VERMONT LABOR RELATIONS BOARD

LAMOILLE NORTH EDUCATION ASSOCIATION	)	
v.	)	DOCKET NO. 98-81
HYDE PARK ELEMENTARY SCHOOL BOARD	)	
LAMOILLE NORTH EDUCATION ASSOCIATION	)	
v.	)	DOCKET NO. 99-11
HYDE PARK ELEMENTARY SCHOOL BOARD	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On December 15, 1998, the Lamoille North Education Association ("Association") filed an unfair labor practice charge, VLRB Docket No. 98-81, against the Hyde Park Elementary School Board ("School Board"). Therein, the Association alleged that the School Board committed unfair labor practices, in the context of negotiating an initial collective bargaining agreement with the Association covering the support staff represented by the Association, by: 1) refusing to acknowledge inclusion in the bargaining unit of positions which were part of the School Board's voluntary recognition of the Association as bargaining unit representative; 2) unreasonably failing to meet with the Association; 3) submitting a discriminatory wage proposal; and 4) unilaterally reducing the work hours of paraeducators [illegible] service employees in the bargaining unit. The Association alleged that, by these actions, the School Board interfered with, restrained, or coerced

employees in the exercise of their rights in violation of 21 V.S.A. §1726(a)(1); discriminated by terms and conditions of employment to discourage membership in the Association in violation of 21 V.S.A. §1726(a)(3); and refused to bargain collectively in good faith with the Association in violation of 21 V.S.A. §1726(a)(5). The School Board filed a response to the unfair labor practice charge on January 7, 1999.

On March 4, 1999, the Association amended its unfair labor practice charge in Docket No. 98-81 to further allege that the School Board violated §1726(a)(1) and (3), as well as interfering with the administration of the Association in violation of §1726(a)(2), through specific unilateral changes in school policy and other intimidating actions by the principal of the Hyde Park Elementary School. The Association alleged that these actions constituted unfair labor practices against support staff represented by the Association. Also, on March 4, 1999, the Association filed an unfair labor practice charge, VLRB Docket No. 99-11, alleging that these same actions by the principal constituted unfair labor practices against the teachers represented by the Association. The School Board filed a response to the amended charge in 98-81, and the charge in 99-11, on March 18, 1999.

The Labor Relations Board issued unfair labor practice complaints in Docket Nos. 98-81 and 99-11 on March 23, 1999. The Association has withdrawn as moot those portions of the unfair labor practice charge in Docket No. 98-81 which alleged that the School Board committed unfair labor practices by refusing to acknowledge inclusion in the bargaining unit of positions which were part of the School Board's voluntary recognition of the Association as bargaining unit representative,

unreasonably failing to meet with the Association, and submitting a discriminatory wage proposal.

Hearings on the remaining issues in Docket No. 98-91, and the issues in Docket No. 99-11, were held before Labor Relations Board Members Catherine Frank, Chairperson; Leslie Seaver and Carroll Comstock on April 15 and 29, 1999, in the Board hearing room in Montpelier. Attorney Anthony Lamb represented the School Board. Vermont-NEA General Counsel Joel Cook represented the Association.

The parties filed post-hearing briefs on May 14, 1999. On May 13, 1999, the Board received a packet of letters and other materials from individuals related to the situation at Hyde Park. The individuals sending the materials were not representing the parties and did not send copies of the materials to the other parties. The Board has not considered these materials; to do so would be inappropriate as they were not presented as evidence at the hearings in this matter.

FINDINGS OF FACT

1. The Association represents a bargaining unit of teachers employed by the Hyde Park Elementary School, and represents another bargaining unit of support staff employed at the school. The Association and the School Board have negotiated a number of collective bargaining agreements covering the teachers. The Association has represented a support staff bargaining unit consisting of all custodians, kitchen staff, secretaries and assistants employed by the School Board since the School Board voluntarily recognized the Association as representative in 1996. The Labor

Relation Board certified the voluntary recognition on July 18, 1996 (Association Exhibit 1).

2. Negotiations for an initial collective bargaining agreement covering the support staff began during the 1996-97 school year, and continued through the 1997-98 school year. The parties engaged in mediation in the Summer and Fall of 1998. In December, 1998, the parties had a factfinding hearing. The factfinder issued his report in February 1999. The support staff engaged in a strike for several days in late March, 1999. The strike ended when the parties reached a tentative collective bargaining agreement covering the support staff. The parties subsequently ratified the agreement.

3. The Association and the School Board engaged in the process of negotiating a successor agreement to the most recent agreement covering teachers for approximately two years. Impasse was reached during the Spring of 1998, and the parties engaged in mediation during the Summer of 1998. The parties submitted the negotiations dispute to factfinding, and the fact finder issued his report in February 1999. The teachers engaged in a strike, along with the support staff, for several days in late March 1999. The strike ended when the parties reached a tentative collective bargaining agreement covering the support staff. The parties subsequently ratified the agreement.

4. Paraeducators signed Employment Agreements for the 1995-96 school year providing that they would work 7 hour days, 5 days a week. The agreements stated that "(w)ork hours per week will not exceed 35 unless requested and authorized by the Principal". The commencement date of the Agreements was

August 22, 1985, and the ending date was June 1[illegible]996. During the 1995-1996 school year, the paraeducators actually worked 7 to 7 1/4 hours a day (School Board Exhibits 3 - 6, 9, 11; Association Exhibit 15).

5. The School Board lengthened the school day by 25 minutes at the beginning of the 1996-97 school year, and the school day has remained that length during the 1997-98 and 1998-99 school years.

6. Paraeducators were budgeted to work 7 hours per day for the 1996-97 and 1997-98 school years (School Board Exhibits 11, 14, 15).

7. Consistent with the lengthening of the school day and despite the budget, paraeducators worked 7 ½ hour days during the 1996-97 and 1997-98 school years (Association Exhibit 15).

8. Prior to the 1996-97, 1997-98, and 1998-99 school years, p[illegible]ucators signed letters indicating their intention to return to Hyde Park Elementary School for the upcoming school year. The letters stated: "Effective the date of the signing of this letter of intent, the Support Staff Member will be considered to hold a contract based on his/her 1995-96 salary with the Hyde Park Town School District" (School Board Exhibits 26, 27, 28).

9. In late August, 1998, School Principal Robert Austin informed paraeducators that their hours of work would be reduced from 7 ½ hour days to 7 hour days, resulting in them working 35 hour weeks rather than 37 ½ hour weeks. The 1998-99 budget reflected this. Austin told the employees that the change was due to the deficits in their budget accounts since they were budgeted to work 35 hours a week and had been working more hours (School Board Exhibit 15).

10. From the start of the school year to November, 1998, the paraeducators worked 35 hours a week. In November, 1998, around Thanksgiving, Austin increased the weekly hours of the paraeducators from 35 hours to 36 3/4 hours. The change resulted in the paraeducators working 7 1/4 hours 3 days a week, and 7 1/2 hours two days a week. The increased hours continued through the hearings in this matter.

11. Food service workers signed Employment Agreements for the 1995-96 school year providing they would work 7 hour days, 5 days a week. The agreements stated that "(w)ork hours per week will not exceed 35 unless requested and authorized by the Principal". The commencement date of the Agreements was August 22, 1995, and the ending date was June 14, 1996 (School Board Exhibits 2, 10; Association Exhibit 15).

12. Although food service workers were budgeted to work 7 hours per day, 5 days per week, for the 1996-97 school year, they actually worked 8 hours a day, 5 days per week, for the year (School Board Exhibit 12, Association Exhibit 15).

13. Despite the 1995-96 employment agreements, food service workers were budgeted to work 8 hours per day, 5 days per week, for the 1997-98 school year. They actually worked 8 hours a day, 5 days per week, for the year (School Board Exhibit 13, Association Exhibit 15).

14. Prior to the 1996-97, 1997-98, and 1998-99 school years, food service workers signed letters indicating their intent to return to Hyde Park Elementary School for the upcoming school year. The letters stated: "Effective the date of the signing of this letter of intent, the Support Staff Member will be considered to hold

a contract based on his/her 1995-96 salary with the Hyde Park Town School District" (School Board Exhibits 26, 27, 28).

15. Despite the fact the food service workers were budgeted to work 40 hours a week during the 1998-99 school year, in late August, 1998, School Principal Robert Austin informed food service workers that their hours of work would be reduced from 8 hour days to 7 hour days, resulting in them working 35 hour weeks rather than 40 hour weeks. Austin told the employees that the change was due to the deficits in their budget accounts. (School Board Exhibits 16, 17).

16. One of the food service workers worked 7 hours a day, 35 hours a week, during the 1998-99 school year. The other full-time food service worker worked more hours, as 2 to 3 days a week she came into work early to bake and worked 8 hours on those days (Association Exhibit 15).

17. Robert Austin became principal of the school at the start of the 1997-98 school year. He generally had a good working relationship with teachers and support staff prior to late January or early February 1999 (School Board Exhibit 19).

18. Prior to a late January 1999 staff meeting, Austin asked teachers to complete a survey on discipline problems. At the staff meeting, Austin acted upset because many teachers had not completed the survey or attended the meeting. He also directed anger at one teacher, an Association member, during the meeting.

19. On the day after the staff meeting, Austin had a discussion with Diane Lehouiller, a first grade teacher and the Association's building representative. At the beginning of the conversation, Austin raised some papers and asked Lehouiller, "Do you know anything about this?" The papers had to do with a complaint of age

discrimination filed by one of the teachers, Jan Sander, against the school. Lehouiller told Austin she was aware of the complaint. Austin then said that "things are going to change around here." Lehouiller responded that "they already have."

20. Austin engaged in ongoing efforts during the 1998-99 school year to make the school operate more efficiently. One of the ongoing concerns he had was that the telephone in the school office frequently was not being answered because secretaries were out of the office delivering telephone messages or for other reasons. Well before late January 1999, Austin instructed the secretaries not to deliver non-emergency messages to teachers while they were instructing students.

21. In late January 1999, one of the school secretaries, an Association member, received a telephone call for a teacher, Jan Sander, in conjunction with problems with Sander's travel arrangements to attend a professional conference. The secretary delivered the message to Sander in her classroom. Sander asked the secretary to stay with her class while she responded to the call. Austin had observed the secretary delivering the message. Austin told the secretary she should not be covering the class. When Sander returned to the classroom, Austin asked her whether she was supposed to be teaching the class.

22. During February 1999, negotiations between the Association and the School Board for collective bargaining agreements covering teachers and support staff reached a critical stage as the factfinder issued his report and recommendations. The Association engaged in a community-wide effort to induce the School Board to reach agreement. Also, the Association engaged in a campaign during the month to

elect two new members to the School Board on Town Meeting Day, thereby seeking to displace two incumbent members of the School Board.

23. On February 8, 1999, Austin delivered a memorandum to Jan Sander in which he indicated that he wanted to meet with Sander to discuss a student reporting to her mother that Sander had told several students to "shut up", and had said "shut the hell up" on another occasion. On February 9, 1999, Austin sent a follow up memorandum to Sander, informing her to "please ignore my communication; it appears that the incident occurred in another class" (Association Exhibits 21, 22).

24. On February 9, 1999, the "Hyde Park Teachers and Staff Crisis Committee" distributed a letter and accompanying flyer to Hyde Park residents. Educator Yvonne Heath and teachers Terri Ayers, Dianne Lehouiller and Betty Poirot were identified in the letter as constituting the "Crisis Committee". The flyer accompanying the letter provided in pertinent part as follows:

A Message to the Community from Teachers and Staff:
The Crisis at the Hyde Park School

- There is a serious crisis developing at the school. We have tried to resolve this internally for many months, but now find ourselves with no choice but to talk to members of the community.
- We are all working hard to make a difference in the lives of kids, yet the actions of the school board have left us feeling demoralized and disrespected.
- The teachers' contract has not been settled.
- Treatment of support staff is so bad that we have filed an Unfair Labor Practice against the board.
- The support staff [illegible]ecretaries, kitchen staff, custodians and instructional assistan[illegible] who work directly with children. They have

had no raise for the last 5 years. After two years with no raise and due to fears of losing the benefits they had, they unionized. They have tried to work with the board for the last three years, yet they still have no contract.

- The offer to teachers would take away some benefits we have had for years, and we would end up with less than we have now.

- The offer to the support staff is non-competitive and takes away or reduces all of their benefits . . .

- We have lost many excellent, well-trained staff members. More are considering leaving. This loss affects our ability to do a good job for our kids.

. . .

- Our goal is to settle fair and equitable contracts for support staff and teachers, so we can get back to concentrating on our work with the kids.

. . .

(Association Exhibit 6)

25. After obtaining a copy of the flyer, Austin sent the following e-mail message to all staff at the school:

I am in possession of a message to the community from Teachers and Staff:

As a member of the staff, I am wondering about the ethics of this kind of circulation.

As principal of this school, I am concerned about the statement:

"We have lost many excellent, well-trained staff members"

I am very concerned by the public admission by staff members that they need a contract "so they can get back to concentrating on our work with kids."

I am interested in any discussion anyone might have concerning this (sic) points . . .

(Association Exhibit 7)

26. On February 11, 1999, Austin also sent an e-mail message to teacher Terri Ayers stating:

Hi Terri,

What's this about a 'crisis' committee?
Did I miss that meeting???

Rob

(Association Exhibit 8)

27. Ayers sent Austin a written response that day, stating: "Thanks for your concern, but this was a union committee." (Association Exhibit 8)

28. Austin replied on the same day with the following e-mail message:

> *If so, then you are using a cover head, letter, identifying that this a (sic)* a position represented by a labor union would be the procedure that respects the rights of others in the building
> Obviously people who might represent a different point of view than the union would respect the same procedure.

(Association Exhibit 9)

29. The school office has an outer office which is occupied by two secretaries, and an inner office occupied by the principal with an adjacent meeting room. Historically, the Association has been able to use the school's facsimile machine. Austin has never objected to the Association using the facsimile machine. Prior to February 11, 1999, the facsimile machine was located in the outer office occupied by the secretaries. On February 11, 1999, due to Austin's concerns about the confidentiality of faxes sent to him, particularly given an increase in confidential faxes sent him as a result of the ongoing collective bargaining dispute, Austin and a school custodian moved the facsimile machine into his inner office. Austin did not prohibit the Association from using the facsimile machine, and there is no evidence that the Association was prevented from sending faxes or receiving faxes. Austin is in his office approximately 30 percent of the time, and staff are able to use the

machine without his oversight when he is not in the office and the office is not locked.

30. On February 10 or 11, 1999, Austin directed temporary secretary Jane Draper to notify teachers by e-mail that "the office will be locked at 3:30 p.m. each day", and "you can access staff through the window." Prior to this, the school office had not been locked before the office staff left at 4:00 p.m. Since the change, the office has been open from 7:00 a.m. to 3:30 p.m. Closing the office at 3:30 p.m. allows Austin to work more easily with the secretary who works to 4:00 p.m. Austin did not notify teachers that he was contemplating closing the office at 3:30 prior to making the change (Association Exhibit 11).

31. For 8 or 9 years prior to February 12, 1999, staff were able to use the school e-mail system for Association purposes and such use was unregulated. The Association's use of the e-mail system had been facilitated by the creation of its own address group through which all members of the Association would receive an e-mail message sent to "#union". There are approximately 24 other address groups on the school e-mail system.

32. When a secretary is absent from work, it is office practice that any new e-mail or other unopened e-mail sent to the office be downloaded and printed by either the other secretary or the principal, whomever is available, to see if there are any messages requiring action. On February 12, 1999, secretary Karolla Powers was absent from work, and Austin asked substitute secretary Jane Draper to print out each item of unopened e-mail received by Powers. Draper printed out the messages and gave them to Austin.

33. Austin discovered that four of the messages were sent to Powers via the "#union" route. Prior to reviewing these messages, Austin had been aware that the Association had been using the e-mail system for Association purposes, but he was not aware that the "#union" address group existed. Upon reviewing the four "#union" messages, Austin discovered that two of the four messages had been sent by teachers during instructional time. Austin was concerned that many teachers could have reviewed these messages during instructional time. Austin did not discuss any of the e-mail messages with the authors of the messages, or a representative of the Association, prior to taking any action on them (School Board Exhibits 21 - 24).

34. After consulting with the School Superintendent, the School Board Chairperson, and Eugene Dambek, the computer consultant retained by the School Board, Austin shut down the school e-mail system at approximately 4:30 p.m. the same day, Friday, February 12. Prior to shutting down the e-mail system, Austin sent an e-mail to "#union" which stated: "this address and group has been deleted from use from this system" (Association Exhibit 12).

35. At all times relevant, the school employee in charge of maintaining the school e-mail system was Heidi Royer. She has been employed at the school for the past 14 years, and is a member of the Association. She left school on Friday, February 12, 1999, at approximately 2:45 p.m. to go to a doctor's appointment. She suffers from a condition which is exacerbated by stress. At approximately 5:15 p.m. that evening, Austin called Royer at home. He began the conversation by telling Royer that she needed to write down an important message. He told her she should write the following: "I will not go into Hyde Park Elementary this weekend. I will

not touch a computer at Hyde Park Elementary until I meet with Rob Austin first thing Monday morning."

36. Royer was surprised and upset, and asked Austin what was wrong. Austin told her she would find out Monday morning. Royer believed Austin was angry. Royer told Austin that he had no right to call her at home on a Friday evening, and then not tell her what was wrong. She began crying, and told Austin that she had just come from the doctor's office and did not feel well. Austin told Royer that she would be in a lot of trouble if she came into school that weekend.

37. Additionally, Austin asked Royer a series of questions about the "#union" address. Royer told him that "#union" had been present for years with the knowledge of the previous school principal. Austin then told Royer that it could be illegal for "#union" to be on the school e-mail system, and that she may be involved in illegal practices. He told her that she could be in trouble if she had put names on the "#union" address group. Royer stated that she had done nothing wrong.

38. As a result of the telephone call from Austin, Royer was physically and emotionally ill during the weekend. She thought Austin was going to fire her on Monday. Royer attributed Austin's behavior towards her to her membership in the Association. Royer believed that Austin was using her as an example, and that she would not have received such a call if she had not been a member of the Association.

39. Royer and Vermont-NEA Uniserv Director Suzanne Dirmaier met with Austin on Monday morning, February 15, for approximately 25 minutes. During the meeting, Austin indicated that it had not yet been determined whether Royer had done anything illegal. After the meeting and after speaking with Eugene Dambek, the

school's computer consultant, Austin concluded that Royer had done nothing wrong, but he did not inform Royer of this conclusion.

40. On Monday, February 15, Austin restored the school e-mail system, but did not restore "#union" to the system. Thus, the Association can still use the school e-mail system by addressing e-mail to Association members individually, but can no longer send messages to Association members by the group method. Since the deletion of "#union" from the e-mail system, Association members have not used the e-mail system to send messages related to Association business.

41. Austin has taken no disciplinary action against any teacher or other staff due to their use of the school e-mail system.

42. A committee has been set up in the school to discuss access to the school e-mail system.

43. Since the conclusion of the strike, some teachers have worn whistles around their neck at school. Their expressed reasons for wearing the whistles are concerns for personal safety when alone with Austin without recourse.

OPINION

Reduction in Hours

The Association first contends that the School Board committed an unfair labor practice by unilaterally reducing the hours of the paraeducators and the food service workers at the start of this school year. The Association maintains that an improper unilateral reduction in hours occurred because the paraeducators had worked 7 ½ hours a day, and the food service workers had worked 8 hour days,

during the previous two school years, and Principal Robert Austin unilaterally reduced their daily work hours to 7 at the beginning of the 1998-99 school year.

The School Board contends that the School Board did not change the status quo with respect to the work hours of the paraeducators and food service workers. The School Board maintains that the status quo for these employees was the employment agreements which they signed for the 1995-96 school year, the last school year before the Association became the representative of these employees. The 1995-96 employment agreements provided that "(w)ork hours per week will not exceed 35 unless requested and authorized by the Principal". The School Board contends that the status quo gave management the right to continue to determine what hours employees needed to work.

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 Association v. City of Burlington, 142 Vt. 434, 435-36 (1986). A school board is not permitted to change conditions of employment during the course of negotiations prior to the exhaustion of mandated dispute resolution procedures. Chester Education Association v. Chester-Andover Board of School Directors, 1 VLRB 426 (1978).

As the initiator of the unfair labor practice charge, the Association has the burden of demonstrating whether any improper unilateral change was effected. Burlington Firefighters Association v. City of Burlington, 4 VLRB 379, 389 (1981). *Reversed in part on other grounds*, 142 Vt. 434 (1983). To meet that burden here, the Association must demonstrate that the School Board changed an established practice.

VSEA v. State of Vermont (Re: Involuntary Transfer of Gonyaw), 7 VLRB 8, 31-32 (1984). An established practice is one that management has accepted and employees have relied upon for a significant period of time. Id. at 31. Local 98, IUOE v. Town of Rockingham, 7 VLRB 363, 375 (1984).

In applying these standards and upon review of our precedents, we conclude that the Association has demonstrated that such an established practice was changed here. In Local 98, International Union of Operating Engineers, AFL-CIO v. Town of Rockingham, 7 VLRB 363 (1984), the Board determined that the employer committed an unfair labor practice by reducing the workweek of town highway department employees from 43 hours to 40 hours per week a month shortly after the union had been certified as the employees' bargaining representative, and while the union and the employer were in the process of negotiating a collective bargaining contract. Under the Personnel Rules in effect in the town, highway department employees were defined as hourly employees whose regular work week is the period Monday through Friday, with hours set by the Highway Department and with payment of time and one-half in wages for hours worked over 40. No specific number of hours of work for Highway Department employees were established by the Personnel Rules. The employer contended that, absent any guaranteed number of straight time or overtime hours, the 40 hour workweek did not constitute a unilateral change in the status quo on hours. The Board disagreed, reasoning that the 43 hour workweek was an established practice of five years and the employer was required to negotiate before changing an established practice.

In Castleton Education Association, Paraprofessional Unit v. Castleton-Hubbardton Board of School Directors, 13 VLRB 140 (1990), the Board determined that the employer made a unilateral change in a condition of employment, in violation of its duty to bargain in good faith, by discontinuing the practice of providing two teacher aides with a paid lunch period. The Board relied on a four year practice of paying one aide for her one-half hour lunch time, and paying another aide for a lunch period for one year.

Similarly here, a practice existed of the paraeducators working 7 ½ hours a day, and the food service employees working 8 hour days, for two full school years prior to the 1998-99 school year. Given the experience over two years, we consider this practice to be one that management had accepted and employees had relied upon for a significant period of time.

We disagree with the School Board that the 1995-96 employment agreements signed by employees constituted the status quo rather than the actual practice over the immediately preceding two years. The 1995-96 agreements had expired by their express terms on "June 14, 1996" at the conclusion of the 1995-96 school year. Also, we are not persuaded that letters of intent signed by employees for the school years succeeding the 1995-96 school year resulted in continuing the 1995-96 agreements as the status quo with respect to their hours of work. The letters of intent provided that the employees "will be considered to hold a contract based on his/her 1995-96 salary". The involved employees are paid an hourly wage, not a salary. We conclude this language means they will be paid at the same hourly rate as they were during the 1995-96 school year pending the negotiation of any collective bargaining agreement

covering the › not construe this language to extend to their hours of work also being frozen at 1995-96 levels.

The School Board further relies on the budgets for the years succeeding the 1995-96 school year to support its status quo argument. The School Board contends that only 35 hours per week were budgeted for these employees. In fact, the food service workers were budgeted for 40 hours a week for the 1997-98 school year. Under such circumstances, the School Board's reliance on the budget obviously is misplaced. In any event, we conclude that the actual experience over the two years preceding the 1998-99 school year is a better indicator of the status quo than budget documents.

In sum, we conclude that the 7 ½ hour work day for paraeducators and the 8 hour work day for food service employees constituted established practices which management had accepted and employees had relied upon for a significant period of time. The School Board was required to negotiate in good faith with the Association through the completion of dispute resolution procedures before changing such an established practice. The School Board's failure to do so means that it violated its duty to bargain in good faith and committed an unfair labor practice.

We need to 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 any unfair labor practice, then the Board "shall issue . . . an order . . . to cease and desist from the unfair labor practice and to take such affirmative action as the Board shall order." Board orders are remedial "make whole" orders. Cavendish Town Elementary School Teachers' Association, Vermont-NEA/NEA v. Cavendish Town

Board of School Directors, 16 VLRB 378, 391 (1993). In ordering affirmative action, the task of the Board is to restore the economic status quo, and recreate the conditions and relationships, that would have existed but for the employer's wrongful act. VSCFF v. VSC, 17 VLRB 1, 17 (1994). Burlington Education Association v. Burlington School District, 16 VLRB 398, 410-11 (1993).

The Association requests that the Board issue an order restoring the hours of the paraeducators to 7 ½ per day, and the hours of the food service workers to 8 per day, and making the employees whole. We conclude this is an appropriate remedy. To make the employees "whole" is to not only restore their hours, but also to award them the difference in pay for the hours they actually worked this year and the hours they would have worked under the established practice if the School Board had not unilaterally changed that practice. We note that the hours of paraeducators were increased from 35 to 36 3/4 hours a week in November, 1998, and that one of the food service workers has been scheduled to work somewhat over 35 hours a week during the school year. This should be reflected in the remedy, thereby reducing the School Board's back pay liability.

Actions of Principal

The Association further alleges that Principal Robert Austin committed unfair labor practices against teachers and support staff represented by the Association through specific unilateral changes in school policy and other intimidating actions. The Association alleges that Austin interfered with, restrained, or coerced employees in the exercise of their rights; discriminated by terms and conditions of employment

to discourage membership in the Association; and interfered with the administration of the Association.

In analyzing these allegations, we note that our consideration is limited to allegations made in the amended unfair labor practice charge filed in Docket No. 98-81, and the unfair labor practice charge filed in Docket No. 99-11, on March 4, 1999. At the hearings in these matters, the Association presented evidence on additional incidents which were not referenced in the unfair labor practice charges and on incidents which occurre[illegible] the charges were filed. We have not considered these incidents in determining whether unfair labor practices were committed. The School Board's opportunity to respond to the unfair labor practice charges, and the unfair labor practice complaints we issued, did not include these additional incidents.

The allegations against Austin which were included in the unfair labor practice charges and which we have considered in determining whether Austin committed unfair labor practices are the following: a) following secretaries delivering messages during the week of February 8, 1999; b) moving the facsimile machine from the outer school office into his office on February 11, 1999; c) directing that the school office be closed at 3:30 p.m. beginning February 11, 1999; d) writing a series of intimidating and/or confusing e-mail messages to staff during the week of February 8, 1999; e) yelling at staff and engaging in other intimidating behavior during the week of February 8, 1999; f) terminating Association access to the school e-mail system on February 12, 1999; and g) making a threatening telephone call to employee and Association member Heidi Royer on February 12, 1999.

In determining whether an employer discriminated against employees for engaging in union activities and improperly interfered with a union, there are two types of cases. In one type, conduct inherently destructive of employee rights is involved. In the other type, the employer's conduct does not reach the level of being inherently destructive of employee rights and proof of anti-union motivation must be presented.

The Association contends that the principal's actions were inherently destructive of important employee rights. When the employer's discriminatory conduct is "inherently destructive" of important employee rights, no proof of anti-union motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. In re Southwestern Vermont Education Association v. Mt. Anthony Union High School Board of Directors, 136 Vt. 490, 494-95 (1987). The phrase "inherently destructive" is not easy to define precisely. In cases concluding that such conduct has occurred, the employer is held "to intend the very consequences which foreseeably and inescapably flow from (the) actions... because (the) conduct does speak for itself - it is discriminatory and it does discourage union membership, and whatever the claimed overriding justification may be, it carries with it unavoidable consequences which the employer not only foresaw but must have intended". Vermont State Colleges Faculty Federation, Local 3180, VFT, AFT, AFL-CIO v. Vermont State Colleges, 15 VLRB 216, 226-27 (1992); *citing* NLRB v. Erie Resistor Corp., 373 U.S. 221, 228 (1963). In examining the evidence before us, we conclude

that Austin's actions do not rise to the level of being inherently destructive of employee rights.

Nonetheless, the Association contends in the alternative that anti-union motivation by the principal has been established by the Association. In cases where conduct of the employer does not reach the level of inherently destructive conduct, proof of anti-union motivation must be advanced by the union. The Board employs the analysis used by the U.S Supreme Court and National Labor Relations Board in such cases. Once an employee demonstrates protected conduct, he or she must show the conduct was a motivating factor in the decision to take action against the employee. Then, the burden shifts to the employer to show by a preponderance of the evidence it would have taken the same action even in the absence of the protected conduct. Horn of the Moon Workers Union v. Horn of the Moon Cafe, 12 VLRB 110 (1988).

The guidelines the Board follows in determining whether the protected conduct of engaging in union activities was a motivating factor in an employer's decision to take action against an employee are: 1) whether the employer knew of the protected activities, 2) whether a climate of coercion existed, 3) whether the timing of the action was suspect, 4) whether the employer gave protected activity as a reason for the decision, 5) whether the employer interrogated the employee about protected activity, 6) whether the employer discriminated between employees engaged in protected activities and employees not so engaged, or 7) whether the employer warned the employee not to engage in such activity. Ohland v. Dubay, 133 Vt. 300, 302-303. Horn of the Moon, 12 VLRB at 126-127.

The presence of improper employer motivation need not be shown by direct evidence; unlawful motivation may be inferred from circumstantial evidence. In re Southwestern Vermont Education Association, 136 Vt. at 494. Among the circumstances which will permit such an inference are employer knowledge of union activity, a climate or coercion, and suspect timing of the employer's action. Id. at 493. Ohland v. Dubay, 133 Vt. 300, 302-303 (1975). A climate of coercion is one in which the employer's "conduct may reasonably be said to have a tendency to interfere with the free exercise of employee rights". Grievances of McCort, (Unpublished decision, Supreme Ct. Docket No. 93-237, 1994). The critical inquiry is not whether the coercion succeeded or failed, but whether the employer's conduct reasonably tended to interfere with or restrain an employee's exercise of protected rights. Id.

In applying these standards to the allegations made by the Association, we begin by stating the obvious. At the time the Association alleges Austin engaged in unilateral changes in school policy and other intimidating actions, employees were involved in protected activities of which Austin was well aware. A negotiations dispute between the Association and the School Board had reached the factfinding level, the last step in the process before a possible strike, and the Association was engaged in a visible campaign to gain community support for a favorable contract settlement.

The Association having shown that employees were engaged in protected conduct, the next step in the analysis is to determine whether the Association has demonstrated that this protected conduct was a motivating factor in any behavior engaged in by Austin, and whether Austin improperly interfered with the

administration of the Association. We conclude that the Association has not made such a showing with respect to the allegations concerning Austin following secretaries delivering messages during the week of February 8, moving the facsimile machine from the outer school office into his office, directing that the school office be closed at 3:30 p.m. beginning February 11, and yelling at staff and engaging in other intimidating behavior during the week of February 8.

The evidence indicated that Austin implemented a measure prohibiting secretaries from delivering non-emergency measures to teachers while they were instructing students well before the week of February 8. This was designed to address Austin's concern that secretaries were too often out of the office and not able to answer the telephone. This was a reasonable measure taken so the school would operate more efficiently. The fact Austin had occasions to enforce this policy in late January or early February does not indicate any improper anti-union motivation on his part.

We conclude similarly with respect to moving the facsimile machine. Austin moved the facsimile machine into his inner office due to his concerns about the confidentiality of faxes sent to him, particularly given an increase in confidential faxes sent him as a result of the ongoing collective bargaining dispute. This was a reasonable response to a legitimate concern. Although this action made it somewhat more difficult for staff to access the fax machine, the evidence does not indicate that discrimination against employees for engaging in protected union activities, or interfering with the operations of the Association, motivated [illegible]tion in any way. Austin did not prohibit the Association from using the [illegible]hine, and there

is no evidence that the Association was prevented from sending faxes or receiving faxes.

In directing that the office be closed at 3:30 p.m., Austin can be faulted for the way the action was taken. He did not notify staff or the Association in advance that he was contemplating taking the action, and the office closing was announced by a terse memorandum from a temporary secretary without reasons for the action being articulated. Nonetheless, the Association has not demonstrated that discrimination against employees for engaging in protected union activities, or interfering with the operations of the Association, were motivating factors in the earlier office closing. Austin indicated at the hearing that he took such action so that he would have a better opportunity to work uninterrupted with one of the secretaries at the end of her work day. There is no evidence from which we can conclude that the earlier office closing resulted in interference with employee rights or had an adverse effect on the Association.

Also, we conclude the Association has not presented evidence beyond specific incidents discussed elsewhere in this opinion to support its general allegation that Austin yelled at staff and engaged in other intimidating behavior during the week of February 8. Further, we conclude that the Association has not demonstrated that Austin's e-mail messages to staff during the week of February 8 improperly interfered with employee rights or the administration of the Association. Austin sent such messages in response to a flyer sent by teachers and support staff to members of the community seeking to gather support for the Association in the negotiations dispute with the School Board. In the e-mail messages, Austin expressed his

differences with statements made in the flyer and expressed his concerns with respect to some of the contents of the flyer.

His expressed views in this regard are protected by 21 V.S.A. §17728, which provides that "the expression of any views, argument or opinion, or the dissemination thereof, whether in printed, graphic, oral or visual form, shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or promise of benefit." Austin's expressed views in his e-mail messages contained no threat of reprisal or promise of benefit and, thus, cannot constitute evidence of an unfair labor practice.

At this stage of the analysis, we reach different conclusions with respect to the allegations concerning Austin terminating Association access to the school e-mail system, and making a threatening telephone call to Heidi Royer. The Association has demonstrated that discrimination against employees for engaging in protected union activities, and interfering with the administration of the Association, played some part in Austin's actions on these matters, and thus we must proceed to the next level of examination.

The timing of Austin taking action on Friday, February 12, to terminate the Association's access to the e-mail system, by completely shutting down the school's e-mail system over the weekend, is suspect. Staff had been able to use the school e-mail system for Association purposes for 8 or 9 years prior to February 12, and such use was unregulated. His complete termination of this access on February 12, when he discovered some Association messages on the e-mail system, indicates some anti-union bias on his part. Austin's action is particularly suspect given that it occurred

during a time the Association was using various communication channels to gather support in its negotiations dispute with the School Board.

We recognize that Austin shut down Association access to the e-mail system after discovering a few Association e-mail messages apparently had been sent by teachers during their instructional time. This was an immediate response to a particular event, and the potential harm to the operation of the school was minimal, and Austin could have dealt with the situation the following Monday morning with more reasonable measures to regulate access. His inappropriate response demonstrates that discrimination against employees due to their Association activities and improper interference with the administration of the Association motivated his action to some extent.

We conclude likewise with respect to the telephone call he made to Heidi Royer on the evening of February 12. In the telephone call, made to an ill employee at home after hours, Austin left Royer understandably fearful of losing her job when he informed her that she may be involved in illegal activity due to her involvement with the Association use of the school e-mail system. The fact that Austin ultimately concluded Royer did nothing wrong serves to demonstrate how inappropriately he handled the telephone call. Austin overreacted to the e-mail situation and poorly treated an off-duty ill employee due to her appropriate involvement in Association activities. We conclude that discrimination against Royer due to her Association activities and improper interference with the administration of the Association constituted motivating factors in his actions towards Royer.

The Association having demonstrated improper motive with respect to Austin's actions concerning the termination of Association access to the e-mail system and the telephone call to Royer, the burden now shifts to the School Board to show by a preponderance of the evidence it would have taken the same action even in the absence of the protected conduct. The Board may determine in protected activity cases that there is a dual motive for the employment decision - a legitimate business reason and an illegitimate employer reaction to its employees engaging in protected activities. In dual motive cases, the Board weighs the interests of the employees in engaging in protected activities and the interests of management in protecting the efficiency of the public services it performs through its employees and strikes a balance between the competing interests. Carbone and VSEA v. State of Vermont, 16 VLRB 282, 311 (1993)

In analyzing the Association access to the e-mail system issue under these standards, we ultimately decline to conclude an unfair labor practice was committed. As indicated above, Austin was partly motivated improperly by anti-union animus in dealing with this issue. However, we also conclude he was motivated by a legitimate business concern of ensuring that teacher use of the e-mail system was not occurring during instructional time.

In striking a balance between these competing interests, it is noteworthy that the school's e-mail system was restored on the first school day following it being shut down. This restored employee access to the e-mail system, including Association access. It is true that the Association's access to the system is not as convenient as it previously was since the Association address group, "#union", was

not restored. We are not inclined to conclude this failure rises to the level of an unfair labor practice absent some evidence presented by the Association indicating discriminatory treatment of the Association in this regard compared to other address groups using the school e-mail system. The Association has presented no such comparative evidence. In sum, we conclude by a preponderance of the evidence that the School Board would have taken the action ultimately taken here regulating the e-mail system absent the protected Association activities of the employees.

We conclude differently with respect to the telephone call made by Austin to Heidi Royer. The School Board has presented no legitimate business reason justifying the treatment by Austin of Royer during the telephone conversation. Royer understandably was left to conclude that she would not have received such a call if she was not a member of the Association. Such coercive behavior which would have a tendency to interfere with the free exercise of employee rights cannot be condoned.

As a remedy for the discrimination against Royer due to her Association activities and the improper interference with the administration of the Association, we conclude that the appropriate remedy is a cease and desist order. Further, we believe it is appropriate to order the School Board to post the Board's order in this case in all places customarily used for employer-employee communications for a period of ninety days.

The Association also requests that we direct the School Board to reimburse the Association for expenses incurred as a result of filing this charge. The Board has recognized that such a remedy is an appropriate exercise of our remedial powers in certain unfair labor practice cases. Rutland School Board v. Rutland Education

Association, 2 VLRB 250, 286-87 (1978). Cavendish Town Elementary School Teachers Association, Vermont-NEA/NEA v. Cavendish Town Board of School Directors, 16 VLRB 378, 393 (1993). Flood Brook Staff Association v. Flood Brook Union Board of School Directors, 19 VLRB 173, 181 (1996). We conclude that such a remedy is not appropriate in this case in which most of the allegations made by the Association were not established.

Additionally, we are distressed by the troubled relationship we have found between the parties in this case. This relationship of ill will and tension which permeated this school year was fed by the inappropriate and irresponsible actions of both parties, and is the antithesis of good labor relations. For instance, the wearing of whistles by some staff, due to expressed concerns about their safety as a result of the actions of Principal Austin, strikes us as an overreaction to Austin's actions. The wearing of whistles only served to exacerbate an already poor relationship.

ORDER

NOW THEREFORE, based on the foregoing findings of fact and for the foregoing reasons, the Vermont Labor Relations Board has concluded that the Hyde Park Elementary School Board has committed unfair labor practices in these matters to the extent sent forth in the Opinion, and it is hereby ORDERED:

1. The Hyde Park Elementary School Board shall cease and desist from implementing the unilateral changes in the number of hours worked by the paraeducators and food service employees which were instituted during the 1998-99 school year, and shall restore paraeducators and food service employees to the number of hours they worked during the 1996-97 and 1997-98 school years;

2. The Hyde Park Elementary School Board shall negotiate in good faith with the Lamoille North Education Association with respect to the hours of work of the paraeducators and food service employees;

3. The Hyde Park Elementary School Board shall pay each paraeducator and food service employee a sum of money which represents the difference in wages between what the employee actually received during the 1998-99 school year and what the employee should have received during that year, plus interest, if the School Board had not improperly changed their hours of work; and the School Board shall restore any benefits lost to employees due to such improper change;

4. The interest due employees on lost wages shall be computed on gross pay and shall be at the legal rate of interest of 12 percent per annum, and shall run from the date each paycheck was due during the period commencing with the beginning of the 1998-99 school year and ending on the date the employees receive such monies;

5. The Hyde Park Elementary School Board shall cease and desist from discriminating against Heidi Royer, and improperly interfering with the administration of the Lamoille North Education Association, due to Royer's appropriate involvement with the Association use of the school e-mail system; and

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

It is further ORDERED that the parties shall notify the Labor Relations Board within 30 days of the date of this order of any problems in computations regarding Paragraphs #3 and #4 above.

Dated this 15th day of July, 1999, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Catherine L. Frank, Chairperson

/s/ Leslie G. Seaver

Leslie G. Seaver

Carroll P. Comstock