VERMONT LABOR RELATIONS BOARD

AFSCME LOCAL 1201, COUNCIL 93	)	
	)	DOCKET NO. 94-62
v.	)	
CITY OF RUTLAND	)	

FINDINGS OF FACT, OPINION AND ORDER

On October 20, 1994, AFSCME Local 1201, Council 93 ("Union"), filed an unfair labor practice charge against the City of Rutland ("Employer"). Therein, the Union alleged that the Employer committed an unfair labor practice, in violation of 21 V.S.A. §1726(a)(5), by unilaterally implementing a drug-free workplace policy and refusing to negotiate its terms and conditions. The Employer filed a response to the charge on November 4, 1994. The Labor Relations Board issued an unfair labor practice complaint on November 30, 1994.

A hearing was held before Labor Relations Board Members Charles McHugh, Chairman, Leslie Seaver and Carroll Comstock on January 19, 1995, in the Board hearing room in Montpelier. Anthony DiRocco, Employer Consultant and Labor Relations Specialist, represented the Employer. Ralph Crippen, AFSCME Council 93 Vermont Coordinator, represented the Union. The Union filed a brief on February 1, 1995. The Employer filed a brief on February 2, 1995.

FINDINGS OF FACT

1. The Union is the exclusive bargaining representative of Department of Public Works employees of the Employer. The Union and the Employer entered into a collective bargaining agreement effective for the period July 1, 1991 - June 30, 1994. Article 19 of the agreement provides that the "discipline and/or dismissal of

employees is to be for just cause according to the following procedures." The agreement specifies the procedures as follows:

1. First offense, an oral caution.

2. Second offense, a written warning.

3. Third offense, a written reprimand.

4. Fourth offense, suspension without pay for a period up to but not to exceed ten (10) work days as determined by the supervising authority.

5. Fifth offense, termination of employment.

DEPENDING ON THE SERIOUSNESS OF THE OFFENSE AND THE NATURE OF THE OFFENSE, DISCIPLINE MAY START AT THE HIGHEST APPROPRIATE LEVEL, I.E., IF A SERIOUS OFFENSE IS COMMITTED, SUCH AS THEFT, THE FIFTH STEP MAY BE USED WITHOUT RECOURSE TO STEPS 1 - 4. THE DISCIPLINING AUTHORITY MAY REPEAT A LOWER STEP IF HE/SHE DETERMINES THAT TO BE THE APPROPRIATE ACTION TO TAKE.

2. In a March 22, 1993, report on the Employer's compliance with specific requirements applicable to federal financial assistance program transactions, an independent auditor indicated that there was no evidence that the Employer had adopted a policy which complied with the federal Drug-Free Workplace Act (Employer Exhibit A).

3. The federal Drug-Free Workplace Act of 1988 provides that no federal agency shall enter into contracts or make grants unless such contracts and grants include certification by the contractor or grantee that the contractor or grantee will not engage in the unlawful manufacture, dispensation, possession, or use of a controlled substance in the performance of the contract. 41 U.S.C. §701(a)(2), §702(a)(2). §701(a)(1) and §702(a)(2) state that the contractor or grantee must certify to the contracting or granting agency that it will provide a drug-free workplace by:

(A) publishing a statement notifying employees that the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited in the (contractor's or grantee's) workplace and specifying the actions that will be taken against employees for violations of such prohibition;

(B) establishing a drug-free awareness program to inform employees about -
(i) the dangers of drug abuse in the workplace;
(ii) the (contractor's or grantor's) policy of maintaining a drug-free workplace;
(iii) any available drug counseling, rehabilitation, and employee assistance programs; and
(iv) the penalties that may be imposed upon employees for drug abuse violations;

(C) making it a requirement that each employee to be engaged in the performance of such (contract or grant) be given a copy of the statement required by subparagraph (A);

(D) notifying the employee in the statement required by subparagraph (A), that as a condition of employment on such (contract or grant), the employee will -
(i) abide by the terms of the statement; and
(ii) notify the employer of any criminal drug statute conviction for a violation occurring in the workplace no later than 5 days after such conviction;

(E) notifying the (contracting or granting) agency within 10 days after receiving notice under subparagraph (D)(ii) from an employee or otherwise receiving actual notice of such conviction;

(F) imposing a sanction on, or requiring the satisfactory participation in a drug abuse assistance or rehabilitation program by, any employee who is so convicted, as required by section 703 of this Title; and

(G) making a good faith effort to continue to maintain a drug-free workplace through implementation of subparagraphs (A), (B), (C), (D), (E), and (F).

4. §703 of the federal Drug-Free Workplace Act states:

A grantor or contractor shall, within 30 days after receiving notice from an employee of a conviction pursuant to section 701(a)(1)(D)(ii) or 702(a)(1)(D)(ii) of this Title -
(1) take appropriate personnel action against such employee up to and including termination; or
(2) require such employee to satisfactorily participate in a drug abuse assistance or rehabilitation program

approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency.

5. The Notice and Final Rule issued to implement the federal Drug-Free Workplace Act contains information in the form of questions and answers to provide guidance to meet the requirements of the Act. One of the questions and answers provides as follows:

> . . .
>
> Clarify whether the requirements of the Act and regulations preempt collective bargaining agreements and inform grantees what to do about negotiations with unions about drug-free workplace requirements.
> **Response:** These requirements co-exist with the collective bargaining process. Compliance with the requirements of the Act and regulations is a condition of receiving a Federal grant. Preemption is not an issue. The Act and regulations do not purport to compel any change in existing labor-management agreements. Of course, labor and management cannot, via a collective bargaining agreement, nullify a grant condition based on federal law. Federal agencies are not compelled to provide grants to organizations that fail to comply with a statutorily-imposed grant condition, for whatever reason. However, where the regulations provide discretion to grantees about the mode of compliance with the regulations (e.g., a grantee may either take disciplinary action against an employee convicted of a criminal drug offense resulting from a violation occurring in the workplace or refer the employee for rehabilitation), labor and management may determine the mode of compliance through collective bargaining.
>
> Governmentwide Implementation of the Drug-Free Workplace Act of 1988, 55 Fed. Reg. 21,687 (1990)

6. Prior to July 6, 1993, the Assistant City Attorney developed a proposed drug-free workplace policy, as well as proposed sexual harassment and no-smoking policies. On July 6, 1993, the Board of Alderman of the Employer, in public session, referred the proposed policies to the General Committee of the Board of Alderman. The referral is noted in the published minutes of the Board (Employer Exhibit B).

7. Public notice of meetings of the Board of Alderman is provided by two postings in City Hall, and one posting in the City Recreation Department. The Board of Alderman meetings are televised on public access cable television.

8. The Employer did not notify the Union directly of either the proposed drug-free workplace policy or that the proposed policy was being referred to the General Committee.

9. On July 14, 1993, the General Committee met in public session to discuss the proposed drug-free workplace, sexual harassment and no-smoking policies. Notice of the meeting was publicly posted prior to the meeting. The Employer did not notify the Union directly of this meeting (Employer Exhibit C).

10. On October 20, 1993, the General Committee met in public session to discuss the proposed drug-free workplace and sexual harassment policies. The Employer did not notify the Union directly of this meeting (Employer Exhibit D).

11. On November 2, 1993, the Board of Alderman approved a drug-free workplace policy. The Employer's Drug-Free Workplace Policy, which was attached to the minutes of the November 2, 1993, meeting, provided in pertinent part as follows:

> PURPOSE AND POLICY STATEMENT
>
> As an employer, the City of Rutland is responsible for maintaining safe, efficient working conditions for its employees by providing a drug-free workplace. Therefore, employees shall not engage in the unlawful manufacture, distribution, possession or use of controlled substances (drugs) on the job or on any City work site.
>
> An employee who is under the influence of any drug on the job may pose serious safety and health risks not only to the user but to co-workers and the general public at large.

. . .

APPLICABILITY AND GENERAL POLICY CONDITIONS

The following conditions shall be applicable to all employees of the City:

1. Employees shall be required, as a condition of their employment, to abide by the terms and conditions of this Drug-Free Workplace Policy.

2. An employee shall notify his Supervisor, who shall notify the Department Head, of any criminal drug statute conviction for a violation occurring in the workplace no later than five (5) days after such conviction. Failure to do so will result in discipline, up to and including dismissal.

3. If a convicted employee works in a federally funded program, the involved federal grant agency shall be notified of the conviction within ten (10) days of the City's receiving the notice of the conviction. In the case of the Vermont Community Development Program, notify the Department of Housing and Community Affairs.

4. An employee convicted under any criminal drug statute for a violation occurring in the workplace, while on or off duty, or on duty away from the workplace, shall be immediately dismissed for the first offense.

5. In the absence of compelling mitigating circumstances, an employee convicted under any criminal drug statute for a violation not occurring in the workplace while not on duty shall be subject to immediate dismissal for the first offense if convicted of a felony. If the conviction is not a felony, discipline up to and including dismissal may be imposed, including for the first offense, provided that there is a nexus between the offense and the job of the employee (emphasis in original).

6. Appropriate disciplinary and/or corrective action is to be taken within thirty (30) days after the employer receives notice of a conviction. This, however, is not to be construed to limit the authority of the employer to take such action thereafter. Any disciplinary action must comply with the collective bargaining agreement, Section 504 of the Rehabilitation Act of 1973 (sic), and the Americans with Disabilities Act, if applicable.

7. An employee not convicted under any criminal drug statute, but who engages in the illegal manufacture, distribution, dispensation, possession or use of

controlled substances in any City workplace while on or off duty, or on duty away from the workplace, shall be subject to discipline up to and including dismissal for the first occurrence. An employee engaging in such actions while off duty and away from the workplace may be subject to discipline, up to and including dismissal, including for the first offense, provided there is a nexus to the employee's job and just cause for the discipline (emphasis in original).

8. An employee on City premises who appears to be under the influence of, or who possesses illegal or non-medically authorized drugs, or who has used such drugs on municipal premises, may be temporarily relieved from duty pending further investigation.

9. If the use of legal drugs endangers safety, management may (but is not required to) reassign work on a temporary or permanent basis.

10. Employees must observe other work rules established by their employing departments regarding the use, possession or presence of drugs involving their employment.

11. Each employee of the City will make a good faith effort to maintain a drug-free workplace and uphold and promote this policy.

. . .

(City Exhibit E).

12. Prior to March 30, 1994, the Employer did not post copies of the Drug-Free Workplace Policy in workplaces of employees represented by the Union, did not provide copies of the policy directly to the employees, and did not otherwise notify the employees of the policy. The Employer also, prior to March 30, 1994, did not notify any Union representative of the existence or contents of the policy.

13. On March 30, 1994, in negotiations for a successor collective bargaining agreement to the 1991-94 agreement, the Employer and the Union exchanged bargaining proposals. Among the Employer proposals was the following:

Article 19 - Discipline and Discharge:

Revise Fifth offense notation as follows:

> DEPENDING ON THE SERIOUSNESS OF THE OFFENSE AND THE NATURE OF THE OFFENSE, DISCIPLINE MAY START AT THE HIGHEST APPROPRIATE LEVEL, I.E., IF A SERIOUS OFFENSE IS COMMITTED, SUCH AS THEFT OR **VIOLATION OF THE CITY'S NO DRUGS POLICY**, THE FIFTH STEP MAY BE USED WITHOUT RECOURSE . . . (CONTINUE REST OF LANGUAGE) (emphasis in original)

(Union Exhibit 1).

14. Upon receipt of this proposal, Union representatives and members became aware for the first time that the Employer had approved a drug-free workplace policy. The Union requested a copy of the policy. The Employer provided a copy of the Employer's Drug-Free Workplace Policy to the Union on May 19, 1994.

15. On June 21, 1994, the Union orally requested that the Employer negotiate the contents of the Drug-Free Workplace Policy. The Employer refused to negotiate the contents of the policy.

16. Union Representative Ralph Crippen put the Union request to negotiate in writing by letter of June 27, 1994. In a July 19, 1994, letter in response, City Attorney Frank Zetelski stated:

> This is in response to your letter dated June 27, 1994, regarding the City's position on negotiating the contents of the Drug Free Workplace Policy.
>
> The City of Rutland does decline to negotiate the contents of that policy. The policy was passed in public session on November 2, 1993. The policy had also been discussed in committee prior to its November 2, 1993 approval. Any request to negotiate the contents of that policy is untimely.
>
> The City proposal in negotiations is to include a violation of that policy in the Discipline and Discharge procedures in the contract and not to negotiate the content of that policy.

> Further, the City implemented this policy in accordance with the Drug Free Workplace Act. As a result, in addition to any questions of the negotiability of the policy and timeliness in the first instance, there may also be questions of public policy which remove the subject from the area of negotiations.
>
> (Union Exhibit 4).

17. On or about September 21, 1994, the Employer posted copies of an unsigned version of the Employer's Drug-Free Workplace Policy on bulletin boards in the workplaces of the employees represented by the Union. This was the first time that copies of the policy were posted in workplaces (Union Exhibit 5).

18. In December, 1994, the Employer placed a copy of the Drug-Free Workplace Policy in each employee's paycheck. This was the first time that the Employer provided copies of the policy to each individual employee.

OPINION

The Union contends that the Employer violated the duty to bargain in good faith by unilaterally implementing a drug-free workplace policy and refusing to negotiate its terms and conditions.

Before reaching the merits of the Union's claim, we first address the Employer's contention that the Union failed to file the unfair labor practice charge in a timely manner by not filing it until October 20, 1994. In this regard, 21 V.S.A. §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 Board", and that the Board "may waive the six-month period if it finds that . . the aggrieved person did not understand that an unfair labor practice had been perpetrated against him". Under this

provision, 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 Employer alleges that the Union's charge was untimely because it was filed nearly a year after the Board of Alderman passed the Drug-Free Workplace Policy on November 2, 1993. The Employer contends that the public warning of Board of Alderman meetings, the public nature of such meetings (including the fact that meetings are televised), and the publishing of minutes from such meetings suffice to constitute making the Union and employees aware that the Drug-Free Workplace Policy had been implemented.

We disagree. There is no proof that the Union and the employees had independent knowledge of the action by the Board of Alderman. Under such circumstances, at the very least, the Employer was required to either post the new policy in the workplace, or forward a copy of the policy to employees or the Union, before we would conclude that the Union should reasonably have been aware that an alleged unilateral implementation of a policy occurred. Rutland, 13 VLRB at 55-57. Cavendish Town Elementary School Teachers' Association, Vermont-NEA/NEA v. Cavendish Town Board of School Directors, 16 VLRB 378, 385-86 (1993). Here, neither the Union nor employees received a copy of the Drug-Free Workplace Policy until May 19, 1994, when the Employer provided the Union with a copy of the policy. The fact that the Union protested the unilateral action by the Employer by seeking negotiations within a month of receiving a copy of the policy, and filed the unfair labor practice charge

approximately three months after the Employer refused to negotiate the contents of the policy, leads us to the conclusion that the charge was timely filed. Cavendish, 16 VLRB at 386. Our conclusion on these grounds means that there is no need to address alternative theories advanced by the union that the charge was timely.

We turn to addressing the merits. 21 V.S.A. §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). Absent a waiver by either the terms of the collective bargaining contract or by actual negotiations, the employer has a duty to bargain changes in mandatory bargaining subjects during the term of a contract if contract negotiations are ongoing or not ongoing. VSCFF v. Vermont State Colleges, 149 Vt. 546, 549 (1988). Burlington Firefighters Association, Local 3044, IAFF v. City of Burlington, 10 VLRB 53, 59 (1987). Mt. Abraham Education Association v. Mt. Abraham Union High School Board, 4 VLRB 224, 231-32 (1981).

It is clear that the Employer unilaterally implemented the Drug-Free Workplace Policy during the term of a contract 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 Drug-Free Workplace Policy constitutes a mandatory subject of bargaining. Under the Municipal Employee

Relations Act, 21 V.S.A. §1721 et seq. ("MERA"), "wages, hours and conditions of employment" are mandatory subjects of bargaining. 21 V.S.A. §1725. "(W)ages, hours and other conditions of employment" is defined as "any condition of employment directly affecting the economic circumstances, health, safety or convenience of employees but excluding matters of managerial prerogative". 21 V.S.A. §1722(17). Managerial prerogative means "any non-bargainable matter of inherent managerial policy". 21 V.S.A. §1722(11).

The Employer contends that the provisions of the Drug-Free Workplace Policy do not constitute mandatory subjects of bargaining because national and Vermont public policy are in favor of a drug-free work place and management's ability to ensure that workplaces are drug-free. The Employer is undeniably correct in its claim that the public policy favors a drug-free workplace, and the Union has no quarrel with the need for a workplace drug policy. This does not translate, however, into unfettered management discretion in enacting a drug-free workplace policy. This is because such policy embraces the mandatory subject of bargaining of disciplining employees. The discipline of employees is a condition of employment which directly affects the economic circumstances of employees pursuant to §1722(17) since dismissal of employees results in permanent loss of pay, suspension results in temporary loss of pay, and reprimands may lead to more severe sanctions in which pay is lost.

The Employer cannot plausibly contend that the provisions of the federal Drug-Free Workplace Act of 1998, and its regulations, remove the disciplining of employees whom violate a drug-free

workplace policy from the mandatory subjects of bargaining. The Act itself speaks in only general terms of requiring "appropriate personnel action up to and including termination", or participation in a drug rehabilitation program, for the very limited issue of a criminal drug statute conviction for a violation occurring in the workplace. In other respects, the Act grants even more discretion (See Findings of Fact #3 and #4). The notice and final rules issued to implement the Act make it clear that an employer and union may negotiate the disciplinary standards for employee violations of a drug-free workplace policy by providing that "labor and management may determine the mode of compliance through collective bargaining" (See Finding of Fact #5).

The Drug-Free Workplace Policy enacted by the Employer goes well beyond the general statements of the Act and regulations by: 1) mandating immediate dismissal for certain offenses, 2) mandating immediate dismissal for other offenses absent compelling circumstances, 3) mandating disciplinary action for certain other offenses, 4) requiring disciplinary action within a limited period of time in instances beyond what the Act requires, 5) requiring discipline for certain off-duty conduct, and 6) containing provisions on temporarily relieving employees from duty pending further investigation.

These provisions of the policy are much more expansive than the provisions of the parties' agreement requiring just cause for discipline and far more demanding than what is required by federal statute. We therefore conclude that they constitute mandatory subjects of bargaining. Our holding in this regard is in line with

decisions of other state labor relations boards concluding that substance abuse and drug-free workplace policies constitute mandatory subjects of bargaining. New Haven Community Schools Board of Education and NEA, MEA, Local 1 (Michigan Employment Relations Commission, Docket No. C90 J-260, April 23, 1992). FOP, Ohio Labor Council v. Ohio Office of Collective Bargaining (Ohio Employment Relations Board, Docket No. 89-ULP-12-0701, July 3, 1991). Federation of Oregon Parole and Probation Officers and State of Oregon (Oregon Employment Relations Board, Docket No. UP-117-89, March 7, 1991).

The final consideration in determining whether there is a per se violation is whether the Union waived the right to bargain over the unilateral change in a mandatory subject of bargaining. 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). The terms of the collective bargaining agreement provide no basis by which to reach a conclusion of waiver, and there is no evidence that the Union otherwise waived its right through negotiations or inaction. As previously discussed, the Union sought negotiations within approximately one month of being provided with a copy of the contents of the Drug-Free Workplace Policy. This was a timely response upon notification of the unilateral action and, thus, we conclude the Union did not waive its bargaining rights.

In sum, the unilateral action by the Employer of implementing the drug-free workplace policy was a per se violation of the duty to

bargain to the extent that such policy contained provisions relating to the disciplining of employees, and the Union did not waive the right to bargain over this issue.

In deciding what remedy to apply as a result of the Employer's unfair labor practice, we look to 21 V.S.A. §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 determining the remedy, we are seeking to enforce the duty to bargain in good faith. This requires the Employer to cease and desist from implementing those provisions of the Drug-Free Workplace Policy relating to disciplining employees, and negotiate in good faith with the Union on the disciplining of employees. The existing disciplinary provisions of the collective bargaining agreement shall apply until such negotiations are concluded.

ORDER

NOW THEREFORE, based on the foregoing findings of fact and for the foregoing reasons, the Labor Relations Board has concluded that the City of Rutland ("Employer") has committed an unfair labor practice, and it is hereby ORDERED as the final Order of the Labor Relations Board in this matter:

1. The Employer shall CEASE AND DESIST from implementing those provisions of the Drug-Free Workplace Policy relating to disciplining employees;

2. The Employer shall negotiate in good faith with AFSCME Local 1201, Council 93 ("Union"), with respect to the disciplining of employees relating to drug-related offenses;

3. The existing discipline provisions of the collective bargaining agreement between the Employer and the Union shall apply with respect to drug-related offenses pending the completion of negotiations; and

4. The Employer shall post copies of this Order in all places customarily used for employer-employee communications for a period of 90 days.

Dated this 6th day of April, 1995, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Charles H. McHugh, Chairman

Leslie G. Seaver

Carroll P. Comstock