VERMONT LABOR RELATIONS BOARD

VERMONT STATE EMPLOYEES' ASSOCIATION	)	
v.	)	DOCKET NO. 07-36
STATE OF VERMONT (RE: AGENCY OF TRANSPORTATION CALL-IN PAY POLICY)	)	

ORDER

The issue before the Labor Relations Board is whether to issue an unfair labor practice complaint. The Vermont State Employees' Association ("VSEA") filed an unfair labor practice charge on November 15, 2007, contending that the State of Vermont Agency of Transportation ("Employer") violated Section 961(1) and (5) of the State Employees Labor Relations Act, 3 V.S.A. Section 901 *et seq.* ("SELRA"), by implementing a new term and condition of employment regarding call-in pay. Section 961(1) and (5) of SELRA provide in pertinent part:

> It shall be an unfair labor practice for an employer:
> (1) to interfere with, restrain or coerce employees in the exercise of their rights guaranteed by section 903 of this title, or by any other law, rule or regulation.
> . . .
> (5) to refuse to bargain collectively with representatives of the employees subject to the provisions of subchapter 3 of this chapter.

VSEA alleges in the charge that, prior to the new call-in policy, the Employer's long-standing established practice was to pay employees for a call-in beginning at the time of the call to the employee. VSEA asserts in the charge that the Employer changed this established practice to provide that employees would not begin being paid for a call-in until they arrived at their place of work.

Subsequent to filing this unfair labor practice charge, on February 8, 2008, VSEA (as well as Agency of Transportation employees Larry Young and Bernard Peters) filed a

grievance with the Board (Docket No. 08-08). Therein, the grievants alleged that the Employer violated Articles 1, 3, 17 and 20 of the collective bargaining contract, past practice, and 3 V.S.A. Section 904 by implementing the changes in call-in pay that are at issue in the unfair labor practice charge.

In its response to the unfair labor practice charge, the Employer requests that the Board not issue an unfair complaint and dismiss the charge. The Employer contends, among other things, that the Board should defer this matter to the grievance process because the underlying action concerns whether the employer violated a past practice that has become embedded in the collective bargaining contract. The Employer contends that such a claim should be addressed through the grievance procedure rather than the unfair labor practice process, a claim that in fact has been made in the grievance filed by VSEA.

When an unfair labor practice charge and a grievance are filed under the State Employees Act challenging the same underlying action, the question presented is whether the Board should issue an unfair labor practice complaint or, instead, hear the grievance and decline to issue an unfair labor practice complaint. That is the question here.

In several cases in which both a grievance and an unfair labor practice charge have been filed contesting actions taken by an employer, the Board has concluded that a dual process of review is not warranted where issues raised in the charge are also raised in the grievance, and has deferred the matter to the Board's grievance proceedings. Locke v. State of Vermont Agency of Transportation, 29 VLRB 302 (2007). Burgess v. State of Vermont Department of Buildings and General Services, 25 VLRB 281 (2002). VSEA v. State of Vermont, Office of the Secretary of State, 25 VLRB 274 (2002). VSEA, Barney, et al v. Department of Public Safety, 21 VLRB 230 (1998). Choudhary v. State of Vermont (Department of Public Service and Department of Personnel), 15 VLRB 185

(1992). Swett and Vermont State Colleges Faculty Federation, Local 3180, VFT, AFT, AFL-CIO v. Vermont State Colleges, 3 VLRB 344 (1980).

The determination whether the Board should defer this matter to the grievance procedure, and not issue an unfair labor practice complaint, turns on Board precedents in grievance cases concerning past practices. In deciding grievances, the Board has concluded that past practices are encompassed within the statutory definition of a grievance. Grievance of Cronin, 6 VLRB 37, 67-69 (1983). The Board has recognized that day-to-day practices mutually accepted by the parties may attain the status of contractual rights and duties, particularly where they are significant, long-standing and not at variance with contract provisions. Grievance of Hanifin, 11 VLRB 18, 27 (1988). Cronin, supra. Grievance of Allen, 5 VLRB 411, 417 (1982). Grievance of Beyor, 5 VLRB 222, 238-239 (1982). If contractual effect is to be granted a past practice, that practice must be of sufficient import to the parties that they can be presumed to have bargained in reference to it and reached a mutual agreement or understanding. Cronin, supra.

In several grievance cases, the Board has considered the question of what happens if a past practice is contrary to the provisions of a collective bargaining contract. The Board has determined that a mistaken interpretation by an employer of a provision of a collective bargaining contract for many years does not justify denying employees rights to which they are entitled under a correct interpretation of the contract. Grievance of VSEA (Re: Compensatory Time Credit), 11 VLRB 300, 306 (1988). Grievance of Nottingham, 25 VLRB 185, 192 (2002). A contractual provision which is incorrectly interpreted for a period of time does not render the provision invalid. Id. By the same logic, a mistaken interpretation by the employer of a provision of a contract does not

justifying granting employees rights to which they are not entitled under a correct interpretation of the contract. Grievance of Brown, et al, 20 VLRB 169, 183 (1997). Grievance of Cronan, et al, 6 VLRB 347, 355 (1983); *Reversed on other grounds*, 151 Vt. 576 (1989).

VSEA alleges that the Employer improperly changed a past practice here. As the above cases indicate, these types of claims have been addressed through the grievance procedure. The Board can examine in the pending grievance in Docket No. 08-08 whether a binding past practice is involved, including a determination of whether the practice is at variance with provisions of the collective bargaining contract. If there is a binding past practice that is significant, long-standing and not at variance with contract provisions, then it cannot be changed by the Employer and the grievance would be sustained. If the provisions of the contract call for a different result than the past practice, then the contract provisions must be given effect and the grievance would be dismissed.

In sum, the underlying action in this unfair labor practice charge is better resolved through the grievance in Docket No. 08-08 pending before the Board, and we decline to issue an unfair labor practice complaint. Based on the foregoing reasons, it is ordered that this unfair labor practice charge is dismissed.

Dated this 29th day of May, 2008, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

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Edward R. Zuccaro, Chairperson

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John J. Zampieri

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James C. Kiehle