Elements of Good Faith Bargaining

Each of the labor relations statutes in Vermont requires representatives of employees and the employer to bargain in good faith with respect to mandatory subjects of bargaining, and it is an unfair labor practice to refuse to bargain collectively in good faith.[1] In this section, elements of good faith bargaining are discussed.

The duty to bargain in good faith is an obligation to participate actively in the deliberations so as to indicate a present intention to find a basis for agreement.[2] This implies an open mind and a sincere desire to reach an agreement, as well as a serious intent to adjust differences and to reach an acceptable common ground.[3]

Generally, employer bad faith bargaining can be characterized as a means to an illegal end or an attempt to expedite or "short-cut" normal collective bargaining deliberations.[4] Employer bad faith bargaining may be manifested in many ways. The employer may intend to subvert the authority of the bargaining representative, avoid settlement altogether, or attempt to effect an agreement on terms substantially dominated by management.[5] 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.[6]

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[1] 3 V.S.A. §961(5); §962(4); §981; 3 V.S.A. §1016; §1026(5); §1027(4); 16 V.S.A. §2001; 21 V.S.A. §1621(a)(5); §1621(b)(3; 21 V.S.A. §1637(b)(5) and (c)(2); 21 V.S.A. §1725(a); §1726(a)(5); §1735; 33 V.S.A. §3603(a) and 3612(b)(5) and (c)(3).
[2] IBEW, Local 300 v. Enosburg Falls Water and Light Department, 8 VLRB 193, 206 (1985); *Affirmed,* 148 Vt. 26 (1987).
[3] Id.
[4] Rutland School Board v. Rutland Education Association, 2 VLRB 250, 273 (1979).
[5] Id.
[6] Id. at 273, 276.

In a 1986 decision,[7] the Vermont Supreme Court cited with approval the following statement of the rationale for the totality of conduct test by the U.S. Court of Appeals for the 2nd Circuit:

> The problem . . . in resolving a charge of bad faith bargaining is to ascertain the state of mind of the party charged, insofar as it bears upon that party's negotiations. Since it would be extraordinary for a party directly to admit a "bad faith" intention, his motive must of necessity be ascertained from circumstantial evidence. Certain specific conduct, such as the . . unilateral changing of working conditions during bargaining, may constitute per se violations of the duty to bargain in good faith since they in effect constitute a "refusal to negotiate in fact." Absent such evidence, however, the determination of intent must be founded upon the party's overall conduct and on the totality of the circumstances, as distinguished from the individual pieces forming part of the mosaic. Specific conduct, while it may not, standing alone, amount to a per se failure to bargain in good faith, may when considered with all of the other evidence, support an inference of bad faith.[8]

Case law treating "hard bargaining" indicates 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.[9] Good faith bargaining requires that claims made by either bargainer should be honest claims, and this is true about an asserted inability to pay an increase in wages.[10]

One form of bad faith bargaining involves a technique whereby the employer submits a package of bargaining positions to the union which it holds fast as a "fair and firm offer". A requisite element in this technique, which has become known as

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[7] IBEW, Local 300 v. Enosburg Falls Water and Light Department, 148 Vt. 26, 30-31, n.3 (1987).
[8] Continental Insurance Co. v. NLRB, 495 F.2d 44, 48 (1974).
[9] Rutland, 2 VLRB at 274-275.
[10] Enosburg Falls, 8 VLRB at 208; 148 Vt. at 32.

"Boulwarism" from the case General Electric Co.,[11] is a massive public relations campaign, portraying the employer as the "true defender" of employee interests.[12]

There is no duty on the part of an employer to be represented at the bargaining table by a person with competent authority to enter into a binding agreement with the employees.[13] Rather, use of a negotiator without authority to bind the employer is merely some evidence, to be considered in conjunction with other conduct, of employer bad faith.[14] However, where a management negotiator agrees to positively recommend a tentative agreement, and subsequently votes against the tentative agreement when the other school board members expressed opposition, the duty to bargain in good faith has been violated.[15]

Employers do not improperly circumvent the bargaining representative and do not bargain in bad faith if direct communications with employees are non-coercive, contain "no threat of reprisal or promise of benefit", and do not undercut the authority of the union as bargaining representative.[16] The fact that an employer chooses to inform employees of the status of negotiations, or of proposals previously made to the union, or of its version of a breakdown in negotiations will not alone establish a failure to bargain in good faith.[17] However, direct communications by employers with employees constitute an unfair labor practice where the employees

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[11] 150 N.L.R.B. 192 (1964); *enforced,* 418 F.2d 736 (1969); *cert. denied,* 397 U.S. 965 (1970).
[12] Rutland, 2 VLRB at 274-275.
[13] IBEW, Local 300 v. Enosburg Falls Water and Light Department, 148 Vt. 26, 31 (1978).
[14] Id.
[15] Orleans Central Education Association v. Irasburg Board of School Directors, 14 VLRB 169 (1991).
[16] Burlington Education Association v. Burlington Board of School Commissioners, et al, 7 VLRB 248, 250-251 (1984). Colchester Education Association v. Colchester Board of Education, 19 VLRB 108, 111-112 (1996).
[17] Burlington Education Association, 7 VLRB at 250.

reasonably conclude that the employer was making a "promise of benefit" of an attractive wage offer.[18]

The VLRB determined that a teachers' association violated its duty to bargain in good faith by unilaterally publicizing a negotiations dispute prior to the declaration of impasse, where the parties had agreed such unilateral publicity could only be done at impasse.[19] Similarly, the Board held that the Vermont State Employees' Association acted contrary to its good faith bargaining obligation by disclosing confidential bargaining proposals to retirees in violation of agreed-upon negotiations ground rules, and disclosing confidential bargaining proposals to VSEA members without informing them of the confidentiality of the proposals in violation of the ground rules.[20]

In another case concerning unilateral publicity during negotiations, the Board concluded that an employer did not commit an unfair labor practice by declining to proceed to bargaining over substantive issues until an understanding was reached on whether unilateral press releases and public statements during pre-impasse negotiations would be allowed.[21] The Board reasoned that such an understanding was integral to the dynamics of how negotiations over substantive issues would proceed.[22] On the other hand, the Board concluded that the union did not commit an unfair labor practice by refusing to agree to the employer's proposed limitation on press releases and public statements during pre-impasse negotiations.[23]

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[18] Essex Junction Education Association v. Essex Junction Prudential Committee, 14 VLRB 107 (1991).
[19] Shaftsbury Town Board of School Directors v. Southwestern Vermont Education Association, Vermont-NEA, 10 VLRB 124, 138-139 (1987).
[20] State of Vermont v. Vermont State Employees' Association, 28 VLRB 1 (2005).
[21] United Electrical, Radio and Machine Workers of America, Local 267 v. University of Vermont, 21 VLRB 106 (1998).
[22] Id. at 110.
[23] Id. at 110-111.

The Board indicated, however, that this latter conclusion did not necessarily lead to the further conclusion that the *conduct* of a party issuing press releases or otherwise publicly disseminating information about negotiations, prior to impasse, without consent of the other party, cannot be an unfair labor practice.[24] Under circumstances where the parties had agreed to negotiate in private and the employer took the position that unilateral press releases and public statements should be prohibited until the parties reached statutory impasse (i.e., mediation and beyond), the Board expressed the view that a party would engage in bad faith bargaining by issuing press releases, or otherwise publicly disseminating information about negotiations, without consent of the other party.[25] The Board indicated that this obviously did not preclude either party from communicating with their respective constituencies about negotiations, or filing unfair labor practice charges (which are a matter of public record) concerning alleged improper conduct of the other party in negotiations.[26]

[24] Id. at 111-112.
[25] Id. at 114.
[26] Id.