VERMONT LABOR RELATIONS BOARD

BURLINGTON EDUCATION ASSOCIATION	)	
	)	
v.	)	DOCKET NO. 92-48
	)	
BURLINGTON SCHOOL DISTRICT	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On September 14, 1992, the Burlington Education Association ("Association") filed an unfair labor practice charge against the Burlington School District ("School Board"). Therein, the Association alleged that the School Board violated 21 VSA §1726(a)(5) by failing to bargain in good faith with the Association. Specifically, the Association alleged that the School Board committed an unfair labor practice by unilaterally eliminating the bargaining unit position of Driver Education Teacher at Burlington High School, during the term of the collective bargaining agreement, and transferring the work of the teacher in that position to the Continuing Education Program.

On March 5, 1993, the Vermont Labor Relations Board issued an unfair labor practice complaint. A hearing was held on May 6, 1993, in the Board hearing room in Montpelier before Board Members Charles McHugh, Chairman; Catherine Frank and Louis Toepfer. Attorney Matthew Daley represented the School Board. Joel Cook, Vermont-NEA General Counsel, represented the Association. The Association filed a post-hearing brief on May 13, 1993. The School Board filed a brief on May 18, 1993.

FINDINGS OF FACT

1. The Association and the School Board entered into a collective bargaining agreement effective for the period September 1, 1988, through August 31, 1992 ("Agreement"). During the 1991-92 school year, the parties were negotiating a successor agreement to the Agreement.

2. The bargaining unit covered by the Agreement consisted of teachers employed by the Burlington School District. The position of Driver Education Teacher at Burlington High School was part of the bargaining unit covered by the Agreement.

3. Rinald Precourt was Driver Education Teacher at Burlington High School from 1985 through the end of the 1991-92 school year. Precourt has been a teacher for 32 years, the last seventeen years with the Burlington School District.

4. In addition to the general school program, in which all instruction is bargaining unit work, the School Board also operates a continuing education program. The continuing education program offers to adults and high school age students a variety of educational programs. The continuing education program is operated, and fully funded, by the Burlington School District. The program has a half-time director and half-time secretary. Instruction under the continuing education program generally is offered outside the regular school day, and the instructors are not members of the bargaining unit while performing their duties. The only continuing education instruction offered during the regular school day usually have been technical or vocational programs. Continuing education instructors are paid on an hourly basis and are not covered by the terms of the Agreement.

5. Driver education in Burlington was provided in both the regular school program and the continuing education program from at least the 1970's through the 1991-92 school year. It was provided in the regular school program for those students who needed special assistance, or for those students whose class schedule allowed it and who elected to enroll. It was provided in the continuing education program for those students who were unable, or found it inconvenient, to take it during the regular school day.

6. Precourt performed his instruction and driving duties only during the regular school day (i.e., 7:45 a.m. - 3:00 p.m.). The driver education instructors in the continuing education program performed their duties only during hours outside the regular school day. This was the manner in which driver education was provided at the inception of the Agreement and during its term, until the 1992-93 school year.

7. During the 1991-92 school year, 40 percent of the students who took driver education took it during the regular school day with Precourt, while the remaining 60 percent of students took it through the continuing education program.

8. As a consequence of declining revenues, the School Board conducted meetings and public hearings during the Fall and early Winter of 1991-92 to consider ways to reduce spending. Among the areas considered was reducing the number of teachers. At a December 17, 1991, School Board meeting, the School Board decided, among other things, to eliminate the Driver Education position, occupied by Precourt, and to eliminate driver education from the regular school program (School Board Exhibit 2).

9. At the January 7, 1992, School Board meeting, the School Board adopted the budget for the following school year. The budget reflected the elimination of the Driver Education Teacher position at Burlington High School (School Board Exhibit 3).

10. The decision to eliminate the Driver Education Teacher position was made for the purpose of saving money. The School Board estimated that the savings would be $24,000, reflecting the belief that Precourt would displace a less experienced teacher in another teaching area whose compensation was $24,00. Precourt's salary for 1991-92 was $45,000 (School Board Exhibit 3).

11. The School Board made the decision to eliminate the Driver Education Teacher position without negotiations with the Association.

12. Section 6.10 of the Contract provides in pertinent part as follows:

> (a) The Board agrees that reduction of the professional staff of the Burlington School District covered by this Agreement will not be made arbitrarily, capriciously, or without basis in fact, or without just cause.
>
> (b) The Board shall notify the Association in writing of any contemplated reduction in teaching staff on or before February 1.
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> (c) The Board will provide, at the written request of the Association, an opportunity to challenge the need for a reduction in staff. Upon timely written request, the Board will provide the Association on or before March 7 with relevant written data which the Board will consider in making its decision on the contemplated reduction in staff.
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> The Association will, in good faith, inform the Board in writing on or before March 14 as to those issues which will form the basis of the Association challenge to the contemplated reduction in teaching

> staff. At the challenge meeting, which will occur on or before March 22, the Association will be free to raise any other issues which it did not in good faith contemplate raising when its issue notice was sent to the Board. It is agreed that the Association challenge will be heard prior to formal Board action on the reduction in teaching staff. The challenge and the decision on reduction in teaching staff by the Board may occur at the same meeting.
>
> . . .
>
> (q) A grievance alleging a violation of a teacher's rights pursuant to section 6.10, except subsection (a), shall be processed pursuant to the expedited procedure of section 7.3 of this Agreement.
>
> (School Board Exhibit 1)

13. Section 6.11 of the Contract provides in pertinent part as follows:

> The provisions of . . . subsection 6.10(a) shall not be subject to the grievance and arbitration procedures of this Agreement . . .
>
> (School Board Exhibit 1)

14. By memorandum of January 29, 1992, School Board Chair Nancy Furlong notified Association President Linda Deliduka of a "contemplated reduction of teaching staff" of 60 Full Time Equivalent positions (School Board Exhibit 4).

15. On March 18, 1992, Assistant Superintendent Bruce Chattman notified Deliduka by letter that the School Board, at the March 17, 1992, meeting, had acted to "reduce in force" twelve teachers, including Precourt (School Board Exhibit 5).

16. Chattman also informed Precourt by letter of March 18, 1992, that his position was being eliminated and he was being issued a "reduction in force" notice. Precourt received this letter on March 26, 1992 (School Board Exhibit 6).

17. The Association initiated no action to challenge the elimination of the Driver Education Teacher position, or the reduction in force of Precourt, pursuant to Section 6.10 of the Contract.

18. Precourt remained employed as a Driver Education Teacher until the conclusion of the 1991-92 school year. Precourt then was laid off for the 1992-93 school year as he did not displace another teacher.

19. At some time prior to May 7, 1992, the School Board decided that it would increase the availability of driver education offered through the continuing education program, and would expand the hours of driver education offered through continuing education into the early afternoon hours. The School Board did not notify the Association of these plans.

20. On May 7, 1992, Superintendent Paul Danyow wrote a letter to Bruce Richardson, Deputy Commissioner of the State Department of Education, which provided as follows:

> As part of our restructuring efforts at Burlington High School, we are proposing to use an alternative approach to providing driver education for our students. In order to implement this change, we plan to depart from the traditional format. We believe that this is consistent with the spirit and intent of V.S.A. Title 16 §1045.
>
> Each year Burlington High School offers driver education to about 240 students. Presently about 60% of these elect to take the course through the Continuing Education Program. A major reason for this is the limited time available for course selection during the traditional eight period day to meet current distribution requirements.
>
> We plan to move all driver education to the Continuing Education Program and to expand instruction throughout the early afternoon and evening as necessary to meet student demand and availability. The program will remain accessible to all qualified students at no cost.

This will have both financial and programmatic benefits because we will be able to deliver the instruction for approximately 1/3 of the present cost while extending the school day without adding costs to the taxpayer.

If you have any questions about this plan, please contact me.

(School Board Exhibit 7)

21. On September 15, 1992, the Vermont State Board of Education voted to grant the Burlington School District a waiver of the requirement of driver education having to be offered during regular school hours (School Board Exhibit 8).

22. During the 1992-93 school year, driver education was offered at Burlington High School exclusively through the continuing education program. The offerings of this program were expanded to accommodate the students who previously would have taken driver education with Precourt during the daytime. The hours of the program were expanded so that instructors were performing duties from 1:30 p.m. - 4:00 p.m., in addition to the evening hours. Also, the driving portion of driver education was conducted during other times of the regular school day.

OPINION

At issue is whether the School Board violated 21 VSA §1726(a)(5) by failing to bargain in good faith with the Association. Specifically, the Association alleges that the School Board committed an unfair labor practice by unilaterally eliminating the bargaining unit position of Driver Education Teacher at Burlington High School, during the term of the collective bargaining agreement, and transferring the work of the teacher in that position to the Continuing Education Program.

The School Board contends that the unfair labor practice charge by the Association is without basis because the School Board acted according to the reduction in force provisions of the collective bargaining agreement in eliminating the position of Driver Education Teacher, and laying off the incumbent of the position, Rinald Precourt. The School Board asserts that the Association waived its right to contest the elimination of the position by not pursuing its contractually provided right to challenge the School Board's action. The School Board maintains that an improper transfer of bargaining unit work did not occur because such work was being performed by the Continuing Education Program prior to the elimination of the Driver Education Teacher position occupied by Precourt, and because the action was taken to reduce spending.

21 VSA §1726(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively in good faith with the exclusive bargaining agent". 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 v. City of Burlington, 142 Vt. 434, 436-37 (1983).

It is clear that the School Board eliminated the Driver Education Teacher position and transferred the work of that position to the Continuing Education Program without negotiating with the Union. The next consideration in determining whether a per se violation of the duty to bargain in good faith exists is whether the transfer of bargaining unit work is a mandatory subject of bargaining pursuant to 16 VSA §2004, which requires bargaining on "matters of salary (and) related economic conditions of employment".

In construing language under the National Labor Relations Act, which requires employers and unions to bargain with respect to "wages, hours and other terms and conditions of employment", 29 U.S.C. §158(d); the D.C. Circuit Court of Appeals decided that the allocation of work to a bargaining unit is a "term and condition of employment." Road Sprinkler Fitters Union v. NLRB, 676 F.2d 826, 831 (1982). The court concluded that an employer may not divert work away from a bargaining unit without fulfilling the statutory duty to bargain. Id. Such improper transfers of work occur when an employer sets up a "runaway shop" at another location, subcontracts work or diverts work from bargaining unit employees to non-bargaining unit employees. Id.

The accepted test for whether work has been transferred away from a bargaining unit is whether, as a result of decisions by

the employer, the bargaining unit in question has suffered an adverse impact. Id. In other words, the proper question is whether work was allocated in such a way so as to have caused the bargaining unit to lose work which, in light of past practices, the bargaining unit otherwise would have been expected to perform. Id. at 831-32.

The union may waive its right to bargain over such work, but such waiver must be clear and unmistakable. Id. at 833. Also, the employer may not shift work away from the bargaining unit simply because it is to the employer's economic advantage. Id. at 834. The views of the Road Sprinkler court are consistent with those of other federal appeals courts. See Soule Glass & Glazing Co. v. NLRB, 652 F.2d 1055, 1088 (1st Cir. 1981); Office & Professional Employees International Union, Local 425 v. NLRB, 419 F.2d 314, 321 (D.C. Cir. 1969).

We find this precedent persuasive given the fact that both the NLRA and 16 VSA §2004 make economic conditions of employment mandatory subjects of bargaining. We conclude that the transfer of bargaining unit work constitutes a mandatory subject of bargaining.

Also, setting aside for the moment the contract language on layoffs, it seems clear that the School Board was obligated to bargain with the Association over the diversion of work to the continuing education program. This is because existing work has been diverted away from the bargaining unit to non-bargaining unit employees, under past practice it is work the bargaining unit was performing, and the bargaining unit has suffered an

adverse impact. Road Sprinkler, 676 F.2d at 831. This is evident by the fact that the driver education work which previously had been done by Precourt was transferred to the Continuing Education Program, and because Precourt, a member of the bargaining unit, was laid off. The fact that the diversion of work was to the School Board's economic advantage does not negate the obligation to bargain. Id. at 834. This does not mean we are insensitive to the difficult fiscal constraints faced by the School Board, but recognizes that difficult fiscal times do not eliminate a bargaining obligation.

Nonetheless, the School Board contends that the Association has waived its right to bargain on this issue because the Association did not pursue its contractually provided right to challenge the School Board's actions of eliminating the position occupied by Precourt and laying off Precourt. In determining whether the Union waived its right to bargain, we look to past decisions of the Board and the Vermont Supreme Court on waiver issues.

In determining whether a party has waived its bargaining rights, we have 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, 375 (1984). VSEA v. State of Vermont 9 re: Implementation of "6-2" Schedule at Vermont State Hospital), 5 VLRB 303, 326 (1982). In such matters, we are further guided by our Supreme Court, which defines a waiver as the "intentional relinquishment of a known right". In re Grievance of Guttman, 139 Vt. 574 (1981). The fact that a matter has been omitted from a labor agreement and has not been

discussed in negotiations does not, in and of itself, constitute a waiver of the parties' right to contest a unilateral change over a particular subject unless the parties have explicitly waived that right. This is particularly true where an established past practice is concerned. Mt. Abraham Education Association v. Mount Abraham Union High School Board, 4 VLRB 224, 231 (1981).

If the Association was contesting Precourt's layoff standing by itself, the School Board would have a stronger waiver argument. However, the Association is not contesting the layoff standing by itself. The Association is contesting the layoff in combination with the fact that the work previously done by Precourt was given to instructors outside the bargaining unit. If the work previously done by Precourt was not done after his layoff, the School Board would be on more solid ground in relying on the contractual language. However, the fact that the work was done by instructors outside the bargaining unit, a subject not covered in the contract and one obviously important to the Association, leads us to conclude that the Association did not intentionally relinquish the right to contest such transfer of work.

Our conclusion in this regard does not mean we believe that the Association bears no responsibility for the events in this matter. The contractual language on layoffs contemplates a process where there will be open communication on any concerns with respect to potential layoffs so that the most informed reduction in force decisions can be made. At the time the School Board informed the Association of Precourt's impending layoff, it would have been reasonable for the Association to at least raise

questions on whether and/or how the work performed by Precourt would be otherwise assigned. If the Association had raised such questions, perhaps the plan to transfer the work would have come to light earlier, and events would not have transpired as they did.

In any event, however, the Association's failure to raise such questions does not constitute a waiver to contest the ultimate transfer of work. The School Board did not inform the Association at any time that the work performed by Precourt was to be assigned to the Continuing Education Program. Under such circumstances, we cannot find the Association intentionally relinquished the right to contest the transfer.

In sum, the unilateral actions by the School Board of eliminating Precourt's position, laying him off and transferring the work he had performed to the Continuing Education Program was a per se violation of the duty to bargain, and the Association did not waive its right to bargain over this issue.

In deciding what remedy to apply as a result of the School Board's unfair labor practice, we look to 21 VSA §1727(d), which authorizes the Board to require a party committing 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. Cavendish Town Elementary School Teachers' Association, Vermont-NEA/NEA v. Cavendish Town Board of School Directors, 16 VLRB 378, 391 (1993). The U.S. Supreme Court has defined the "affirmative action" provision as "redressing the wrong incurred

by an unfair labor practice . . . to restore the economic status quo that would have obtained but for the (employer's) wrongful act. Franks v. Bowman Transp. Co., 424 US 747, 769 (1976). The task of the Board "is to take measures designed to recreate the conditions and relationships that would have been had there been no unfair labor practice. Id.

The Association requests as a remedy that we order the School Board to: a) cease and desist from not providing driver education instruction through bargaining unit personnel, b) reinstate the position of Driver Education Teacher to the bargaining unit and restore Precourt to that position; c) pay Precourt back pay, plus interest, and benefits, from September 1, 1992, to the present; d) negotiate in good faith with the Association; and e) post the Board's decision and order at each of its schools at places normally used for employer-employee communications.

In determining the remedy, we are seeking to enforce the duty to negotiate in good faith. At the very least, this requires the School Board to cease and desist from not providing driver education instruction through bargaining unit personnel, and negotiate in good faith with the Association on the transfer of such bargaining unit work.

However, this remedy would be incomplete as a "make whole" order to restore the economic status quo that would have obtained but for the School Board's wrongful act. A common remedy in similar cases, in addition to a bargaining order, is to order affected employees reinstated with back pay and benefits.

Middlebury Union High School Educational Support Personnel Unit v. Middlebury Union High School Board of School Directors, 15 VLRB 397, 416 (1992). An implication arising from our cease and desist order, and bargaining order, is that the position of Driver Education Teacher must be restored to the bargaining unit, and Precourt must be reinstated to that position.

Under the circumstances, though, we do not believe that a full back pay order is an "appropriate measure designed to recreate the conditions and relationships that would have been had there been no unfair labor practice". Bowman Transportation, 424 U.S. at 769. As previously indicated, we believe that the Association bears some responsibility for the events which transpired in this matter by not raising questions on whether and/or how Precourt's work would be done, which would have been reasonable to bring forward at the time in March, 1992, that the Precourt's impending layoff was announced by the School Board. We can only speculate as to how events would have proceeded differently, but the Association's failure is a relevant factor in seeking to recreate the conditions and relationships that would have been had there been no unfair labor practice. If the Association had raised questions, the plans of the School Board to transfer the work to the Continuing Education Program may have come to the Association's attention much sooner than it ultimately did, which may have affected subsequent events.

An appropriate remedy to take account of the Association's partial share of responsibility in this matter is to not require the School Board to pay Precourt back pay for the same period of time - i.e., six months - that the Association waited, after being

informed of Precourt's impending layoff, before officially complaining of the action by filing an unfair labor practice charge.

ORDER

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

1. The Burlington School District Board of School Commissioners ("School Board") shall cease and desist from not providing driver education instruction through the bargaining unit represented by the Burlington Education Association ("Association");

2. The School Board shall bargain in good faith with the Association with respect to the transfer of such bargaining unit work out of the bargaining unit;

3. The School Board shall restore the position of Driver Education Teacher to the bargaining unit represented by the Association, and shall reinstate Rinald Precourt to that position;

4. The School Board shall pay Precourt back pay, plus interest, from March 1, 1993, until his reinstatement, minus any income (including unemployment compensation received and not paid back) received by Precourt in the interim;

5. Precourt shall be awarded benefits from September 1, 1992, until his reinstatement;

6. The interest due Precourt on back pay shall be computed on gross pay and shall be at the rate of 12 percent per annum and shall run from the date each paycheck was due commencing with March 1, 1993, and ending on the date Precourt receives such monies; such interest for each paycheck date shall be computed from the amount of each paycheck minus income (including unemployment compensation) received by Precourt during the payroll period;

7. The parties shall submit to the Board by December 6, 1993, a proposed order indicating the specific amount of back pay and other benefits due Precourt; and if they are unable to agree on such proposed order, shall notify the Board in writing that date of specific facts agreed to by the parties, specific areas of factual disagreement and a statement of issues which need to be decided by the Board. Any evidentiary hearing necessary on these issues shall be held on December 20, 1993, at 9:30 a.m. in the Labor Relations Board hearing room, 13 Baldwin Street, Montpelier, Vermont; and

8. The School Board shall have available for review in workplaces a copy of the full decision of the Labor Relations Board in this matter, and shall post these Order pages of the decision in places in all workplaces normally used for employer-employee communications.

Dated this 18th day of November, 1993, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Charles H. McHugh, Chairman

Catherine L. Frank

Louis A. Toepfer