VERMONT LABOR RELATIONS BOARD

BED IBEW, LOCAL 300, UNIT SIX	)	
	)	
v.	)	DOCKET NO. 99-56
	)	
BURLINGTON ELECTRIC DEPARTMENT	)	

MEMORANDUM AND ORDER

The issue in this unfair labor practice case is whether to defer to an arbitration decision. On August 20, 1999, BED IBEW, Local 300, Unit Six ("Union"), filed an unfair labor practice charge against the Burlington Electric Department ("Employer"). The Union alleged that the Employer violated 21 V.S.A. Section 1726(a)(5) by refusing to bargain in good faith and making an improper unilateral change.

Specifically, the Union contended that the Employer, without notice or negotiation, changed a longstanding past practice dealing with merit wage increases and contained in the Employer's personnel policy manual that has been made part of the collective bargaining agreement between the Union and Employer. The Union maintained that, prior to the change, employees were granted 3% merit wage increases, with few exceptions, as long as they met performance standards. As a result of the change in the policy, the Union alleged that employees, who would have received a 3% merit increase under the past practice, were denied increases with the exception of a few individuals who received 1% increases. The Union indicated in the charge that several grievances had been filed over the alleged change to the merit wage increase policy.

On September 9, 1999, the Employer filed a response to the unfair labor practice charge and a Motion for Summary Judgment. In the response and motion, the Employer contended that this dispute should be deferred to the grievance and arbitration procedure

set forth in the collective bargaining agreement between the parties. On October 7, 1999, the Union filed a response to the Employer's Motion for Summary Judgment.

In a November 5, 1999, decision, the Board declined to rule on this unfair labor practice charge and deferred the matter to the grievance procedure. 22 VLRB 325. The Board indicated that such deferral did not necessarily bar the Board's later consideration of the matter. Id. at 328. The Board retained jurisdiction for the purpose of entertaining a motion that grievance arbitration of the underlying issue in this matter failed to meet the following criteria necessary for the Board to defer to an arbitrator's award: 1) fair and regular arbitration proceedings; 2) agreement by all parties to be bound; 3) the decision is not repugnant to the purpose and policies of the Municipal Employee Relations Act; 4) the arbitrator clearly decided the unfair labor practice issue; and 5) the arbitrator decided issues within his or her competency. Id.

Subsequent to the Board decision, the Union and Employer proceeded through the grievance procedure, ultimately submitting the dispute to binding arbitration. The Union filed the grievance on behalf of six employees who received "good/competent" overall performance ratings and did not receive any merit increase, and two employees who received ratings higher than "good/competent" and were awarded merit increases of less than 3%. The arbitration hearing was held on March 10, 2000. In a May 24, 2000, decision, Arbitrator Ann Gosline denied the grievance. In the decision, the applicable contract language, past practices and bargaining history are discussed. Her decision states in pertinent part:

> Were the grievants entitled to a 3% merit increase by virtue of having received an overall rating of "good/competent" work performance? The inquiry must begin with the language of the contract itself. Here, the parties have

incorporated personnel policy into the contract. The key language provides in relevant part:

a. An employee who is not at the maximum rate of pay for his/her job classification shall be eligible for consideration for a performance-related wage compensation increment.

b. Consideration for a merit pay increase or decrease shall occur upon completion of an Employee Performance Planning and Review document by an employee's immediate supervisor and review of such document by the employee. A merit pay increase or decrease must be approved by the employee's supervisor(s), Sector Manager and General Manager.

e. The normal merit pay increase or decrease for an exempt and non-exempt employee shall be equal to zero percent (0%) to three percent (3%) of the maximum for such employee's job classification.

This language repeatedly provides only for "consideration" of a merit increase. It also provides that the normal merit increase will be in the range of "zero percent (0%) to three percent (3%)." I conclude on its face this language can only be reasonably read to give management the discretion to determine whether an employee shall receive a merit increase and, if so, to set the increase within 0% to 3%, based on performance. Nothing in this language specifically requires BED to grant a full 3% increase in every case in which employees receive a satisfactory performance appraisal.

The Union argues that this language is general and that past practice should therefore be used to interpret the parties' intent. Specifically, the Union argues that the language does not explicitly provide for discretion on the part of BED, but rather that it provides in general for merit pay increases. Under these circumstances, the Union argues, the parties' past practice clarifies the standards the parties agreed to use in applying the contract language.

I cannot agree. As I discuss above, the repeated use of the word "consideration" must reasonably be read to reflect discretion on BED's part. Coupled with the provision of a range, I think the language can only fairly be read as providing management discretion to consider and provide for an increase within a range at its discretion. Inherent in the concept of consideration is flexibility to exercise judgment. The specific standard and set 3% increase the Union urges would negate this discretion and would make the "normal" merit increase a 3% increase. This interpretation would conflict with, not clarify, the clear provisions incorporated into the contract.

. . . Management bargained for and obtained governing language that allows it discretion in granting employees merit increases based on performance. Past practice does not supercede a clear contract provision.

> This is the case even though (BED General Manager Barbara) Grimes acknowledged that under her predecessor it had been the usual practice to grant a 3% increase to employees who received "good/competent" performance ratings. The question is not whether there was a practice, but whether it was binding. In the face of clear, unambiguous contract language, a contrary practice is not binding.

On June 23, 2000, the Union filed a motion, and supporting memorandum, with the Board to renew the unfair labor practice charge. The Union contends that the Board should not defer to the arbitration decision because the arbitrator did not clearly decide the unfair labor practice dispute, and the decision was repugnant to the purpose and policies of the Municipal Employee Relations Act.

The Union contends that the BED General Manager made a unilateral change in the compensation plan by requiring employees to receive higher performance evaluations than they had in the past to be eligible for any merit pay increase, and that this "tore the heart out of the negotiated pay plan in the collective bargaining agreement". The issue in the unfair labor practice charge, the Union argues, is whether the Union waived its right to bargain a change in the structure of the pay plan as both parties knew and understood it. The Union maintains that this issue was never even considered by the arbitrator, and thus the arbitrator failed to clearly decide the unfair labor practice issue.

The Union further contends that the arbitration decision is repugnant to the Municipal Act because the arbitrator ignored the fundamental question in the unfair labor practice case, and because of the timing and substantive effect of the unilateral change by the Employer. As for the timing, the Union notes that the General Manager announced the change only days after the Union and Employer had concluded negotiations for a new collective bargaining agreement. Substantively, the Union contends that employees had a significant piece of their compensation package withheld from them.

On July 13, 2000, the Employer filed a memorandum in response to the Union's motion, and also filed a cross-motion to dismiss the unfair labor practice charge. The Employer contends that the Board should defer to the arbitrator's decision. On July 28, 2000, the Union filed a memorandum in opposition to the Employer's cross-motion.

In deciding whether to defer to an arbitrator's decision, we have previously indicated that we will apply standards developed under the National Labor Relations Act in such cases. Burlington Education Association v. Burlington Board of School Commissioners, 1 VLRB 335, 341-44 (1978). Local 881, IAFF v. City of Barre, 2 VLRB 81, 85 (1979). In addressing the Union's argument that the arbitrator did not clearly decide the unfair labor practice issue, we find persuasive the following standard articulated by the National Labor Relations Board in Olin Corporation and Local 8-77, Oil, Chemical and Atomic Workers International Union, AFL-CIO, 268 N.L.R.B. 573, 574 (1984), which standard continues to be applied in administering the National Act:

> We would find that an arbitrator has adequately considered the unfair labor practice if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the *facts relevant to resolving the unfair labor practice. In this respect,* differences, if any, between the contractual and statutory standards of review should be weighed by the Board as part of its determination under the *Spielberg* standards of whether an award is "clearly repugnant" to the Act.

An award is "clearly repugnant" to the Act if it is "palpably wrong"; that is not susceptible to an interpretation consistent with the Act. Id.

In applying these standards to this case, we conclude that the arbitrator has clearly decided the unfair labor practice issue. In the unfair labor practice charge, the Union contended that the Employer made an improper unilateral change in a longstanding past practice of a merit wage increase policy contained in the Employer's personnel policy

manual that has been made part of the collective bargaining agreement between the Union and Employer. In the arbitration case, the issue presented was whether employees were entitled to a 3% merit increase by virtue of having received an overall rating of "good/competent" work performance. In deciding this issue, the arbitrator had to decide whether the Employer's failure to provide 3% merit increases to employees with "good/competent" work was authorized by the collective bargaining agreement. The arbitrator concluded that the merit pay language in the personnel policy manual that was incorporated into the contract was unambiguous, and on its face can only be reasonably read to give management the discretion to determine whether an employee shall receive a merit increase and, if so, to set the increase within 0% to 3% based on performance.

Once the arbitrator made this determination, the unfair labor practice issue effectively was decided. This is because, once an arbitrator determines that an action by an employer is specifically covered and permitted by the contract, that same action cannot be determined to be an improper unilateral action in violation of unfair labor practice provisions of the Act. Bay Shipbuilding Corporation and Local 449, International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO, 251 N.L.R.B. 809, 810-11 (1980). The collective bargaining agreement and its meaning lie at the center of this dispute, and unfair labor practice provisions would be implicated only if the agreement did not grant the Employer the right to make the disputed changes. Collyer Insulated Wire and Local Union 1098, IBEW, AFL-CIO, 192 N.L.R.B. 837, 842 (1971.

In sum, the same facts examined by the arbitrator to decide the contractual issue are sufficient to determine the unfair labor practice issue of whether there was an

improper unilateral change in conditions of employment. Accordingly, the contractual and unfair labor practice issues are factually parallel and the arbitrator was presented with the facts necessary to resolve the unfair labor practice issue.

We are not persuaded by the Union's contention that the arbitrator did not decide the unfair labor practice question because the arbitrator did not address the issue of whether the Union waived its right to bargain a change in the structure of the pay plan. The arbitrator concluded that the terms of the collective bargaining agreement grant the employer discretion in granting merit pay increases. It necessarily follows from this conclusion that the Union, through negotiations, acquiesced in the Employer exercising discretion with respect to merit increases. VSCFF v. Vermont State Colleges 149 Vt. 546, 549 (1988). We thus reject the Union's contention that the arbitrator did not clearly decide the unfair labor practice issue.

We further disagree with the Union's argument that the arbitrator's decision was clearly repugnant to the Municipal Employee Relations Act because the arbitrator ignored the fundamental question at issue in the unfair labor practice case, and because of the timing and substantive effect of the unilateral change by the Employer. As discussed above, the arbitrator did not ignore the fundamental question in the unfair labor practice case. The arbitrator performed her proper function of interpreting the terms of a collective bargaining agreement. Her conclusion that the agreement was unambiguous in giving the Employer discretion in granting merit pay increases was not palpably wrong. Her determination that past practice does not supercede unambiguous contract language is consistent with principles of contract construction developed by the Vermont Supreme

Court. Swett v. Vermont State Colleges, 141 Vt. 275 (1982). Hackel v. Vermont State Colleges, 140 Vt. 446, 452 (1981).

We recognize that the timing and substantive effect of the Employer's action of limiting merit pay increases understandably would upset employees represented by the Union, as indicated by the arbitrator. This is particularly so given that it was implemented so soon after the parties had completed negotiations on a successor collective bargaining agreement. However, given the arbitrator's determination that the Employer's action was specifically covered and permitted by the contract, we cannot conclude that the Employer made an improper unilateral action in violation of unfair labor practice provisions of the Municipal Employee Relations Act. The Union would have us substitute our judgment for that of the arbitrator, which we choose not to do.

NOW THEREFORE, based on the foregoing reasons, we defer to the arbitrator's decision, and it is hereby ORDERED that the unfair labor practice charge filed in this matter is dismissed.

Dated this 26th day of September, 2000, at Montpelièr, Vermont.

VERMONT LABOR RELATIONS BOARD

Catherine L. Frank, Chairperson

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