

VERMONT LABOR RELATIONS BOARD

STATE OF VERMONT

v.

VERMONT STATE EMPLOYEES'
ASSOCIATION

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DOCKET NO. 04-47

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On November 29, 2004, the State of Vermont ("State") filed an unfair labor practice charge against the Vermont State Employees' Association ("VSEA"), contending that VSEA is engaging in a refusal to bargain in good faith by violating negotiation ground rules on the confidentiality of bargaining. VSEA filed a response to the charge on November 30, 2004. Labor Relations Board Executive Director Timothy Noonan met with the parties on December 1, 2004, in furtherance of the Board's investigation of the charge and to attempt to informally resolve issues in dispute. The disputed issues were not resolved. The Board issued an unfair labor practice complaint on December 3, 2004.

The Board held a hearing on the complaint on December 16, 2004, in the Board hearing room in Montpelier before Board Members Edward Zuccaro, Chairperson; Carroll Comstock, Richard Park and Joan Wilson. Attorney Michael Marks represented the State. VSEA General Counsel David Stewart represented VSEA. The parties filed post-hearing briefs on December 23, 2004.

FINDINGS OF FACT

1. VSEA and the State are in the midst of negotiations for successor collective bargaining agreements to the agreements effective July 1, 2003 – June 30,

2005, for the Non-Management Unit, Supervisory Unit, Corrections Unit and State Police Unit. Paragraph 22 of the negotiation ground rules agreed to by VSEA and the State in October 2004 provides:

The parties agree that good faith bargaining should occur directly in a confidential bargaining setting. The parties agree that bargaining proposals and sessions will be confidential except within their own internal unit membership or the State's senior officials in its agencies and departments, and the parties shall advise those constituencies of the confidentiality of the issues shared. The parties agree that no confidential information will be placed on a publicly accessible portion of a web site, or otherwise be publicly disseminated, in violation of this paragraph. The parties will work to keep bargaining proposals and sessions confidential. No statement to the general public and/or press releases shall be issued without twenty-four (24) hours notice to the other party of the topic(s) and position(s) to be outlined. Either party may respond to public statements made by the other party, but may only discuss such subjects as are necessary to a reasonable response and shall avoid discussion of specific proposals unless necessary for a response to another party's public statement that has already disclosed specific information on proposals or bargaining. Once the matter is submitted to last best offer, the matter is a public dispute and this paragraph shall no longer apply. (State Exhibit 1, VSEA Exhibit A)

2. This ground rule differed from ground rules on confidentiality of bargaining sessions and proposals which governed negotiations between the parties in prior years. Prior to 2004, dating back to negotiations for the 1999-2001 collective bargaining agreement, the parties had a ground rule that provided in its entirety: "The parties agree that bargaining proposals and sessions will be confidential except within their own internal unit membership or executive constituency; and that no statement to the general public and/or press releases shall be issued without twenty-four (24) hours notice to the other party of the topic(s) and position(s) to be outlined." In negotiations for the 1996-1997 and 1997-1999 collective bargaining agreements, there was a ground rule which provided in its entirety: "The parties agree that bargaining proposals and sessions will be confidential , and that no public statement and/or press release shall be issued

without twenty-four (24) hours notice to the other party of the topic(s) and position(s) to be outlined.” A ground rule for the 1994 – 1996 collective bargaining agreement provided in its entirety: “The parties agree that bargaining proposals and sessions will be confidential, and that no public statements and/or press statements shall be issued without twenty-four (24) hours notice to the other party.” (VSEA Exhibits B – G).

3. Terry Macaig is Executive Assistant to VSEA Director Anne Noonan. Noonan is the VSEA Chief Negotiator for collective bargaining negotiations. Noonan was in Florida on Tuesday, November 23, 2004. That day, at approximately 3:57 p.m., Macaig left a telephone voice message for Attorney Michael Marks, who is the State’s Co-Chief Negotiator. Marks was aware that Noonan was in Florida. The message from Macaig to Marks provided in its entirety:

I am calling you regarding our bylaws and our requirement to notify each other 24 hours in advance if we are going to be doing anything public. I just want to notify you today that we will be corresponding with people other than our members. In particular our retirees regarding contract negotiations and our concerns of the problem with prescription drugs and economics issues that we have. So we will be sending out a letter to them tomorrow that should be in their hands on Friday. We don’t expect anything to go further than that but who knows. So that is where we are. If you wish to talk to me I am at the office until about 4:45 today at 223-5247. I will not be at the office tomorrow but I will be at home and my number at home is 878-3872. Also I will follow up this with an email to you today.
(State Exhibit 3)

4. Macaig sent Marks a follow-up email that day, at approximately 4:32 p.m., that provided in pertinent part:

This is to notify you, pursuant to bargaining ground rule 22, that VSEA will be sending a mailed flyer to members and retirees tomorrow, November 24, 2004. The flyer should be received on or after Friday due to the holiday. The flyer will inform members and retirees of the status of negotiations with respect to Health care and prescription drugs and our concerns regarding cost shifting to employees and retirees. This could lead to public comments next week. . .
(State Exhibit 4)

5. Marks responded to this email by sending Macaig an email at approximately 4:51 p.m. on November 23 that provided in pertinent part:

I believe you have misinterpreted the ground rules. . .

The violations of the ground rules of what you are contemplating include the following: 1) The VSEA does not bargain for retirees. Retirees are not covered by SELRA, and they are not in any of the “internal unit” memberships who are bargaining. You are therefore not allowed to discuss the specifics of bargaining with retirees. 2) The ground rules require the confidentiality of specific proposals, and allow communication with your internal membership only with the accompanying protection of a good faith effort to advise of confidentiality and maintain the confidentiality of the process. Your advance warning demonstrates you intend to make this a public issue in violation of the ground rules. 3) The ground rule requiring advance notice of public comment is not a license to engage in public comment; confidentiality of bargaining remains the rule, a rule which you are about to breach.

It is particularly disturbing that you are taking this step while we are in the mediation process.

If you proceed with this step, we will consider all of our legal options.

If you proceed with this plan, please immediately fax or email me a copy of any document that you distribute. This is a formal information request.
(State Exhibit 5)

6. Macaig did not see this email response from Marks until the following Monday. Marks sent an email to Macaig at approximately 9:48 a.m. on Wednesday, November 24, stating that he had “received no reply to my phone call or email message of yesterday.” Marks requested that he be immediately provided with a copy of the “flyer” (State’s Exhibit 6).

7. Noonan became aware of the State’s objections to the VSEA “flyer” at approximately 4:00 p.m. on November 24. Katie Boyd of the VSEA staff sent Marks an email at approximately 4:51 p.m. on November 24. The email contained an attached letter from Anne Noonan to Marks that provided in pertinent part:

This is in response to your e-mail to Terry Macaig, dated November 23rd, regarding VSEA's announcement to you of our intent to make a public statement(s) regarding the economic and health care issues in our contract negotiations. VSEA does not agree that our action will violate the parties' mutually agreed ground rules.

...

(State's Exhibit 7)

8. On November 24, VSEA mailed a "Contract Campaign Update" to approximately 5500 VSEA members and approximately 2500 retirees entitled "VSEA Members and Retirees: Can You Afford Increased Costs in Health Care??" The front page of the "Contract Campaign Update" provided in its entirety:

The Douglas Administration has put contract proposals on the table demanding significant changes to the health care plan that covers 20,000 State employees, retirees and dependents. The State is seeking dramatic 'givebacks' in prescription drug coverage, the establishment of a "preferred drug list." The State even proposes to eliminate its bargaining obligations if it changes the health care plan! The State's proposal would eliminate the out-of-pocket dollar maximum on drugs – exposing many of our members and retirees to financial ruin if they become sick. Some of the most severely ill plan members would be forced to pay out thousands of dollars in drug costs alone. A VSEA member recently testified for the union at the Statehouse that her family's costs would increase from \$325 a year to \$2,800 a year – provided that her husband's health status (heart transplant patient) did not change to require any new drugs.

All of these changes are being proposed even though our health care plan posted a SURPLUS last year of \$12 million; this year of \$6.6 million; and a projected \$1.7 million next year. The Plan is not broken or in need of repair – and certainly not in need of cost shifting to employees and retirees – and certainly does not need the heavy hand of the State interfering with health care decisions of your doctor.

The State's proposal spells "BAD NEWS" and "COST SHIFT" to employees and retirees. If you don't like what you've read so far, then keep reading to find out more and how to join the fight.

VSEA has the right under law and our contract to make the State bargain over these proposed changes. Your union teams are fighting these proposals right now in contract talks. Yet, the State may hold onto these 'concession' proposals for the duration of negotiations, hoping that they might prevail during impasse, and thereby forcing the changes upon the workforce.

(For more info about the bargaining and impasse process, contact VSEA at vsea@vsea.org).

The removal of the ‘out-of-pocket maximum’ for prescription drugs could be a financial disaster for many employees and retirees. Currently, the out-of-pocket exposure for prescription drugs is \$325 per year. Under the State’s proposed system, your financial exposure would be uncapped. See the bulleted list below outlining the proposed cost shifting to the employees and retirees:

- Co-pay of 10% per person for each generic drug filled.
- Co-pay of 20% per person for each preferred drug filled.
- Co-pay of 40% per person for each non-preferred drug filled, with NO out-of-pocket maximum.
- Minimum co-pay of \$5 for each drug filled at a pharmacy.
- Minimum co-pay of \$10 for each drug filled by mail.
- Maximum out of pocket of \$50 for each generic or preferred drug filled at pharmacy.
- Maximum out of pocket of \$100 for each generic or preferred drug filled by mail.
- May require filling all prescriptions in excess of 30 days by mail.

RALLY FOR A FAIR CONTRACT:

December 2nd, 4:45 p.m.

In front of the Pavilion Office Building, 109 State Street, Montpelier

See back for more details

TAKE ACTION TODAY

Call the Governor’s Hotline at 828-3345 or 1-800-649-6825. Tell the Governor you want a fair contract, and that you are especially disappointed and angry at the health care proposals being put forth by his Administration that will harm State workers and retirees.

(State Exhibit 2)

9. The back page of the “Contract Campaign Update” described the December 2 rally as “(a)n informational rally in support of a fair contract for Vermont State Employees”. It identified participants in the rally as “(m)embers of the Vermont State Employees’ Association, labor leaders and the general public” (State Exhibit 2).

10. VSEA did not send Marks a copy of the “Contract Campaign Update”, and did not distribute it to anyone other than members and retirees. VSEA intended that

the distribution of the “Contract Campaign Update” would place pressure on the State concerning its health insurance bargaining proposals.

11. VSEA held the December 2 rally as scheduled. None of the speakers at the rally disclosed the specific bargaining proposals of the State or VSEA. VSEA directed unit negotiation chairpersons who spoke at the rally to not discuss specific bargaining proposals.

12. VSEA and the State commenced mediation with Commissioner Ed Jones of the Federal Mediation and Conciliation Service on Monday, November 29.

OPINION

The State contends that VSEA violated 3 V.S.A. Sections 903, 962(4) and 962(9) through disregarding negotiation ground rules on the confidentiality of bargaining by mailing a “flyer” to VSEA members and retirees that disclosed health insurance bargaining proposals of the State and contained no statement that bargaining is confidential. Section 903 provides that “employers, . . . and employees or representatives shall exert every reasonable effort to make and maintain agreements”. Section 962(4) makes it an unfair labor practice “for an employee organization or its agents . . . to refuse to bargain collectively with an employer”. Section 962(9) makes it an unfair labor practice “for an employee organization or its agents . . . to engage in activities unlawful under section 903 of this title.”

VSEA responds that the State has failed to prove that VSEA violated Section 903 when it mailed the flyer to retirees or that VSEA failed to bargain collectively with the State as required by Section 962. VSEA contends that it correctly interpreted the ground

rule as allowing it, upon providing 24 hours notice to the State, to mail the flyer to retirees who are directly affected by the State's health care proposals and who effectively rely on VSEA to negotiate their benefits. VSEA references 3 V.S.A. Section 631(a)(2)(A) to support its communications with retirees. VSEA further contends that negotiation ground rules authorize both VSEA and the State to discuss specific bargaining proposals with anyone upon providing 24 hours notice to the other side.

There is a threshold issue concerning VSEA's representative status with respect to retirees since the ground rules provide that bargaining proposals shall be confidential except within VSEA's "internal unit membership", and VSEA disclosed the State's health insurance bargaining proposals to retirees. Statutory support does not exist for a conclusion that VSEA is the bargaining representative for retirees. VSEA is the exclusive bargaining representative of "employees" under the State Employees Labor Relations Act ("SELRA"). 3 V.S.A. Sections 902(3), 927 and 941. An "employee" under SELRA means an "individual employed on a permanent or limited status basis" by the State. A retiree is not so employed by the State.

It is true, as VSEA asserts, that retirees are impacted by the State's health care proposals. Retirees are provided insurance coverage through the statute addressing insurance benefits for state employees. 3 V.S.A. Section 631(a)(2)(A) states that "(f)or purposes of group life and group hospital-surgical-medical expense insurance, the term 'employees' shall include employees as defined herein and employees who are retired and are receiving a retirement allowance from the Vermont employees' retirement system". The insurance benefits statute further provides that the terms of coverage for

group insurance “shall be determined under section 904 of this title”. 3 V.S.A. Section 631(a)(1). Section 904 is the section of SELRA containing subjects of bargaining.

Under this statutory scheme, the Vermont General Assembly has extended to retirees by statute the identical insurance coverage that is negotiated for state employees through collective bargaining. VSEA is not serving as the bargaining representative for retirees under such a scheme. Rather, VSEA is acting as the representative of active state employees when negotiating health insurance benefits. The fact that retirees receive the same health insurance coverage that VSEA and the State negotiate does not derive from VSEA representation in collective bargaining negotiations but instead depends entirely on legislative action.

In determining whether VSEA violated its duty to bargain in good faith by mailing the “flyer” to VSEA members and retirees, we are guided by our precedents. The duty to bargain in good faith implies an open mind and a sincere desire to reach an agreement, as well as a serious intent to adjust differences and to reach an acceptable common ground. Chittenden South Education Association v. Hinesburg School District, 8 VLRB 219, 236 (1985); *Affirmed*, 147 Vt. 286 (1986). The totality of the parties’ conduct must be analyzed and the context in which the bargaining took place must be evaluated to determine if bad faith exists. Id. The bargaining of negotiations ground rules is integral to the process of negotiating over substantive issues; Local 4003, VFT/AFT, AFL-CIO v. Vermont State Housing Authority, 11 VLRB 344, 353-354 (1988); and the Board has concluded that a party violated the duty to bargain in good faith by unilaterally publicizing a negotiation dispute in violation of ground rules agreed upon by the union

and employer. Shaftsbury Town Board of School Directors v. Southwestern Vermont Education Association, Vermont-NEA, 10 VLRB 124, 138-139 (1987).

Thus, we need to determine whether VSEA violated the negotiation ground rules by mailing a flyer to VSEA members and retirees that disclosed health insurance bargaining proposals of the State and contained no statement that bargaining is confidential. In interpreting the ground rules, we follow the rules of contract construction developed by the Vermont Supreme Court. A contract must be construed, if possible, so as to give effect to every part, and from the parts to form a harmonious whole. In re Grievance of VSEA on Behalf of "Phase Down" Employees, 139 Vt. 63, 65 (1980). The contract provisions must be viewed in their entirety and read together. In re Stacey, 138 Vt. 68, 72 (1980). We will not read terms into the contract unless they arise by necessary implication. Id. at 71. It is the duty of the Board to construe contracts; not to make or remake them for the parties, or ignore their provisions. Vermont State Colleges Faculty Federation v. Vermont State Colleges, 141 Vt. 138, 144 (1982).

In applying these standards here, we disagree with VSEA's contention that the negotiation ground rules authorize both VSEA and the State to discuss specific bargaining proposals with anyone upon providing 24 hours notice to the other side. Taken to its logical conclusion, VSEA's contention means that one party could receive a set of bargaining proposals from the other party, immediately provide the other party with notice that the proposals would be publicly released in 24 hours, and then publicly release the proposals 24 hours later.

Such a construction of the ground rules is contrary to the requirements to give effect to every part of the ground rules and to view provisions in their entirety. The

disputed paragraph of the ground rules contains several references to the confidentiality of bargaining. It provides that “(t)he parties agree that good faith bargaining should occur directly in a confidential bargaining setting”, and “that bargaining proposals and sessions will be confidential except within their internal unit membership or the State’s senior officials in its agencies and departments, and the parties shall advise those constituencies of the confidentiality of the issues shared”. It also states that “no confidential information will be . . . publicly disseminated, in violation of this paragraph.” It contains the further statement: “The parties will work to keep bargaining proposals and sessions confidential.”

Each of these statements requiring confidentiality precede the sentence relied on by VSEA that provides: “No statement to the general public and/or press releases shall be issued without twenty-four (24) hours notice to the other party of the topic(s) and position(s) to be outlined”. Immediately following this sentence is another statement of confidentiality which allows a party to respond to public statements made by the other party, with the proviso that the “party may only discuss such subjects as are necessary to a reasonable response and shall avoid discussion of specific proposals unless necessary for a response to another party’s public statement that has already disclosed specific information on proposals or bargaining.” The construction that VSEA places on the disputed paragraph essentially ignores the reciprocal confidentiality provisions preceding and following the sentence relied on by VSEA.

In viewing the disputed paragraph in its entirety, which we concede is not a model of clarity, we interpret it to provide for VSEA making statements to the general public and/or press releases only if by so doing VSEA does not disclose the confidential

information of bargaining proposals and sessions. Otherwise, VSEA is allowed to disclose confidential information only to its “internal unit membership” provided that it advises unit members of the “confidentiality of issues shared”.

The flyer that VSEA sent to VSEA members and retirees disclosed confidential information about the State’s health insurance bargaining proposals, and contained no statement advising of the confidentiality of the proposals. Thus, VSEA violated the ground rules by disclosing confidential bargaining proposals to retirees because retirees are not members of the bargaining units represented by VSEA. VSEA further violated the ground rules by not informing VSEA members of the confidentiality of the proposals.

Nonetheless, VSEA contends that its dissemination of the flyer cannot constitute an unfair labor practice because Section 966 of SELRA prohibits such a determination. Section 966 provides: “The expression of any views, argument or opinion, or the dissemination thereof, whether in written, printed, graphic, oral or visual form, shall not constitute or be evidence of an unfair labor practice under this chapter, if such expression contains no threat of reprisal or force or promise of benefit.” We disagree that Section 966 has any applicability to this matter. This is not a case of VSEA being restricted in the “expression of any views, argument or opinion”. Instead, at issue is the enforceability of ground rules agreed upon by VSEA which restrict the disclosure of specific bargaining proposals. The freedom of expression provisions of Section 966 are not implicated.

The timing of dissemination of the flyer exacerbated the violation of the ground rules by VSEA. The mailing of the flyer on the afternoon prior to the Thanksgiving holiday indicated bad faith on the part of VSEA. VSEA intended that the mass mailing criticizing the State’s health insurance bargaining proposals, accompanied by the

solicitation of calls to the Governor's hotline and an invitation to a public rally, would place pressure on the State concerning its health insurance bargaining proposals. The fact that VSEA took such action during a period when it was difficult for the State to communicate with VSEA and timely respond to the mailing demonstrates VSEA taking unfair advantage of the State. This was contrary to its obligation to make a good faith attempt to narrow the parties' differences in negotiations.

In sum, we conclude that the totality of VSEA's conduct in violating negotiation ground rules concerning confidentiality of bargaining in a manner indicating bad faith bargaining constituted an unfair labor practice in violation of 3 V.S.A. Section 962(4) and (9). Having said that, we recognize that VSEA is in a difficult position in health insurance negotiations since the negotiations directly impact not only the state employees that they represent but also retirees. It is understandable that VSEA is interested in soliciting the support of retirees in preserving terms of health insurance coverage. Nonetheless, this does not warrant VSEA violating ground rules to which it agreed in order to enlist retirees in its health insurance campaign. Under the terms of the ground rules, VSEA needs to garner such support by means other than disclosing specific bargaining bargaining proposals of the State.

In determining a remedy for VSEA's unfair labor practice, the Board is authorized to require a party committing an unfair labor practice "to cease and desist from the unfair labor practice, and to take such affirmative action as will carry out the policies" of SELRA. 3 V.S.A. Section 965(d). In exercising its broad powers to remedy unfair labor practices, Board orders are remedial "make whole" orders, and are not punitive. VSCFF v. VSC, 17 VLRB 1, 17 (1994). We conclude that the appropriate

remedy is to order VSEA to cease and desist from its unfair labor practice and to bargain in good faith with the State. There is no further remedy at this point that would redress any harm caused by VSEA's actions.

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered:

- 1) The Vermont State Employees' Association ("VSEA") has committed an unfair labor practice in violation of 3 V.S.A. Section 962(4) and (9);
- 2) VSEA shall cease and desist from disclosing confidential bargaining proposals to retirees, in violation of negotiations ground rules agreed upon by VSEA and the State of Vermont;
- 3) VSEA shall cease and desist from disclosing confidential bargaining proposals to VSEA members without informing them of the confidentiality of the proposals, in violation of negotiations ground rules agreed upon by VSEA and the State of Vermont; and
- 4) VSEA shall bargain in good faith with the State of Vermont in negotiations for successor collective bargaining agreements between the parties.

Dated this 4th day of January, 2005, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Edward R. Zuccaro, Chairperson

Carroll P. Comstock

Richard W. Park

Joan B. Wilson