Bargaining Duty During Term of Contract

Absent a waiver by either the terms of the collective bargaining contract or by actual negotiations, the employer has a duty to bargain changes in mandatory bargaining subjects during the term of a contract if contract negotiations are ongoing or not ongoing.[1] The unilateral imposition of terms of employment during a contract term when the employer is under the legal duty to bargain in good faith is the very antithesis of bargaining and is a per se violation of the duty to bargain.[2] The duty to bargain with respect to a proposed change in a condition of employment applies to the exclusive bargaining representative of employees, and management cannot negotiate directly with employees concerning such a proposed change.[3]

In determining whether a party has waived its bargaining rights, the VLRB has required that it be demonstrated a party consciously and explicitly waived its rights.[4] In such matters, the Board is further guided by the Vermont Supreme Court, which defines a waiver as the "intentional relinquishment of a known right".[5] The burden of establishing a waiver is on the party asserting it.[6] A party can intentionally relinquish a known right by failing to assert it in a timely manner.[7]

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[1] VSCFF v. Vermont State Colleges, 149 Vt. 546, 549 (1988). Burlington Firefighters Association, Local 3044, IAFF v. City of Burlington, 10 VLRB 53, 59 (1987). Mt. Abraham Education Association v. Mt. Abraham Union High School Board, 4 VLRB 224, 231-232 (1981).

[2] Burlington Firefighters, supra. Mt. Abraham, supra. VSEA v. State, 5 VLRB 303, 324-329 (1982).

[3] VSEA v. State of Vermont, 2 VLRB 155, 167 (1979).

[4] Burlington Education Association v. Burlington Board of School Commissioners, 35 VLRB 235, 245-247 (2019). Orleans Central Education Association v. Orleans Central Supervisory Union Board of School Directors, 35 VLRB 126, 132 (2019). AFSCME Council 93, Local 1201, AFL-CIO v. Town of Castleton, 32 VLRB 98, 115 (2012). Local 98, IUOE, AFL-CIO v. Town of Rockingham, 7 VLRB 363 (1984). VSEA v. State of Vermont, 5 VLRB at 326. Mt. Abraham, 4 VLRB at 231.

[5] In re Grievance of Guttman, 139 Vt. 574, 578 (1981).

[6] Id.

[7] VSEA v. State of Vermont, 6 VLRB 217 (1983).

The fact that a matter has been omitted from a labor agreement and has not been discussed in negotiations does not, in and of itself, constitute a waiver of the parties' right to contest a unilateral change over a particular subject unless the parties have explicitly waived that right. This is particularly true where an established past practice is concerned.[8] The Board has stated that "(a) collective bargaining agreement cannot cover every aspect of the working relationship between management and its employees", and "(t)o a large extent that relationship is governed by past practices which are too numerous to be included in the agreement but which are relied on as much by the employer as by the employee."[9]

In interpreting a so-called "zipper" clause in a contract, which restricts the obligation to bargain during the term of the contract, the VLRB has indicated that an employer may rely on such a clause to avoid bargaining over a subject that is clearly addressed in the collective bargaining agreement.[10] However, the employer is not free to use the provision to justify a unilateral change in existing conditions of employment.[11]

The Board also has concluded that the transfer of bargaining unit work to non-bargaining unit employees during the term of a contract constitutes an improper unilateral change on a mandatory subject of bargaining.[12] The test for whether work has been transferred away from a bargaining unit is whether, as a result of decisions by the employer, the bargaining unit in question has suffered an adverse impact.[13]

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[8] Mt. Abraham, 4 VLRB at 231.
[9] VSEA v. State of Vermont, 2 VLRB 26, 36 (1979).
[10] Orleans Central Education Association v. Orleans Central Supervisory Union Board of School Directors, 35 VLRB 126, 133 (2019).
[11] AFSCME Council 93, Local 1201, AFL-CIO v. Town of Castleton, 32 VLRB at 115-116. Burlington Area Public Employees Union, Local 1343, AFSCME, AFL-CIO v. Champlain Water District, 10 VLRB 252, 259 (1987); *Reversed on other grounds,* 156 Vt. 516 (1991).
[12] Burlington Education Association v. Burlington School District, 16 VLRB 398, 406-407 (1993).
[13] Id. Road Sprinkler Fitters Union v. NLRB, 676 F.2d 826, 831-32 (D.C. Cir. 1982).

The proper question is whether work was allocated in such a way so as to have caused the bargaining unit to lose work which, in light of past practices, the bargaining unit otherwise would have been expected to perform.[14] Also, the employer may not shift work away from the bargaining unit without bargaining simply because it is to the employer's economic advantage.[15]

Another mid-term bargaining issue which has been decided by the Board is the obligation of a party to proceed to mediation during the term of the contract when the party makes a proposal to change a provision of a contract, then withdraws the proposal when agreement is not reached, and ends negotiations without proceeding to mediation. A municipal union asserted that a city violated its duty to bargain in good faith by so proceeding. The Board disagreed, stating:

> We conclude that the City did not commit an unfair labor practice by refusing to proceed to mediation on the issues in dispute because no duty to bargain existed. No duty to bargain the proposed changes to the Contract with respect to vacations, scheduling and work hours ever existed in this matter since the parties contractually provided that the "Contract shall not be changed or altered unless the change or alteration has been agreed to in writing by the parties." Once the City proposed changes in the Contract, this did not mean that they acquired the duty to bargain during the term of the Contract and proceed to mediation on unresolved issues. Pursuant to the contractual language agreed to by the parties, either party was entitled to end the negotiations process at any time by deciding to no longer pursue changes to the Contract.[16]

The Board has indicated that an employer cannot avoid its statutory duty to bargain with the exclusive bargaining representative by requiring individual employees to waive the right to bargain over a matter as a condition of employment.[17] The Board determined that such practices would run contrary to the

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[14] Id.
[15] Id.
[16] Local 1343, AFSCME, AFL-CIO v. City of Burlington, 14 VLRB 153, 155 (1991).
[17] VSEA v. State of Vermont, 2 VLRB 155, 167 (1978).

purpose of the applicable labor relations act to provide orderly and peaceful procedures to prevent management from interfering with the rights of employees.[18]

Also, the Board determined that a municipal employer was required to renegotiate a provision of a collective bargaining agreement, upon request to do so by the union, where the contract provision was rendered null and void by a court decision, thus substantially changing employees' conditions of employment.[19] The Board recognized that, unlike the classic unilateral change case, the employer made no unilateral change in conditions of employment.[20] Nonetheless, the Board concluded that employees' rights should not be affected because the change in conditions of employment was imposed from the outside by the Vermont Supreme Court.[21]

Dispute resolution procedures apply to bargaining disputes arising during the term of an agreement where a duty to bargain exists, just as they apply to disputes arising in negotiation of an agreement.[22] The Board explained the rationale for such a conclusion under the State Employees Labor Relations Act:

> (T)he Legislature took away the strike as an economic weapon of State employees . . . and, in its place, substituted impasse resolution procedures. The Legislature has opted for a peaceful and reasoned, although often-times lengthy, approach to resolve bargaining disputes rather than a potentially-disruptive approach emphasizing the respective powers of the parties. Without resort to the impasse resolution procedures over mid-term bargaining disputes, State employees would be left without meaningful collective bargaining rights in regard to such disputes. Employees would have neither the strike weapon nor threat of an imposed settlement to induce the State to bargain meaningfully.[23]

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[18] Id.
[19] Local 2413, AFSCME v. Town of St. Johnsbury, 13 VLRB 341 (1990).
[20] Id. at 347.
[21] Id.
[22] VSEA v. State, 5 VLRB at 326-328. Petition of VSEA for Appointment of Fact-Finding Panel, 5 VLRB 215 (1982).
[23] Petition of VSEA for Appointment of Fact-Finding Panel, 5 VLRB at 218.

Also, the Board has determined that, in situations where parties are negotiating over the impact of a decision on a mandatory subject of bargaining during the term of a contract, an employer is required to engage in impact negotiations through the completion of statutory dispute resolution procedures, or until agreement is reached, and the employer may not take final action to unilaterally implement the decision until that time.[24] However, in a case where the collective bargaining agreement contained explicit provisions addressing management's discretionary authority to change schedules and overtime work without any reference to negotiating the impact of such decisions, the Board determined that it was appropriate to defer the matter to the grievance procedure rather than ruling on a union's unfair labor practice claim that the employer was required to bargain with the union over the impact of the changes.[25]

[24] Milton Education and Support Association v. Milton Board of School Trustees, 20 VLRB 114, 129 (1997).

[25] International Union of Public Employees, Hartford Police Union v. Town of Hartford, 32 VLRB 357, 364-365 (2013).