VERMONT LABOR RELATIONS BOARD

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

MEMORANDUM AND ORDER

The issue in this unfair labor practice case on remand from the Vermont Supreme Court is to reconsider our earlier decision in light of the results of an arbitration decision. 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"). 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 that previously had been performed by members of the bargaining unit represented by the Association.

On November 12, 1996, the Labor Relations Board issued an unfair labor practice complaint. The School Board filed a motion for summary judgment on January 22, 1997, contending, among other things, that 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 was the subject of a pending grievance filed by the Association.

The Labor Relations Board held hearings on the merits on February 27 and March 27, 1997. On June 6, 1997, the Board issued a decision. The Board denied the School Board's summary judgment motion and declined to defer to the grievance and arbitration

procedure set forth in the parties' agreement. The Board further concluded that there was no waiver of bargaining rights by the Association and the School Board violated its duty to bargain in good faith through the unilateral action of contracting out custodial work during a time it was under a legal duty to bargain in good faith. The Board ordered the School Board to cease and desist from implementing its contracting out decision, negotiate in good faith on the issue with the Association, and reinstate the affected custodians with back pay and benefits. 20 VLRB 114. On November 19, 1997, the Board issued a final order on the back pay and benefits due the custodians. 20 VLRB 276.

Meanwhile, the grievance on subcontracting custodial services proceeded to arbitration. On September 3, 1997, arbitrator Mark Irvings concluded that the School Board did not violate the collective bargaining agreement between the School Board and the Association when it subcontracted custodial services.

The School Board appealed the decision of the Labor Relations Board to the Vermont Supreme Court. On appeal, the School Board claimed that, because the scope of its management rights under the collective bargaining agreement is a question of contract interpretation, the Labor Relations Board erred by refusing to defer to the arbitration process provided for in the collective bargaining agreement. The School Board further claimed that the Board erred in concluding that the Association did not waive its right to bargain over the subcontracting decision. In a July 14, 2000, decision (Sup. Ct. Docket No. 97-218), the majority of the Court agreed with the School Board's first argument, and disagreed with its second argument. The Court thus affirmed in part, reversed in part and remanded for the Labor Relations Board to reconsider in light of the parties' arbitration. The majority opinion stated:

> We conclude that: (1) the question of whether the school board had the authority, under the management-rights section of the contract, to subcontract bargaining-unit work, requires an interpretation of the contract; (2) deferral in this case is not contrary to the purposes of the collective-bargaining statute; and (3) deferral in this case is not contrary to the Labor Board's policy on deferral. Accordingly, the Labor Board erred in failing to defer to arbitration. To be clear, we do not decide the merits of the unfair-labor-practice claim. Rather, we remand to give the Labor Board the opportunity to reconsider its decision on the unfair-labor-practice claim in light of the result of the parties' arbitration.

Justice Denise Johnson dissented from the section of the majority decision concluding that the Labor Relations Board erred by declining to defer this dispute to arbitration. Justice Johnson stated that she would affirm the Board decision.

On remand, the School Board and the Association agreed to having the Labor Relations Board decide this matter based on written memoranda submitted by the parties. The Association and the School Board filed memoranda of law in support of their positions on October 18 and 19, 2000, respectively. The Association and the School Board filed reply briefs on October 25 and 26, 2000, respectively.

At the outset, we note how the Board proceeded in considering this case on remand. Exercising our discretion pursuant to 3 V.S.A. Section 921(a), the following Board members have been involved in the decision: Catherine Frank, Carroll Comstock, Richard Park and John Zampieri. All the findings of fact contained in the original decision of the Board on June 6, 1997, 20 VLRB 114, have been assumed to be accurate by the Board members involved in this decision.

In deciding whether to defer to the arbitration decision in this matter, arbitration of the underlying issue in this matter must 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.

The Association argues that several of these criteria were not met in this case. The Association contends that the arbitrator did not clearly decide the unfair labor practice issue, the decision is repugnant to the purpose and policies of the Municipal Employee Relations Act, and the arbitrator did not decide issues within his competency. The School Board maintains that the arbitration decision met all the criteria necessary for the Board to defer to that decision.

We first consider whether the arbitrator clearly decided the unfair labor practice issue. We would find that an arbitrator has adequately considered the unfair labor practice issue if the contractual issue is factually parallel to the unfair labor practice issue, and the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice issue. BED IBEW, Local 300, Unit v. Burlington Electric Department, 23 VLRB 245 (2000).

We distinguish this case from our recent decision in BED IBEW, Local 300, Unit v. Burlington Electric Department, supra, in which we concluded that the arbitrator had clearly decided the unfair labor practice issue. There, the union filed an unfair labor practice charge contending 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 was incorporated into the collective bargaining agreement. The union also filed a grievance that proceeded to arbitration. In the arbitration case, the arbitrator concluded that the merit pay language incorporated into the contract was

unambiguous, and on its face can only be reasonably read to give management the discretion to determine whether the employer shall receive a merit pay increase and, if so, to set the increase within 0% to 3% based on performance. We concluded that, 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 Municipal Act. Id. at 250.

In this case, on the other hand, the arbitrator did not determine that the action taken by the employer was specifically covered by the contract. On pages 13-14 of his decision, the arbitrator stated:

> The parties' collective bargaining agreement neither explicitly provides for nor prohibits the subcontracting of bargaining unit work. In 1995, after the Board first publicly explored the possibility of subcontracting custodial work, the Association sought to amend the contract to expressly bar the Board from any subcontracting of bargaining unit work during the life of the collective bargaining agreement. The Board rejected this modification. Apparently deciding that overall agreement was more important than going to impasse over this issue, the Association signed the collective bargaining agreement without achieving this goal. While the VLRB has determined that this aspect of bargaining history cannot be viewed as the Association waiving whatever statutory bargaining obligation the Board has if it wants to subcontract, it does indicate the Association was aware the collective bargaining agreement, as written, does not bar all subcontracting.
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> The collective bargaining agreement does contain a detailed management rights provision which enumerates both general powers --- such as determining the manner, means, and methods of operation --- and specific examples of actions by which general powers are effectuated --- such as laying off employees or discontinuing departments and functions. The fact that subcontracting is not one of the specifically enumerated examples of managerial actions means the Board cannot claim an absolute right to subcontract. However, the absence does not necessarily reflect a mutual understanding that subcontracting is wholly precluded. When the parties negotiated the language of section 3, the issue of subcontracting

was never raised, so no firm conclusion can be drawn as to what was in the collective minds of the parties.

Arbitrators have generally held that subcontracting is an inherent management right which flows out of an employer's power to dictate the means and manner of operations, including the promotion of efficiencies. Where there is no express limitation on that right --- by job category, impact, duration, or other criteria --- an employer is free to subcontract so long as it does so in good faith, for reasonable, legitimate business objectives. Subcontracting cannot be utilized to simply circumvent express negotiated provisions, like the wage scale, nor may it be employed to undermine the bargaining unit. Arbitrators have looked at a number of factors and applied a balancing test, weighing the operational justifications with the potentially adverse impact on the bargaining unit as a whole.

The arbitrator ultimately concluded, at page 16 of his decision:

> Since the subcontract was, on balance, a reasonable exercise of inherent management rights, it did not constitute a violation of the collective bargaining agreement. As was mentioned, the contract does not incorporate statutory bargaining provisions. I express no opinion on the question of whether, as a prerequisite to exercising a reserved contract right, the Board should first have satisfied some statutory bargaining responsibility, either as to the decision to subcontract or the impact of the subcontract on terms and conditions of employment.

Thus, the arbitrator based his conclusion that the collective bargaining agreement was not violated on "the reasonable exercise of inherent management rights", rather than on specific coverage of subcontracting in the collective bargaining agreement. Unlike BED IBEW, Local 300, Unit v. Burlington Electric Department, supra, we cannot conclude that the contractual issue was factually parallel to the unfair labor practice issue. We also cannot conclude that the unfair labor practice issue effectively was decided on grounds that the arbitrator determined that employer's action was specifically covered and permitted by the contract. A decision that the collective bargaining agreement was not violated under circumstances where the contract does not specifically cover the action taken by the employer is much different than a decision concluding that the employer's action is specifically covered and permitted by the contract.

In its decision remanding this case, the Supreme Court majority was critical of the Board dismissing, in one sentence and with no analysis of the management rights article of the agreement, the School Board's claim that subcontracting was covered by the agreement. The Board decision stated: "A review of the management rights article provides no basis for deferral (to the parties' grievance procedure) since it does not explicitly refer to management's ability to subcontract work." 20 VLRB at 125. Our analysis of the management rights provision at this point is pertinent to our consideration of whether the arbitrator clearly decided the unfair labor practice issue. This is because, absent a waiver by either the terms of a contract or by actual negotiations, the employer has a duty to bargain changes in mandatory bargaining subjects during the term of an agreement. Vermont State Colleges Faculty Federation v. Vermont State Colleges, 149 Vt. 546, 549 (1988). BED IBEW, Local 300, Unit Six v. Burlington Electric Department, 23 VLRB at 251. It is undisputed that subcontracting of work is a mandatory subject of bargaining. Thus, a pertinent consideration in determining whether the School Board violated its duty to bargain is whether the Association waived its bargaining rights by the terms of the collective bargaining agreement.

In its decision, the Supreme Court stated at page 8 of its opinion that "the question presented in the original grievance and in the subsequent Labor Board proceedings is whether the agreement contains bargained-for managerial rights that include the ability to subcontract bargaining unit work". It is in seeking to address this question that we undertake our analysis of the management rights provision of the agreement. In so doing, we caution that we are only analyzing the collective bargaining agreement to the extent

necessary to determine whether the Association has waived its right to bargain about a mandatory bargaining subject. NLRB v. C & C Plywood, 385 U.S. 421, 427-28 (1967).

We conclude that the terms of the collective bargaining agreement do not constitute a waiver of the Association's rights to bargain over subcontracting, and the decision of the arbitrator does not change this conclusion. 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 303, 326 (1982). Mount Abraham Education Association v. Mount Abraham Union High School Board, 4 VLRB 224, 231 (1981). 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).

The management rights provision of the collective bargaining agreement provides the School Board with the general powers of determining the manner, means and methods by which all operations of the school district will be carried out; and taking such other actions as it deems necessary to maintain the efficiency of the District's operations. These general powers are insufficient for us to conclude that, by agreeing to them, the Association consciously and explicitly waived its right to bargain over the subcontracting of bargaining unit work. 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. More specific language than the general statement of powers present here is needed for us to conclude that a union waived its right to bargain over such a crucial matter as subcontracting.

The management rights provision further grants the School Board the specific rights to lay off employees and discontinue a function or position. Similarly, we conclude that these enumerated rights are not sufficient for us to conclude that the Association waived its right to bargain over the subcontracting of work. The layoffs of employees may result from subcontracting, but it would be putting the cart before the horse to conclude that the Association intentionally waived its right to bargain over subcontracting by agreeing to grant management the right to lay off employees in certain circumstances. Also, we do not find any conscious and explicit waiver by the Association in agreeing to management's having the right to discontinue a function or position. A common understanding of discontinuing a function or position is that the work will no longer be performed, not that the work will still be performed on a subcontracting basis. In sum, we conclude that the terms of the management rights provision of the collective bargaining do not constitute a conscious and explicit waiver by the Association of its right to bargain over the subcontracting of custodial work absent specific language addressing management's ability to subcontract work.

The decision of the arbitrator does not change this conclusion. The arbitrator concluded that the collective bargaining agreement neither explicitly provided for nor prohibited the subcontracting of bargaining unit work, and he expressed no opinion on whether the School Board should have satisfied a bargaining responsibility before subcontracting bargaining unit work.

The decision of the arbitrator also does not change the conclusion the Board reached in the original decision that the parties' bargaining history demonstrates that the Association did not consciously and explicitly waive its bargaining rights over

subcontracting. We recognize that the Association, during negotiations leading to the 1996-1999 agreement, proposed but did not obtain a provision prohibiting the School Board from subcontracting any bargaining unit work. This does not result in a conclusion that the Association waived its right to bargain over subcontracting. 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. The fact that the Association did not pursue its proposal means it lost a guarantee that subcontracting would not occur during the term of the agreement, but does not mean the Association intentionally relinquished its statutory right during the term of the agreement to negotiate over any decision to subcontract before it was implemented.

The arbitrator's decision did not disturb this conclusion. The arbitrator stated in reference to this bargaining history: "While the VLRB has determined that this aspect of bargaining history cannot be viewed as the Association waiving whatever statutory bargaining obligation the (School) Board has if it wants to subcontract, it does indicate that the Association was aware the collective bargaining agreement, as written, does not bar all subcontracting". This statement reflects the arbitrator's conclusion that the collective bargaining agreement did not completely bar subcontracting, but it also reflects that he is not addressing the unfair labor practice issue of whether the Association waived the right during the term of the agreement to negotiate over any decision to subcontract before it was implemented. Elsewhere in his decision the arbitrator makes it clear that he

is expressing no opinion on the question of the School Board's bargaining responsibility. In short, the arbitrator did not decide the unfair labor practice issue.

The next issue is whether the arbitration decision is repugnant to the purposes and policies of the Municipal Employee Relations 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. BED IBEW, Local 300, Unit Six v. Burlington Electric Department, 23 VLRB at 249. We conclude that, if we were to defer to the arbitration decision, the result would be clearly repugnant to the Act.

The arbitrator determined that "the subcontract was, on balance, a reasonable exercise of inherent management rights". Under the Municipal Employee Relations Act, subcontracting is not an inherent managerial right. Under the Act, an employer and union are required to bargain in good faith with respect to wages, hours and conditions of employment. 21 V.S.A. Section 1725(a). "Wages, hours and 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 as defined in this section." 21 V.S.A. Section 1722 (17). "Managerial prerogative" means "any nonbargainable matters of inherent managerial policy". 21 V.S.A. Section 1722(11). Since subcontracting indisputably is a mandatory subject of bargaining, it is not a "nonbargainable" matter of "inherent managerial policy" pursuant to 21 V.S.A. Section 1722(11) and (17).

Given the provisions of the Act, in enforcing our unfair labor practice jurisdiction, we cannot sanction a decision holding that subcontracting existing bargaining unit work is an "inherent management right". This would be the result if we deferred to the

arbitration decision in this case. The arbitration decision is not susceptible to an interpretation consistent with the Act, and we do not defer to it.

In sum, we have reconsidered the Board's earlier unfair labor practice decision in light of the result of the parties' arbitration. We hold that the arbitration decision has failed to meet two of the criteria necessary for the Board to defer to an arbitrator's award. We conclude the arbitrator failed to decide the unfair labor practice issue, and the decision is repugnant to the purposes and policies of the Municipal Employee Relations Act. Thus, we decline to defer to the arbitration decision.

In reconsidering the Board's earlier decision, we adhere to the original conclusion that the School Board committed an unfair labor practice. We determine that, 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 its duty to bargain. The remedy for this unfair labor practice is consistent with the remedy ordered in the original decision of the Board.

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 January 12, 2001, 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 January 25, 2001, at 9:00 a.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 15th day of December, 2000, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Catherine L. Frank
Catherine L. Frank, Chairperson

/s/ Carroll P. Comstock
Carroll P. Comstock

/s/ Richard W. Park
Richard W. Park

/s/ John J. Zampieri
John J. Zampieri