

VERMONT LABOR RELATIONS BOARD

BURLINGTON POLICE OFFICERS')		
ASSOCIATION)		
)	DOCKET NO. 98-52
v.)		
)	
CITY OF BURLINGTON)		

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On July 30, 1998, the Burlington Police Officers' Association ("Association") filed an unfair labor practice charge against the City of Burlington ("City"), alleging that the Employer violated 21 V.S.A. Section 1726(a)(5) by unilaterally prohibiting the use of marked police cruisers with blue lights for extra duty work. The City filed a response to the charge on August 20, 1998. On September 14, 1998, Labor Relations Board Executive Director Timothy Noonan met with the parties to investigate the charge and to explore informally resolving issues in dispute. On October 19, 1998, the Labor Relations Board issued an unfair labor practice complaint.

A hearing was held before Labor Relations Board Members Richard Park, Acting Chairperson, Leslie Seaver and Carroll Comstock on November 12, 1998, in the Board hearing room in Montpelier. Attorney James Dunn represented the Association. Attorney Janet Murnane represented the City. The parties filed post-hearing briefs on November 30, 1998.

FINDINGS OF FACT

1. The Association is the exclusive bargaining representative for employees below the rank of Lieutenant in the Burlington Police Department.

2. The City and the Association have a long-standing practice dating back many years in which police officers have been permitted to perform extra duty police work during hours outside their regularly scheduled hours. Prior to 1992, the practice was carried out by understandings and verbal agreements. Beginning with the collective bargaining agreement effective July 1, 1992 - June 30, 1993, and continuing with the two succeeding agreements, the parties have included in the agreement provisions covering extra duty work (Association Exhibits 1 - 3).

3. The collective bargaining agreement presently in effect defines extra duty employment as "voluntary law enforcement employment performed outside of the employee's regular working hours and performed in situations where the City . . . and the . . . Association complete a contract to provide police protection". The agreement provides that all extra duty employment must be approved by the Chief of Police or the Chief's designee, and that the Association shall select the officers to work extra duty employment. The Association is responsible for completion of a contract between the Association and the party requesting the extra duty work. The contract must be in a form agreed to by the City and the Association and needs to include an indemnification clause. The completed contract is presented to the office of the Chief of Police for approval (Association Exhibit 3).

4. The collective bargaining agreement provides that "(c)harges for extra duty work, including an administrative fee, shall be mutually agreed to" by the City

and the Association. Compensation for extra duty work comes from the fees charged to the users of such services. Compensation is processed through the Police Department's payroll system. While working extra duty, employees remain protected by the City's workers' compensation and life insurance coverage (Association Exhibit 3).

5. The collective bargaining agreement provides that officers engaging "in extra duty employment shall wear the full police uniform", and that officers "shall not use any police equipment in an extra duty assignment other than that authorized for department use". It further provides that officers "working an extra duty assignment shall be subject to all department rules, policies and procedures", and that in "the event of a conflict between directives of the extra duty employer and the department rules, policies and procedures the latter shall control". The agreement also provides that on-duty supervisors "may inspect an extra duty assignment site to monitor for officer safety and conformance to departmental, rules, policies and procedures" (Association Exhibit 3).

6. Over the past several years, officers have performed extra duty work in a number of different types of assignments where police cruisers are needed. These have included providing traffic and pedestrian control at the Vermont City Marathon, parades, festivals, road construction sites, and Vermont Expos baseball games. Prior to July 1998, the practice has been for the on-duty officer in charge to allow an officer to use a marked police cruiser, with blue lights, for such assignments if a cruiser was available. It has been determined that it is advantageous for officers to have blue lights in certain assignments to move more quickly and have high

visibility. There have been occasions when cruisers have not been available for such assignments.

7. There have been other types of off duty assignments, representing a majority of off duty assignments, where it has been determined that police cruisers are not needed and permission has not been granted for use of cruisers. Examples are providing security at high school sports events, fraternity parties, Planned Parenthood, or Burlington Waterfront activities.

8. The last time the parties mutually agreed, under the collective bargaining agreement, to charges for extra duty work was in the Summer of 1997. It was agreed that officers would be paid \$25.00 per hour for extra duty work, and the Police Department would receive a \$2.50 per hour administrative fee plus a \$35 fee to any party outside the City of Burlington seeking extra duty services. During the period administrative fees have been calculated and assessed, the administrative fee has not included the cost of the cruiser.

9. At a December 1, 1997, meeting, the Burlington Board of Police Commissioners voted to increase the hourly rate for extra duty work by 20 percent plus an additional \$15.00 per hour when a police cruiser was used. The Police Commissioners took this action unilaterally, and the Association did not become aware of it until May of 1998. The Association filed a grievance over the unilateral change on May 29, 1998, pursuant to the collective bargaining agreement's grievance procedure. On June 15, 1998, the Police Commissioners rescinded their action on increasing the extra duty rate, and suspended the charge for the use of cruisers

pending review by the Police Department and the Association of the rate to be charged for the use of equipment (Association Exhibits 4 - 6).

10. Police Department Commander Glenn Button sent a memorandum to Police Department employees on July 21, 1998, providing:

In a previous memo I had mentioned there were discussions at various levels of government regarding extra duty employment. One of the major issues is the use of police cruisers in performing these functions.

The discussions have focused on the following issues: What law enforcement function does the use of a cruiser on an extra duty job serve? Is the use of the cruiser necessary? Is the cost of using the cruiser being inappropriately shifted to the taxpayer? Is the use of blue lights at a traffic site appropriate (lawful)? What is the public perception of using City vehicles for these functions?

After extensive discussion and careful consideration it has been decided that the use of Burlington Police vehicles for extra duty jobs is prohibited. This policy takes effect immediately.

There are ongoing discussions with the BPOA leadership to look at alternatives to this policy . . . (Association Exhibit 7)

11. Commander Button's query as to whether the use of blue lights was lawful was a reference to 23 V.S.A. §§1252 and 1255, which provide in pertinent part:

§1252. Uses of sirens or colored lamps or both

(a) When satisfied as to the condition and use of the vehicle, the commissioner (of motor vehicles) shall issue and may revoke, for cause, permits for sirens or colored signal lamps in the following manner:

(1) Sirens and/or blue or blue and white signal lamps for all law enforcement vehicles, owned or leased by a law enforcement agency or a certified law enforcement officer . . .

§1255. Exceptions

(2) All persons with motor vehicles equipped as provided in section 1252(a)(1) . . . of this title, shall use the sirens or colored signal lamps or both only in the direct performance of their official duties. When any person other than a law enforcement officer is operating a motor vehicle equipped as provided in section 1252(a)(1) of this title, the colored signal lamp shall be either removed, covered or hooded . . . (City Exhibit 1)

12. At the time the new policy on use of police cruisers was announced on July 21, 1998, the City and Association were actively engaged in negotiations for a successor collective bargaining agreement. At no time did the City present to the Association, either during negotiations or otherwise, a proposal to increase the administrative fee for extra duty work or to eliminate the use of cruisers for such work.

13. On July 27, 1998, Commander Button sent employees a memorandum informing them that unmarked cruisers with amber lights would be made available for extra duty work in which it was appropriate to have a vehicle with a warning light (City Exhibit 2).

14. Since July 21, 1998, no officer has been permitted to use a marked police cruiser with blue lights to perform any extra duty work. There have been occasions where officers have been permitted to use unmarked Police Department vehicles with portable amber lights. The difference between blue lights and amber lights is that blue lights represent compliance whereas amber lights represent warning. An officer operating a vehicle with amber lights cannot force a person to stop their vehicle, while an officer operating a cruiser with blue lights can so require a person.

15. Police officers represented by the Association earn, on average, an estimated \$1,000 per year performing extra duty work.

16. The new policy prohibiting the use of marked police cruisers with blue lights is expected to reduce the amount of extra duty work opportunities for

officers because some groups seeking extra duty services will prefer to have a marked police cruiser with blue lights.

OPINION

At issue is whether the City committed an unfair labor practice in violation of 21 V.S.A. Section 1726(a)(5) by unilaterally prohibiting the use of marked police cruisers with blue lights for extra duty work performed by employees represented by the Association.

The City first contends that this issue is subject to the grievance procedure of the collective bargaining agreement between the City and the Association, and thus the Board should defer its consideration of the unfair labor practice charge to the grievance procedure. There is no evidence in the record to support the City's contention in this regard as the City presented no evidence related to whether this issue is properly subject to the parties' grievance procedure.

After the hearing in this matter, and after the parties submitted their post-hearing briefs, the City filed a supplemental memorandum requesting leave to submit as additional evidence the grievance and arbitration provisions of the collective bargaining agreement. Section 32.17 of the Board Rules of Practice provides that "(m)otions for leave to reopen a hearing because of newly-discovered evidence shall be timely made" and that the "Board may, in its discretion . . . reopen a hearing and take further testimony at any time". There is no claim by the City that the provisions of the agreement ly discovered evidence, so we are left to decide whether to otherwise exercise our discretion to reopen the hearing and allow the admission of the grievance and arbitration provisions of the agreement.

We deny the City's request to admit into evidence the grievance and arbitration provisions of the agreement. The City had the opportunity to offer any relevant evidence at the November 12 hearing, and the City does not allege that any new information has come to light since the hearing which was not known at the time of the hearing. Hartford Career Fire Fighters Association and Town of Hartford, 6 VLRB 337, 338 (1983). It would be prejudicial to the Association and disruptive to the orderly processing of cases before the Board to allow the City to present evidence on an issue which should have been fully explored at the hearing.

We turn to the issue of whether the City violated 21 V.S.A. Section 1726(a)(5) by unilaterally prohibiting the use of marked police cruisers with blue lights for extra duty work performed by employees represented by the Association. The Association contends that this constituted a unilateral change in conditions of employment in violation of the City's duty to bargain in good faith.

The unilateral imposition of terms of employment during the time an 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 Firefighters Association v. City of Burlington, 142 Vt. 433, 435-36 (1983). Absent a waiver of bargaining rights, an employer is required to bargain if the employer seeks any changes in mandatory bargaining subjects during the term of an agreement whether contract negotiations are ongoing or not ongoing. 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 (1981).

Under the Municipal Employee Relations Act, “wages, hours and other conditions of employment” are mandatory bargaining subjects. 21 V.S.A. §1722(4); §1725(a). “Wages, hours and other conditions of employment” means “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). Matters of “managerial prerogative” are defined as “any non-bargainable matter of inherent managerial policy.” 21 V.S.A. §1722(11).

The City contends that the issue of the use of marked police cruisers with blue lights on extra duty jobs is not a mandatory subject of bargaining, but is instead a permissive subject of bargaining because it involves a management prerogative on restricting the use of Police Department equipment. The City submits that, while the extra-duty employment wages of officers may be limited to some degree, the City’s actions did not prohibit extra-duty work but merely placed a restriction on using Police Department equipment during the performance of that work.

We conclude that the issue of the use of marked police cruisers with blue lights on extra duty jobs is a mandatory subject of bargaining. It constitutes a “condition of employment directly affecting the economic circumstances” of employees. There has been a longstanding practice of allowing officers to use marked police cruisers with blue lights on certain types of extra duty jobs. The uncontradicted evidence is that the new policy prohibiting the use of such cruisers on extra duty jobs is expected to reduce the amount of extra duty work opportunities for officers because some groups seeking extra duty services will prefer to have a marked police cruiser with blue lights. The reduced amount of extra duty

opportunities directly affects the economic circumstances of employees by reducing an available source of extra income. Local 2413, AFSCME v. Town of St. Johnsbury, 13 VLRB 75, 86 (1990) (ban on town police officers engaging in secondary employment with a sheriff's department constitutes a mandatory subject of bargaining). A policy having such a direct impact on employees' compensation is not a matter of inherent managerial policy which an employer is free to unilaterally impose without bargaining.

Nonetheless, the City contends in the alternative that the practice of allowing the use of cruisers on certain extra duty jobs is in violation of 23 V.S.A. §§ 1252 and 1255, which provide that persons "shall use . . . colored signal lamps . . . only in the direct performance of their official duties". We are not prepared under the circumstances to hold that this statutory provision precludes the issue of the use of marked police cruisers with blue lights on extra duty jobs being considered a mandatory subject of bargaining.

The parties have had a practice for many years of an on-duty officer in charge allowing an officer performing certain types of extra duty assignments to use a marked police cruiser, with blue lights, for such assignments if a cruiser was available. In recent years, the City and the Association have included provisions regulating extra duty work in their collective bargaining agreement. Among the provisions are that the Chief of Police has to approve all extra duty assignments, employees performing extra duty work are protected under the City's workers compensation and insurance coverage, employees on extra duty work are covered by Police Department rules, policies and procedures, and on-duty supervisors of the

Police Department may monitor extra duty work. Given these characteristics of extra duty work, demonstrating extensive employer involvement in such work, we conclude that the City failed to present us with sufficient evidence that employees are not engaging in “official duties” for purposes of 23 V.S.A. §§ 1252 and 1255 when they are performing extra duty work. Moreover, no evidence was introduced to establish that any court, or administrative body or department, has ever ruled or issued an opinion that the extra duty work by City police officers does not constitute performing “official duties” for purposes of 23 V.S.A. §§ 1252 and 1255.

In sum, we conclude that the City committed an unfair labor practice in violation of 21 V.S.A. Section 1726(a)(5) by unilaterally prohibiting the use of marked police cruisers with blue lights for extra duty work performed by employees represented by the Association. We now decide what remedy to apply for this unfair labor practice. 21 V.S.A. §1727(d) provides that, if the Board decides that an employer is engaging in an unfair labor practice, the Board “shall issue and cause to be served on that person an order requiring (the employer) to cease and desist from the unfair labor practice and to take such affirmative action as the board shall order”.

The Association requests that the Board order the City to cease and desist from enforcing the new policy, and negotiate in good faith with the Association over the fees and rates to be charged for extra duty work. We conclude that an appropriate remedy is to order the City to cease and desist from implementing its policy prohibiting the use of marked police cruisers with blue lights for extra duty work performed by employees represented by the Association, and to negotiate with the Association over the fees and rates to be charged for extra duty work. Alternatively,

if the City desires to change the policy with respect to the extra duty use of marked police cruisers with blue lights, the City first must negotiate with the Association through the completion of mandated statutory dispute resolution procedures, if necessary, over the effect of the policy change on the economic circumstances of employees.

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 Burlington ("City") 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 City shall CEASE AND DESIST from implementing its policy prohibiting the use of marked police cruisers with blue lights for extra duty work performed by employees represented by the Burlington Police Officers' Association ("Association");
2. The Employer shall negotiate in good faith with the Association over the fees and rates to be charged for extra duty work or, alternatively, if the City desires to change the policy with respect to the extra duty use of marked police cruisers with blue lights, the City first must negotiate with the Association through the completion of mandated statutory dispute resolution procedures, if necessary, over the effect of the policy change on the economic circumstances of employees.; and

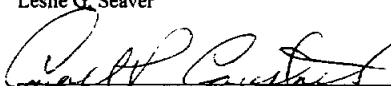
3. The City shall post copies of this Order in all places customarily used for employer-employee communications for a period of 90 days.

Dated this 21st day of January, 1999, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Richard W. Park, Chairperson

/s/ Leslie G. Seaver
Leslie G. Seaver


Carroll P. Comstock