 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).

The circumstances existing here indicate the Union did not intentionally relinquish its right to bargain over these matters. The changes regarding the lunch break and afternoon coffee break were contained in Town Manager McAuliffe's June 25, 1984, memorandum, and on June 28, 1984, the Union requested the Town not implement the memorandum. While there was no specific discussion by the parties on June 28 or any subsequent date regarding these issues, the issues are integrally related to the reduction in hours which was specifically discussed by the parties. If the Union's request that the reduction in work hours from 43 to 40 not be implemented had been granted, then the time of the lunch break and the afternoon coffee break would presumably remain what they were under the 43-hour work week. Thus, these issues were indirectly raised by the Union in negotiations and cannot be presumed to be waived. Accordingly, the Town committed an unfair labor practice by unilaterally making these changes and must negotiate with the Union over these matters.

We now must decide what remedy to apply as a result of the Town's unfair labor practice. 21 VSA §1727(d) authorizes the Board to issue an order requiring 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".

In determining a remedy, we are seeking to enforce the duty to negotiate in good faith. At the very least, this requires the Town to cease and desist from implementing the reduction in work hours, the 3 percent pay increase, the change in the time of the lunch break, and the elimination of the afternoon coffee break instituted on July 1,

1984. The Town must return to the identical work schedule (including time of lunch and coffee breaks) and hourly rates of pay in effect prior to July 1, 1984, and negotiate in good faith on these matters with the Union.

However, this remedy would be incomplete since it would not take into account the fact that the employees have been adversely affected for six months to date by the improperly-instituted unilateral changes. MERA provides the Board with discretionary authority as to what "affirmative action" to order to remedy unfair labor practices. The employees have been improperly deprived of three hours of regular weekly overtime for the past 26 weeks as a result of the Town's July 1, 1984, change in their regular work schedule, and we believe it appropriate to take the affirmative action of ordering the Town to reimburse employees for their wage losses during this period.

The Town contends it should be given the opportunity to receive services for any makeup pay and to offset the 3 percent wage increase against any liability. We disagree the employees should have to provide services prospectively for any makeup pay. If we ordered such a remedy, the likely result would be that the Town would offset its liability during the coming winter months when the employees presumably will work a great deal of overtime plowing snow. This would mean the employees would receive no more wages than they would have absent the remedy and still would have received no reimbursement for their losses to date since July 1, 1984. The Town improperly denied employees wages they were entitled to and should have to reimburse them. We view this situation as comparable to one where an employee is improperly dismissed and as a remedy we order the employee to be reinstated with back pay. Grievance of Benoir, 7 VLRB 308 (1984). In re Grievance of Brooks, 135 Vt. 563, 570 (1977).

Here, too, the employees should receive back pay without having to "work off" the wages.

However, we agree with the Town that the 3 percent increase employees received on July 1, 1984, should be used to offset any liability. The 3 percent increase was improperly given by the Town and employees are not entitled to it.

We also note that any wages employees have received since July 1, 1984, as a result of working more than 40 but less than or equal to 43 hours in any given week should be used to offset the Town's liability. If we did not so provide, employees would be paid twice for those hours. It is our intent to make employees whole for their losses but not to create a windfall for them. We caution that any wages employees receive as a result of working more than 43 hours in any given week during this period should not be used to offset the Town's liability.

ORDER

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

1. Effective as of the week beginning December 30, 1984, cease and desist from implementing the unilateral changes in Highway Department employees' weekly work hours, hourly pay rate, lunch break time and provision for coffee breaks which it instituted on July 1, 1984;

2. Effective as of the week beginning December 30, 1984, take the affirmative action of returning Highway Department employees to the hourly rates of pay they received and regular weekly work schedule, including hours of work, time for lunch break, and provision for paid coffee breaks, they operated under prior to July 1, 1984;

3. Negotiate in good faith with Local 98, International Union of Operating Engineers, AFL-CIO, concerning hourly rates of pay, number of hours worked, lunch break time, and provision for coffee breaks for Highway Department employees;

4. Pay each Highway Department employee a sum of money which equals the wages the employee would have received for 78 hours of work at time and one-half of the employee's hourly rate of pay the employee operated under prior to July 1, 1984, minus 3 percent of the employee's gross wages for time worked during the period July 1, 1984 to December 29, 1984, and minus any wages the employee has received for time worked during the period July 1, 1984 to December 29, 1984, as a result of working more than 40 hours but less than or equal to 43 hours in any given week during this period; and

5. Post copies of this Order on all Town bulletin boards customarily used for employer-employee communication, for a period of 60 consecutive days.

It is further ORDERED that the parties shall notify the Vermont Labor Relations Board within 30 days of the date of this order of any problems in computations regarding Provision #4 above.

Dated this 3rd day of December, 1984, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney, Chairman

William G. Kemsley, Sr.

James S. Gilson