VERMONT LABOR RELATIONS BOARD

CAVENDISH TOWN ELEMENTARY SCHOOL TEACHERS' ASSOCIATION, VERMONT-NEA/NEA	)	
	)	DOCKET NO. 93-8
v.	)	
CAVENDISH TOWN BOARD OF SCHOOL DIRECTORS	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On February 10, 1993, the Cavendish Town Elementary School Teachers' Association, Vermont-NEA/NEA ("Union"), filed an unfair labor practice charge against the Cavendish Town Board of School Directors ("School Board"). Therein, the Union alleged that the School Board violated 21 VSA §1726 (a) (1) and (5), and 16 VSA §§ 2001, 2006, 2007 and 2008 by interfering with employees' right to bargain, refusing to bargain, refusing to bargain in good faith, and improperly imposing terms and conditions of employment on teachers in unilaterally imposing a Teachers Employment Policy covering the 1991-92 and 1992-93 school years.

On March 22, 1993, taking the verified allegations contained in the unfair labor practice charge as true, the Labor Relations Board issued an unfair labor practice complaint. The parties stipulated to the facts and relevant exhibits, thus eliminating the need for an evidentiary hearing. The parties filed briefs on June 11, 1993. The Findings of Fact contained herein consist of the facts stipulated by the parties, plus relevant information from the exhibits which the parties attached to their stipulation of facts.

FINDINGS OF FACT

1. The School Board is responsible for overseeing public schools in the Town of Cavendish.

2. The Union is the exclusive bargaining agent for the approximately ten teachers employed by the School Board.

3. By letter dated October 31, 1990, the Union requested collective bargaining to negotiate a successor agreement to the 1989-91 collective bargaining agreement between the School Board and the Union. The Union made the bargaining request more than 120 days before the School Board's annual meeting (Exhibits A, B).

4. The School Board and the Union commenced collective bargaining on January 23, 1991. The School Board's spokesperson during pertinent collective bargaining sessions was Gary Lazetera. The Union's representative during pertinent collective bargaining sessions was Norman Bartlett.

5. The negotiating teams for the School Board and the Union met three times prior to declaring impasse on March 28, 1991. During the bargaining session which was held on February 20, 1991, the Union proposed a two-year agreement and requested that the School Board also make a proposal covering the 1991-93 school years. The School Board did not make a proposal covering the 1991-93 school years prior to impasse being declared and the parties proceeding to mediation.

6. Commissioner John Knight of the Federal Mediation and Conciliation Service met with the negotiating teams for the School Board and the Union on May 8, 1991 in an attempt to resolve the bargaining impasse.

7. Since Commissioner Knight's mediation efforts were unsuccessful, the School Board and the Union agreed to proceed to formal fact finding pursuant to 16 VSA §2007.

8. The fact finding panel was composed of Lawrence Kelly, Joyce Foster and J. Larry Foy, Esq. Representatives of the School Board and the Union appeared before the fact finding panel on December 9, 1991. At the December 9 hearing, the parties' representatives presented evidence to the fact finding panel. The parties were allowed to submit supplemental evidence by mail after the December 9 hearing. The fact finding hearing was declared closed on February 21, 1992. The parties presented three issues to the fact finding panel: 1) duration of the contract, 2) salary schedules, and 3) health insurance premiums.

9. On April 2, 1992, the fact finding committee chairman, J. Larry Foy, issued a fact finding report. The fact finding report set out the parties' respective positions relating to the duration of a collective bargaining agreement as follows:

> Association's Argument:
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> The Association opposes the School Board's proposal that the new contract be for 1991-92 (one year) only. The Association proposes a two year contract covering 1991-92 and 1992-93. The Association argues that a one year contract would require the parties immediately to begin negotiations for 1992-93. The parties already have been in negotiations since winter of 1990-91. The issues have been difficult and would be equally difficult if the parties were to continue negotiating for 1992-93. Such negotiations almost certainly would be protracted, would distract the energy and attention of everyone concerned and would undermine teacher morale. It also would likely result in the cost of another fact finding proceeding (and possibly mediation). It is in the parties' mutual interest to achieve the labor peace a two year contract would bring.
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> Board's Argument:
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> In other circumstances, a two year contract might be desirable for the reasons argued by the Association, but in

> light of current economic conditions, it is essential that a one year contract be agreed. Economic conditions have deteriorated to the point where a severe and persistent recession grips Vermont and Cavendish in particular. The future duration of the recession cannot be gauged. It would be irresponsible to agree to a second year when economic conditions for that year cannot yet be reliably forecast. It especially would be irresponsible for the Board to agree to salary increases it cannot afford if the recession continues. The Board must be allowed to assess what it is able to pay for 1992-93 in light of what economic developments occur in the coming months. The Board should not be required to make that assessment based upon unknowns. (Exhibit C, p. 5-6).

10. In the fact finding report, Foy recommended that the new contract be for a two year duration covering July 1, 1991 through June 30, 1993. Foy set forth the following reasons for his recommendation:

> The Association has made sound and persuasive arguments for a two year contract covering 1991-92 and 1992-93. The parties immediately would be back into negotiations if a one year contract were agreed. At present, a one year contract already would be nearly two thirds over. It is in both parties' interest to have respite from the tension of an ongoing and difficult labor dispute. The best interests of students, staff and community are best served by a decent interval between negotiations.
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> The School Board's argument that a salary and insurance settlement for 1992-93 should be made based upon the most current information would be more persuasive if this fact finding proceeding occurred last year (i.e., spring or summer of 1991). As it is, the July 1, 1992 second year proposed by the Association is merely three months away. The only way any significant informational advantage could be obtained at this point would be if a settlement for 1992-93 were delayed well into the 1992-93 school year. That would only exacerbate the work place and community tension discussed above. It would result in a second consecutive school year beginning and continuing for a long period of time without a new contract being in effect (Exhibit C, p. 10-11).

11. The Union position with respect to salaries at fact finding was that its proposed 1991-92 salary schedule would result in a 7.53% increase (inclusive of the cost of paying step

movement) over 1990-91 salaries, and its proposed 1992-93 salary schedule would result in a 6.88% increase (again, inclusive of step movement) over 1991-92 salaries. The School Board salary position at fact finding was that its proposed 1991-92 salary schedule would result in a 6.38% increase (inclusive of the cost of step movement) over 1990-91 salaries. Since the School Board proposed a one year contract, the School Board had no salary proposal for the 1992-93 school year. In the fact finding report, Foy recommended that the salary schedules proposed by the Union be accepted for 1991-92 and 1992-93 (Exhibit C).

12. During the time of the fact finding process, the percentage of health insurance premiums for teachers paid by the School Board were as follows: 100% for individual coverage, 90% for two person coverage and 90% for family coverage. The Union position during fact finding was that the School Board's contributions should be increased as follows: individual coverage remain at 100%, and two person and family coverage increase to 95%. The School Board proposed that its contributions toward health insurance premiums be frozen at the annual dollar levels contributed as of January 1991 for incumbent teachers, and that its percentage contribution be reduced to lower levels for teachers hired after July 1, 1991. In the fact finding report, Foy recommended that the School Board continue paying 100/90/90 percent of health insurance premium costs (Exhibit C).

13. Subsequent to receipt of the fact finding report, the School Board and the Union met in bargaining sessions on April 27, 1992 and July 23, 1992.

14. During the July 23, 1992, bargaining session, the School Board proposed a two year agreement covering the 1991-93 school years. This was the first time the School Board had proposed a two year agreement, and the first time it proposed terms for the 1992-93 school year. The salary schedule proposed by the School Board for the 1991-92 school year contained an increase from the 1990-91 school year. For the 1992-93 school year, the School Board proposed that teachers would move to the next appropriate step on the salary schedule and then their salaries would be reduced by 10 percent. The School Board proposed that its contribution toward health insurance premiums continue at the same percentages as previously for the 1991-92 school year, but that the School Board contribution be reduced during the 1992-93 school year. Specifically, the Board's contribution would be reduced during 1992-93 from full payment to 75% for single coverage, and from 90% for two person and family coverage to the total of the Board's single contribution plus 50% of the cost of the two person or family coverage (Exhibit D).

15. The Union rejected the School Board's proposal. The Union did not object to the School Board's proposal of a two year agreement. The Union proposed that the parties accept the recommendations of the fact finding report. The School Board rejected the Union's proposal.

16. At the close of the July 23, 1992, bargaining session, the School Board informed the Union that it was imposing its two year proposal pursuant to the finality provisions of 16 VSA §2008.

17. On August 20, 1992, the School Board followed up by sending a packet of information reflecting its finality position to Bartlett and each member of the Union. The packets included the finality Employment Policy and individual two year contracts covering the 1991-93 school years for each respective teacher (Exhibit E).

18. The Union advised its members to sign and return the imposed two contracts, with the qualification that the signing of those contracts did not constitute acceptance of the School Board's imposed Employment Policy by either the Union or its members. The Union informed the School Board by letter of September 28, 1992, that the Union did "not agree with the imposition of the contract for 1991-1992 or 1992-1993", and that the Union was "prepared to continue negotiations in an attempt to reach a mutually acceptable conclusion to these negotiations". (Exhibit F).

19. On October 23, 1992, Anthony Dupre, Chairman of the School Board, wrote a letter to Bartlett stating that the School Board was standing by its imposition of finality and refused to negotiate with regard to the 1991-93 school years. However, the School Board offered to proceed with negotiations for the 1993-94 school year (Exhibit G).

20. To date, the School Board has refused to continue negotiations for a 1991-92 or 1992-93 collective bargaining agreement.

OPINION

The Union contends that the School Board violated the duty to bargain in good faith when it imposed "finality" on the Cavendish teachers by unilaterally imposing a teacher employment policy covering the 1991-92 and 1992-93 school years.

Before reaching the merits of the Union's claim, we need first address the School Board's contention that the Union failed to file the unfair labor practice charge in a timely manner by not filing it until February 10, 1993. In this regard, 21 VSA §1727(a) provides that "no complaint shall issue based on any unfair labor practice occurring more than six months prior to the filing of the charge with the (B)oard." The six month clock begins to run at the time the charging party was aware, or reasonably should have been aware, that the alleged unfair labor practice occurred. Local 2323, IAFF v. City of Rutland, 13 VLRB 48, 57 (1990).

The School Board alleges that the Union was aware, or reasonably should have been aware, that the School Board was imposing the two year teacher employment policy on July 23, 1992, when at the close of a bargaining session the School Board informed the Union that it was imposing its two year proposal. Since the Union did not file the charge until more than six months after this date, the School Board contends that the charge was untimely filed.

The School Board argument ignores our precedents. First, the six month clock does not begin running on alleged unilateral changes in conditions of employment until the employer actually

implements the changes. Mt. Abraham Education Association v. Mt. Abraham Union High School Board of School Directors, 4 VLRB 224, 228-29 (1981). Here, the earliest date on which it can be construed that the School Board implemented its teacher employment policy was August 20, 1992, when the School Board forwarded a copy of the policy to the Union and teachers. The Union filed the charge less than six months after this date.

Moreover, the School Board argument ignores the fact that the Union protested the unilateral action by the School Board by letter of September 28, 1992, indicating that the Union did not agree with the imposition of the teacher employment policy by the School Board and that the Union was prepared to continue negotiations. In past cases, the Board has held that a bargaining duty does not survive after a failure to assert it for a period of six months; that the failure of a union to protest an alleged unilateral change in a condition of employment within the six month period for filing an unfair labor practice charge means the union has waived the right to bargain over it. City of Rutland, 13 VLRB at 55. VSEA v. State of Vermont, Dept. of Public Safety, 6 VLRB 217, 225-26 (1983). Conversely here, the fact that the Union protested the unilateral action by the School Board well within the six month period, and then filed an unfair labor practice charge well before six months passed after the School Board refused to continue negotiations, leads us to the conclusion that the charge was timely filed. Thus, the charge clearly was timely filed under both these lines of our precedents.

We turn to addressing the merits. The issue before us is whether the School Board violated its duty to bargain in good faith upon imposing the two year teacher employment policy under the authority of 16 VSA §2008. §2008 provides that "all decisions of the school board regarding matters in dispute in negotiations shall, after full compliance with this chapter, be final."

The Union alleges that the School Board violated its duty to bargain in good faith by including within the teacher employment policy terms substantially reducing teacher salaries and increasing their share of health insurance premiums for the second year of the policy, when the School Board had not even made proposals for a second year of a collective bargaining agreement until after the fact finding process was completed. The Union alleges that the term "matters in dispute" pursuant to §2008 refer to bargaining issues which were discussed in pre-impasse negotiations and were subject to the impasse resolution procedures of mediation and fact-finding set forth in 16 VSA §2006-2207. The Union contends that, since the School Board did not discuss any terms of the second year of the contract until after fact finding, such terms were not "matters in dispute" on which "finality" could be imposed.

The School Board contends that the duration of the contract being negotiated by the parties was a "matter in dispute" prior to the imposition of finality. The Employer reasons that this is because the Union proposed a two year contract prior to mediation, the parties then argued their respective positions on

duration during the fact finding process, the fact finder recommended a two year contract as proposed by the Union, and the School Board subsequently proposed the terms of a two year contract in a negotiations session prior to imposing finality.

Our determination whether the School Board committed an unfair labor practice requires us to interpret the provisions of §2008 in light of the principles of good faith bargaining. The duty to bargain in good faith is an obligation to participate actively in discussions so as to indicate a present intention to find a basis for agreement. Richford Teachers Association v. Richford Town Board of School Directors, 13 VLRB 154, 162 (1990). This implies an open mind and sincere desire to reach an agreement, as well as a serious intent to adjust differences and to reach an acceptable common ground. Id.; Chittenden South Education Association, Hinesburg Unit v. Hinesburg School District and Hinesburg School Board, 8 VLRB 219, 236 (1985), Affirmed, 147 Vt. 286 (1986).

Generally, employer bad faith bargaining can be characterized as a means to an illegal end or an attempt to expedite or "short-cut" normal collective bargaining deliberations. Rutland School Board v. Rutland Education Association, 2 VLRB 250, 273 (1979). Bad faith may be manifested in many ways; the employer may intend to subvert the authority of the bargaining representative, avoid settlement altogether, or attempt to effect an agreement on terms substantially dominated by management. Id. 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 exists. Id., at 273, 276. Hinesburg, 8 VLRB at 236.

The requirements of §2008 are examined in light of these principles. §2008 allows a school board to make final decisions regarding matters in dispute after the parties have failed to reach agreement through the process of negotiation, mediation and fact finding. Hinesburg, 147 Vt. at 290. Matters that are not in dispute have not been made part of the bargaining process, and thus cannot be unilaterally deleted or added pursuant to a declaration of finality under 16 VSA §2008. Id. The school board has the final "hammer" in negotiations, provided it has bargained in good faith and the negotiations process survives our scrutiny. Hinesburg, 8 VLRB at 247. The "matters in dispute" language of §2008 are construed so as to not allow school boards to hurry through negotiations and engage in shadow bargaining, and then unilaterally dictate whatever terms they desire. Id. at 241.

In applying these principles to the facts of this case, we conclude that the School Board committed an unfair labor practice in unilaterally imposing the two year teacher employment policy. The School Board is correct in observing that the duration of the contract was a matter in dispute during negotiations, since whether the contract should be for one year or two years was a matter the parties disagreed on throughout negotiations and the fact finding chairman made a recommendation that the contract should be for two years. However, that does not end the inquiry since both parties did not present proposals on the terms of the second year of the contract until the post-fact finding final negotiations sessions prior to the imposition of finality.

For us to allow the School Board to make a predictably unacceptable proposal on salaries and health insurance for the first time at a negotiations session, and then impose finality without any further negotiations or dispute resolution procedures being invoked, would make a mockery of the good faith bargaining principles we have set forth. The actions by the School Board substantially reducing teacher salaries, and increasing their health insurance premiums, after discussion of such terms at one bargaining session are completely contrary to demonstrating a serious intent to adjust differences and reach an acceptable common ground with the Union. By so acting, the School Board sought to "short-cut" normal collective bargaining deliberations. The School Board ensured, by its proposals, that settlement would be avoided altogether. This allowed the School Board to implement terms of employment on terms substantially dominated by management. The context in which the School Board's actions took place indicate clearly that bad faith existed.

We cannot permit the School Board to hurry through bargaining on the second year of a contract as it did, make predictably unacceptable proposals, and then dictate those unacceptable terms to the Union. The terms of the second year of the contract cannot be considered "matters in dispute" negotiated in "full compliance with this chapter", allowing the School Board to invoke finality pursuant to 16 VSA §2008, given the totality of the School Board's conduct in light of the context in which such conduct occurred. In sum, we conclude that the School Board committed an unfair labor practice in violation of 21 VSA §1726 (a)(1) and (5), and 16 VSA §2008, in unilaterally imposing the two year teacher employment policy.

We turn to discussing what remedy to apply as a result of the School Board's unfair labor practice. The Association requests that we direct the School Board to take the following remedial action: 1) cease and desist from implementing the terms of its illegally imposed employment policy, and make teachers who have been affected by the Employment Policy whole for their losses, including interest; 2) bargain in good faith over the terms of a 1991-92 and 1992-93 collective bargaining agreement and continue the terms and conditions of the 1989-91 Agreement until such time as all relevant provisions of the Vermont Statutes are fully complied with; 3) compensate the Union for all expenses incurred as a result of filing this charge; and 4) post this order for ninety days at the Cavendish Town Elementary School and the Cavendish Town Offices.

21 VSA §1727(d) 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." In exercising our broad powers to remedy unfair labor practices, our orders are to be remedial, "make whole" orders, not punitive. Rutland School Board, 2 VLRB at 286-87.

We first conclude that it is appropriate to order the School Board to rescind the terms of the teacher employment policy, and make teachers whole, including interest, for the losses suffered as a result of the implementation of the policy. As discussed previously, the implementation of the policy was an unfair labor

practice and, accordingly, it must be rescinded. Employees must be reimbursed for any economic losses suffered as a result of implementation of the policy in order to be made whole for the improper School Board action.

However, we do not believe it is appropriate to order the School Board to bargain concerning the 1991-92 school year. The problem with the teacher employment policy concerned its provisions for the second year of the policy, the 1992-93 school year, not the 1991-92 school year. The timing of the imposition of the teachers employment policy for the 1991-92 school year was proper, since it occurred more than 30 days after the parties received the fact finding report. Hinesburg, 8 VLRB at 240. Rutland School Board, 2 VLRB at 271-73. Also, the Union has made no contention that any of the terms of the policy for 1991-92 were improper. Under such circumstances, the proper remedy for 1991-92 is not a bargaining order, but rather to substitute in place of the improper two year policy a policy covering just 1991-92 with the terms being identical to the terms for such year contained in the improper two year policy. Hinesburg, 8 VLRB at 240-51.

We do believe it is appropriate to order the School Board to bargain concerning the 1992-93 school year. The proper remedy for the School Board's bad faith attempt to "short-cut" the normal collective bargaining deliberations for that year is to order that the School Board negotiate in good faith through the completion of mandated statutory impasse resolution procedures, if necessary.

The next issue is whether we should direct the School Board to compensate the Union for all expenses incurred as a result of filing this charge. The Board has recognized that such a remedy is an appropriate exercise of our remedial powers in certain cases. Rutland School Board, 2 VLRB at 286-87. In Rutland, the Board ordered the union to reimburse the school board for its reasonable expenses, including attorney's fees, incurred in unfair labor practice proceedings resulting from an illegal teachers' strike. Id. We conclude that the circumstances here similarly warrant the School Board reimbursing the Union for all reasonable expenses incurred in these unfair labor practice proceedings. This will serve to make the Union whole for having to litigate a situation brought about by School Board actions completely contrary to its obligation to bargain in good faith.

We also believe it is appropriate to order the School Board to post the Board's order in this case in all places customarily used for employer-employee communications for a period of ninety days.

Finally, we make clear one issue we are not deciding in this case. The Union requests that we hold that school boards may never issue a teacher employment policy for more than one year. We need not decide that issue to decide this case. We have determined that, under the circumstances, the School Board committed an unfair labor practice by implementing a two year policy. It is unnecessary to decide whether there is a blanket prohibition on multi-year policies, and we make no judgment on that issue.

ORDER

Based on findings of fact of the Vermont Labor Relations Board, the Board has concluded that the Cavendish Town Board of School Directors ("School Board") committed an unfair labor practice in collective bargaining negotiations with the Cavendish Town Elementary School Teachers' Association, Vermont-NEA/NEA ("Union"), and it is hereby ORDERED:

1. The School Board shall rescind the teacher employment policy which it implemented covering the 1991-92 and 1992-93 years, and shall substitute in its place a teacher employment policy covering the 1991-92 year with the terms being identical to the terms for such year contained in the improper two year policy;

2. The School Board shall engage in collective bargaining negotiations with the Cavendish Town Elementary School Teachers' Association, Vermont-NEA/NEA ("Union") for the 1992-93 year, and the School Board shall negotiate in good faith through the completion of statutory impasse resolution procedures, if necessary;

3. The School Board shall reimburse the teachers for economic losses, plus interest, realized as a result of the improper implementation of the teacher employment policy. The interest due teachers on lost sums shall be at the rate of 12 percent per annum and shall run from the date each paycheck was due during the period commencing with the losses and ending on the date the teachers receive such monies;

4. The School Board shall reimburse the Union for reasonable expenses incurred in these unfair labor practice proceedings;

5. The parties shall submit to the Labor Relations Board by September 3, 1993, a proposed order indicating the amount due each teacher, and the amount due the Union, and if they are unable to agree on such proposed order, shall notify the Board in writing that date of specific factual disagreements and a statement of issues which need to be decided by the Board. Any evidentiary hearing necessary on those issues shall be held on September 21, 1993, at 9:00 a.m., in the Labor Relations Board hearing room, 13 Baldwin Street, Montpelier, Vermont; and

6. The School Board shall post copies of this Order in all places customarily used for employer-employee communications for a period of ninety days.

Dated this 12th day of August, 1993, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Charles H. McHugh, Chairman

Louis A. Toepfer

Carroll P. Comstock