VERMONT LABOR RELATIONS BOARD

MILTON EDUCATION AND SUPPORT ASSOCIATION	)	
v.	)	DOCKET NO. 96-63
MILTON BOARD OF SCHOOL TRUSTEES	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On July 19, 1996, the Milton Education and Support Association ("Association") filed an unfair labor practice charge against the Milton Board of School Trustees ("School Board"). Therein, the Association alleged that the School Board violated 21 V.S.A. Section 1726(a)(1) and (5) by its unilateral decision to subcontract custodial services which previously had been performed by members of the bargaining unit represented by the Association. The Association further alleged that the School Board interfered with, restrained or coerced members of the bargaining unit with respect to the exercise of their right to apply for and receive unemployment compensation benefits.

On November 12, 1996, the Vermont Labor Relations Board issued an unfair labor practice complaint. The School Board filed a motion for summary judgment on January 22, 1997. The Association did not file a response to the School Board's motion. The Board reserved judgment on the School Board's motion.

Hearings on the merits were held on February 27 and March 27, 1997, before Board Members Catherine Frank, Chairperson, Louis Toepfer and Carroll Comstock. Joel Cook, Vermont-NEA General Counsel, represented the Association. Attorney

Dennis Wells represented the School Board. At the February 27 hearing, the Association withdrew its allegation that the School Board interfered with, restrained or coerced members of the bargaining unit with respect to the exercise of their right to apply for and receive unemployment compensation benefits. The parties filed briefs on April 11, 1997.

FINDINGS OF FACT

1. The Association is the exclusive bargaining representative of all educational office personnel, food service personnel, maintenance personnel, non-instructional supervisory personnel, and paraprofessional personnel employed by the School Board, excluding those employees who work in the Superintendent's office and temporary employees (Association Exhibit 1, Article 1; School Board Exhibit 1, Article 1).

2. Article III of the 1992-1994 collective bargaining agreement between the Association and the School Board provided in pertinent part as follows:

> It is herein agreed that except as specifically and directly modified by the express language in a specific provision of this Agreement, the Board retains all rights and powers that it has, or may hereafter be granted by law, and may exercise such powers at its discretion.
>
> (School Board Exhibit 23)

3. During negotiations for the 1994-96 collective bargaining agreement, the parties agreed to the following language in Article III of the agreement which constituted a change to the above-cited management rights provision:

> 3.1 Management rights shall include, but not be limited to, the right:

a. to hire, discharge, discipline, lay off, recall, transfer, promote and demote employees,

b. to assign work and require overtime,

c. to organize, enlarge, reduce or discontinue a function, position or department,

d. to introduce new technology, tools, equipment or labor-saving devices,

e. to establish new jobs,

f. to classify and reclassify employees,

g. to determine or change shifts, starting and quitting times and the number of hours and days worked,

h. to evaluate employees,

I. to promulgate rules and regulations which do not otherwise contravene the terms of this Agreement,

j. to determine the manner, means, and methods by which all operations and all educational missions and goals of the School District will be carried out,

k. to take such other action as it deems necessary to maintain the efficiency of the District's operations.

3.2 The Board's exercise of any management right or function in a particular manner will not preclude the Board from exercising same in any other manner which does not expressly violate a specific provision of this Agreement. The Board's failure to exercise any right or function reserved to it shall not be deemed a waiver of its right to exercise same.

3.3 It is understood that the Board may carry out its functions and responsibilities through the Superintendent and his or her staff as well as other managers, supervisors and principals.

(School Board Exhibit 1)

4. The Association and the School Board executed the 1994 - 1996 collective bargaining agreement on August 31, 1995. In the Spring of 1995, the School Board had openly considered, and decided against, the subcontracting of the School District's custodial and maintenance services to a non-bargaining unit provider. The Association was aware of the School Board's consideration of subcontracting at that time (School Board Exhibit 3)..

5. During the Fall of 1995, the parties negotiated a successor collective bargaining agreement to the 1994-1996 agreement. The Association made two alternative proposals on subcontracting. One proposal provided: "The duties of any bargaining unit member or the responsibilities of any position in the bargaining unit *shall not be altered, increased or transferred to persons not covered by this* Agreement." The other proposal provided: "The Board shall not employ persons or services to perform work regularly and customarily performed by bargaining unit personnel except for major projects and emergencies." The School Board rejected the proposal, and no specific provision on subcontracting was included in the successor agreement, which covers the period July 1, 1996 - June 30, 1999. The provisions of Article III of the 1994-96 agreement were carried forward to the 1996-1999 agreement. Both the School Board and the Association ratified the 1996-1999 agreement by the end of December, 1995 (School Board Exhibit 22, Association Exhibit 1).

6. *During negotiations and prior to ratification of the* 1996 - 1999 agreement, neither the School Board nor any representative of the School Board

notified the Association that the School Board was considering subcontracting custodial and maintenance services.

7. On February 1, 1996, the School Board approved a proposal made by School District Business Manager John Gifford to revise job descriptions for maintenance and custodial personnel (Association Exhibit 2).

8. On February 19, 1996, School District Superintendent Tim Meagher sent a memorandum to Association President Diana Palm which provided as follows:

> At this time John Gifford, School District Business Manager, is considering the "contracting out" of custodial services for FY'97 (July 1, 1996 through June 30, 1997). Group I employees in the staff agreement with the Board include the category of Maintenance Personnel. Maintenance Personnel is made up of maintenance workers and custodians. Only the custodian portion is being considered for subcontracting now.
>
> The consideration of "contracting out" is aimed to gain possible cost savings in relation to quality of service. I want M.E.S.A. and the custodians to be aware of the possible contracting out of cleaning services for next year commencing July 1, 1996. Further I plan to keep you informed of any specific recommendations to the Board regarding this matter.
>
> Should you have any questions do not hesitate to contact John or me.
>
> (Association Exhibit 3)

9. By letter dated March 28, 1996, from Palm to the School Board, the Association requested "to negotiate over the impact of the implementation of sub-contracting for custodial services". The School Board agreed to meet with the Association "to negotiate over the impact should the Board decide to sub-contract for custodial services". On April 17, Association and School Board representatives met for the purpose of discussing the impact of the decision to subcontract custodial

services. However, the School Board had not decided to subcontract by the time of the meeting, and much discussion occurred on the reasons the School Board was considering subcontracting. Another meeting was scheduled for further discussions but was never held (Association Exhibits 4, 5).

10. In addition to requesting negotiations over the impact of potential subcontracting of custodial services, the Association organized public opposition to the proposed subcontracting during March and April. The campaign included letter writing and phone calls to School Board members, letters to the editor of the local newspaper, presenting a petition to the School Board opposing subcontracting, and attending School Board meetings and speaking against subcontracting.

11. At a May 2, 1996, meeting, the School Board voted to authorize the School District's business manager to execute a contract with the company Coastal Building Maintenance for custodial services for the 1997 fiscal year, July 1, 1996 - June 30, 1997 (School Board Exhibit 11).

12. On May 9, 1996, the Association filed a grievance alleging that the School Board violated the collective bargaining agreement by subcontracting custodial work. The Association requested as a remedy that the subcontracting decision be rescinded. As of the date of the Labor Relations Board hearing in this unfair labor practice case, the parties were awaiting the conducting of an arbitration hearing on the grievance scheduled for April 29, 1997 (School Board Exhibits 12, 17, 20).

13. On May 23, 1996, Superintendent Meagher informed employees who performed custodial services that they were being laid off effective July 1, 1996, due to the contracting out of custodial services (School Board Exhibit 14).

14. On June 12, 1996, Association President Palm sent a letter to Superintendent Meagher which provided in pertinent part:

> As you know, the Association was given no indication during negotiations for the 1996-1999 Master Agreement that the School Board was considering contracting out maintenance services. The Association learned of this almost two months after the new agreement was formally ratified by MESA Support Staff members. As you also know, the Association has tried to dissuade the Board from making such a unilateral decision.
>
> We have already requested that the Board negotiate over the impact of that decision. We now add to that a formal request to negotiate over the decision to subcontract itself.
>
> . . .
>
> If the Board decision remains in effect following conclusion of negotiations, we would then intend to negotiate over the impact of subcontracting on the bargaining unit and affected employees.
>
> . . .
>
> (Association Exhibit 9)

15. On July 1, 1996, the School Board implemented the decision to subcontract custodial services. In a July 12, 1996, letter; in response to a June 27, 1996, letter from Vermont-NEA Uniserv Director David Boulanger requesting that the School Board inform the Association whether the subcontracting decision would be rescinded and the custodial employees reinstated; Superintendent Meagher informed Boulanger:

. . . The Board does not rescind its action to subcontract and therefore will not reinstate as a result of subcontracting.

The Board remains ready to negotiate the effects of its action to contract out . . .
(Association Exhibits 11, 12).

16. Boulanger provided advice to the Association regarding the issue of subcontracting custodial services from the time the Association was first notified in February 1996 that the District was considering subcontracting such services. Prior to June 1996, when Boulanger and Association leaders consulted with Vermont-NEA General Counsel Joel Cook, Boulanger and Association leaders believed that the Association was limited to negotiating over the "impact" of the subcontracting decision in Milton as opposed to bargaining over the subcontracting decision itself. During approximately nine years as a UniServ Director, Boulanger has been involved in negotiating initial collective bargaining agreements covering support staff in which provisions on subcontracting were negotiated. He also has been involved in responding to a school district unilaterally subcontracting bargaining unit work during the time initial agreements covering support staff were being negotiated. He further has advised local associations on how to proceed when school districts unilaterally decided to subcontract bargaining unit work during the term of a collective bargaining agreement (School Board Exhibits 25 - 28, 31-32, Association Exhibits 13 - 14).

OPINION

At issue is whether the School Board violated 21 V.S.A. Section 1726(a)(1) and (5) by its unilateral decision to subcontract custodial services which previously had been performed by members of the bargaining unit represented by the Association.

School Board Motion for Summary Judgment

As a preliminary matter, we discuss the School Board's motion for summary judgment, a motion on which we have reserved judgment. Summary judgment may be granted only if there exists "no genuine issue as to any material fact and . . . any party is entitled to judgment as a matter of law". V.R.C.P. 56(c)(3). The School Board contends that the Labor Relations Board should conclude that the School Board is correct as to the factual issues it has presented in its motion because the Association failed to file a response to the motion. Further, the School Board contends that its version of the facts entitles it to summary judgment as a matter of law for two reasons: 1) the Labor Relations Board should defer jurisdiction because determination of the scope of the School Board's management rights is subject to the collective bargaining agreement's grievance procedure, and this issue already is the subject of a pending grievance filed by the Association; and 2) by requesting bargaining over the impact of the subcontracting decision without requesting bargaining over the decision itself, the Association waived any right it may have otherwise possessed to bargain over the issue.

Suffice it to say that, even accepting the material facts presented by the School Board in its motion for summary judgment as unrefuted and accurate, such

facts are insufficient for us to conclude that the School Board is entitled to summary judgment as a matter of law. This case requires the fuller development of facts afforded by an evidentiary hearing on the merits to adequately determine whether the School Board violated the law through its subcontracting decision. Thus, we deny the School Board's summary judgment motion, and turn to considering this case based on the factual record established at the hearing.

Deferral to Grievance/Arbitration Procedure

The School Board contends that this dispute should be deferred to the grievance and arbitration procedure set forth in the parties' collective bargaining agreement. The determination of the scope of the School Board's management rights to subcontract involves an interpretation of the collective bargaining agreement, the School Board maintains, and an arbitration proceeding is pending on this issue.

A threshold issue which has been decided in unfair labor practice cases is whether the Board should defer to a contract's grievance procedure in lieu of issuing an unfair labor practice complaint. The Board has not ruled on unfair labor practice charges where the Board believed the dispute involved the interpretation of a collective bargaining agreement and employees had an adequate redress for the alleged wrongs through the grievance procedure. Burlington Education Association v. Burlington Board of School Commissioners, 1 VLRB 335 (1978). AFSCME Local 490 v. Town of Bennington, 9 VLRB 195 (1986). Fair Haven Graded School Teachers Association, Vermont-NEA v. Fair Haven Board of School Directors, 13 VLRB 101, 109-110 (1990). Parties to a collective bargaining agreement are required to exhaust available contractual remedies before a statutory unfair labor practice

complaint will lie. Burlington Area Public Employees Union, Local 1343, AFSCME, AFL-CIO v. Champlain Water District, 156 Vt. 516, 518 (1991).

The Board begins its analysis by considering if the issue contained in the charge is subject to arbitration, irrespective of whether it might also be an unfair labor practice. Id. at 519. If the issue is subject to arbitration, the contract grievance procedure should be applied, barring an overriding statute or if the Board's own deferral guidelines indicate that deferral would not serve the purpose of the statute. Id., at 520. Mt. Abraham Education Association v. Mt. Abraham School Board, 4 VLRB 224 (1981), involved a situation in which the Board declined to defer to arbitration. Therein, the Board stated:

> The charge made by the Association involves an issue central to the system of collective bargaining. In these instances, we will apply our own principles of interpretation of the collective bargaining statute we are empowered to administer. Our mandate is to enforce a statutorily-determined system of collective bargaining; this duty differs from that of the arbitrator who looks to contract interpretation alone. Id. at 231.

We reach a similar conclusion in this case. The issue of subcontracting work previously done by bargaining unit employees goes to the heart of a union's ability to protect bargaining unit employees represented by the union, and thus involves an issue central to the system of collective bargaining. We previously have ruled under the Municipal Employee Relations Act that contracting out custodial work previously performed by bargaining unit employees constituted a mandatory subject of bargaining, and that a school board committed an unfair labor practice by acting unilaterally to subcontract work without negotiating with the union. Middlebury

Union High School Educational Support Personnel Unit v. Middlebury Union High School Board of Directors, 15 VLRB 397 (1992).

Given the significance of subcontracting to the collective bargaining relationship, we will assert our unfair labor practice jurisdiction and not defer to the grievance and arbitration procedure of a collective bargaining agreement, unless the agreement explicitly addresses management's ability or inability to contract out work. The School Board here relies on the management rights article of the collective bargaining agreement between the School Board and the Association as a basis for us to defer to the parties' grievance procedure. A review of the management rights article provides no basis for such deferral since it does not explicitly refer to management's ability to subcontract work.

Further, the parties' bargaining history provides no aid to the School Board's case. The School Board relies on the Association having proposed, but not obtained during negotiations leading to the 1996-1999 agreement, a provision prohibiting the School Board from subcontracting any bargaining unit work. Such negotiations occurred several months after the School Board had openly considered, and decided against, subcontracting custodial work. The School Board apparently views this history as demonstrating the Association was unsuccessful in curtailing existing management rights to subcontract work under the collective bargaining agreement.

Such bargaining history can just as readily be viewed as indicating the Association was seeking to secure a greater right for employees through negotiations than they already had under law. Under the Association's proposal, bargaining unit employees would be guaranteed they would not lose their jobs to subcontracting

during the term of the collective bargaining agreement. This would afford a greater right than existed under law where employees potentially could lose their jobs to subcontracting during the term of an agreement after negotiations on subcontracting occurred between the School Board and the Association. Under this view of the Association's proposal, there is no recognition by the Association that management had rights to subcontract work under the collective bargaining agreement without negotiating with the Association. In sum, this bargaining history is insufficient for us to decline to assert our unfair labor practice jurisdiction. The collective bargaining agreement has been silent on management's ability to contract out work. This silence does not equate with the School Board's ability to unilaterally contract out work without negotiating with the Association.

Waiver of Right to Bargain

The School Board further asserts that the Association waived any right it otherwise may have possessed to bargain over the subcontracting decision by requesting bargaining over the impact of the subcontracting decision without requesting bargaining over the decision itself. The School Board points to the fact that the Association failed to request decisional bargaining until four months after it was notified that the School Board was considering subcontracting. The School Board contends that the Association was provided with ample opportunity to request meaningful bargaining over the subcontracting decision itself before the decision was made, but failed to seek bargaining over the decision until after the School Board was committed to the subcontractor.

Absent a waiver, the employer has a duty to bargain changes in mandatory bargaining subjects during the term of a collective bargaining contract. 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 at 231-232. The unilateral imposition of terms of employment during a contract term when 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 Firefighters, supra. Mt. Abraham, supra. VSEA v. State, 5 VLRB 303, 324-329 (1982).

In determining whether a party has waived its bargaining rights, the Board has required that it be demonstrated that a party consciously and explicitly waived its rights. Local 98, IUOE, AFL-CIO v. Town of Rockingham, 7 VLRB 363 (1984). VSEA v. State of Vermont, 5 VLRB at 326. Mt. Abraham, 4 VLRB at 231. In such matters, the Board is further guided by the Vermont Supreme Court, which defines a waiver as the "intentional relinquishment of a known right". In re Grievance of Guttman, 139 Vt. 574 (1981). A party can intentionally relinquish a known right by failing to assert it in a timely manner. VSEA v. State of Vermont, 6 VLRB 217 (1983).

In applying these standards to the facts of this case, and keeping in mind the overriding purpose of the Municipal Employee Relations Act to promote good faith bargaining, we conclude that the Association did not waive its right to negotiate over the subcontracting decision and that the School Board committed an unfair labor

practice. We recognize that the Association was not without fault in this matter by initially seeking to bargain only on impact and failing at the outset to request bargaining over the subcontracting decision itself. However, all the circumstances of this case do not justify a conclusion that the Association was precluded from subsequently requesting bargaining over the subcontracting decision itself.

We so decide because we view the actions of the School Board in this matter as seriously detrimental to good faith labor relations and precluding meaningful negotiations. Subcontracting work performed by bargaining unit employees involves an issue central to the system of collective bargaining. Absent provisions of a collective bargaining agreement permitting subcontracting, a school board commits an unfair labor practice by acting unilaterally to subcontract work without negotiating with the union. The burden is on a school board to initiate subcontracting negotiations, and a school board operates at its own peril by not proceeding carefully in such situations.

The School Board here failed in these affirmative responsibilities. The School Board should have indicated during negotiations for the 1996 - 1999 collective bargaining agreement that consideration was being given to subcontracting custodial services. Instead, the School Board was silent on this issue during negotiations and waited until a few months after the agreement was ratified to announce it was considering subcontracting custodial and maintenance services. This served to mislead the Association.

The School Board then acted rashly to contract out custodial services without providing the Association a meaningful opportunity to negotiate over the issue. At

a May 2, 1996, meeting, the School Board voted to authorize the School District's business manager to execute a contract with a company for custodial services for the July 1, 1996 - June 30, 1997 fiscal year. The School Board took this action after only one meeting with the Association discussing the impact of a potential decision to subcontract custodial services, a meeting in which much discussion occurred on the reasons the School Board was considering subcontracting and which ended with further discussions being contemplated. The School Board action also was taken in the midst of a campaign organized by the Association to oppose the subcontracting.

An employer is required to negotiate with a union the impact of a decision on a mandatory subject of bargaining through the completion of statutory dispute resolution procedures, or until agreement is reached, and the employer may not take final action to unilaterally implement the decision until that time. VSEA v. State, 5 VLRB at 328-29. The School Board acted contrary to this obligation by approving execution of a contract after just one negotiations meeting with the Association, well prior to the completion of statutory dispute resolution procedures.

The School Board could have remedied the situation by agreeing to negotiate with the Association over the subcontracting decision itself once the Association sought such negotiations in June, 1996. The Association request was made shortly after the subcontracting decision had been made inappropriately and prior to the actual implementation of the subcontracting. Under all the circumstances, we conclude that the Association asserted its right to negotiate over the subcontracting decision itself in a timely manner. The School Board declined to agree to such

negotiations, however, and proceeded with implementation of the contract on July 1, 1996.

The School Board's disregard of the collective bargaining process is particularly troublesome given the importance of what was at issue - i.e., the removal of work from the bargaining unit by giving the work to a private contractor. The School Board's actions certainly were damaging to the fostering of good faith labor relations. When this case is reduced to its essence the School Board did not meet its burden to negotiate. There being no waiver of bargaining rights by the Association, the unilateral action by the School Board of contracting out custodial work during a time it was under a legal duty to bargain in good faith was a violation of the duty to bargain.

In deciding what remedy to apply as a result of the School Board's unfair labor practice, we look to section 1727(d) of MERA, 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 negotiate in good faith. At the very least, this requires the School Board to cease and desist from implementing its contracting out decision, and negotiate in good faith on this issue with the Association. However, this remedy would be incomplete since it would not make the laid off custodians "whole" for the School Board's statutory violation. The common remedy in such cases, in addition to a bargaining order, is to order the affected employees reinstated with back pay and benefits. Middlebury, 15 VLRB at 416. We conclude that such a remedy is appropriate in this case.

ORDER

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

1. The Milton Board of School Trustees ("School Board") shall cease and desist from the contracting out of custodial services in the Milton School District;

2. The School Board shall bargain in good faith with the Milton Education and Support Association ("Association") with respect to the contracting out of custodial services;

3. The custodians of the Milton School District who were laid off due to the contracting out of custodial services shall be reinstated to their bargaining unit positions as custodians;

4. The custodians shall be awarded back pay and benefits from the date commencing with their layoff until their reinstatement to bargaining unit positions for all hours of their regularly assigned shift, minus any income (including unemployment compensation received and not paid back) received by the custodians in the interim;

5. The interest due employees 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 during the period commencing with the layoff of employees, and ending on the date of their reinstatement to bargaining unit positions; such interest for each paycheck date shall be computed from the amount of each paycheck minus income (including unemployment compensation) received by the custodians during the payroll period;

6. The parties shall submit to the Labor Relations Board by June 19, 1997, a proposed order indicating the specific amount of back pay and other benefits due the custodians; 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 hearing necessary on these issues shall be held on June 26, 1997, at 1:30 p.m., in the Labor Relations Board hearing room, 13 Baldwin Street, Montpelier, Vermont; and

7. Copies of this Order shall be posted by the School Board at places in the Milton School District normally used for employer-employee communications.

Dated this 6th day of June, 1997, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Catherine L. Frank, Chairperson

Louis A. Toepfer

Carroll P. Comstock