VERMONT LABOR RELATIONS BOARD

BARRE TOWN EDUCATION ASSOCIATION	)	
BOARD OF SCHOOL COMMISSIONERS OF CITY OF BARRE AND SPAULDING HIGH SCHOOL UNION DISTRICT BOARD OF SCHOOL DIRECTORS	)	DOCKET NO. 11-04

MEMORANDUM AND ORDER

The issue before the Labor Relations Board is whether to issue an unfair labor practice complaint in this matter. On January 24, 2011, the Barre Education Association, Vermont-NEA ("Association"), filed an unfair labor practice charge against the Board of School Commissioners of the City of Barre. Subsequently, the Association amended the charge to add the Spaulding High School Union District Board of School Directors as a charged party (the two school boards hereinafter are collectively referred to as "Employers").

The Association contended in the charge that the Employers committed unfair labor practices in violation of 21 V.S.A.§1726(a)(1), (3) and (5), and 16 V.S.A.§2001, by: 1) failing to raise the issue of rescinding vertical step credit on the salary schedule for newly hired teachers in a timely manner prior to imposing terms and conditions of employment for the 2010-2011 school year; and 2) by imposing terms providing for contracting out of bargaining unit work (driver education) and paying for that work at an hourly rate instead of at the salary rate. The Employers filed a response to the charge on February 11, 2011.

Board Executive Director Timothy Noonan met with the parties on April 12, 2011, in furtherance of the Board's investigation of the charge and to informally attempt

to resolve issues in dispute pursuant to Section 35.8 of Board *Rules of Practice*. The parties subsequently entered into a Stipulation of Partial Settlement, which they filed with the Labor Relations Board on July 18, 2011. Therein, the parties resolved the issue concerning the Employers failing to raise the issue of rescinding vertical step credit on the salary schedule for newly hired teachers in a timely manner prior to imposing terms and conditions of employment for the 2010-2011 school year. This partial settlement left the remaining issue to be decided by the Labor Relations Board of whether the Employers committed an unfair labor practice by imposing terms providing for contracting out of driver education work, and paying for that work at an hourly rate instead of at the salary rate.

Factual Background

The pertinent factual background for deciding whether to issue an unfair labor practice complaint is based on materials filed by the parties and undisputed facts brought forth during the Labor Relations Board's investigation of this charge.

The Association has been the exclusive bargaining representative of the teachers of the Employers at all times relevant. The Spaulding High School Board employs teachers to provide classroom instruction and driving training/observation in its Driver Education Program. The Association and Employers were parties to a collective bargaining agreement effective July 1, 2005, to June 30. 2010.

The 2005-2010 collective bargaining agreement provided that all time spent by a driver education teacher for classroom instruction and/or driving training/observation during the school day was compensated under the terms of the negotiated salary schedule.

However, the 2005-2010 agreement provided that driver education teachers would be paid at an hourly rate for all driving instruction provided after school.

Negotiations for a successor agreement began in the fall of 2009. The Employer made proposals regarding the driver education program. The Employers proposed that all driving instruction time be compensated at a negotiated hourly rate, regardless of whether the driving instruction was provided before, during or after school, or during the summer months. Classroom instruction for driver education would continue to be compensated under the negotiated teacher salary schedule. The Employer also made a proposal which would allow it to contract out driver education services during the summer school recess.

The parties engaged in numerous bargaining sessions, mediation and fact-finding. The Association made counterproposals to the Employer's driver education proposals. The proposals and counter-proposals were the subject of discussion and negotiation between the parties. The parties failed to reach agreement on this issue.

On October 13 2010, more than 30 days after receipt of the fact finder's report, the Employer declared finality pursuant to 16 V.S.A.§2008 and voted to impose terms and conditions of employment on the teachers represented by the Association for the 2010-2011 academic year. The imposed terms and conditions included the following driver education provisions:

> . . .
> 7.14 The stipends for driver education and department heads covered by this Agreement are set forth in Appendix B which is attached to and incorporated in this Agreement. Driver Education teachers shall be compensated for classroom instruction performed during the summer, and during, after, or before the school day based on the contract salary scale and the teacher's contracted FTE. Driving lessons and observation time performed by Driver Education teachers shall be compensated based on the hourly rate in Appendix B for work performed during, before, and after the school day, on weekends, or during the summer.
> . . .

8.16(E) Drivers Education services may be contracted out during the summer recess.

These driver education provisions were consistent with the Employer's proposals on these matters throughout negotiations.

Discussion

In deciding whether to issue an unfair labor practice complaint based on this factual background, the Board has discretion whether to issue an unfair labor complaint and hold a hearing on a charge.[1] In exercising its discretion, the Board will not issue a complaint unless the charging party sets forth sufficient factual allegations for the Board to conclude that the charged party may have committed an unfair labor practice.[2]

The Association contends that the Employers' actions imposing terms providing for contracting out of driver education work, and paying for that work at an hourly rate instead of at the salary rate, interfered with, restrained and coerced the employees represented by the Association in violation of 21 V.S.A.§1726(a)(1) by eviscerating the bargaining unit. The Association also asserts that these actions so eviscerated the negotiated agreement that it is a *per se* violation of 21 V.S.A.§1726(a)(3), which prohibits discrimination in regard to terms and conditions of employment to discourage membership in any employee organization. The Association further alleges that the Employers failed to bargain in good faith in violation of 21 V.S.A.§1726(a)(5) by taking these actions which gutted the bargaining unit.

The Association asserts that, if the Employers can simply contract out bargaining unit work at the conclusion of the negotiations, the bargaining unit and Association will

[1] 21 V.S.A.§1727(a).
[2] Burke Board of School Directors v. Caledonia North Education Association, 17 VLRB 187 (1994).

be so inherently harmed that the equal bargaining positions of the parties will be out of balance. The Association contends that the Employers total actions of imposing a provision allowing it to contract out driver education work, and imposing bifurcated wages on driver education employees without limitation, is so inherently destructive of employee rights to constitute a *per se* unfair labor practice.

In deciding whether to issue an unfair labor practice complaint, we consider the negotiations framework established by the Labor Relations for Teachers Act and how the Act's negotiation provisions have been construed by the Board and the Vermont Supreme Court. The Act requires, upon request of either party, the use of mediation and fact-finding to resolve negotiations disputes. It further provides that "all decisions of the school board regarding matters in dispute in negotiations shall, after full compliance with this chapter, be final".[3]

In cases arising under this Act, the Labor Relations Board has held that the school board may not take unilateral action on matters in dispute until 30 days after receipt of the fact-finder's report. Genuine deadlock is not reached until the parties have exhausted the mandated dispute resolution procedures and it is not appropriate for management to make unilateral changes until then.[4] Once "finality" is invoked by a school board, the VLRB has determined that the duty to bargain terms of the contract for that year is ended.[5]

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[3] 16 V.S.A. §§2006-2008.
[4] Rutland Education Association v. Rutland School Board, 2 VLRB 250 (1979). Chester Education Association v. Chester-Andover Board of School Directors, 1 VLRB 426 (1978).
[5] Chittenden South Education Association, Hinesburg Unit v. Hinesburg School District and Hinesburg School Board, 8 VLRB 219 (1985); *Affirmed*, 147 Vt. 286 (1986).

The provision of the Teachers Act limiting school boards to taking unilateral action on "matters in dispute in negotiations"[6] allows a school board to make final decisions regarding matters in dispute after the parties have failed to reach agreement through the process of negotiation, mediation and fact finding.[7] The school board has the final "hammer" in negotiations, provided it has bargained in good faith and the negotiations process survives the Board's scrutiny.[8]

Under the Teachers Act, teachers also have a limited right to strike. The VLRB has determined that, upon construing the statutes relating to teacher labor relations, teachers have the same limited right to strike as municipal employees; a strike is permitted if it is timely and does not "endanger the health, safety or welfare of the public".[9] The VLRB has concluded, just as it has concerning the right of the school board to invoke finality, that the Vermont General Assembly intended at least a 30-day cooling off period after receipt of the fact-finder's report before a strike is permitted.[10]

There is no dispute that contracting out driver education work, and compensating certain driver education work by an hourly rate of pay instead of salary, were matters in dispute during negotiations. Also, there is no contention by the Association that the Employer did not bargain in good faith over these matters prior to the unilateral imposition. Further, the timing of the Employer's unilateral imposition was appropriate as it occurred more than 30 days after issuance of the fact finder's report. Given these

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[6] 16 V.S.A. §2008; Hinesburg, supra.
[7] Hinesburg, 147 Vt. at 290.
[8] Hinesburg, 8 VLRB at 247.
[9] 21 V.S.A. §1730; Green Mountain Union High School Board of Directors and Chester-Andover Elementary Union Board of Directors v. Chester Education Association and Vermont Education Association, 2 VLRB 90, 99-101 (1979).
[10] Id.; Rutland, 2 VLRB at 266-273.

circumstances, the Employers acted lawfully by taking unilateral action on the "matters in dispute" of the driver education provisions.

The Teachers Act cannot reasonably be construed to provide that employers may take unilateral action on some "matters in dispute" but not on others. It unambiguously provides that "(a)ll decisions of the school board regarding matters in dispute in negotiations shall, after full compliance with this chapter, be final."[11] There is no distinction based on the subject of the matters in dispute.

We do not find persuasive the Association's assertion that, if the Employers can simply contract out bargaining unit work at the conclusion of the negotiations, the bargaining unit and Association will be so inherently harmed that the equal bargaining positions of the parties will be out of balance. The Association disregards the important tool of a permissible strike possessed by teachers to balance the negotiations process. The check on an employer's ability to impose finality is the teachers' ability to engage in a strike if they view imposed terms and conditions of employment as unacceptable.

Our ruling should not be construed as diminishing the importance of addressing the issue of the contracting out of bargaining unit work in the collective bargaining process. It is true, as the Association points out and the Board has stated, that "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, and thus involves an issue central to the system of collective bargaining".[12] However, this statement was made by the Board in the much different context of an employer unilaterally contracting out work without negotiating the matter with the union and absent

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[11] 16 V.S.A. §2008.
[12] Milton Education Association v. Milton Board of School Trustees, 20 VLRB 114, 124 (1997).

a waiver by the union of the right to bargain over it. Here, the Employers fulfilled its obligation to bargain over the matter before imposing its decision to contract out work.

In sum, the Employers engaged in no violation of the unfair labor provisions cited by the Association. Based on the foregoing reasons, we decline to issue an unfair labor practice complaint and it is ordered that the unfair labor practice charge filed by the Barre Education Association, Vermont-NEA, is dismissed.

Dated this 12th day of August, 2011, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

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