VERMONT LABOR RELATIONS BOARD

BURLINGTON FIREFIGHTERS ASSOCIATION, LOCAL 3044, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS	)	
v.	)	DOCKET NO. 86-45
CITY OF BURLINGTON	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On July 25, 1986, the Burlington Firefighters Association, Local 3044, International Association of Firefighters ("Association"), filed an unfair labor practice charge against the City of Burlington Fire Department ("Employer"). The Association alleged that the unilateral promulgation by the Employer of a policy entitled "Non-service Connected Injuries/Illness" was in direct conflict with the collective bargaining contract between the Association and the Employer and, as such, was an unfair labor practice under 21 VSA §1726(a)(1) and (5) in that it constituted a failure to bargain in good faith.

After investigation of the charge, the Labor Relations Board issued an unfair labor practice complaint on October 30, 1986. A hearing was held before Board members Charles H. McHugh, Acting Chairman; William G. Kemsley, Sr.; and Catherine L. Frank on December 4, 1986. Attorney James Dunn represented the Employer. Attorney Michael Schein represented the Association. The Association filed Proposed Findings of Fact and Memorandum of Law on December 12, 1986. The Employer filed a brief on December 15, 1986.

FINDINGS OF FACT

1. At all times relevant, the Association has been the sole and exclusive bargaining agent for all full-time, permanent employees of the Employer below the rank of lieutenant, with the exception of probationary and clerical employees.

2. The collective bargaining contract between the Association and the Employer, effective from July 1, 1985 to June 30, 1986 ("1985-86 Contract") and the Contract effective from July 1, 1986 to June 30, 1987 ("1986-87 Contract") both provide, in relevant part, as follows:

ARTICLE III

City Functions

3.1 It is understood and agreed that the City possesses the sole right and authority to operate and direct the employees of the City and its various departments in all aspects, except as otherwise specifically agreed to in this Agreement, or otherwise specifically agreed to in writing between the parties; these rights include, but are not limited to, the right:

To plan, direct and control Department activities, to determine Department policies...

To maintain order, and to suspend, demote, discipline and discharge employees for just cause;

To make, publish and require observance of reasonable rules and regulations...

3.2 Prior to the issuance of non-emergency additions to or changes in the Rules and Regulations or General Orders, the proposed changes will be submitted by the Department to the Association and the City Personnel Director for their review and comment. If the Association responds within two weeks, the Department agrees to meet with the Personnel Director, Association President and such other Association members as the President shall name, to discuss the Association's position relative to the proposed change. The Association may also propose changes in the Rules and Regulations or General Orders, copies of which shall be sent to the City Personnel Director, and the Department agrees to meet and discuss the proposed changes as herein previously described. All non-emergency additions to or changes in the rules and regulations or General Orders will not take effect until this process has been completed in full.

ARTICLE XV, Discipline

15.01. ...The City agrees that an allegation of arbitrary or capricious discipline which is intended to result in either written documentation thereof, suspension or discharge may be subject to the grievance procedure. The City shall not discipline or discharge any post-probationary employee without just cause...

15.02. ...The City agrees with the tenets of progressive and corrective discipline, where appropriate...

ARTICLE XX, Final Resolution and Duration of Agreement

20.01. This Agreement represents the full and complete agreement between the parties and it is understood and agreed that any subject matter whether or not referred to in this Agreement shall not be open for negotation during the term of this Agreement except as the parties mutually agree.

(Joint Exhibit 1, 2)

3. The established practice is that Section 3.2 of the Contracts has been used to promulgate rules on matters within the Employer's management rights, which are not governed by the Contract.

4. With respect to sick leave, the 1985-86 Contract provides in pertinent part as follows:

ARTICLE X, Hours of Work

...10.2. The starting time shall be 7:30 a.m. on weekdays and Saturdays and 8:00 a.m. on Sundays and holidays.

ARTICLE XIII, Sick Leave

...13.2 ...An employee absent on account of illness or injury shall notify the supervisor by the regular starting time of the work day.

...13.3 ...Any man absent from duty due to illness for a period longer than two days shall provide the City with written verification of illness from a physician of his choice. Such absences of longer than two work days shall not be the basis for disciplinary action so long as the required notification and verification is provided. For absences of two work days or less, no verification shall be necessary so long as notice is given. In cases where the City questions the man's continued capacity to serve as a firefighter, the City may request a physical examination.

(Joint Exhibit 2)

5. The 1986-87 Contract provides the same starting time for work as the 1985-86 Contract and contains two options for sick leave, for which existing employees make a one-time irrevocable choice. Option 1 provides in relevant part as follows:

> (13.1)c. It is understood and agreed that abuse of sick leave shall be grounds for disciplinary action. It is also understood and agreed that requests for physician's certificate shall not be for harassment, but only when there exists reasonable cause to believe that an employee is abusing sick leave, except that an employee absent from duty due to illness or non-work connected injury for a period in excess of two work days shall provide the City with written verification from his attending physician. In cases where the City questions an employee's continued capacity to serve as a firefighter, the City may request a physical examination.
>
> 13.2 ...An employee absent on account of illness or injury shall notify the supervisor, or other person designated by the Chief, no later than one-half hour prior to the commencement of the shift.

Option 2 provides in relevant part as follows:

> 13.2 ...An employee absent on account of illness or injury shall notify the supervisor by the regular starting time of the work day.
>
> 13.4 Any man absent from duty due to illness for a period of longer than two work days shall provide the City with written verification of illness from a physician of his choice. Such absences of longer than two work days shall not be the basis for disciplinary action so long as the required notification and verification is provided. For absences of two work days or less, no verification shall be necessary so long as notice is given. In cases where the City questions the man's continued capacity to serve as a firefighter, the City may request a physical examination.
>
> (Joint Exhibit 1)

6. On February 19, 1986, at which time the 1985-86 Contract was in effect and the Association and City had not commenced negotiations for the 1986-87 Contract, the Employer submitted to the Union for its review an addition to the Employer's Administration Manual entitled "Non-Service Connected Injuries/Illnesses" (hereinafter referred to as

"sick leave policy"). The Employer drew up the policy in an effort to tighten procedures on sick leave use and establish more accountability.

7. At some point after this submission but prior to February 27, 1986, Gilbert Myers, Attorney for the Association, telephoned James Dunn, Attorney for the Employer, and raised some questions concerning the sick leave policy. As a result of this conversation, the Employer modified a portion of the sick leave policy concerning failure to appear at a scheduled appointment of the Medical Board. The Employer did not respond to the Association's objection to the inclusion of a section on the Fire Department Chief arranging for the examination of any member who, in the opinion of the Chief, is not capable of performing duties. That section was not revised (Employer Exhibit A).

8. On March 11, 1986, the revised sick leave policy was sent to Michael O'Neil, the President of the Association. O'Neil did not consult the Association's bargaining team and took no further steps with respect to the sick leave policy. No meetings were held between the Employer's and the Association's bargaining teams over the sick leave policy (Employer Exhibit B).

9. Effective March 25, 1986, the Employer promulgated the sick leave policy.

10. As a result of the promulgation of the sick leave policy, the following changes in conditions of employment took effect:

- Under the policy, employees calling in sick must call the Chief either a half hour or an hour prior to the start of the shift, depending on the day they were scheduled to work, to be

eligible for authorized leave. Prior to the policy implementation, employees were required to call in sick by the start of the shift.

- Under the policy, employees are required to submit a physician's statement prior to the start of the fourth duty day that the employee is absent, and weekly thereafter. Failure to submit physician's statements in a timely manner result in designation of the leave as unauthorized and loss of sick leave pay. Prior to the implementation of the sick leave policy, an employee was required to present only one written verification of illness from his or her physician if the absence exceeded two duty days. Failure to submit the statement did not result in any automatic sanction. A "duty day" is 24 hours;

- Under the policy, employees are scheduled for an examination by a physician of the Medical Board if they have seven absences in any 12 month period, whether or not the absences are authorized. Failure to appear as scheduled results in loss of pay and liability for the cost of the missed appointment. Failure to appear at other Medical Board examinations ordered by the Chief results in disciplinary action. Prior to implementation of the sick leave policy, there was no automatic scheduling of an employee to appear before the Medical Board after a specified number of absences and there was no automatic sanction for failure to attend a Medical Board appointment.

(Association Exhibit 1)

11. From the time the sick leave policy was promulgated on March 25, 1986, until the Association filed the unfair labor practice charge herein on July 25, 1986, the Association did not file a grievance over the promulgation of the policy and made no demands to negotiate the provisions of the policy.

OPINION

At issue is whether the promulgation by the Employer of the sick leave policy during the term of a collective bargaining contract was an unfair labor practice under 21 VSA §1726(a)(1) and (5) in that it constituted failure to bargain in good faith.

The unilateral imposition of terms of employment during the time the employer is under a legal duty to bargain in good faith is the very antithesis of bargaining and is a per se violation of the duty to bargain. Burlington Fire Fighters Association v. City of Burlington, 142 Vt. 433, 435-436 (1983). Absent a waiver of bargaining rights, an employer is required to bargain changes in mandatory bargaining subjects during the term of an agreement even if contract negotiations are not ongoing. Mt. Abraham Education Association v. Mt. Abraham Union High School School Board, 4 VLRB 224, 231 (1981). Local 881, IAFF v. City of Barre, 2 VLRB 81 (1979).

There is no dispute in this case as to whether the sick leave policy involves conditions of employment and, thus, concerns a mandatory subject of bargaining. 21 VSA §1722(17), §1725(a). It is clear it does. There also is no issue whether the policy constituted a change in conditions of employment from what had previously existed. It is clear such a change occurred (see Finding of Fact #10). The question is whether the Employer met its obligation to bargain in good faith with the Association before instituting the changes.

The Employer contends 1) that it has fully complied with its obligation to bargain with the Association over the subject matter contained in the sick leave policy, and 2) that any failure to bargain which may have occurred is a result of the Association's conscious and explicit waiver of its rights. We discuss each of these contentions in turn.

The Employer contends it met its bargaining obligation concerning the sick leave policy by adhering to the provisions of Article 3.2 of the 1985-86 Contract, which provides that "(p)rior to the issuance of non-emergency additions to or changes in the Rules or Regulations or General Orders, the proposed changes will be submitted by the Department to the Association...for...review and comment". The Employer contends its actions of sending the sick leave policy to the Association prior to its promulgation, subsequently revising one section of the policy pursuant to a comment by the Association and then sending the revised policy to the Association for further review before its promulgation, were consistent with Article 3.2 and gave the Association ample opportunity to bargain, comment, object or take whatever other action it deemed appropriate.

The Employer's reliance on Article 3.2 to support its actions is unwarranted when that contract provision is considered in conjunction with other contract provisions and when the subject matter of the policy is compared to provisions of the Contract.

Article 3.1 of the 1985-86 Contract provides the Employer has the right to "determine Department policies" and to "make, publish and require observance of reasonable rules and regulations". However, this is not an unfettered right since Article 3.1 provides the

Employer possesses these rights "except as otherwise specifically agreed to in this Agreement". Article 20.1 of the Contract provides that "any subject matter...shall not be open for negotiations during the term of this Agreement except as the parties mutually agree". Given these provisions, it is evident the requirements of Article 3.2 are binding on the Association only when changes in rules and regulations are contemplated which are not covered under the Contract.

The sick leave policy conflicted with provisions of both the 1985-86 and 1986-87 Contracts provisions in various ways. The policy requires calling in sick prior to the start of the shift while the Contracts (at least for some employees) require notice by the start of the shift. The sick leave policy provides for automatic loss of pay for failure to file a physician's statement on time, failure to provide a weekly updated statement or unauthorized failure to attend a medical board appointment. The policy further provides that failure to appear at a medical board examination "shall result in disciplinary action". The Contracts have no automatic loss of pay provisions and provide that "arbitrary or capricious discipline" is grievable, that all discipline is subject to a "just cause" standard and that the tenets of "progressive discipline" apply, where appropriate. Whether employee failures in the cited areas constitute just cause for discipline depends on the circumstances; yet the policy's automatic penalties are fixed without regard to circumstances. The policy requires employees to submit updated physician statements on a weekly basis in addition to an initial statement required once three duty days are missed. The Contract requires only one physician statement if an absence exceeds two duty days.

Thus, the Employer did not meet its bargaining obligation concerning the sick leave policy by giving the Association an opportunity to comment on the sick leave policy pursuant to Article 3.2 of the Contract. The provisions of Article 3.2 are not applicable under the circumstances herein where the sick leave policy conflicted with Contract provisions.

Nonetheless, the Employer contends the Association waived whatever bargaining rights it may have had by failing to assert them in a timely fashion. As evidence of this, the Employer points to the fact that the sick leave policy was not adopted until the Association completed two two-week review periods and made comments and raised questions concerning the policy, that the Association did not demand negotiations with respect to the policy and that the Association did not formally object to the adoption of the sick leave policy until filing the unfair labor practice charge herein five months after being notified of the policy.

In determining whether a party has waived its bargaining 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 (1982). Mt. Abraham Education Association v. Mt. Abraham Board of School Directors, 4 VLRB 224 (1981). 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). A party can intentionally relinquish a known right by failing to assert it in a timely manner. VSEA v. State of Vermont, 6 VLRB 217 (1983).

We conclude the Association has not waived its bargaining rights. It was not obligated to demand negotiations upon receipt of the sick leave policy or respond in any manner since the parties expressly provided in Article 20.1 of the Contract that "any subject matter...shall not be open for negotiation during the term of this agreement except as the parties mutually agree". Under this provision, the Association was not required to bargain over the subject matter of the sick leave policy but was entitled to rely upon the sick leave provisions of the Contract which were essentially "locked in" during the Contract term. The fact that the Association did comment on a few provisions of the policy prior to its promulgation is insufficient for us to conclude it intended to agree to revision of the Contract's sick leave provisions. Further, the Association did not waive its bargaining rights by waiting five months after being notified of the policy to file an unfair labor practice charge. Under 21 VSA §1727(a), the Association had six months in which to file an unfair labor practice charge.

In sum, we conclude the promulgation of the sick leave policy by the Employer constituted unilateral imposition of changes in conditions of employment during the term of a contract, which was a violation of the Employer's duty to bargain in good faith pursuant to 21 VSA §1726(a)(1) and (5).

In fashioning a remedy pursuant to 21 VSA §1727(d), we believe it is appropriate to require the Employer to cease and desist from implementing the provisions of the sick leave policy. To the extent possible, this will return conditions of employment regarding sick leave to what they would have been had the Employer not improperly promulgated the policy.

ORDER

Now therefore, based on the foregoing Findings of Fact and for the foregoing reasons, it is hereby ORDERED that the City of Burlington Fire Department shall:

1) Effective immediately, cease and desist from implementing the changes in employees' conditions of employment resulting from its March 25, 1986, promulgation of an addition to the Department's Administration Manual entitled "Non-Service Connected Injuries/Illnesses", and shall rescind such policy; and

2) Post copies of this Order on all Employer bulletin boards customarily used for employer-employee communication for a period of 60 consecutive days.

Dated this 17th day of February, 1987, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Charles H. McHugh, Chairman

William G. Kemsley, Sr.

Catherine L. Frank