VERMONT LABOR RELATIONS BOARD

VERMONT STATE EMPLOYEES' ASSOCIATION, INC.	)	
	)	DOCKET NO. 83-38
v.	)	
	)	
STATE OF VERMONT (re: Involuntary transfer of Fish and Game Warden Ronald Gonyaw)	)	

MEMORANDUM AND ORDER

By motion dated January 30, 1984, the State of Vermont requested that this Board alter or amend its Order in this unfair labor practice case or that the Board grant the State a new trial. After consideration of the parties' memoranda, and for the reasons set forth below, the Board has decided to deny the State's motion.

The State seeks relief from the Board's Order dated January 19, 1984, on the following grounds:

1. That the appropriateness of redistribution of territory among Game Warden districts and the selection of the person suited to fulfill the Department of Fish and Game's needs when an involuntary transfer must be made are management rights for which management has no duty to negotiate;

2. That the Board exceeded its authority by ordering Warden Gonyaw reinstated to the Montpelier District;

3. That the State was surprised unfairly by the Board's reliance on a past practice of the Department not to make involuntary transfers of employees except in exceptional circumstances not present in this case;

4. That no such past practice existed;

5. That even if such a past practice existed, the union negotiators did not have it in mind during negotiations for the collective bargaining agreement. Therefore, the collective bargaining agreement supersedes the practice because it reflects bargaining about and knowledge of involuntary transfers. The failure to negotiate transfer procedures amounts to a waiver because of such knowledge and the State is not required to negotiate during mid-term bargaining over what would amount to a change in the contract.

The first and second grounds for relief recited above were fully briefed by the parties and considered by the Board in its original deliberations. The Board sees no reason to alter its judgment on those issues.

Similarly, the Board declines to reconsider its finding that there existed in the Fish and Game Department an express policy to not transfer wardens involuntarily from one Warden District to another except to correct performance or personnel problems or as a disciplinary action. Former Commissioner Kehoe was questioned extensively and carefully on the subject. His testimony is clear, authoritative and convincing. The Board remains persuaded that such a policy existed. Moreover, because the policy was implemented by Kehoe to improve employee morale, the Board believes that the policy was known to the wardens.

The Board does not believe that the State's claim of surprise as to the Board's reliance on this past practice of the Department entitles it to a new hearing or altered decision in this matter. The Board notes that the Department practice against involuntary transfers was

not specifically raised in the pleadings. However, Section 24.3 of the Board's Rules of Practice does not require that evidentiary support be catalogued in unfair labor practice cases. The Rule requires only a brief statement of the facts concerning the alleged violation. The pleadings in this matter satisfy the Rule. The complainant was not foreclosed by the pleadings from introducing evidence of the past practice upon which it relied at hearing. Cf. Concra Corp. v. Andrus, 141 Vt.169 (1982).

Any defect in the pleadings was waived by the State when it allowed evidence of the past practice into the hearing record without objection. Concra Corp v. Andrus, supra; Valsangiacomo v. Paige & Campbell, Inc., 136 Vt. 278 (1978). Even though the State may have been surprised at the Board's finding on the issue or by the weight given that finding, it is clear from the record that the State could not have been surprised that the issue was a part of the case. The State has had a fair and full opportunity to litigate the issue, and the Board declines to relitigate it.

The final issue raised by the State is whether the past practice in issue was superseded by the collective bargaining agreement. The State bases this claim on the agreement's silence as to the practice and the absence in the record of evidence that the union's negotiators were aware of the practice. The State claims that it is not bound by a past practice which was not mutually known, mutually accepted, and relied upon in negotiations. We have held that where a past practice is concerned, and the agreement is silent on the subject and it was not raised in

negotiations because neither party foresaw that a change in the practice was likely to occur, the parties must negotiate over a change in that practice during the term of the Agreement. Vermont State Employees' Association, Inc., v. State of Vermont, 2 VLRB 26, 35-36 (1979). That is the case here, and we adhere to the reasoning of this holding. It would be neither fair nor workable to limit the effect of past practice as the State proposes.

ORDER

Now therefore, based on the foregoing reasons, it is hereby ordered:

The State's motion in this matter dated January 30, 1984, to alter or amend judgment or, in the alternative, motion for new trial is DENIED.

Dated this 21st day of March, 1984, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney, Chairman

William G. Kemsley, Sr.

James S. Gilson