VERMONT LABOR RELATIONS BOARD

BURLINGTON AREA PUBLIC EMPLOYEES UNION, LOCAL 1343, AFSCME, AFL-CIO	)	
and	)	DOCKET NO. 87-32
CHAMPLAIN WATER DISTRICT	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On June 23, 1987, the Burlington Area Public Employees Union, Local 1343, AFSCME, AFL-CIO ("Union") filed an unfair labor practice charge against the Champlain Water District ("Employer"). As filed, the charge did not conform to the Rules of Practice of the Labor Relations Board. On July 30, the Union filed a revised charge in conformity with Board Rules of Practice. Therein, the Union alleged the Employer violated 21 VSA §1726(a)(1) through its actions during a hearing on an employee's dismissal.

After investigation of the charge, the Board issued an unfair labor practice complaint on September 24, 1987. The Employer filed a Motion for Summary Judgment on October 23, 1987. A hearing was held before Board Members Charles H. McHugh, Chairman; William G. Kemsley, Sr., and Catherine Frank on November 5, 1987. Lindol Atkins, Union President, represented the Union. Attorney Dennis Wells represented the Employer. At the hearing, the Board indicated that it would reserve judgment on the Employer's Motion for Summary Judgment. At the conclusion of the hearing, the Employer indicated that it would not pursue the Motion for Summary Judgment but requested that the

Board consider arguments made by the Employer in the Motion when ruling on the merits of the case. Neither party filed briefs.

FINDINGS OF FACT

1. The Union has been the exclusive bargaining representative for the supervisor of water treatment, chief plant operator, maintenance technician-plant and instrumentation, maintenance technician-line and repair, bookkeeper, secretary/receptionist and treatment plant operators of the Champlain Water District since July 18, 1983.

2. At all times relevant, the collective bargaining agreement ("Contract") between the Union and Employer has provided in pertinent part as follows:

ARTICLE XIV

Grievance Procedure

14.1. A grievance is defined as a dispute between the District and the Union as to the meaning or application of a specific written provision of the Agreement. Said grievance shall be considered only if arising after execution of this Agreement. Other disputes which do not involve a tenable claim that a specific provision of this Agreement has been violated shall not be considered a "grievance".

14.2. This grievance procedure constitutes the sole and exclusive means of resolving grievances...

14.6. An aggrieved employee shall be entitled to have a Union representative present to assist at all stages of the grievance procedure whenever said grievance will result in written documentation to be entered in the employee's personnel file.

14.7 STEPS: It is the intent of both parties that grievances be settled at the lowest step possible. Discharge or suspension grievances may be introduced at the next step above the level of the person ordering such discharge or suspension.

STEP 1. Except for grievances involving suspension or discharge, grievances shall be filed at Step 1. The employee or the Union Steward, with or without the aggrieved employee, shall take up the grievance in writing with the

employee's immediate supervisor in charge on the day of the incident...

STEP 2: A grievance which is not settled at Step 1 is waived unless appealed to Step 2 to the General Manager within three working days after the response of the Supervisor is due or the receipt of the response from the Supervisor. The General Manager or his designee shall meet with the Union Steward, the aggrieved employee may be present, and shall respond to the Union Steward in writing within three working days.

STEP 3: A grievance which is not settled at Step 2 is waived unless appealed to Step 3 to the district Board of Commissioners within seven working days after the general manager's response is due or the receipt of the response from the General Manager. The Board of Commissioners shall consider the grievance at its next regularly scheduled meeting following the appeal to Step 3. However, if there are less than five working days from the date of the appeal to the Board of Commissioners and its next regularly scheduled meeting, then the grievance will be heard at the next regularly scheduled meeting. The Board of Commissioners shall render its decision in writing within seven working days after it hears the appeal.

14.8 ARBITRATION: The Union upon written notice to the district within 10 working days following the unsuccessful consideration of the grievance by the Board of Commissioners as provided in Step 3 of Section 14.8 may request arbitration of any grievance which involves the interpretation or application of a specific term or provision of this Agreement. Arbitration is possible only if such grievance has not been settled after being fully processed through the grievance procedure in accordance with the provisions of this article...

The Arbitrator's authority shall be limited to interpreting and applying provisions of this Agreement and he shall have no power to add or subtract from, alter or modify any of said provisions.

ARTICLE XVIII

Termination and Legality

...18.2. The parties acknowledge that during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to all subjects (mandatory) of collective bargaining and that all such subjects have been discussed and negotiated upon and that the contract shall not be subject to reopening for any issue whatsoever during the term of the contract. Further, the union, and the district for the life of this Agreement, voluntarily and

> unqualifiedly waives the right and agrees that neither party, union or district, shall be obligated to bargain collectively with respect to any subject or matter not specifically referred to or covered in the Agreement, even though such subject or matter may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this Agreement.
>
> (Joint Exhibit 1)

3. At some point prior to May 9, 1987, George Hedenberg, a member of the bargaining unit represented by the Union, was dismissed.

4. The Union filed a grievance on behalf of Hedenberg concerning the dismissal pursuant to the grievance procedure set out in the Contract. The grievance was denied at the Step II level and was appealed to the Employer's Board of Commissioners at the Step III level.

5. On May 9, 1987, the Board of Commissioners held a regularly scheduled meeting during which the Board went into executive session to conduct the Step III grievance meeting on Hedenberg's dismissal. At the outset of the grievance meeting, the Board of Commissioners indicated how the meeting would proceed: that the Union would present its case first on behalf of Hedenberg, then the Union and Hedenberg would leave the room and management would present its case to the Board in the absence of Hedenberg and the Union. The Union representative, Lindol Atkins, indicated that he would not participate in such a meeting because the Union would not be allowed to be present when management presented its case. Atkins and Hedenberg then left the meeting.

6. Subsequently, the Union appealed the grievance over Hedenberg's dismissal to arbitration pursuant to the Contract.

7. The Union filed no grievance concerning what occurred at the May 9, 1987, meeting.

8. Prior to the May 9, 1987, meeting, the Board of Commissioners had held several Step III grievance meetings concerning the disciplinary suspensions of employees. In those meetings, management would present its case first and then the Union would present its case. The Union representative and the involved employee would remain in the room during management's presentation.

9. During the period between the Union being certified as the bargaining representative of employees and the dismissal of Hedenberg, the Employer had dismissed no other employees.

10. The issue as to how Step III grievance meetings would proceed was not discussed by the Union and the Employer during negotiations for the last two collective bargaining agreements negotiated by the parties.

OPINION

At issue is whether the procedure used by the Champlain Water District Board of Commissioners during a grievance hearing on an employee's dismissal constituted an unfair labor practice pursuant to 21 VSA §1726(a)(1).

The Employer contends that this matter should be dismissed because the dispute involves contractual interpretation which should be deferred to the grievance arbitration procedure of the parties' Contract, and heard by an arbitrator together with the grievance concerning the employee's dismissal, pursuant to the deferral doctrine adopted by the Board in past cases.

It is true the Board in the past has required the exhaustion of contractual remedies and not ruled on an unfair labor practice charge when the Board believed the dispute involved the interpretation of a

contract and the employee(s) had an adequate redress for the alleged wrongs through the grievance procedure. AFSCME, Local 490, Bennington Department of Public Works and Police Units v. Town of Bennington, 9 VLRB 195 (1986). Burlington Education Association, Inc., and Burlington Board of School Commissioners, 1 VLRB 335 (1978). Here, however, we conclude the dispute does not involve the interpretation of contractual language. At issue is the procedure adopted by the Employer during a grievance meeting on an employee's dismissal of having the Union present its case on behalf of the dismissed employee to the Board of Commissioners and then the Union and involved employee being absent when management presents its case. The procedure to be used by the Board of Commissioners during grievance meetings is nowhere addressed in the Contract and the Contract limits the definition of grievance to "a dispute ... as to the meaning or application of a specific written provision of the Agreement." Thus, the contractual grievance procedure does not provide adequate redress for the alleged wrongs.

§1726(a)(1) of the Municipal Employee Relations Act (MERA) provides that it is an unfair labor practice for an employer "to interfere with, restrain or coerce employees in the exercise of their rights guaranteed by this chapter or by any other law, rule or regulation." Absent a waiver, the unilateral imposition of changes in mandatory bargaining subjects during the term of an agreement is an unfair labor practice. Burlington Fire Fighters 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 (1981).

Under MERA, "wages, hours and conditions of employment" are mandatory bargaining subjects. 21 VSA §1722(4); 1725(a). "Wages, 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(17). The procedure employed during grievance meetings in dismissal cases directly affects the economic circumstances of employees since the disposition of such grievances obviously impacts on the income of employees. Thus, a required subject of bargaining is at issue here.

Further, it is evident the Employer imposed a unilateral change. In prior disciplinary grievance meetings, the procedure employed by the Board of Commissioners differed. Management presented its case first with the Union and involved employee being present. While prior disciplinary grievance meetings involved suspensions of employees, not dismissals, it is fair to conclude that the procedure employed in both types of disciplinary cases would be consistent.

The final component of our analysis in determining whether an unfair labor practice has been committed is determining whether the Union waived its right to be protected from unilateral changes in mandatory bargaining subjects. In determining whether a party has waived its rights, the Board has required that it be demonstrated a party consciously and explicitly waived its rights. Local 98, IUOE, AFL-CIO v. Town of Rockingham, 7 VLRB 363 (1984). VSEA v. State of Vermont (re: Implementation of "6-2" Schedule at Vermont State Hospital), 5 VLRB 303, 326 (1981). Mt. Abraham, Supra. In such matters, we are further guided by the Vermont Supreme Court, which

defines a waiver as the "intentional relinquishment of a known right". In re Grievance of Guttman, 139 VT. 574 (1981). 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. Mt. Abraham, supra, at 231.

Here an established past practice is involved which has been omitted from the Contract and not discussed in negotiations. The parties have negotiated a so-called "zipper" clause in the Contract (Article 18, Section 2) which restricts the obligation to bargain during the term of the Contract. However, a fair reading of this contractual provision is that, while the Employer may rely on the "zipper" clause to avoid bargaining over new subjects during the term of the Contract, the Employer is not free to use the provision to justify a unilateral change in existing conditions of employment. Accordingly, we find no Union waiver.

In sum, we conclude the Employer made an improper unilateral change in a mandatory subject of bargaining during the term of the Contract in violation of 21 VSA §1726(a)(1). An appropriate remedy to redress this unfair labor practice pursuant to 21 VSA §1727(d) is to order the Employer to cease and desist from implementing the change and, if the Union and involved employee so desire, to require the Board of Commissioners to conduct a Step III grievance meeting on the employee's dismissal consistent with the established procedure used in prior disciplinary grievance meetings.

ORDER

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

1. The Champlain Water District Board of Commissioners shall cease and desist from implementing the unilateral change in the procedure used in conducting disciplinary grievance meetings which was employed during the grievance meeting concerning the dismissal of George Hedenberg and shall conduct disciplinary grievance meetings consistent with the established procedure used in prior disciplinary grievance meetings; and

2. If the Burlington Area Public Employees Union, Local 1343, AFSCME, AFL-CIO, and George Hedenberg so desire, the Board of Commissioners shall conduct a grievance meeting on the dismissal of Hedenberg consistent with the established procedure used in prior disciplinary grievance meetings.

Dated the 10th day of December, 1987, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Charles H. McHugh, Chairman

William D. Kemsley, Sr.

Catherine L. Frank