

VERMONT LABOR RELATIONS BOARD

ESSEX JUNCTION EDUCATION)	
ASSOCIATION)	
)	
v.)	DOCKET NO. 90-63
)	
ESSEX JUNCTION PRUDENTIAL)	
COMMITTEE)	

FINDINGS OF FACT, OPINION, AND ORDER

Statement of Case

On October 4, 1990, the Essex Junction Education Association ("Association") filed an unfair labor practice charge with the Vermont Labor Relations Board, alleging that the Essex Junction Prudential Committee ("Employer") committed unfair labor practices in violation of 21 V.S.A. §1725(a), §1726(a)(1), (2), (3), and (5). Specifically, the Association alleges that the Employer: (1) willfully circumvented the sole and exclusive bargaining agent for support staff employed by the Employer by engaging in direct wage and benefit discussions with members of the bargaining unit; (2) disparaged the bargaining process by failing to negotiate over job classifications/descriptions and attendant wage rates with the Association, while unilaterally implementing said classification rates; (3) engaged in activities which were designed to delay the timely process of negotiations with the Association while the Employer attempted to interfere with the formation and administration of the Association; (4) unilaterally modified the "status quo" with respect to leave benefits, work year and wage rates while negotiations over said matters were subjects of collective negotiations between the parties; (5) discriminated and retaliated against Association

officials; and (6) repeatedly interfered with the legitimate rights of the bargaining agent.

The Labor Relations Board issued an unfair labor practice complaint on November 29, 1990. A hearing was held on January 31 and February 1, 1991, before Board members Charles H. McHugh, Chairman, Leslie G. Seaver, and Carroll P. Comstock. Attorney Anita R. Tuttle of Downs, Rachlin and Martin, Burlington, Vermont represented the Employer. Donna Watts, Associate General Counsel of Vermont-NEA, represented the Association. At the hearing, the Association withdrew its allegations relating to leave benefits.

The Association and the Employer both filed Proposed Findings of Fact and Memoranda of Law on February 19, 1991.

FINDINGS OF FACT

1. As a result of a representation election conducted by the Labor Relations Board on April 18, 1989, the Board certified the Association on May 2, 1989, as the exclusive bargaining representative of the instructional assistants, tutors, library assistants, custodians, maintenance workers, audio-visual workers, switchboard operators, secretaries, bus drivers, bus aides and food service workers employed by the Employer, excluding various positions. Inclusion in the bargaining unit represented by the Association was limited to employees who worked more than 20 hours per week (Board Docket No. 89-18).

2. Subsequently, the Association elected a negotiating team during June of 1989 to initiate contract negotiations for the 1989-90 school year. The Employer's chief negotiator at this time was Assistant Superintendent Dr. Christopher Bogden.

3. Bogden sent a memorandum to all support staff employees represented by the Association on or about June 19, 1989. In it, he stated that, until a contract was negotiated with the Association, the terms and conditions of the 1988-89 individual contracts entered into between the Employer and individual employees would be in force (Association Exhibit 2).

4. Suzanne Bratek is an instructional assistant employed by the Employer. She has worked in this capacity for approximately 12 years. Bratek was active in organizing the support staff. She was elected to serve on the negotiations team for the Association for support staff negotiations. Bratek's 1988-89 contract was for 35.4 weeks, or 177 days for that year (Association Exhibit 3).

5. During the 12 years Bratek has worked for the Employer, the Employer has determined the number of instructional assistants' contract days, including orientation and inservice days. Orientation days are days worked prior to the return of the students to school in September, and coincide with days teachers are required to work. Inservice days occur during the school year on days the students are not in attendance. During Bratek's 12 year tenure with the Employer, her contracts have varied from 175 to 177 days, or from 35.0 - 35.4 weeks a year. The number of contract days for all instructional assistants have varied due to the calendar and the term of the teacher's contract.

6. Prior to the start of the 1988-1989 school year for students, there were two orientation days for teachers.

Instructional assistants worked these orientation days. During the 1989-1990 school year, there was only one orientation day for teachers and instructional assistants prior to the start of the school year for students. This meant that instructional assistants would have had one less day of work for the 1989-1990 school year unless they were allowed to work an additional inservice day. The Employer provided the instructional assistants with an opportunity to work the additional inservice day, thus giving them the opportunity to work the same number of days as the preceding year. Some instructional assistants, including Bratek, chose not to work the optional inservice day and thus were paid for one less day that year than the preceding year (Board Exhibits A, B and E).

7. There were no orientation days for teachers and instructional assistants prior to the start of the 1990-1991 school year. That meant that instructional assistants would have two less days of work for the 1990-1991 school year unless they were allowed to work two additional inservice days. The Employer has made, and intends to make further, inservice opportunities available to instructional assistants during the 1990-1991 school year.

8. Joseph Blanchette is a Vt-NEA Uniserv Director and has worked in this capacity full time for approximately nine years. He has been the chief spokesperson for the Association for support staff contract negotiations since the inception of negotiations.

9. The Employer and the Association agreed early in the negotiations process that there needed to be a classification study of support staff employees because of pay inequities. Bogden indicated that meaningful negotiations over salaries would not be feasible without the classification study being completed. Blanchette suggested that the National Education Association may have had grant money available for such a study, but this idea ultimately was rejected by the Employer. No agreement between the Association and the Employer was reached regarding a joint study. In November, 1989, Bogden sought bids for a classification study. The Association decided that it would not be appropriate to have the Association linked to the type of study Bogden was proposing.

10. Bogden notified the Association in December that the District had selected Palmer and Associates to perform the job classification study. On December 13, 1989, the Association negotiating team sent a memorandum to support staff, which stated:

The team has been informed that Chris Bogden has asked some members of the support staff to join a newly formed "job classification study."

We are presently attempting to bargain over the issue. Chris Bogden and the Board has rejected our proposal. Therefore we will not be participating in Chris Bogden's classification proposal, and we urge all association members not to join this committee (Association Exhibit 7).

11. Members of the Association negotiating team understood, pursuant to discussions with Bogden, that the results of the classification study, which came to be known as the Palmer Report, would be shared by the Employer with the Association negotiating team. However, it was the understanding of Bogden

that the results would be shared directly with support staff, but not with the Association negotiating team.

12. A January 2, 1990 letter to all the staff from Joan Palmer of Palmer Associates described the purpose of the study. This letter stated in pertinent part:

...

The main purpose of this project is to develop a job classification and pay plan for support staff of the Essex Junction School District...

The first phase of the project will be an in-depth study of all support staff positions....The study...will compare all jobs...with similar jobs being assigned to the same category or level...

The second phase of the project will be a review of all current staff wages and salaries to determine whether they are consistent with the job evaluation study...(Association Exhibit 8).

13. The study took place over the winter and spring of 1990, with support staff employees participating in the study to the extent of working on job descriptions for their positions. The results of the study were not forthcoming as quickly as expected by the Association. Absent the study results, the Association made its first salary proposal to the Employer on February 22, 1990. There had been approximately nine negotiating sessions between the Employer and the Association at this time (Association Exhibits 1, 9, 10, 11 and 13).

14. The Employer responded to the Association proposal on March 8, 1990. The Employer proposal reflected a total compensation package, that is salaries and benefits were combined in the Employer proposal (Employer Exhibit F).

15. The Association did not respond to the March 8, 1990, proposal with a counterproposal. The parties met on March 22, 1990, at the conclusion of which meeting the Association declared impasse.

16. After impasse was declared, the parties agreed on a mediator/factfinder, David Randles. The first mediation session was eventually set for June 20, 1990.

17. On or about May 1, 1990, Bratek, in her capacity as a negotiator for the Association, wrote a letter to Bogden, which stated:

In accordance with your statement on March 8, 1990, that the Palmer Report would be completed by the first week in April, we would appreciate a copy as soon as possible.

Considering that it is the first of May, we are disappointed that we have not received this information sooner (Association Exhibit 16).

18. On or about May 2, 1990 Bogden notified all support staff that Joan Palmer would be completing the job classification study in a few weeks, and at that time he would "share her proposal" with them (Association Exhibit 18).

19. In a May 9, 1990, letter to Bogden, Bratek referred to "assurances from (Bogden) at the negotiating table that the report would be completed and a copy made available to the team by the first week in April." In response, Bogden stated in pertinent part:

Your recollection of "my assurances at the negotiating table" are different from mine. However, let me assure you once again, that the recommendations from Palmer and Associates will be shared with all support staff when they are completed. (Association Exhibits 19 and 20)

20. On May 25, 1990, Bogden sent a summary of the Palmer & Associates Report to all support staff. He introduced the recommendations with a memorandum which stated in pertinent part:

Attached is a copy of Palmer & Associates preliminary recommendations for classifying the Essex Junction and CCD support staff...I will not be able to explain Palmer's proposal in the detail or depth it deserves in this memo. Therefore, I would like to invite you to a question and answer session to be held by Palmer & Associates from 2:00 to 4:00 in the High School Auditorium on June 12. You will be able to ask any questions you have about the project at that time.

...

Please understand that the Palmer report is a preliminary recommendation for two reasons. First, any plan as comprehensive as this one, may require refinement....Secondly, this job classification and pay structure obviously impacts your compensation, which is a mandatory subject of bargaining. Before the district can adopt these pay rates, they must be negotiated with your union. (Association Exhibit 21)

21. Attached to the letter from Bogden were materials from the Palmer Report which identified each employee by name, proposed job classifications, proposed rates of pay, and proposed individual retroactive wage payments for the 1989-90 school year.

22. Subsequently, the amount of time allotted for the June 12 meeting increased by an hour, ending at 5:00 p.m. rather than 4:00 p.m. (Association Exhibit 22).

23. Due to the inability of many of the support staff to attend a meeting that would begin at 2:00, Bratek requested of Bogden that the June 12 meeting be rescheduled to a time when the majority of employees could attend the entire presentation. Bogden denied the request to reschedule the meeting, restating the willingness of Palmer to stay later in the day until 5:00 p.m. (Association Exhibits 24 and 25).

24. In addition to her rescheduling request, Bratek also requested permission for Association President Jay Kaplan, who is a teacher, and Blanchette to attend the meeting. Bogden denied this request, stating:

This meeting is intended to address the questions of Essex Junction support staff only. Jay Kaplan and Joe Blanchette will have ample opportunity to discuss the Palmer report, at other times in other forums. (Association Exhibits 24 and 25).

25. Many support staff who were represented by the Association were confused over the Palmer Report materials which they received. It appeared to them that these recommendations constituted the Employer's wage proposal for contract negotiations. Some of the employees thought this appeared to be a attractive offer, and they urged the Association negotiating team to accept the Palmer Report, despite the fact that the Palmer Report was not presented by the Employer as a wage proposal. This was the first time support staff had ever negotiated a collective bargaining contract, and many did not understand the process.

26. On June 5, 1990, the Association negotiating team sent a memorandum to all support staff, which memorandum stated in pertinent part:

For your information:

1. The Palmer Report is NOT you(sic) Association's proposal.
2. The Palmer Report is NOT the Board's proposal as it has NOT been brought to the bargaining table.
3. If the Board does indeed adopt this report, it would have to be presented at the bargaining table.
4. Upon preliminary review, the negotiating team has serious concerns about the process and findings of this report.

Remember our goal is a fair contract for the majority, not a few winners at the expense of others (Association Exhibit 23).

27. The June 12, 1990, meeting went ahead as scheduled. Joan Palmer and Bogden made preliminary remarks about the report. Due to the timing of the meeting, not all support staff were able to attend at 2:00 p.m. and missed preliminary remarks and explanations. Other employees had to leave the meeting before its conclusion. After the meeting, there remained confusion among the support staff about what the Palmer Report represented. Many support staff continued to believe the Palmer Report represented the Employer's wage proposal and urged the Association negotiating team members to "accept" the Palmer Report. This confusion continued through the mediation/factfinding process among many members of the support staff.

28. The first mediation session between the Association and the Employer was held with mediator/factfinder David Randles on June 20, 1990. The Employer hired Attorney Dennis Wells to be chief negotiator prior to the June 20, 1990, session, and he attended the June 20 session as the Employer's representative. Randles met individually with Blanchette and Wells at the June mediation session. The Palmer Report was briefly mentioned. Wells told Randles the Palmer Report was not the Employer's offer, and he was still analyzing it himself.

29. The position of head custodian at the Employer's A.D. Lawton School became available in July, 1990. The head custodian at the A.D. Lawton School supervises three employees and is responsible for approximately 48,000 to 68,000 square feet of building space.

30. Fred McGuire is a member of the bargaining unit represented by the Association and is the head custodian at the Essex Junction High School. McGuire is responsible for three buildings and approximately 447,000 square feet of space. He has 16 employees under his supervision, including directly supervising three group leaders. McGuire applied for the vacancy at the A.D. Lawton School. Director of Property and Services, Don Soderberg, told McGuire that the head custodian position at the A.D. Lawton School was in a lower classification than his position at the high school. Bogden told McGuire he would make less money if he took the A.D. Lawton position. McGuire withdrew his application.

31. Brian Greenwood is a custodian and group leader at the high school and has been so employed for approximately 14 years. Greenwood is a member of the Association negotiating team. Greenwood also inquired about the head custodian position at the A.D. Lawton School. He spoke with Soderberg. Soderberg told Greenwood he should check with the personnel office for detailed salary information concerning the position. Greenwood discovered ultimately that he would make only slightly more money if he accepted the position, and he did not apply for the position.

32. Randles held a factfinding session on September 13, 1990. Wells referred to the Palmer Report during this session with Randles, but did not present the Palmer Report as a bargaining proposal. The Association negotiating team had still not received a copy of the Palmer Report.

33. Subsequent to the factfinding session, both parties submitted factfinding briefs on economic issues. The Employer made a proposal which modified its previous economic proposal. The Employer proposal was a modified version of the recommendations of the Palmer Report, most notably proposing that much of the Palmer salary recommendations be implemented, but over three years, instead of two years.

34. Blanchette did not read through the Employer brief prior to November 6, and was not aware that the Employer had proposed a modified version of the Palmer Report. A final session was held with Randles on November 6, 1990. Blanchette discovered at the November 6 session for the first time that the Employer proposal was substantially different than its earlier proposal and was a modified version of the Palmer Report.

35. To date, the Association negotiating team has not received a copy of the Palmer Report.

36. Randles issued his factfinding report on January 24, 1991.

37. Any support staff employees in the bargaining unit represented by the Association hired since the preliminary recommendations of the Palmer Report were made in May, 1990, have been hired at pay levels within the range existing during the previous few years. The Employer has used the beginning wage rates recommended in the Palmer Report as a guideline for establishing beginning wage rates for newly hired employees.

38. Support staff represented by the Association have not received any pay increases since receiving increases for the 1988-1989 school year.

OPINION

Alleged Unilateral Changes in Conditions of Employment

The Association first contends that the Employer committed unfair labor practices through unilateral changes in conditions of employment during the period the parties were in the process of negotiating over the first collective bargaining contract to cover support staff of the Employer. The Association asserts that the Employer disparaged the bargaining process and failed to bargain in good faith, in violation of 21 VSA §1725(a) and §1726(a)(1) and (5), through the following alleged unilateral changes in wages, hours and conditions of employment: 1) unilaterally reducing the number of contractual days for instructional assistants; and 2) unilaterally implementing the job classification/wage study - i.e., the Palmer Report - the commissioned during the 1989-90 school year.

The number of hours worked by employees and the wages they are paid clearly are mandatory subjects of bargaining under the Municipal Employee Relations Act ("MERA"). 21 VSA §1722(4) and (17); §1725(a). Unilateral changes in mandatory bargaining subjects during the time 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. Burlington Fire Fighters Association v. City of Burlington, 142 Vt. 434, 435-436 (1983). A municipal employer may not make unilateral changes in conditions of employment until mandated dispute resolution procedures are exhausted. Burlington Fire Fighters Association

v. City of Burlington, 4 VLRB 379 (1981). The burden of proving that an improper unilateral change in a condition of employment occurred lies with the charging party. Castleton Education Association, Vermont-NEA v. Castleton-Hubbardton Board of School Directors, 13 VLRB 60, 66 (1990). The standard of proof is by a preponderance of the evidence. 21 VSA §1727(d).

We conclude that the Association has failed to establish by a preponderance of the evidence that the Employer made unilateral changes in mandatory bargaining subjects.

The Association contends that the Employer, during the period of contract negotiations, reduced the contractual number of days for instructional assistants for the 1989-90 and 1990-91 school years from the number of contractual days they worked during the 1988-89 school year.

Historically, the number of days worked by instructional assistants has been dictated by the calendar and the teachers' contract. The number varies each year and is determined by the number of orientation days available before Labor Day in the month of September. Teachers must be working in order for the orientation days to be scheduled and included in its aides' contract. If teachers are not working before the first day of school, days worked by assistants are reduced. In 1989-90 and 1990-91, the School Board has acted consistent with established practice as to how the number of days is calculated. There is no change in the status quo.

Also, the evidence indicates that, during the 1989-90 school year, the Employer provided instructional assistants with an opportunity to work an additional inservice day to make up for one less orientation day they worked that year, thus giving them

the opportunity to work the same number of days as the preceding year. During the 1990-91 school year, the Employer has made, and intends to make further, inservice opportunities available to instructional assistants to make up for the lack of orientation days this school year. Thus, we conclude that no improper unilateral change in the status quo in the time worked by instructional assistants occurred.

The Association further contends that the Employer made improper unilateral changes in wages through implementation of the Palmer Report, which resulted in: a) higher wages being paid to newly hired employees than senior employees, and b) present employees being informed they would take a pay cut if they transferred or would receive only a slight pay increase if they were promoted. The Association, in order to prevail, would have to demonstrate by a preponderance of the evidence that wage rates paid after the issuance of the Palmer Report were outside the range of rates paid prior to the report being issued to establish that an unfair labor practice occurred in this respect. The Association has not demonstrated that such an improper unilateral change in the status quo occurred in the Employer's wage decisions.

The evidence indicates that any support staff hired into the bargaining unit represented by the Association since the issuance of the Palmer Report have been hired at pay levels within the range existing during the previous few years. The existing employee, a head custodian, who was told he would have to take a

pay reduction if he transferred to another head custodian position would have been assuming a position with substantially decreased responsibilities. Under those circumstances, we cannot presume that a wage reduction would be an improper unilateral change. Similarly, we have no evidentiary basis to conclude that the granting of a slight wage increase to a custodial employee seeking promotion to a head custodian position constituted an improper unilateral change in wage decisions made by the Employer.

Direct Communication with Employees Concerning Palmer Report

The Association contends that the Employer violated its duty to bargain in good faith, improperly circumvented the Association as the exclusive bargaining representative for support staff and delayed the timely progress of negotiations, in violation of 21 VSA §1725(a) and §1726(a)(1)(2) and (5), by engaging in direct wage and benefit discussions with members of the bargaining unit. The Association contends these alleged improper actions occurred when the Employer provided a summary of the Palmer Report directly to all support staff rather than to the Association, and then scheduling a meeting with support staff to discuss the Palmer Report.

In determining whether the Employer's actions constitute an unfair labor practice, the provisions of §1725 and §1726 cited by the Association must be viewed in conjunction with §1728 of MERA, which provides as follows:

The expression of any views, argument or opinion, or the dissemination thereof, whether in written, printed, graphic, oral or visual form, shall not constitute or

be evidence of an unfair labor practice under this chapter, if such expression contains no threat of reprisal or promise of benefit.

The Vermont General Assembly, by enacting this provision which is virtually identical to Section 8(c) of the National Labor Relations Act, provided that municipal employers have at least some ability to directly communicate with employees, during the period when contract negotiations are ongoing, concerning negotiations. Employers do not improperly circumvent the bargaining representative and do not bargain in bad faith if communications are non-coercive and contain "no threat of reprisal or promise of benefit". Burlington Education Association v. Burlington Board of School Commissioners, et al, 7 VLRB 248, 250-251 (1984). The totality of the employer's conduct must be analyzed and the context in which the bargaining took place must be evaluated to determine if bad faith bargaining exists. Rutland School Board v. Rutland Education Association, 2 VLRB 245, 273, 276 (1979).

In considering the totality of the Employer's conduct with respect to directly communicating to support staff recommendations of the Palmer Report, and in evaluating the context in which negotiations were occurring, we conclude that the Employer committed an unfair labor practice.

The Employer initiated its improper actions by its May 25, 1990, communication to support staff. Included in the materials sent to support staff was a summary of the Palmer Report which identified each employee by name, proposed job classification, proposed rates of pay and proposed retroactive wage payment. The

memorandum from the employer accompanying the Palmer Report summary caused many support staff to reasonably conclude that the proposed pay rates and retroactive pay in the Palmer Report represented the wage proposal of the Employer in contract negotiations. That can logically be inferred and such inference is further supported by the added statement in the memorandum by providing "(b)efore the district can adopt these pay rates, they must be negotiated with the union".

This resulted in many support staff pressuring the Association negotiation team to "accept" the Palmer Report even though, in fact, the Employer had not presented the Palmer Report recommendations as a wage proposal. The context in which negotiations occurred aggravated the effect of the Employer's actions. This was the first time support staff had ever negotiated a collective bargaining contract, and many did not understand the process.

The Employer exacerbated already damaging actions by the way in which it handled the informational meeting on the Palmer Report contents on June 12, 1990. The Employer declined to let Association representatives attend the meeting, and refused to reschedule the meeting even though many of the support staff could attend only a portion of the meeting. This meeting could have served to dispel the confusion concerning what the Palmer Report represented. Instead, as a result of the way the Employer handled the meeting, many of the support staff remained confused after the meeting, even though the Association attempted to dispel such confusion by informing employees that the Employer

had not presented Palmer Report recommendations as a wage proposal. Many support staff continued to believe that the Palmer Report represented the Employer's wage proposal and urged the Association team members to accept the Palmer Report.

We conclude that the direct communications by the Employer to support staff constituted the "expression of... views" which contained "promise of benefit" in violation of §1728 of MERA. The communications caused many support staff to reasonably conclude that the Employer was making a "promise of benefit" of what many support staff evidently considered an attractive wage offer. The fact that the wage offer was not actually made to the Association caused substantial damage to the progress of good faith negotiations. The totality of the Employer's actions contaminated the climate required for healthy negotiations and constituted bad faith bargaining and improper circumvention of the exclusive bargaining representative.

In fashioning a remedy for this unfair practice, we look to §1727(d) of MERA, which directs the Board to issue an order requiring the party who has committed an unfair labor practice to "cease and desist from the unfair labor practice and to take such affirmative action as the board shall order". Unfortunately, we are unable to undo the damage created by the Employer's improper actions with respect to the Palmer Report.

The Association requests that the Employer be directed to cease and desist from its illegal activity and to promptly enter into a good faith effort to negotiate a contract with the Association. We conclude that this is an appropriate remedy.

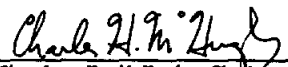
Finally, we note that the Association alleged in its unfair labor practice charge that the Employer had discriminated and retaliated against Association officers. We conclude that this charge has not been proven by the Association.

ORDER

Now therefore, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED that the Essex Junction Prudential Committee shall promptly enter into good faith negotiations with the Essex Junction Education Association concerning a collective bargaining contract covering support staff employed by the Essex Junction Prudential Committee and represented by the Essex Junction Education Association, and shall CEASE AND DESIST from communicating directly with support staff employees represented by the Essex Junction Education Association concerning the completed job classification and pay plan study done by Palmer and Associates until negotiations have been completed.

Dated this 11th day of April, 1991, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Charles H. McHugh, Chairman


Leslie G. Seaver


Carroll P. Comstock