

VERMONT LABOR RELATIONS BOARD

SOUTHWESTERN VERMONT EDUCATION )  
ASSOCIATION, VERMONT-NEA )  
 )  
v. )  
 )  
SHAFTSBURY TOWN BOARD OF SCHOOL )  
DIRECTORS )  
 )  
SHAFTSBURY TOWN BOARD OF SCHOOL )  
DIRECTORS )  
 )  
v. )  
 )  
SOUTHWESTERN VERMONT EDUCATION )  
ASSOCIATION, VERMONT-NEA )

DOCKET NO. 86-59

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

At issue herein are an unfair labor practice charge filed by the Southwestern Vermont Education Association, Vermont-NEA ("Association") on October 8, 1986, against the Shaftsbury Town Board of School Directors ("School Board") and a counter-unfair labor practice charge filed by the School Board against the Association on December 15, 1986.

The Association alleged in its charge that the School Board had refused to bargain in good faith with the Association over salary and conditions of employment concerning the school nurse employed at the Shaftsbury Elementary School; that the Board had restrained, coerced, and discriminated against the school nurse in that it refused to include the school nurse in the Association bargaining unit; and that the Board had refused to enter into a written agreement upon mandatory subjects of bargaining. The Association's charge alleged

violations of 21 VSA §1726(a)(1) and (5), and 16 VSA §1982(c), 1991(b), 2001, 2004 and 2005. As a remedy, the Association requested that the Labor Relations Board find that the School Board had committed unfair labor practices in refusing to recognize the school nurse as a member of the bargaining unit, issue an order that the School Board bargain with the Association over terms and conditions of her employment, and order any other relief appropriate to address the School Board's unfair labor practices.

The School Board alleged in its counterclaim that the Association violated 21 VSA §1726(b)(4) and 16 VSA §2005 by refusing to enter into a written agreement incorporating therein matters agreed to in negotiations based upon its unjustified insistence that the School Board acknowledge the school nurse to be a member of the bargaining unit; and that the Association threatened and coerced the School Board and violated the negotiating protocol by going public with the bargaining dispute prior to any declaration of impasse. Accordingly, the School Board alleged that the Association refused to bargain in good faith. As a remedy, the School Board requested that the Board order the Association to cease and desist from its unfair labor practices, order the payment of attorney fees and other expenses of the School Board and order any other appropriate relief.

The Labor Relations Board issued an unfair labor practice complaint on the charge filed by the Association on December 2, 1987, and issued a complaint on the counter-charge filed by the School Board on January 12, 1987. A hearing on both complaints was held before Board Members Charles H. McHugh, Chairman, and Catherine L. Frank on February 5, 1987. The parties stipulated that Member Louis Toepfer

would review the record and participate in the decision if necessary to resolve any disagreements between Chairman McHugh and Member Frank. A further hearing was held on March 3, 1987, before those two members and Louis Toepfer. James Suskin, Vermont-NEA General Counsel, represented the Association. Attorney John Zawistoski represented the School Board. Requested Findings of Fact and Memoranda of Law were filed by both parties on March 24, 1987.

#### FINDINGS OF FACT

1. The Shaftsbury Town School District is a public elementary school district in Shaftsbury, Vermont, which district is governed by a Board of School Directors. It is a municipal employer within the meaning of 21 VSA §1735 and a school district within the meaning of 16 VSA §1981.

2. The Association is the exclusive bargaining agent for the Shaftsbury Elementary School teachers.

3. The School Board and the Association, prior to February 1986, were parties to a number of collective bargaining agreements.

4. The Agreement negotiated to cover the period from July 1, 1984, to June 30, 1986, provides in Article I, Recognition, as follows:

The School Board of Shaftsbury, Vermont, recognizes the Southwestern Vermont Education Association as the exclusive representatives of the Shaftsbury Elementary School teachers.

5. Article II, Procedures, of the 1984-86 Agreement, sets forth bargaining procedures and includes the following provision:

No new releases will be made except jointly by the Board and the Association and only with the consent of both parties. Upon declaration of impasse agreed to by both parties, each will be free to publicize (its) views as (it) sees fit.

6. Jane Altobell is the school nurse at the Shaftsbury Elementary School. She has held the position for approximately 14 years.

7. Prior to negotiations for the successor agreement to the 1984-86 Agreement, the Association and the School Board did not consider the school nurse to be a member of the teacher bargaining unit. During her employment, the school nurse has always had an individually-negotiated agreement concerning the terms and conditions of her employment.

8. It is the responsibility of the school nurse to oversee the general state of health and safety at the school. Specific duties include height, weight, vision, hearing and scoliosis testing; maintaining files on students containing vital health information; monitoring the immunization history of each child; dispensing medication to students; monitoring students for infectious diseases; administering medical care to injured or ill students; being available to soothe the anxieties and fears of students; being available as a resource person in the classroom to speak on relevant health topics; coordinating dental care programs; organizing student physicals; and communicating with teachers as to student problems. (School Board Exhibit B).

9. The Shaftsbury School nurse is not required to instruct students in the classroom or otherwise have responsibilities in the development of curriculum.

10. The Vermont State Board of Education is required to "make regulations governing the certification and qualification of all public school teachers, administrators and other school personnel who are subject to certification as determined by the state board." 16 VSA §164(5).

11. The State Board of Education issued Certification Regulations effective September 1, 1982. The Regulations provide that "(a)ll persons who teach, administer, or serve as professional educational personnel must be certified." A school nurse is required to be certified under these regulations. (Joint Exhibit 3, pages. 5, 6, 12).

12. There are presently only two levels of certification for all Vermont educators. The Certification Regulations provide for a professional probationary certificate and a professional continuing certificate. All educators certified receive the same certificate. There is no distinction between a classroom teacher certificate, a school nurse certificate or an administrator certificate other than the specific endorsement found on each individual certificate (Joint Exhibit 3).

13. The Shaftsbury School Nurse holds a "Professional Continuing Certificate" with the endorsement "School Nurse." The Certification Regulations provide that candidates for a school nurse endorsement must graduate from a regionally accredited three or four year nursing program. The endorsement authorizes the nurse to conduct health service activities such as medical appraisals and screening; providing emergency care, giving medication and controlling communicable diseases. A person holding the endorsement of school nurse is required to possess the ability to counsel students, parents and school personnel on how to deal with health and developmental problems of students, possess the ability to contribute to developing individualized programs for handicapped students and refer students for special needs, and possess the ability to be a consultant on

health related issues and health education (Joint Exhibit 3, pages 12, 47-49). The duties of the Shaftsbury school nurse are not inconsistent with the duties of the school nurse specified in the Certification Regulations.

14. The Certification Regulations provide for an endorsement for health education. This endorsement entitles an educator to teach in the area of health (Joint Exhibit 3, pages 11, 33-34). The Shaftsbury school nurse does not possess the health educator endorsement.

15. The Labor Relations for Teachers Act was enacted in 1969 (16 VSA §1981 et seq). The stated Purpose of the Act was as follows:

"In order to forward the orderly growth and development of education in Vermont it is hereby declared to be the policy of the state to promote the improvement of communications and agreements between certificated employees of the schools within the state and the school boards of those schools by providing a procedure whereby certificated school employees may join associations of their choice and be represented by such associations in arriving at agreements with school boards on the terms and conditions of their professional service and other matters mutually agreed upon."

16. At all times relevant herein, §1981 of the Teachers Act has contained the following definitions:

"Administrator" means any person so certified by the state board of education the majority of whose employed time in a school or a school district is devoted to serving as superintendent, assistant superintendent, assistant to the superintendent, supervisor, principal, or assistant principal.

"Teacher" means any person certified employable as a teacher by the state board of education who is not an administrator as herein defined.

17. At all times relevant herein, 16 VSA §1792(a) has provided as follows:

A professionally-certified teacher is a holder of a professional three-year certificate, a professional probationary certificate, a professional standard certificate or a professional continuing certificate as issued under the regulations of the state board of education.

18. The Municipal Employee Relations Act excepts "certified employees of school districts" from the definition of "municipal employee" except for the purposes of representation in, and prevention of unfair labor practices. 21 VSA §1722(12)(E), 21 VSA §1735.

19. In discussing groundrules for negotiations for a successor agreement to the 1984-86 Agreement, the Association and School Board agreed that no new proposals would be submitted subsequent to the third negotiating session.

20. On February 25, 1986, the Association and the School Board began negotiations for a successor agreement to the 1984-86 Agreement. The Association bargaining team consisted of teachers employed at the Shaftsbury Elementary School. The School Board bargaining team consisted of School Board members Barbara Burnham and David Mance. The Association team provided the School Board a copy of the following statement:

We have been advised, according to law, any person who is certificated by the state board to work in a school, within the meaning of the law, is considered to be a teacher, therefore inclusive in this contract. (Association Exhibit 1).

21. The Association informed the School Board that this proposal included the school nurse, Jane Altobell. The Association did not submit a written proposal on salary and terms of employment for the school nurse at the February 25 meeting. The School Board did not indicate at the meeting whether it would bargain with the Association concerning the school nurse.

22. The third negotiating session between the parties occurred by the end of March 1986. By this point, the School Board had not indicated whether it would bargain concerning the nurse.

23. On or about May 19, 1986, the School Board tendered an offer of salary and terms of employment to Altobell, as had been done throughout her employment with the School District. (Association Exhibit 2).

24. Some time thereafter, Altobell notified the school principal that she wished to be represented by the Association in negotiations for her salary and conditions of employment.

25. On June 16, 1986, the Association submitted its first proposal on salary and benefits for the school nurse (Association Exhibit 3). By this time, the School Board team had not agreed to negotiate concerning the nurse and had indicated the issue was being discussed with the School Board lawyer.

26. At a negotiating session in late July or early August, Burnham indicated that the School Board would negotiate with the Association over the terms and conditions of the school nurse position. In so agreeing, the School Board bargaining team understood that the Association would be representing the nurse the same as a lawyer or other individual would be representing the nurse, but they did not consider the nurse to be a member of the teachers' bargaining unit. The School Board bargaining team did not clearly relate this understanding to the Association team. The Association team believed that the School Board had agreed to include the nurse in the teacher bargaining unit and include whatever terms were negotiated concerning the nurse in the teacher contract.

27. At an August 11, 1986, negotiations session, the Association and School Board teams negotiated concerning the salary and benefits to be paid the nurse. The parties reached an agreed figure on salary but did not finalize the benefits to which the nurse would be entitled.



28. Subsequently, the Association decided to seek higher pay for the nurse than agreed to at the August 11 meeting and made this proposal at a negotiations session on August 25, 1986. The School Board team indicated that it wished to adhere to the previously agreed-upon salary and stated that the School Board wanted to negotiate a contract for the nurse which was separate from the teacher contract. Also, at the August 25 session, the parties reached agreement on all other issues still in dispute concerning the teachers. The negotiating teams agreed that the School Board would have the Agreement typed for review. The parties left the August 25 meeting without agreeing on the nurse position. Both parties understood they would discuss the nurse position at a later time.

29. The Association team met with Burnham on September 2, 1986, after the Agreement was typed and reviewed by the parties. Burnham indicated she wished to sign the Contract on behalf of the School Board. The Association then indicated they would not sign the Agreement because it did not include the school nurse. Burnham indicated that the School Board did not consider the nurse part of the teaching contract. The Association indicated that they would sign the Agreement only if the School Board would sign a document indicating that the parties would continue to negotiate relative to the nurse position and incorporate the results of such negotiations as an appendix to the teacher contract, making it a part thereof (Association Exhibit 6). Burnham declined to so agree.

30. The parties next met on September 22, 1986. Attending this meeting were members of the Association bargaining team and Mance and Burnham. The Association team indicated the Association would only

sign the agreement if the nurse was included in the agreement. The School Board members stated that they would not agree to signing a contract with the nurse included in it. Discussion then occurred concerning issuing public statements and news releases on the dispute. No agreement was reached as to publicizing the dispute either separately or jointly. Also, the parties reached no agreement as to whether they were at impasse.

31. Subsequent to this meeting, an Association representative separately spoke to a newspaper reporter for the Bennington Banner concerning Association views on the negotiations dispute. An article reporting the contents of this discussion was in the Banner on October 16, 1986 (School Board Exhibit A).

#### MAJORITY OPINION

The first issue to address is whether the Shaftsbury school nurse is a "teacher" within the meaning of the Labor Relations for Teachers Act. The Association alleges that the nurse does fall within this definition and thus, the School Board failed to bargain in good faith by not recognizing her as a member of the teacher bargaining unit. The School Board alleges that the nurse is not a teacher and, thus, the Association failed to bargain in good faith by not signing a collective bargaining agreement based upon its unjustified insistence that the School Board acknowledge the nurse to be a member of the bargaining unit.

In construing the Labor Relations for Teachers Act with other statutory provisions concerning school employees, we conclude the Shaftsbury school nurse is a "teacher" within the meaning of the Labor Relations for Teachers Act.

To be a teacher within the specialized meaning of the Act, a person must meet two criteria: 1) be certified employable as a teacher; and 2) not be an administrator. 16 VSA §1981(5). The nurse is clearly not an administrator as that term is defined in the act, 16 VSA §1981(1); and, thus, the issue is whether the nurse is certified employable as a teacher.

Clearly, the school nurse is a "certified" employee. The Certification Regulations issued by the State Board of Education require that the school nurse be certified. The Shaftsbury school nurse holds a "professional continuing certificate" under these regulations.

This professional certificate makes the school nurse "certified employable as a teacher" since 16 VSA §1792(a) provides that "(a) professionally certified teacher is a holder of a professional three-year certificate, a professional probationary certificate, a professional standard certificate or a professional continuing certificate as issued under the regulations of the state board of education." In construing this provision in conjunction with 16 VSA §1981(5), we conclude teacher under the meaning of the Teacher Labor Relations Act is the holder of a professional certificate issued under the regulations of the State Board of Education, whether or not that person actually instructs students. Since the Shaftsbury school nurse holds such a professional certificate, she is "teacher" within the specialized meaning of the Act.

Our conclusion that holders of professional certificates are teachers under the Teacher Act is bolstered by the stated legislative purpose of the Act to provide collective bargaining rights under the Act to "certificated school employees" concerning "arriving at

agreements with school boards on the terms and conditions of their professional service." This indicates that the legislature intended to include within the protection of the Act a group of professional employees broader than those who are actually engaged in instruction.

We note that our conclusion is limited to the extent that a person must actually be an occupant of a position which is required to be certified by the State Board of Education to be considered a teacher under the Act. To hold otherwise could produce results the legislature clearly could not have intended. For instance, a person employed as a custodian or cook in a school, who is certified as an English teacher, would not be eligible for membership in a teacher bargaining unit.

If we were to accept the School Board position and decide that the school nurse was not covered under the Teachers Act, the result would be that the school nurse would be excluded from any collective bargaining rights under Vermont law. Other groups of school professional certified employees also would lack collective bargaining rights; such as guidance counselors, school psychologists, reading specialists, speech pathologists, audiologists and learning specialists. Only pure instructional teachers, administrators and non-certified employees of school districts would have such rights. The only other law granting collective bargaining rights to school employees who are not "teachers" or "administrators" is the Municipal Employee Relations Act. 21 VSA §1721, et seq. However, the Municipal Act excludes "certified employees of school districts," like the school nurse, from its coverage except for unfair labor practice protection. Acceptance of the School Board position would thus lead to

an unfair and discriminatory result and clearly not one intended by the legislature.

In so holding, we recognize that we are adopting a somewhat different approach than was earlier adopted by the Board. In two earlier rulings, the Board held that the exclusion from the Municipal Act of "certified employees of school districts" referred to employees who are required to be certified by statute, not to employees who are required to be certified by agency regulation. Windham Northeast Support Staff Association v. Windham Northeast Supervisory Union, 3 VLRB 354, 361 (1980). Vermont Education Association v. Rutland City School Department, 2 VLRB 108, 110 (1979). Here, the school nurse is required to be certified by regulations of the State Board of Education, not by statute.

However, the State Board of Education is given explicit statutory authority to determine which school personnel are subject to certification, 16 VSA §164(5), and we believe it more appropriate to consider "certified employees of school districts" within the meaning of the Municipal Act to refer to employees so determined by the State Board of Education.

In sum, we conclude that the Shaftsbury school nurse is a "teacher" within the meaning of the Labor Relations for Teachers Act and, thus, is a member of the teacher bargaining unit represented by the Association. As such, the School Board interfered with the rights of the school nurse to be represented by the Association as part of the teacher bargaining unit in violation of 21 VSA §1726(a)(1) and refused to bargain collectively in good faith with the exclusive bargaining agent pursuant to 21 VSA §1726(a)(5) by failing to consider

the school nurse as part of the teacher bargaining unit when engaging in contract negotiations with the Association.

The fact that the Association and School Board have not considered the school nurse in the past to be a teacher covered by the parties' contract does not mean the nurse should not be considered a member of the teacher bargaining unit, as the School Board contends. The question of whether the school nurse is a teacher entitled to the protection of the Labor Relations for Teachers Act, in the context of an unfair labor practice complaint, is one of statutory construction not limited by contract. Our mandate is to enforce a statutorily-determined system of collective bargaining, which is not dependent on how contracts have been interpreted or administered. Mt. Abraham Education Association v. Mt. Abraham Union High School Board of School Directors, 4 VLRB 224, 230 (1981).

Also, the fact that the Association did not make a specific proposal on salary and benefits for the nurse until after the third negotiations session does not lend credence to the School Board contention that no failure to bargain in good faith occurred on their part, even though the parties had agreed that no proposals would be submitted after the third negotiations session. The Association indicated at the first negotiations session their desire to negotiate on behalf of the nurse. Failure to submit a specific proposal until after the third session was of no practical significance because the School Board had not decided by that point whether they would negotiate at all concerning the nurse.

We turn to determining what remedy to apply to this School Board unfair labor practice. The Association requests that the Board direct

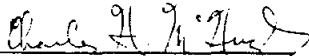
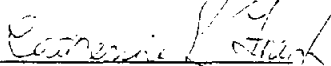
the School Board to include the school nurse in the collective bargaining agreement and sign the Agreement including all items which have already been agreed upon by the parties. However, the evidence does not indicate the parties finally agreed on the specific terms and conditions of employment for the school nurse. Accordingly, we conclude the appropriate remedy is to direct the School Board to return to the negotiations table and bargain in good faith with the Association with respect to terms and conditions of employment for the nurse as part of the teacher bargaining unit and any other unresolved issues between the parties.

The final issue to be addressed is whether the Association committed an unfair labor practice by unilaterally publicizing the negotiations dispute between the parties. In its counter-charge, the School Board alleged that the Association engaged in threatening and coercive action and violated the negotiating protocol in the expiring agreement by going public with the dispute prior to any agreed declaration of impasse.

The duty to bargain in good faith 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. Chittenden South Education Association v. Hinesburg School District, 8 VLRB 219, 236 (1985). The totality of the parties' conduct must be analyzed and the context in which the bargaining took place must be evaluated to determine if bad faith exists. Id.

The Association violated this duty by unilaterally publicizing the dispute. The negotiations groundrules agreed upon by the parties provided that news releases would be made jointly during negotiations

and that a party could unilaterally publicize its views only upon declaration of impasse agreed to by both parties. In contravention of this ground-rule, the Association publicized its views to the press before any agreed-upon impasse and without agreement by the School Board on publicizing the dispute. This constituted a violation of its duty to bargain in good faith pursuant to 21 VSA §1726(b)(4). We conclude there is no appropriate remedy for this violation other than to order the Association to cease and desist from this practice and to bargain in good faith with the School Board.

  
Charles H. McHugh, Chairman  
  
Catherine L. Frank

CONCURRING OPINION OF MEMBER TOEPFER

I disagree with that part of the majority opinion concluding that persons other than teachers who hold professional certificates are teachers. However, given the special circumstances of this case, I do not disagree with the finding that the school nurse in question is a member of the teacher bargaining unit. I concur in the finding that the Association committed an unfair labor practice with its publicity about the dispute.

  
Louis A. Toepfer



ORDER

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

1. The Shaftsbury Town Board of School Directors shall cease and desist from failing to recognize the school nurse at the Shaftsbury Elementary School as a member of the teacher bargaining unit of the school and shall bargain in good faith with the Southwestern Vermont Education Association, Vermont-NEA over the salary and economic conditions of employment of the school nurse and any other unresolved issues between the parties in negotiations for a successor agreement to the 1984-86 agreement of the parties; and

2. The Southwestern Vermont Education Association, Vermont-NEA shall cease and desist from unilaterally publicizing the negotiations dispute between the Association and the Shaftsbury Town Board of School Directors in violation of agreed-upon negotiations groundrules, and shall bargain in good faith with the School Board in negotiations for a successor agreement to the 1984-86 agreement of the parties.

Dated the 28<sup>th</sup> day of May, 1987, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Charles H. McHugh  
Charles H. McHugh, Chairman

Catherine L. Frank  
Catherine L. Frank

Louis A. Toepfer  
Louis A. Toepfer