VERMONT LABOR RELATIONS BOARD

CHITTENDEN SOUTH EDUCATION ASSOCIATION, HINESBURG UNIT	)	
v.	)	DOCKET NO. 85-15
HINESBURG SCHOOL DISTRICT AND HINESBURG SCHOOL BOARD	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On April 8, 1985, the Chittenden South Education Association, Hinesburg Unit ("Association") filed an unfair labor practice charge with the Vermont Labor Relations Board alleging that the Hinesburg School Board ("School Board") committed various violations of 16 VSA §2002 and 21 VSA §1726(a)(1), (3), (5) and (6). These allegations centered on conduct which occurred during the course of negotiations for a new contract for the 1984-85 school year and during the ensuing strike initiated by the Association on April 3, 1985.

After investigation, the Board issued a Complaint in the matter on April 26, 1985. On May 1, 1985, the Association filed amendments to its unfair labor practice charge.

A hearing was conducted by the Board at the State House in Montpelier on May 16, 1985. Chairman Kimberly Cheney and Member William Kemsley, Sr., were present for the Board. Member James Gilson disqualified himself from the case and has not participated in the decision. The School Board was represented by Nicholas DiGiovanni Jr., Esq., of Morgan, Brown and Joy, Boston, Massachusetts, and by Dennis Wells, Esq., of Downs, Rachlin and Martin, Burlington, Vermont. The Association was represented

by James Suskin, Esq., General Counsel, Vermont-NEA, Robert Chanin, Esq., General Counsel, National Education Association and Bredhoff and Kaiser, Washington, DC, and Bruce Lerner, Esq., Bredhoff and Kaiser, Washington, DC. At the hearing, the Board ruled the issues raised in the May 1 amendments to the charge were encompassed in the original April 8 charge.

Briefs, by request of the parties, were due to be filed on July 5, 1985, and Reply Briefs were due on July 12, 1985. The School Board filed a Brief on July 3, 1985, and the Association filed its Brief on July 5, 1985. Reply Briefs were filed by the School Board and Association on July 10 and 12, 1985, respectively.

FINDINGS OF FACT

1. The Hinesburg School District is comprised of a single K-8 elementary school. Approximately 425 students attend the school, and at the beginning of the 1984-85 school year there were 29 teachers filling the equivalent of 26 1/2 full-time positions. There is a single building principal and a five-member school board in charge of the district.

2. Hinesburg is also one of four elementary school systems (Williston, Charlotte and Shelburne) which, along with the Champlain Valley Union High School (CVU), comprise the Chittenden South Supervisory District (CSSD), an organizational unit which is headed by a superintendent, a director of personnel, and supporting staff, and provides each of the school districts with administrative support. Each of the school districts, however, has its own school board, and up until 1984, each had traditionally done its own negotiations with its own local teacher associations, all affiliates of the Vermont-NEA.

3. Until the fall of 1983, Hinesburg teachers were represented by the Hinesburg Teachers Association, affiliated with Vermont-NEA.

4. In the mid-1970's, negotiatons between the School Board and the Hinesburg Teachers Association were highly localized. The Association's bargaining team consisted of four or five teachers. School Board Chairperson Rita Villa, along with the Superintendent, conducted the negotiations for the School Board. In 1978, however, both parties began to use professional negotiators to head the bargaining teams. Attorney Nicholas DiGiovanni was retained as chief negotiator for the School Board, and a Vermont-NEA UniServ Director served as chief negotiator for the teachers. The first contract negotiated in that manner was a two-year contract for the 1979-81 school year. Another two-year contract covering 1981-83 followed, and a one-year agreement was arrived at for 1983-84.

5. The 1983-84 negotiations were lengthy and difficult in nature. Agreement was not reached until late January, 1984, and the new agreement was not signed until March 1, 1984 (School Board Exhibit 1, Page 23).

6. For the 1983-84 school year, 4 percent had been budgeted for teachers' salary increases and the Association and the School Board ultimately negotiated a 9 percent salary increase retroactive to the beginning of the year. The difference between the budgeted salary and the actual salary increase was made up by unexpected surpluses in the budget due to unemployment compensation that was appropriated but did not have to be paid and the retirement of a senior teacher and his replacement by a less senior and less expensive teacher.

7. During the fall of 1983, the Hinesburg Teachers Association, along with local Associations at Charlotte, Shelburne, Williston and CVU, voted to merge with the Champlain Valley Union Teachers Association, designating that body as the "successor bargaining agent" for all 1984-85 negotiations. All of the bargaining units within CSSD were coming up for negotiations for new agreements to commence July 1, 1984, and the CVU Teachers Association notified all CSSD school boards it was the Association's intent to bring to the bargaining table a unified contract proposal for the 1984-85 school year. The Association proposed to the school boards that they bargain a system-wide contract for all CSSD units. The individual school boards elected not to participate in system-wide bargaining but to negotiate individually with the Association. The CVU Teachers Association later changed its name to its current Chittenden South Education Association. (School Board Exhibits 9, 10).

8. The Association did not press its demand for system-wide coalition bargaining, but informed all of the CSSD school boards it would be coming to the table with a single bargaining team comprised of a representative teacher from each unit and led by David Boulanger, a teacher at CVU, who would serve as chief negotiator. Thus, unlike all prior years, only one Hinesburg teacher (Margaret McNeil) would be on the bargaining team during the 1984-85 Hinesburg negotiations (School Board Exhibit 10).

9. The 1984-85 negotiations began on February 21, 1984. At the first meeting, the Association presented its contract demands, which were identical to those presented by the Association to other school boards within the CSSD and were patterned after the CVU High School contract. The Association's initial salary demand would have cost over 30 percent in new money (School Board Exhibit 2).

10. The School Board's major proposals related to health insurance and salary. The Board proposed a new cost containment Blue Cross-Blue Shield plan which had deductibles. On salary, the Board proposed no additional base increase but proposed moving each teacher up a step on the salary schedule which would have cost approximately 3 percent in new money. The School Board did not propose to eliminate grievance arbitration, which was then in place under the 1983-84 contract (School Board Exhibit 11).

11. On March 20, 1984, the School Board approved the budget it would recommend to voters to pass for the 1984-85 school year. The School Board budgeted a 7 percent increase in teacher salaries. The school budget was approved by voters on May 7, 1984, at Hinesburg's annual school meeting. There was a public meeting on the budget approximately a week prior to the May 7 vote. At that meeting, School Board Chairperson Villa, in reference to the 7 percent increase, stated, "If you think the teachers are going to settle for this, you have your head in the clouds", or words to that effect. Villa mentioned the teachers probably would strike unless they were given more money (School Board Exhibit 20).

12. The parties held six negotiation sessions between late February and May 15, 1984, when impasse was declared. During those meetings, some movement was made and the parties arrived at tentative agreements. However, neither party moved off its initial salary demands.

13. The parties agreed to proceed to mediation and met on July 12, 1984, with Mediator Gary Overton for both Hinesburg and CVU negotiations. Mediation was unsuccessful in resolving the impasse.

14. At the beginning of the 1984-85 school year, in September, 1984, the School Board moved teachers a step up on the salary scale, which represented an approximate 3 percent salary increase for teachers. This action was consistent with its wage proposal and consistent with a Labor Relations Board decision in Chester Education Association v. Chester-Andover School Board, 1 VLRB 426 (1978).

15. The parties then proceeded to factfinding. James Litton was selected as the factfinder. The parties agreed upon September 17, 1984, at 10:00 a.m. as the date and time for the hearing. However, shortly before the hearing date, Joseph Blanchette, Vermont-NEA UniServ Director brought in by the Association at the impasse stage, requested the release from school of all members of his district-wide bargaining committee so they could attend the factfinding. The School Board agreed to release Margaret McNeil, the one Hinesburg teacher on the team, but indicated that since none of the other teachers were employees of Hinesburg, the School Board was without power to release them. The other districts chose not to release those teachers. The School Board offered to begin the factfinding in the afternoon to accommodate the other teachers, but since Blanchette and another Association negotiator had an evening commitment on the 17th, the Association ultimately requested a postponement of the hearing. The next available date for factfinding offered by Litton was November 26, 1984 (School Board Exhibit 13).

16. Following the postponement, DiGiovanni wrote to Blanchette expressing the School Board's disappointment the Association had obtained a postponement. He further stated:

> (S)ince, as a result of the postponement, the prospects for a settlement early in the school year appear dim, we want to remind you of the fact that the question of

> retroactivity will continue to remain a negotiable item. Absent some future agreement, you should not assume that the final terms of any settlement will "automatically" be retroactive to July 1, 1984 or to the beginning of the school year. The issue of retroactivity of any future settlement will be negotiated as part of that settlement.
>
> (School Board Exhibit 7)

17. Factfinding was held at the Hinesburg school on November 25, 1984. In accordance with the understandings of the chief negotiators, the day was devoted to economic presentations only. Another date, January 7, 1985, was set aside for a meeting between Litton, Blanchette and DiGiovanni to review the non-economic demands.

18. At factfinding, there were numerous issues still outstanding. On salaries, the School Board position had not changed and the Association position had changed minimally (i.e., it reduced its proposed base salary from $15,000 to $14,900). In defense of its position, the School Board offered statistical exhibits which emphasized the low rate of inflation, the high tax strain suffered by Hinesburg taxpayers and what the School Board viewed as the competitive and comparable position the Hinesburg teachers were already in vis-a-vis other local schools (School Board Exhibit 15). The Association stressed that Hinesburg teachers' salaries were behind other school districts in the county and should receive comparable salaries. The School Board did not raise retroactivity as an issue during factfinding.

19. The factfinder's report was delivered to the parties on February 19, 1985. Factfinder Litton ruled various ways on the noneconomic issues. On economic issues, he recommended an $1,100 base increase on the salary schedule, raising it to $12,900, plus a new step across the bottom of the salary columns. This resulted in a recommended 13 percent overall wage increase. Litton also recommended the continuation of the current Blue Cross/Blue Shield coverage and recommended the School Board increase its premium contribution from 90 percent to 95 percent (School Board Exhibit 3).

20. At the time the factfinding report was issued, the School Board was aware that for the 1984-85 school year it had received $14,500 less in State Aid than was budgeted and had to pay $9,500 in unbudgeted and unanticipated special education bills for two children who had moved into the school district. There had been no counterbalancing decreases in expenditures (School Board Exhibit 21).

21. Each 1 percent raise in teacher salaries in Hinesburg is worth approximately $6,000.

22. After receipt of the facfinding report, the bargaining teams met to review it on February 20, 1985. At that meeting, Blanchette and DiGiovanni met off-the-record, with Blanchette indicating the report would probably be acceptable to the Association. DiGiovanni expressed concern that the School Board would have difficulty with the report, particularly with the economics. The meeting concluded, however, with no "official" positions being taken, and with the understanding that DiGiovanni would be in further contact with the Association on the School Board's position.

23. On or before March 12, 1985, the Association informed the School Board it would accept the factfinder's report. On or about March 12, 1985, DiGiovanni informed the Association's chief negotiator, David Boulanger, of the School Board position on various items from the factfinder's report. This was confirmed in writing in a letter to Boulanger on March 12, 1985. In this letter, the School Board officially modified its salary proposal, offering a new base of $12,300, a $500 base increase. The offer was retroactive to the beginning of the school year but the School Board reserved the right to rescind retroactivity if agreement could not be reached. The School Board's stance on all other outstanding issues before the factfinder was delineated; some

recommendations being accepted and others being rejected. DiGiovanni indicated in the letter that any previous offers and tentative understandings on various articles would remain on the table, but a general reservation of rights to modify or rescind such positions was included in the event complete agreement on a contract was not reached (Association Exhibit 1).

24. The Association did not call or otherwise respond to the March 12, 1985, letter, nor did it ask for another bargaining session. DiGiovanni previously had indicated to Blanchette the School Board would move "not a wiggle more". From this comment, Blanchette inferred the School Board's position stated in its March 12 letter was a firm and final offer.

25. On the night of March 18, 1985, at a regular School Board meeting, Emily Tyl, the Association's President, read the following statement to the School Board in an open meeting:

> The teachers are here tonight to let you know that we expect to settle our contract with the compromise the factfinder recommends. We know the compromise is fair, especially in view of the sacrifices we made in the interest of a settlement last year.
>
> Hinesburg teachers do not intend to make sacrifices again. We are willing to compromise - exactly as the factfinder suggests - but no more -
>
> Our support for the factfinder's report is firm and unanimous.
>
> We urge you, in the interest of settling the contract, to compromise exactly as we are willing to compromise.
>
> (Association Exhibit 11)

The School Board did not respond to this statement.

26. On March 19, 1985, at 7:00 a.m., the teachers voted to strike on April 3, 1985, if there was no settlement. The teachers immediately informed the school principal of the strike vote and sent out a letter that day to all community members, including School Board members.

27. On March 19, 1985, DiGiovanni wrote a letter to Boulanger which provided in pertinent part:

> Enclosed please find a complete contract draft representing the Board's final position on all matters. This draft basically reflects the Board's position as outlined to you in the March 12 correspondence. The Board's offer shall remain on the table until 12:00 midnight April 3. Once again, I would remind you that the Board reserves its right to alter or rescind its offer of retroactivity on the salary schedule in the event the Association and teachers do not agree to accept the Board's offer. The Board also reserves the right to alter or rescind its other offers on other contract provisions as well as any tentative agreements we have reached thus far in the event agreement is not reached on a complete contract.
>
> (Association Exhibit 2)

Accompanying the letter was the School Board's final contract package (School Board Exhibit 4). The Association did not respond to this letter.

28. The parties engaged in no negotiations during the period March 19, 1985, to April 3, 1985. Nether Boulanger nor Blanchette contacted DiGiovanni or CSSD Personnel Director James Rice, who assisted DiGiovanni during negotiations, to arrange a meeting. It was Association practice that arrangements for negotiations would be made by either Blanchette or Boulanger and no one else.

29. During the period March 19 to April 3, 1985, Blanchette did call Federal mediator Ira Lobel to inform him of the strike vote but he told Lobel he was not asking him to mediate the dispute.

30. On March 28, 1985, a memorandum on the status of negotiations was sent to "Hinesburg Community Members" from "Hinesburg Teachers" which contained the statement: "We are always willing to meet with the board... for however long it takes to settle this contract" (Association Exhibit 21). The memorandum indicated the teachers were willing to

accept the factfinder's report as the basis for settlement. Copies of this memorandum were sent to School Board members.

31. On April 1, 1985, a memorandum was sent to "Hinesburg Citizens" from "Hinesburg Teachers" which stated that to "get agreement on a fair contract", it would "take reason, compromise and negotiations between the school board and the teachers" (Association Exhibit 22). The memorandum indicated the teachers were willing to accept the factfinder's report as a basis for settlement. Copies of this memorandum were sent to School Board members.

32. On April 1, 1985, the School Board held its annual meeting to vote on the 1985-86 budget. During the meeting, a resident questioned what were the School Board's options if the teachers went on strike. Villa responded the School Board had two options; to seek injunctive relief to get the strikers back to work and to try to reopen school with replacements. Also, Villa stated the voters had approved a 7 percent salary increase for teachers for the 1984-85 year at the last school district meeting and the School Board was unable to give the teachers more than a 7 percent increase for that year.

33. On Wednesday, April 3, 1985, all of the Hinesburg teachers went out on strike. The School Board sent the students home after two hours of school. The strike continues as of this date.

34. On the evening of April 3, the School Board met and considered whether to seek an injunction against the strike under 16 VSA §2010 and whether to declare "finality" under 16 VSA §2008. The School Board chose to invoke §2008 and immediately implement a Teachers Employment Policy. The Policy differed from the School Board's final offer in the following respects:

a). The Policy did not contain a binding grievance arbitration provision. The 1983-84 Contract had contained such a provision and its deletion had never been discussed in negotiations for the 1984-85 contract. The School Board's final offer defined a grievance as a claim there had been a "violation, misinterpretation or misapplication of the terms of this contract" and provided for arbitration as the final step of the grievance procedure. The final offer further provided "no teacher shall be disciplined, suspended, discharged... except for just cause".

b) The Policy contained the School Board's final offer of a $12,300 base salary but provided the increase would not be retroactive;

c) The March 19 final offer contained a Preamble which provided the contract was entered into by the Association and the School Board. The Preamble was not contained in the April 3 policy.

d) The March 19 final offer contained an Article entitled "Rights of the Association" which included the rights of the Association to use school facilities and equipment, transact official business on school property and use the teachers' lounge and mailboxes for communication purposes. The April 3 policy deleted this article.

e) The March 19 final offer contained an article detailing the procedure for negotiating a successor contract. The April 3 policy deleted this article.

f) The March 19 final offer contained the following article on "Duration":

> This agreement shall continue in full force and effect until 12:00 midnight June 30, 1985 and from year to year thereafter unless written notice of desire to terminate or modify this agreement is given by either party to the other in writing on or before October 15 of that contract year. This agreement may be extended from time to time beyond its expiration date of mutual agreement in writing between the representatives of the Board and the Association.

The April 3 policy contained the following different "Duration" article:

> This policy shall become effective at 12:00 midnight April 3, 1985, and shall continue in full force and effect until 12:00 midnight June 30, 1985. If no agreement has been reached with the Association for a new collective bargaining agreement for 1985-86 as of 12:00 midnight on

> June 30, 1985, then this policy shall remain in effect until 12:00 midnight June 30, 1986, unless a new collective bargaining agreement is negotiated and ratified or unless the Board exercises its rights under Title 16, Chapter 57, Subchapter 3, particularly 16 VSA Section 2008.
>
> (Association Exhibit 4; School Board Exhibit 4, 16)

35. After the Teacher Employment Policy had been passed by the School Board, Emily Tyl presented a letter to them which provided:

> The teachers request that the school board return to the bargaining table immediately to negotiate. We are prepared to negotiate for the entire length of time it takes to settle this dispute.
>
> Please contact us no later than Friday afternoon with your choice of time and place. We will be there.
>
> (Association Exhibit 3)

36. Within the CSSD, it has been common practice that contracts negotiated after the beginning of the school year they become effective provide any salary increases are retroactive to the beginning of the school year.

37. On April 4, 1985, the School Board sent each teacher a copy of the Teacher Employment Policy along with an individual contract containing the person's salary and teaching assignments for the remainder of the year, and an explanatory letter stating the person had 15 days to return the contract signed or else rejection would be presumed and he or she would be "subject to replacement" (Association Exhibits 5, 6)

38. In addition to this communication to the teachers, the School Board simultaneously sent a copy of the Policy to Boulanger, Blanchette and Tyl, along with an explanatory letter. The letter, which was from DiGiovanni to Boulanger, provided in pertinent part:

> Pursuant to the action of the School Board at its meeting of April 3, 1985, and pursuant to 16 VSA Section 2008, the Board has approved the enclosed Teacher Employment Policy for the remainder of the school year. The new policy is in effect commencing midnight April 3, 1985.

Each teacher has been sent a copy of this policy as well as an individual contract which must be signed and returned within fifteen days or the teacher will be subject to replacement.

It is the Board's sincere hope that the teachers will sign these contracts and return to work. In your role as their bargaining representative, we would strongly urge you to encourage your members to sign these agreements.

It is our decided preference to reopen school with our existing staff of teachers. However, we wish to be very clear about the fact that the education of our students and the successful completion of the school year must remain a paramount consideration. With this goal in mind, therefore, we do want to impress upon you the fact that, if necessary, we will replace, on either a temporary or permanent basis, teachers who do not sign contracts. In the event the teacher is replaced on a permanent basis he or she will remain on employee status but will have the right to return to work only if the replacement leaves, the position remains available and in accordance with whatever further rights may be afforded for both the School Board and the striking teachers under relevant Vermont law.

Replacing the staff is not a step we choose to take lightly, but it is one which we will take to ensure the continuing education of our students.

At the Board meeting last night, we received a demand from the Association to reopen negotiations for this year. Since we have invoked finality under Section 2008, we decline to negotiate any further for a 1984-85 agreement. However, while the invocation of finality under Section 2008 concludes negotiations for 1984-85, the Board is very willing to negotiate with the Association for a new collective bargaining agreement for 1985-86, and, if mutually acceptable, a multi-year agreement. Please advise us as to whether the Association is willing to negotiate under these terms.

(Association Exhibit 7)

39. Upon receipt of the communication from the School Board, there were many discussions among teachers about whether they should go back to work since they might be permanently replaced. However, the teachers felt they could not return to work since the Teacher Employment Policy contained no provision for binding grievance arbitration and no retroactive pay increases. The deletion of binding grievance arbitration contributed to the continuation of the strike.

40. At the time the School Board invoked finality, it had no replacements ready to take over classroom instruction. During the 15-day period, the School Board began advertising for either temporary or permanent replacements (School Board Exhibit 19), and Personnel Director Rice actively began interviewing people for positions in case some or all of the striking teachers did not return. However, no individuals were hired prior to April 20 (i.e., until after the 15-day period expired). Most people who were willing to work in this situation indicated to Rice they would only do so if the job was permanent rather than temporary.

41. Following declaration of finality by the School Board, there were repeated requests by the Association to the Board, or its representatives, to engage in collective bargaining regarding an agreement for the 1984-85 school year. In connection with these requests, the Association indicated that it was prepared to make changes in its bargaining position,including specifically a reduction in its financial demands. The School Board rejected all such requests by the Association and stated that it was under no legal obligation to engage in collective bargaining regarding an agreement for the 1984-85 school year subsequent to the declaration of finality. The School Board expressed its willingness to enter into collective bargaining regarding a contract for the 1985-86 school year.

42. Federal mediator Ira Lobel called a mediation session on April 18, 1985, to deal with various points of disagreement between the parties. Both the School Board and the Association participated in the session. The School Board made it clear to Lobel and the Association it was

not in a position to bargain any longer for the 1984-85 school year (Association Exhibit 14). During the mediation session, proposals were made by both sides to try and resolve the dispute. The Association offered a three-year deal, which accepted the School Board's earlier 7 percent offer for 1984-85 with a $12,300 base, and demanded bases of $13,900 and $15,700 for 1985-86 and 1986-87 respectively. The School Board rejected that and instead proposed a 1985-86 contract which included all of the language of the School Board's March 19 offer, a lump sum payment on July 1, 1985, equal to the retroactivity the teachers would have received, and a 9 percent wage increase. This was rejected by the Association. The Association eventually proposed a one-year package for 1984-85 which consisted of a base of $12,300 for the first half of 1984-85 and then a move up to $12,900 for the rest of the year. The School Board rejected going beyond 7 percent. The School Board then proposed a 1985-86 contract which consisted of the March 19 language, a lump sum retroactive payment on July 1, 1985, and a 10 percent wage increase for 1985-86. This was rejected and the evening ended without any resolution.

43. At no time during the evening, or at any other time, did the Association indicate a willingness to accept the Teacher Employment Policy invoked under §2008. At no time did the Association express a willingness to settle for the 1984-85 year if the School Board would return to the March 19 offer. At no time did the School Board express a willingness to modify its Teacher Employment Policy for the 1984-85 school year.

44. Prior to April 22, 1985, no teachers informed the School Board they were returning to work. On April 22, school reopened with a replacement staff of both permanent and temporary replacements. Replacements were hired under the Teacher Employment Policy and the salary schedule therein.

OPINION

The Association's unfair labor practice charge and its amendments contained numerous allegations of fact and law concerning the School Board's actions. Some of these allegations were dropped at the hearing; either expressly or through failure to present evidence on them. At this point, the Association's remaining allegations can be summarized as follows:

1. The School Board refused to bargain in good faith prior to April 3, 1985, which made the resultant April 3, 1985, teachers' strike an unfair labor practice strike;

2. The School Board committed an unfair labor practice on April 3, 1985, and prolonged the strike by improperly imposing a teacher employment policy on teachers;

3. The School Board committed an unfair labor practice and prolonged the strike by refusing to bargain with the Association since the imposition of finality on April 3, 1985; and

4. The School Board acted improperly by hiring permanent replacements for striking teachers.

We discuss each of these issues in turn.

I. Refusal to Bargain in Good Faith Prior to April 3 Strike

The Teachers Labor Relations Act (TLRA) requires the school board and the recognized teacher organization to meet together at reasonable times, upon request of either party,and bargain in good faith on all matters properly before them, 16 VSA §2001; and to enter into a written agreement incorporating therein matters agreed to in negotiation. 16 VSA §2005. It is an unfair labor practice for an employer to refuse to bargain collectively in good faith with the exclusive bargaining agent. 21 VSA §1726(a)(5).

Since the pertinent language of Vermont statutes and the National Labor Relations Act (NLRA) are parallel, we look to Federal court decisions interpreting the NLRA for guidance. In re Local 1201, AFSCME, 143 Vt. 512, 515 (1983).

The duty to bargain in good faith implies "an open mind and a sincere desire to reach an agreement", NLRB v. Montgomery Ward and Co., 133 F2d 676, 686 (9th Cir., 1943), as well as a "serious intent to adjust differences and to reach an acceptable common ground". NLRB v. Insurance Agents Union, 361 US 477, 485 (1960). The totality of the employer's conduct must be analyzed and the context in which the bargaining took place must be evaluated to determine if bad faith exists. Rutland School Board v. Rutland Education Association, 2 VLRB 250, 273, 276 (1979). Continental Insurance Co. v. NLRB, 495 F2d 44, 48 (2nd Cir., 1974).

The Association alleges the School Board failed in its bargaining obligation prior to the April 3 strike in two ways. First, the Association contends the bargaining stance adopted by the School Board, including but not limited to its refusal to offer any economic package beyond the 7 percent tentatively budgeted in March, 1984, was bad faith bargaining. Second, the Association alleges the School Board acted improperly by refusing to bargain with the Association during the period between March 12 and April 3, 1985.

In regard to the bargaining position adopted by the School Board, the Association alleges the School Board engaged in bad faith bargaining by holding fast to a predetermined salary offer regardless of what was said at the bargaining table and regardless of what was recommended by the factfinder. We do not find the School Board's pre-strike bargaining conduct amounted to an unfair labor practice.

The School Board cannot be faulted for recommending in Spring 1984 that 7 percent be budgeted for salary increases for the 1984-85 school year. At the time this recommendation was made, negotiations for the

1984-85 school year had barely started and the parties were far apart on wages. The School Board had to come up with some figure for a salary increase and we cannot conclude 7 percent was an unreasonable estimate. Further, as had been demonstrated during negotiations for the 1983-84 school year, the amount budgeted for salaries is not a firm and final figure indicating where the parties will settle in negotiations. Four percent was budgeted for salary increases for 1983-84; yet the parties negotiated a 9 percent increase for teachers.

The School Board's initial 3 percent wage offer for 1984-85 and its failure to move off that position prior to factfinding also does not indicate bad faith bargaining. Three percent was simply an opening position as was the Assocation's proposal for a 30 percent increase. The Association moved off its wage position only minimally prior to factfinding, and we cannot find the School Board at fault given the Association's similar stance.

We also do not find evidence of bad faith by the School Board's post-factfinding position. The School Board was not required to accept the factfinder's recommended 13 percent increase. It did move from its original 3 percent offer to a proposed 7 percent increase. While this was well below the factfinder's recommendation and this position was held to the point of impasse, this does not mean bad faith existed. An employer is not required to make concessions as evidence of good faith but may hold a bargaining position to the point of impasse, so long as that position is based on sound reasons and is not taken to frustrate bargaining. IBEW, Local 300 v. Enosburg Falls Water and Light Department, 8 VLRB 193, 208 (1985). Rutland, supra, at 274-275. A preponderance of the evidence

does not indicate the School Board held firm at 7 percent because that was what it had budgeted. Instead, unanticipated and unbudgeted expenses and budget shortfalls had surfaced by the post-factfinding period, unlike 1983-84 where an unexpected budget surplus had allowed the School Board to grant salary increases in excess of that budgeted. Given these budget realities, we cannot find its final wage offer was not based on "sound reasons". We find no bad faith in this respect. Our conclusion is bolstered by the School Board's conduct during 1983-84 negotiations which indicate it did not view itself as wedded to the amount budgeted.

We also do not find the School Board refused to bargain during the period March 12 to April 3, 1985, because, simply stated, the Association never requested bargaining during this period. The statute does not compel the employer to seek out the recognized representative of teachers to negotiate, but provides the parties shall negotiate "upon request". 16 VSA §2001. cf. NLRB v. Columbian Enameling and Stamping Co., 306 US 292, 297-298 (1939). It was Association practice that arrangements for negotiations would be made by only two of its representatives, Joseph Blanchette and David Boulanger. Neither Boulanger nor Blanchette contacted School Board representatives during this period to request negotiations.

The Association contends a statement made by the Association's President, Emily Tyl, at a March 18, 1985, School Board meeting indicates an Association request to negotiate, as do two newsletters sent by teachers to Hinesburg residents during this period. The Association relies on the US Supreme Court decision, NLRB v. Columbian Co., supra, to support its position. Therein, the Court stated for an employer to

be found in violation of its duty to bargain in good faith, "the employees must at least have signified... their desire to negotiate" and a refusal to bargain charge cannot be supported if there is no evidence the union gave to the employer "any indication of its willingness to bargain". Id, at 297-298. The Association contends the statement made by Tyl and the two newsletters clearly informed the School Board the Association was willing to bargain.

We disagree these communications constitute requests to bargain which the School Board was obligated to honor. The communications were ambiguous. While the statement made by Tyl could be construed as an Association request to negotiate, it could also be construed as simply a public reiteration of the Association's position it was willing to compromise to the extent of accepting the fact-finder's recommendation but no more. The newsletters state the teachers are willing to negotiate but are more accurately viewed as a vehicle of generating public pressure on the School Board to accept the factfinder's report than a request to negotiate. In a small state such as Vermont, where negotiations have high public visibility, it is important people deal through recognized channels and make bargaining requests directly. Although we recognize that as negotiations deadlines approach parties engage in a type of minuet for face-saving purposes, we do not want to create a situation where a party can act ambiguously and then later charge the opposing party with bad faith bargaining.

If the Association desired a renewal of negotiations, it would have been easy enough for Boulanger or Blanchette to contact School Board representatives directly. It had a legal duty to do so if it wished

to meet. Conversely, the School Board had no duty under these circumstances to pierce the teacher's public rhetoric aimed at others in order to find a request to bargain.

We find no other evidence indicating the School Board bargained in bad faith prior to the April 3 strike. As of the commencement of the strike, the School Board had committed no unfair labor practices. Thus, the strike at its inception was an economic strike, not an unfair labor practice strike. cf. Enosburg, supra, at 209.

II. Imposition of Teacher Employment Policy Under 16 VSA §2008

We now turn to determining whether the School Board unlawfully imposed its Teacher Employment Policy on the evening of April 3. At issue is the meaning of 16 VSA §2008, which provides:

> All decisions of the school board regarding matters in dispute in negotiations shall, after full compliance with this chapter, be final.

It is evident here the timing of the School Board's §2008 policy was proper. Teachers may not strike until 30 days after receipt of the factfinder's report and the same limitation applies to invoking finality under §2008, as well. Rutland, supra, at 271-273. Here, the strike and imposition of finality both occurred more than 30 days after the parties received the factfinder's report and the timing of both actions was legal. We have recognized in the past there is a substantial question whether and when teachers may strike. Rutland, supra. The School Board accepts that the strike here is legal and we operate from that premise.

What is at issue is whether the content of the policy constituted an unfair labor practice. In the private sector, the subject of a unilateral action must be discussed during negotiations and an employer

bargains in bad faith by taking action without prior consultation with the union with respect to conditions of employment substantially different from what the employer had proposed during negotiations, NLRB v. Crompton-Highland Mills, 337 US 217 (1949); or by taking action without providing the exclusive representative with notice and an opportunity to negotiate. PERB v. Modesto City School District, 136 Cal. App. 3rd 888, 900 (5th District, 1982). The employer need not always implement changes absolutely identical with its last offer on a given issue. However, the unilateral adoptions must be reasonably comprehended within the pre-impasse proposals. Taft Broadcasting Co., 163 NLRB No. 55, enforced sub nom., American Federation of Television and Radio Artists v. NLRB, 395 F2d 622 (DC Cir. 1968). See also "Impasse and the Duty to Bargain in Good Faith", Terrence Murphy, University of Pittsburgh Law Review, (Fall 1977, pages 1-61).

It is evident the Vermont Legislature acted consistent with this private sector precedent when it enacted §2008 in limiting school boards to taking unilateral action on "matters in dispute in negotiations". To hold otherwise would allow school boards to hurry through negotiations and engage in shadow bargaining, and then unilaterally dictate whatever terms they desire. This we cannot permit. At the completion of mandated statutory impasse procedures, the school board may take unilateral actions on "matters in dispute". Addison-Rutland Education Association v. School Boards of Benson, Orwell and West Haven, 5 VLRB 137, 139 (1982).

With these principles in mind, we turn to the facts of this case. The Teachers Employment Policy implemented by the School Board differed from its final offer in negotiations in six areas.

Preamble, Successor Agreement, Duration

The changes in three areas were necessitated by the fact no final contract had been negotiated on all issues and are simply reflective of the unilateral implementation by the employer of an employment policy. Deletion of the Preamble and the article on negotiating a successor agreement were proper because the provisions presuppose an existing contract. Similarly, a different "Duration" clause was properly imposed to reflect the Employment Policy would be the operating document until a contract was negotiated for the succeeding year. While these areas were not technically matters in dispute in negotiations, changes made were structural changes necessitated by the circumstances.

Changes in three other areas - retroactivity of pay increase, grievance arbitration and Association rights - require more extended discussion.

Retroactivity

The Association alleges the failure of the School Board to include a fully retroactive pay increase in its teacher employment policy was an improper unilateral change of an undisputed matter and that retroactivity was a "given" in the district. We find retroactivity was, in fact, a "matter in dispute" during negotiations. The School Board had raised the matter when an Association-caused delay in factfinding occurred and a specific condition of its final offer was possible withdrawal of retroactivity of salary increases if its final offer was not accepted by the Association. The fact retroactivity of pay increases had been a district-wide practice does not preclude the School Board from raising it as an issue. Given the context in which this time-conditioned offer was made, we find it an effective negotiations tactic to induce a settlement. This was a

reasonable and proper tactic under the facts of this case. Pittsburgh-DesMoines Corp. v. NLRB, 663 F2d 956 (9th Cir., 1981).

Arbitration

We conclude differently in regard to the School Board's deletion of binding grievance arbitration from the Policy. The 1983-84 Contract had contained such a provision and its deletion had never been discussed in negotiations for the 1984-85 contract. Consistent with our prior general discussion of applicable legal principles, grievance arbitration was not a "matter in dispute during negotiations" and should have been included as part of the Policy.

Nonetheless, the School Board maintains arbitration is a "creature of contract", United Steelworkers v. Warrior and Gulf Navigation, 363 US 574, 582 (1960) and since there is no "contract" here, the School Board did not have to unilaterally bind itself to an arbitration clause in its interim policy.

In evaluating the propriety of the deletion of the arbitration provision, we have to evaluate where the parties found themselves as a result. The teachers were out on strike and were now faced with a situation where they could return to work only if they accepted the fact they would no longer have grievance arbitration to redress any alleged violations of established terms and conditions of employment. Retaliation against returning striking employees is a possibility in any strike situation and arbitration is a central protection to employees to guard against retaliation and other management violations of established conditions of employment. If grievance arbitration had been retained in the Teacher Employment Policy, teachers would have the right to have an arbitrator determine whether just cause existed for any discipline, including dismissal.

Without arbitration, we recognize teachers would have a limited right of appeal from imposed discipline. Review of school Board decisions under Section 1752 of Title 16, governing grounds and procedures for suspension and dismissal, may be obtained by a writ of certiorari. The review, however, is not de novo but confined to substantial questions of law. Further, it is not granted as a matter of right but is largely discretionary according to the merits of the case. Burroughs v West Windsor Board of School Directors, 141 Vt. 234 (1982); In re Petitions of Davenport, et al., 129 Vt. 546, 554-555 (1971). Also, review may possibly be obtained by an action at law for breach of contract. 16 VSA §1752(k). Burroughs, supra. Brattleboro Union High School Board v. Windham Southeast Education Association, et al., 137 Vt. 1 (1979).

However, this court review is more limited than that of grievance arbitration; where review is de novo, a matter of right and where arbitrators typically have a broader scope of review than do courts in reviewing management's disciplinary actions. Moreover, the arbitration procedure is substantially quicker than court appeals, under which improperly discharged teachers may wait one to three years for a remedy.

Arbitration has a preferred place in Vermont for resolving labor disputes. The Vermont Supreme Court has expressed a strong preference for arbitration as "a reasonably amicable method of resolving disputes in the least expensive and most expeditious manner possible". Morton v. Essex Town School District, 140 Vt. 345, 349 (1981). Arbitration is a key ingredient in fostering labor peace and is to be supported. North Country Education Association v. Board of School Directors of North Country School District, 5 VLRB 395, at 405-406 (1982).

The School Board's contention that arbitration only has a place in a bilateral contract is fallacious. Individual teachers returning to work under the unilateral policy would be working under individual contracts, bilateral in nature. See Perry v. Sinderman 408 US 593 (1972). The School Board even required them to sign individual "contracts" when coming back to work. Arbitration is a relinquishment of management authority. There is nothing to say management cannot relinquish this authority as a term and condition of employment. As we view it, arbitration is no more bilateral than other working conditions offered by the district which would have been accepted by a teacher returning to work under the Policy. The deletion of the arbitration provision was a substantial change in a significant condition of employment.

Given the central purpose of grievance arbitration in labor relations and because the legislature provided only a "matter in dispute" in negotiations could be unilaterally imposed, we conclude the School Board committed an unfair labor practice by not including it in its policy. cf. Modesto, supra, at 901 (Replacement of advisory arbitration in previous contract with review board found to be improper unilateral change). In sum, the improper use of §2008 is an unfair labor practice because it is a violation of the School Board's duty to bargain in good faith. 21 VSA §1726(a)(5).

We recognize the grievance arbitration provisions of the 1983-84 contract confined grievances to alleged "violations, misinterpretations or misapplications of the terms of the contract" (emphasis added). However, the "Policy" could be written to substitute "Policy" for "contract" where it appears in the article.

Association Rights

Finally, we deal with the deletion of the Association rights article from the policy. The School Board's final offer contained an article on Association rights which was deleted from the April 3 policy. It permitted certain forms of union activity in the school, such as use of the teachers' lounge for union business. This deletion was not reasonably comprehended within its final offer position and the Association did not dispute those provisions should be part of the contract. Thus, there was no "matter in dispute" and the School Board's deletion of its final offer position was an improper unilateral change, which carried a hint of union disparagement.

III. Duty to Bargain After Imposition of Finality

The School Board, after declaring finality under §2008, refused to negotiate further on a contract for 1984-85. The School Board adhered to this position despite the teachers' announced willingness to make changes in its bargaining position, including specifically a reduction in its financial demands. The Association points to private-sector precedent and the Board's Rutland, supra, decision for the proposition that the duty to bargain is revived, even after §2008 is invoked, whenever a change in circumstances suggests further bargaining may settle a labor dispute. In Rutland, the Board stated:

> ...(T)he duty to bargain may only be suspended, not absolutely extinguished... After all statutory impasse procedures are utilized, the duty is dormant until a changed circumstance indicates agreement may be possible.

By this decision, we meant that the duty to bargain continues after statutory impasse procedures for at least a 30-day cooling-off period after receipt of the factfinding report. However, at the conclusion

of this 30-day period, the school board has a right to unilaterally implement disputed conditions of employment assuming it has bargained in good faith. Rutland, supra, at 273. Addison-Rutland, supra. Once "finality" is invoked under §2008, the duty to bargain terms of the contract for that year is ended. The clear purpose of §2008, which has no parallel we know of in either the private or public sector, is to put an end to the negotiations process. It designates a point in time when mandatory negotiations will conclude for that year. The Legislature has final authority to determine the scope and duration of negotiations. Vermont State Colleges Faculty Federation v. Vermont State Colleges, 138 Vt. 451 (1980). It has given the school board the final "hammer" in negotiations, provided it has bargained in good faith and that process survives our scrutiny.

Of course, this does not mean school boards may not negotiate further once they have imposed finality. The pressure of a strike may cause a school board to agree to provisions different than its unilaterally-imposed policy to settle a strike and get teachers back to work. By this ruling, we also do not mean to imply school boards have to invoke §2008 once the 30 days after receipt of the factfinding report have passed. We only hold that once §2008 is legally invoked, a school board is no longer mandated to bargain for that year.

Also, we note that while the Policy implemented by the School Board in this case was improper in some respects, we believe the remedy for that, as discussed infra, is not a bargaining order but substitution of its final offer position in those areas in place of the improper parts of the policy.

IV. Conversion of Strike into Unfair Labor Practice Strike

The Association alleges that its April 3 strike was caused and then prolonged by the School Board's unfair labor practices, thus making the strike an unfair labor practice strike. We have already decided the strike at its inception was not an unfair labor practice strike. We turn now to determining whether the School Board's improper deletion of grievance arbitration and an article on Association rights from its Teacher Employment Policy converted the strike into an unfair labor practice strike.

A strike which is at least partly motivated by employer unfair labor practices can be an unfair labor practice strike. That a strike also has economic objectives and may stem from mixed motives does not prevent the strike from being an unfair labor practice strike, so long as the employer's conduct was a contributory cause. Enosburg, supra, at 209. NLRB v. Heads and Threads Co., 724 F2d 282, 288 (2nd Cir., 1983). NLRB v. Safeway Steel Scaffolds Co., 383 F2d 273, 280-281 (5th Cir., 1967). NLRB v. Fitzgerald Mills Corp., 313 F2d 260, 267 (2nd Cir., 1963). An economic strike is converted into an unfair labor practice strike if it is prolonged or aggravated by the employer's unfair labor practice. NLRB v. Windham Community Memorial Hospital, 577 F2d 805, 814 (2nd Cir., 1978). American Cyanide v. NLRB, 592 F2d 356 (5th Cir., 1979).

Here, we conclude the School Board's improper actions upon implementing its Teacher Employment Policy, particularly its deletion of grievance arbitration, converted the strike into an unfair labor practice strike.

Forcing the union to make a choice whether to continue working under less favorable conditions than either the prior contract or the last offer of the employer, or to strike, can easily undermine collective bargaining.

Pittsburgh Law Review, supra, at 48. The teachers in this case, once out on strike, were left with a choice which seriously interfered with their statutory right to strike. They could either remain on strike or return to work under a policy that unlawfully eliminated important benefits.

The evidence indicated one of the reasons teachers felt they could not return to work was the absence of arbitration; and its inclusion in the Policy would have made a difference to teachers in their decision whether to return to work or to continue the strike. We have already discussed the importance of grievance arbitration to labor relations, and it is clear to us its elimination by the School Board contributed to the continuance of the strike and converted the strike into an unfair labor practice strike.

The School Board contends even if this is so, its unfair labor practices ended at mediation on April 18, 1985, where the School Board offered grievance arbitration back to the Association. This argument ignores the fact the School Board, in mediation, refused to bargain at all for the 1984-85 year and thus the offer on arbitration would not have become effective until the 1985-86 school year began.

V. Right to Hire Permanent Replacements

The Association requests we rule the School Board acted contrary to the TLRA here by hiring permanent replacements because the availability of the injunction remedy under 16 VSA §2010 obviates the need for hiring such replacements.

This position is an intriguing one, not without force. However, we believe it unnecessary to decide that issue here because, as discussed infra in the Remedy section, we will require the School Board to discharge

replacements upon an unconditional offer by teachers to return to work. The issue thus becomes moot.

VI. Remedy

Strikers who engage in an unfair labor practice strike, and who are permanently replaced, are entitled to reinstatement to their former jobs (and replacements discharged) upon an unconditional offer to return to work. Enosburg, supra, at 213. Mastro Plastics Corp., 350 US 270, 278 (1956). NLRB v. Heads and Threads Co., supra. NLRB v. Fitzgerald Mills Corp., supra. NLRB v. Windham Community Hospital, supra. No such offer has been made in this case, but if it is made, the School Board is required to reinstate those teachers making such a request.

21 VSA §1727(d) grants us discretion in determining what "affirmative action" to order as the result of an unfair labor practice. In determining whether to award teachers backpay commencing as of the date employer unfair labor practices contributed to the continuation of the strike, we exercise our discretion not to award such back pay then.

The strike started as an economic strike, not as an unfair labor practice strike as was the case in Enosburg, supra. While the deletion of grievance arbitration converted the strike into an unfair labor practice strike shortly after it commenced, we cannot conclude the strike continued only as a result of the School Board's unfair labor practices. The engine driving this strike was primarily economic. The Association's demands and desire for movement towards system-wide bargaining also was a factor in the strike's continuance. Even the Association has not taken the position the strike continued solely as a result of the deletion of grievance arbitration. Given the mixed motive nature of the strike, we

believe it inappropriate to require the School Board to pay both the striking teachers and their replacements by ordering backpay as of April 3rd. This is particularly so where the teachers have yet to terminate their strike. We will require backpay to striking teachers only if the School Board does not reinstate them upon request.

Finally, we conclude the proper remedy for the School Board's unlawful deletion of grievance arbitration and the article on Association rights from the Teacher Employment Policy is to require such provisions as contained in its final offer to the Association in these areas be added to the Policy.

ORDER

Now therefore, based on the foregoing findings of fact and the foregoing reasons, and pursuant to our authority to prevent unfair labor practices under 21 VSA §1727(d), it is hereby ORDERED the Hinesburg School Board shall:

1. Cease and desist from interfering with, restraining and coercing its employees in the exercise of their rights, in violation of 21 VSA §1726(a)(1) and §1726(a)(5) by implementing a Teacher Employment Policy which deletes a provision on grievance arbitration and an article on Association rights which were contained in its final offer to the Chittenden South Education Association, Hinesburg Unit ("Association"); and

2. Take the following affirmative action:

a) Add the provisions on grievance arbitration and Association Rights as contained in its final offer to the Association, to the Teacher Employment Policy it implemented on April 3, 1985, with the exception that the word "policy" should be substituted for "contract" whenever it appears in the grievance arbitration provision;

b) Offer strikers, upon unconditional application, reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges, discharging, if necessary, any replacements hired after the commencement of the April 3 strike, with the proviso that any employees working for the School Board before the commencement of the strike shall not be discharged;

c) If there are any individual teachers whom the School Board contends are not entitled to reinstatement, the School Board shall so notify this Board within 20 days of a request for reinstatement and request a compliance proceeding to determine the teacher(s)' eligibility for reinstatement;

d) Make whole all said strikers for any loss of earnings they may have suffered by payment to each a sum of money equal to that which each normally would have earned as wages from five days after the strikers' unconditional request for reinstatement, to the date of their reinstatement, for all hours of their regularly-assigned shift, minus any income (including unemployment compensation received and not paid back) received by employees in the interim. The interest due employees on backpay shall be at the rate of 12 percent per annum and shall run from the date commencing five days after the strikers' unconditional request for reinstatement to the date of their reinstatement; and

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

Dated this 30th day of August, 1985, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney, Chairman

William G. Kemsley, Sr.