

VERMONT LABOR RELATIONS BOARD

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| VERMONT STATE EMPLOYEES |) | |
| ASSOCIATION |) | |
| |) | |
| v. |) | DOCKET NO. 87-9 |
| |) | |
| STATE OF VERMONT (re: Smoking |) | |
| Policies) |) | |

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On January 23, 1987, the Vermont State Employees' Association ("VSEA") filed an unfair labor practice charge against the State of Vermont ("State"). VSEA alleged that the State violated 3 VSA §961 (1) and (5) by its unilateral implementation of smoking bans and refusal to bargain with VSEA concerning smoking policies. VSEA requested that the Board order the State to cease and desist from issuing smoking policies without first negotiating with VSEA and order the suspension of smoking bans in effect in the Bennington and Morrisville State Office buildings.

The Board issued an unfair labor practice complaint on February 20, 1987. A hearing was held before Board Members Charles H. McHugh, Chairman, Catherine L. Frank and Dinah Yessne on April 27, 1987. Assistant Attorney General Michael Seibert represented the Employer. Michael Zimmerman, VSEA Staff Attorney, represented VSEA. Briefs were filed by the parties on May 11, 1987.

FINDINGS OF FACT

1. At all times relevant herein, 21 VSA §223(a) has provided as follows:

Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or significant physical harm to his employees; and the employer shall comply with safety and health standards under the VOSHA code.

2. The collective bargaining contracts between the State and VSEA effective for the period July 1, 1986 to June 30, 1988 ("Contracts") provide in pertinent part as follows:

AGENCY, DEPARTMENT AND INSTITUTION RULES

1. ESTABLISHMENT OF RULES

a. Each agency, department or institution shall put into writing those rules of conduct and procedure it deems necessary for its efficient operation. All changes to these rules must be in writing.

b. Agency, department and institution work rules shall not be in conflict with existing law, contract provisions or with the Rules and Regulations for Personnel Administration.

2. NOTIFICATION AND DISTRIBUTION OF RULES

a. All employees affected by the agency, department or institution work rules must be notified in writing, by posting or otherwise, of those rules and changes to those rules at least 15 days prior to the date they become effective, except that the 15-day notice shall not apply in case of emergency.

In any such emergency situation, the appointing authority or designee shall meet with the appropriate steward(s) in advance of the notice and explain the nature of the emergency and the reason why the 15-day notice does not apply. The written notice shall state the existence of the emergency.

b. The State shall provide written notification to the VSEA of all new rules and changes to existing rules concurrent with the notice to employees...

3. REASONABLENESS AND APPLICATION OF RULES

a. An employee or the VSEA may grieve the reasonableness of any rule promulgated under this Article and, further, may grieve any action taken against an employee based upon any such rule. In either case, the grievance may include a claim that the rule is unreasonable in its application to the employee or group of employees so aggrieved. The time limits for any claim that the rule is inherently unreasonable shall run from the date the rule becomes effective.

b. In the case of an emergency rule, as defined in Section 4 of this Article, the time limit for any claim that the rule is inherently unreasonable shall be extended an additional 15 days.

4. EMERGENCY RULES

a. With express approval from the Commissioner of Personnel, an agency, department or institution may implement a work rule on an emergency basis for a period not exceeding 60 days in response to a situation or circumstances which may jeopardize the safety or well-being of employees or the fiscal viability of the state prior to fulfilling the two-week advance notification requirement of Section 2.

b. Notification to all employees affected by such emergency rules must be in writing, by posting or otherwise, and oral notification to the VSEA central office must be provided on the date the rule becomes effective. Written notice to the VSEA central office must be provided promptly following the date the rules becomes effective.

OCCUPATIONAL SAFETY AND HEALTH LAWS

...

3. The State shall make reasonable efforts to comply with VOSHA and other statutory requirements. Nothing in this Article shall be deemed to prevent the State from promulgating safety rules in excess of VOSHA or federal requirements, provided, however, the reasonableness of any such rule may be grieved ... The fact that a safety rule exceeds VOSHA or federal requirements shall not by itself be evidence of unreasonableness.

3. The State has never had a state-wide policy on smoking in the workplace. The State has left the decision whether to have a worksite smoking policy up to agency heads, department heads and local managers.

4. In the summer or fall of 1980, during bargaining for a collective bargaining agreement between the State and VSEA, the Employer's chief negotiator, Alan Drachman, made a suggestion concerning a proposal to allow management to restrict workplace smoking. No written proposal materialized, and no contract provision concerning smoking in the workplace exists now, or has ever existed in the past.

5. Prior to the implementation of the smoking policies in Bennington and Morrisville at issue in this case, various departments and agencies of the State had implemented smoking policies. In no case had VSEA and management formally negotiated the contents of the policy. However, generally VSEA has participated in the formulation of smoking policies when requested to by employees. VSEA generally has informed management that VSEA considers smoking policies to be a mandatory subject of bargaining but one that VSEA would not request formal negotiations over if a policy could be worked out informally (VSEA Exhibits 1, 2, 5 - 12, 15, 17, 19).

6. During bargaining for the 1984-86 Contracts between the State and VSEA, neither the State nor VSEA made any proposals concerning smoking policies.

7. Bargaining for the 1986-88 Contracts took place during the summer, fall and winter of 1985-86. During bargaining, the State made no proposals concerning smoking policies. The only proposal concerning worksite smoking came from VSEA in the context of bargaining for the Liquor Store Unit Contract. On July 18, 1985, VSEA presented the following proposal to the State:

The Department shall post 'no smoking'
signs in the sales areas of each store.

There was some discussion at the bargaining table about that proposal, but the proposal did not find its way into the Contract.

8. The State office building in Bennington contains offices for the Department of Social Welfare (DSW), the Department of Social and Rehabilitation Services (SRS), the Department of Corrections Probation and Parole, the Health Department, Vocational Rehabilitation (VR), and the Department of Employment and Training (DET). In addition, in the same office complex, but separated by an uncovered walkway, is the State's Attorney's office and the District Court.

9. Prior to 1984, Bennington SRS workers had no restrictions placed on smoking, and they were free to smoke at their desks. In 1984, however, their district director imposed a ban on smoking at their desks, and they were allowed to smoke only in the kitchen area in the building.

10. Prior to 1984, Bennington DSW workers had no restrictions placed on smoking, and they, too, were free to smoke at their desks. In 1984, however, they were allowed to smoke at their desks only if they had smoke-eater ashtrays.

11. In the fall of 1986, prior to October 28, George Daley, district director of the Bennington DSW office, telephoned VSEA Senior Field Representative Steven Janson. Daley told Janson that he intended to implement a smoking policy in his office, that he anticipated controversy as a result, and asked Janson if he would serve as a mediator. Janson told Daley that VSEA's position on smoking policies was that they were changes in working conditions, and, as such, were a subject for bargaining. Janson told Daley that VSEA would assist in developing a smoking policy, but that if what Daley had in mind was

unilateral implementation followed by an after-the-fact mediator, VSEA would not oblige. Janson told Daley that if Daley took unilateral action to implement a smoking policy, VSEA would take action.

12. After this conversation with Daley and some time before October 28, 1986, Janson heard from DSW employees in Bennington that a smoking policy was imminent. As a result of those reports, Janson, on October 28, 1986, wrote a letter to Daley, which provided in pertinent part, as follows:

I haven't heard from you in some time regarding the smoking policy in your office so I thought I'd take this opportunity to outline our general position on this issue. Smoking policies usually constitute a change, minor or major, in working conditions. We believe, therefore, that under the State Employee Labor Relations Act, they fall under mandatory subjects of collective bargaining. We have not asserted the right to bargain in those instances where policies are proposed which accommodate smokers and non-smokers alike and which seem to meet with the general approval of the affected staff.

I am aware that departmental personnel are reviewing your office situation with the intent to propose a smoking policy. Before any policy is formally proposed or implemented, I ask that you notify me so that we might review and discuss it with the affected employees. This request is made to hopefully preclude any grievance or dispute, not to obstruct the adoption of a responsible policy.

(VSEA Exhibit 18, Page 1)

13. Daley did not respond to Janson's letter. By memorandum to office employees dated November 12, 1986, a copy of which Daley sent to Janson, Daley announced a new smoking policy for the DSW office, to become effective November 17, 1986. Under that policy, DSW employees could not smoke at their desks, but were allowed to smoke either outdoors or in the kitchen.

14. Following his receipt of Daley's memorandum concerning the smoking policy, Janson, on November 19, 1986, sent Daley a letter which read, in pertinent part, as follows:

Please consider this a formal request to suspend the smoking policy outlined in your November 12 memorandum... until we are provided the opportunity to formally review the situation and, if need be, bargain over any new smoking policy. As I pointed out in my October 28 letter to you, your smoking policy constitutes a clear change in working conditions and, as such, is subject to collective bargaining. Unilateral implementation of a smoking policy frustrates the stated intent of the parties which has been to work towards mutually acceptable solutions which recognize the needs and rights of all your employees.

(VSEA Exhibit 18, Page 3)

15. In response to Janson's letter, Daley informed Janson by letter of November 24, 1986, that he had decided to keep the policy in effect, but that Janson was welcome to meet with office staff to seek to come up with an alternative smoking policy (VSEA Exhibit 18, page 4).

16. Subsequently, the smoking policy was amended so that smoking was prohibited for most workers in the Bennington office building and they could only smoke in the lobby in the adjacent district court building. VSEA was not involved in these policy changes.

17. State offices in Morrisville are housed in a rented building. The Departments of Social Welfare (DSW), Social and Rehabilitation Services (SRS), Corrections (P&P), and Vocational Rehabilitation (VR) are all located in that building.

18. Before 1985, there were no smoking policies in the Morrisville office building and employees could smoke anywhere. In 1985, a circulation problem in the building resulted in a number of complaints from employees about cigarette smoke and odors in the building. Caroline Russell, District Director of the SRS office, requested that SRS employees voluntarily restrict their smoking to the coffee room or conference room, where there were exhaust fans.

19. In early December 1986, an SRS employee presented Russell with a doctor's note, which read, in pertinent part, as follows:

I saw and examined a patient today with a history of difficulty in the environment at work.

She has stuffiness in the nose, headaches and running eyes when she is in an environment that contains smoke and/or formaldehyde.

It is my recommendation that she stay as far away from this environment as possible but still maintain her job.

She tested positively to both these items while in the office and I think there is little or no doubt about the diagnosis.

(State's Exhibit A)

20. As a result of the doctor's note, Russell decided to ban smoking in the SRS office at her request. At Russell's request, the DSW and P&P managers in the Morrisville office building agreed to an outright ban on smoking in the office. On Thursday, December 11, 1986, Russell and Kay Nesky, the DSW District Director, in a joint memorandum to SRS, DSW, P&P and VR staff announced that, effective December 15, 1986, there would be a total ban on smoking in the building. The VR and P&P managers ultimately decided to allow their employees to smoke at their desks notwithstanding the ban (VSEA Exhibit 20, Page 1).

21. In developing and implementing the Morrisville smoking policy, Russell did not review the Contracts and did not seek the participation of VSEA. Russell also did not speak to the Commissioner of Personnel concerning the smoking ban prior to its implementation.

22. Following the issuance of Russell's memorandum, VSEA Field Representative Jerry Fishbein learned of the new smoking ban.

Fishbein wrote to Russell and Nesky, asking, in terms nearly identical to Janson's November 19 letter to Daley, that the smoking ban be lifted (VSEA Exhibit 20, pages 2 and 3).

23. Nesky, speaking for herself and Russell, informed Fishbein that they refused to rescind the smoking ban because they saw no other way to protect the health of the affected employee.

24. On December 15, 1986, Thomas Whitney, VSEA's Executive Director, wrote to John Dooley, Secretary of Administration, requesting negotiations over a statewide smoking policy or any departmental or agency policy which the State intended to implement. In response, Dooley informed Whitney that the State did not recognize the adoption of smoking policies to be a mandatory subject of bargaining but that the State would agree to meet and confer with VSEA on smoking policies. Whitney agreed to meet but reiterated that VSEA took the position they had bargaining rights on smoking policies (VSEA Exhibits 21, 23, 24).

OPINION

At issue is whether the State committed an unfair labor practice in violation of 3 VSA §961(1) and (5) through unilateral implementation of the Bennington and Morrisville smoking policies and refusing to negotiate with VSEA concerning the policies.

The State contends that VSEA has no standing to request bargaining on the smoking policies, since the policies constitute work rules under the Contracts and VSEA has agreed under the Contracts that bargaining on work rules is not required; instead work rules are subject to challenge only by way of a grievance.

However, if smoking policies are rules, as the State alleges, the State did not follow the procedures for implementing rules set out in the Contract. In neither the Bennington nor the Morrisville situation did management abide by the contractual notice provision for implementing rules (i.e., a 15-day notice to employees and VSEA).

Under the circumstances of this case, the State committed an unfair labor practice in violation of 3 VSA §961(1) by improperly attempting to adopt a work rule by failing to provide the contractually required notice. §961(1) makes it an unfair labor practice to "interfere with... employees in the exercise of their rights guaranteed by Section 903 of this title". Under Section 903, employees have the right to "bargain collectively" and employers are obligated to "exert every reasonable effort to make and maintain agreements". The failure to give the contractually-required notice interfered with the employees' rights to the benefits of a collectively bargained agreement pursuant to §903.

Normally, contractual violations are properly pursued through the grievance procedure, not through the unfair labor practice route; only extraordinary circumstances justify adjudicating contract disputes through the unfair labor practice route. VSEA v. State of Vermont, 7 VLRB 119, 7 VLRB 227 (1984). Such extraordinary circumstances exist here. The notice provision is not grievable since the work rule article provides that grievances may only be filed over the reasonableness of work rules or actions taken against employees based upon any such rule. To rule that the State's actions did not

constitute an unfair labor practice would leave VSEA with no redress. We conclude this is not appropriate, particularly given the provisions of 3 VSA §982(g) that "(t)he board is authorized to enforce compliance with all provisions of a collective bargaining agreement upon complaint of either party" through "proceed(ing) in the manner prescribed in section 965 of this title relating to the prevention of unfair labor practices".

Thus, under the circumstances herein, the State violated 3 VSA §961(1) by implementation of the Bennington and Morrisville smoking policies. The promulgation of the policies being an unfair labor practice, the State is required to cease and desist from implementation of these policies pursuant to 3 VSA §965(d).

ORDER

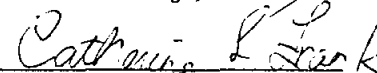
Now therefore, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED:

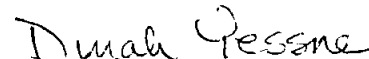
The State of Vermont shall cease and desist from implementing the smoking policies instituted in Bennington on November 17, 1986, as subsequently amended and instituted in Morrisville on December 15, 1986.

Dated this 4th day of September, 1987, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Charles H. McHugh, Chairman


Catherine L. Frank


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