

VERMONT LABOR RELATIONS BOARD

AFSCME COUNCIL 93, LOCAL 1201,)	
AFL-CIO)	
)	DOCKET NO. 11-03
v.)	
)	
TOWN OF CASTLETON)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

AFSCME Council 93, Local 1201, AFL-CIO (“Union”) filed an unfair labor practice charge on January 24, 2011, alleging that the Town of Castleton (Town” or “Employer”) interfered with employee rights in violation of 21 V.S.A. §1726(a)(1), and made an improper unilateral change in conditions of employment in violation of 21 V.S.A. §1726(a)(5), by requiring Eden Neary to sign an agreement before employing him as a full-time police officer which required him to reimburse the Employer for training costs should he leave employment with the Town before a certain period of time, and then enforcing the agreement when Neary left employment with the Town. The Union asserts that the Employer improperly failed to bargain with the Union on this matter. The Union requests as a remedy that the Employer be ordered to withdraw its demand that the patrol officer pay back any portion of the Employer’s costs for training at the Vermont Police Academy, and that Neary be made whole in every way. The Employer filed a response to the charge on February 10, 2011. The Union filed a reply to the Employer’s response on March 17, 2011.

Labor Relations Board Executive Director Timothy Noonan met with the parties on April 11, 2011, in furtherance of the Board’s investigation of the charge and in an attempt to informally resolve issues in dispute. He had another meeting with the parties

on May 9, 2011, and subsequent conference calls, to attempt to resolve the case. The case was not resolved. The Labor Relations Board issued an unfair labor practice complaint on December 2, 2011.

The Board held a hearing on the complaint on February 2, 2012, in the Board hearing room in Montpelier before Board Members Linda McIntire, Acting Chairperson; Louis Lacroix and Alan Willard. Union Attorney Michael Blair represented the Union. Attorney Joseph McNeil represented the Employer. The Union and the Employer filed post-hearing briefs on March 2 and March 12, 2012, respectively.

FINDINGS OF FACT

1. The Union has been the exclusive bargaining representative for many years of all full-time employees of the Town Highway Department (except the Highway Department Foreman), Police Department (except the Chief of Police), and Transfer Station; both full-time and part-time office workers (except the Town Manager, the Town Accountant, the Town Assessor, the Zoning Administrator, the Secretary to the Town Manager, and the Assistant Town Clerk); and all Waste Water Treatment Plant and Roustabout employees (Joint Exhibit 1, Labor Relations Board Docket Nos. 88-24, 91-8, 93-18).

2. The collective bargaining agreement between the Union and the Town provides in pertinent part:

...

Section 110 – Complete Agreement

This Agreement constitutes the entire agreement of the Town and Union arrived at as a result of collective bargaining negotiations, except such amendments hereto as shall have been reduced to writing and signed by the parties. All matters not included in this Agreement shall be deemed to have been raised and disposed of as if covered herein and neither party shall be required to negotiate with respect to any such matter during the term of this Agreement.

Section 111 – Management Rights

A. The Town retains all of the rights and functions necessary to effectively manage the Town except to the extent that they are expressly and specifically modified or limited by the written provisions of this Agreement. These rights include, but shall not be limited to the right to:

1. Plan, direct, schedule, assign, transfer and control employee work assignments and duties;
2. Determine the means, methods, processes, materials and equipment necessary to deliver the services provided by the Town;
- ...
5. Establish and require reasonable rules and regulations not in conflict with the express written provisions of this Agreement;
- ...
6. Hire . . . promote . . . employees . . .
- ...

B. The Town's exercise of any management right or function in a particular manner shall not preclude the Town from exercising the same right or function in any other manner which does not expressly violate a specific written provision of this Agreement. The Town's failure to exercise any right or function reserved to it shall not be deemed to be a waiver of its right to exercise such right or function at any future time.

...

Section 205 – Training

Employees in the Police Department shall receive the hours of training required by the State for certification. The Town and Union shall work together to provide training that will improve the expertise of the officer, efficient(sic) of the department and the best training value for the Town.

...

Section 504 – Grievance and Arbitration Procedures

A. A "grievance" is a claim by an employee or the Union that there has been a violation of the express written terms of this Agreement.

...

APPENDIX B – JOB DESCRIPTION

...

D) NATURE AND DESCRIPTION OF POSITION

Police Officer for the Town of Castleton. Full time. Hourly wages.

DUTIES AND RESPONSIBILITIES:

Works under the direct supervision of Police Chief.

1. Responsible for performing duties as required by departmental policy and Vermont State Law.
2. Participates in training as required by law and as directed by the Police Chief.

3. Performs various details as prescribed by Police Chief within the realm of police work.

REQUIREMENTS OF THE JOB:

1. Working knowledge of all laws and regulations pertaining to the conduct and procedures of a law enforcement officer in the exercise of their powers.
2. Knowledge of procedures when dealing with various types of complaints as described in the Police Department Policy Manual.

...

EDUCATION, TRAINING AND EXPERIENCE

1. Completion of a high school degree or equivalent.
2. Certified full-time Law Enforcement Officer by the Vermont Criminal Justice Training Council, or
3. Qualified to receive certification by the VCJTC based on training and/or prior experience.

...

(Joint Exhibit 1)

3. The Town hired Eden Neary in the spring of 2009 as a part-time police officer. As a part-time officer, Neary was not represented by the Union.

4. The Town hired Neary as a full-time police officer on October 17, 2009.

The Town and Neary entered into an agreement on October 16, 2009, the day before

Neary was hired as a full-time officer. The agreement provided in its entirety:

This agreement is made this 16th day of October, 2009 by and between the Town of Castleton Police Department ("Employer") and Eden R. Neary ("Employee").

In consideration of the mutual promises and covenants contained herein and other good and valuable consideration, Employer and Employee agree as follows:

1. Employee enters into this Agreement to induce Employer to hire Employee as a full-time police officer of the Castleton Police Department ("Department"), a position for which Employee is not currently qualified and or certified.
2. This Agreement is in addition to and supplements any other employment agreement(s) between Employer and Employee.
3. Employee will attend the Vermont Police Academy ("Academy") on a schedule to be agreed upon by Employer and Employee.
4. During the period that Employee is attending the Academy, Employer will pay Employee's salary and benefits and other costs incurred by Employer for Employee's attendance at the Academy.

5. Employee shall remain in the employment of the Department for a minimum of thirty-six (36) months after the Employee's satisfactory completion of full-time training at the Academy.
 6. If, within thirty-six (36) months following the completion of Employee's training, Employee's involvement by the Department is terminated by decision of Employer, Employee, or otherwise, Employee agrees to reimburse the Employer for the Employee's salary, benefits and other training costs incurred by Employer during the period of Employee's attendance at the Academy, Reimbursement shall be as follows:
 - A. If such termination occurs less than thirty-six (36) months after the completion of Employee's training, Employee shall be given a credit of one thirtieth(sic) ($1/36^{\text{th}}$) for every full month worked by Employee after the completion of Employee's training. This credit shall be deducted from the full salary, benefits and other costs incurred by Employer during Employee's training at Academy and Employee shall pay to Employer the difference between such costs and the credited amount. (Total amount of reimbursement will be \$14,931.20 or \$414.76 per month remaining.)
 - B. If such termination occurs more than thirty six (36) months following Employee's completion of training, Employee shall have no obligation to Employer to reimburse any of the costs associated with the training.
 7. In the event that Employee is terminated from employment with the Department, and such termination is without cause, Employee will have no obligation or responsibility to reimburse Employer for the salary, benefits and other costs incurred for Employee's training.
 8. Any obligation set forth in this Agreement shall be satisfied completely within three hundred sixty-five (365) days of the obligation becoming due and owing, in twelve (12) equal monthly payments, without interest. In the event that Employee refuses, neglects or otherwise fails to make payments as herein set forth, Employee shall be responsible for the costs (including reasonable attorney's fees) incurred by Employer in collecting such payment and shall bear interest at the rate of twelve percent (12.0%) per annum from the date such payment is due until paid in full.
 9. The laws of the State of Vermont shall govern this Agreement, Employee acknowledges that Employee has had at least five (5) days to examine this Agreement and has been advised by the Chief of the Department that Employee should consult with any attorney at Employee's expense prior to entering into this Agreement.
 10. Nothing in this Agreement shall limit the authority and power of the Employer or the Town of Castleton under the laws of the State of Vermont or the policies of the Castleton Police Department.
- (Joint Exhibit 4)

5. Neary was required to serve a one-year probationary period as a full-time police officer before he became a permanent status employee. Probationary employees are not considered employees covered by the Municipal Employee Relations Act. The Union does not represent police officers until they successfully complete their probationary period.

6. Prior to the Employer entering into the agreement with Neary, the Employer and the Union had no discussions concerning such agreements. The agreement with Neary was the first such agreement the Employer entered into with one of its employees. The Employer entered into the agreement because they had experienced losing police officers to the State Police after the Employer had paid for the officers to be trained at the Vermont Police Academy.

7. Neary attended training at the Vermont Police Academy from February 7, 2010, to May 28, 2010. During his training, the Employer paid him \$10,348.80 in wages (16 weeks x 40 hours per week x \$16.17 hourly rate. The Employer also provided him with benefits with a value of \$4,505.05 and training attire valued at \$80. The total amount of the wages, benefits and attire was \$14,933.85 (Joint Exhibit 2).

8. Neary successfully completed his probationary period in October 2010. At this time, he became a permanent status employee represented by the Union.

9. In early January 2011, Neary informed the Town police chief that he was moving to Albany, New York, and would be leaving his full-time employment in early March 2011. Neary had a relationship with a woman who lived and worked in Albany. Their geographic separation was taking a toll on their relationship, and Neary had decided to move to Albany.

10. On or around January 10, 2011, the Employer informed Neary that he would be required to reimburse the Employer \$11,200.39 for resigning from employment 2 years and 3 months prior to the end of the 3 year period during which he was required to reimburse the Employer if he left employment for the payroll and benefit costs incurred while he was undergoing training at the Vermont Police Academy. The Employer calculated the amount sought from Neary as follows:

Maximum reimbursable amount	\$14,933.85
As a monthly amount (\$14,933.85 / 36 months)	414.83
Length of reimbursable time period	36 months
Less credit for months worked following training ((6/10-2/11)	9 months
Months to be reimbursed to employer by employee	27 months
Times monthly rate	\$414.83
Total amount to be reimbursed to employer by employee	\$11,200.39
Maximum repayment period	12 months
Monthly repayment amount (Joint Exhibits 2, 3)	\$933.37

11. Neary contacted Union representative George Lovell, Vermont Coordinator for AFSCME Council 93, at some point between January 10 and January 24, 2011, and informed him of the agreement and reimbursement requirement. This was the first time that the Union became aware of the agreement that Neary had entered into with the Employer on October 16, 2009. The Union filed the unfair labor practice charge now before us on January 24, 2011.

12. Neary sent a letter to Town Police Chief Bruce Sherwin on February 11, 2011, which provided in pertinent part:

I am hereby submitting to you my change in status from full-time to part-time as a police officer for the Castleton Police Department, effective March 4, 2011, for

the reasons previously discussed. It is my intent to continue my employment as a police officer with the Castleton Police Department on a part-time basis.

...
(Joint Exhibit 5)

13. Town Manager Charles Jacien informed Neary by letter dated March 3, 2011, that, because he “breached . . . (the) contract” to “give three years of service in exchange for your certification training”, he was “obligated to pay back the Town a prorated share of this training cost”. Jacien provided Neary with a breakdown of what was owed (Joint Exhibit 6).

14. Neary’s last day of full-time employment was March 4, 2011. He moved to Albany in March.

15. Jacien sent Neary another letter dated March 17, 2011, providing in pertinent part: “As you are aware, the Town has paid out the leave time you had at the time of your termination of employment with the Town as a full-time police officer. The net amount of those payroll checks that would otherwise have been paid to you directly were applied to your obligation of the police academy training costs.” Jacien enclosed an invoice for \$10,008.93, representing the \$11,200.39 the Employer had previously informed Neary he owed minus \$1,191.46 credit for the value of unused leave time (Joint Exhibit 7).

16. Additionally, the Town withheld the paychecks due Neary on March 3 and March 10 for work he had performed prior to leaving full-time employment. The two paychecks covered 80 hours of pay at \$17.09 per hour for a total of \$1,367.20. This reduced the amount the Town is seeking from Neary to \$8,641.73 (\$10,008.93 - \$1,367.20) (Joint Exhibit 7).

17. Neary served as a part-time officer for the Town for one shift after March 4, 2011. Jacien did not allow Neary to work any other part-time shifts. The Employer terminated Neary's part-time employment in August 2011.

18. Neary has not paid the Employer any of the \$8,641.73 the Employer seeks from him.

OPINION

The issue before the Labor Relations Board is whether the Town of Castleton committed an unfair labor practice by entering into an agreement with Eden Neary before employing him as a full-time police officer which required him to reimburse the Employer for training costs at the Vermont Police Academy should he leave employment with the Town within three years of completing training, and then enforcing the agreement when Neary left full-time employment with the Town. The Union contends that the Employer interfered with employee rights in violation of 21 V.S.A. §1726(a)(1), and made an improper unilateral change in conditions of employment in violation of 21 V.S.A. §1726(a)(5), through its actions. The Union asserts that the Employer improperly failed to bargain with the Union on this matter.

The Employer contends that it was under no duty to bargain with the Union over the retention agreement because Neary was not a member of the bargaining unit represented by the Union when the agreement was reached. The Employer further asserts that the retention agreement is not a "condition of employment" requiring bargaining with the Union; that it is a qualification of employment for which there is no duty to bargain. The Employer requests that the Board rule that asking Neary to sign the retention agreement in exchange for training making him a certified law enforcement

officer falls within the Employer's managerial prerogative statutorily exempt from collective bargaining. The Employer asserts that its requirement of three years of service after completion of training is a matter of inherent managerial policy to maintain and improve the quality of policing by discouraging Town police officers from leaving employment to work for other police organizations.

Absent a waiver by either the terms of the collective bargaining contract or by actual negotiations, the employer has a duty to bargain changes in mandatory bargaining subjects during the term of a contract if contract negotiations are ongoing or not ongoing.¹ The unilateral imposition of terms of employment during a contract term when the employer is under the legal duty to bargain in good faith is the very antithesis of bargaining and is a per se violation of the duty to bargain.² The duty to bargain with respect to a proposed change in a condition of employment applies to the exclusive bargaining representative of employees, and management cannot negotiate directly with employees concerning such a proposed change.³

The first consideration in determining whether the Employer violated its duty to bargain in good faith is whether entering into an agreement with Neary before employing him as a full-time police officer which required him to reimburse the Employer for training costs should he leave employment with the Town within three years of the training, and then enforcing the agreement when Neary left employment with the Town, constituted a mandatory subject of bargaining.

¹ VSCFF v. Vermont State Colleges, 149 Vt. 546, 549 (1988). Burlington Firefighters Association, Local 3044, IAFF v. City of Burlington, 10 VLRB 53, 59 (1987). Mt. Abraham Education Association v. Mt. Abraham Union High School Board, 4 VLRB 224, 231-232 (1981).

² Burlington Firefighters, *supra*. Mt. Abraham, *supra*. VSEA v. State, 5 VLRB 303, 324-329 (1982).

³ VSEA v. State of Vermont, 2 VLRB 155, 167 (1979).

Under MERA, “wages, hours and conditions of employment” are mandatory subjects of bargaining.⁴ “Wages, hours and other 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”.⁵ “Managerial prerogative” means “any non-bargainable matters of inherent managerial policy”.⁶

The Board has had occasion in the past to decide whether matters constituted “conditions of employment” subject to a bargaining obligation or whether required bargaining was excluded due to a managerial prerogative. The Board held that the contracting out of custodial services by a school employer related primarily to conditions of employment rather than formulation or management of public policy. The Board determined this was particularly so where the employment of five employees had been terminated, directly impacting their “economic circumstances”, and there was no evident matter of “inherent managerial policy”. The Board concluded that the decision to contract out custodial services was a mandatory subject of bargaining.⁷

Also, the Board previously has looked to decisions of labor relations boards and courts in other jurisdictions for guidance in determining whether a particular subject constitutes a mandatory subject of bargaining under MERA where there is similar statutory language on the scope of required bargaining.⁸ In this case, we have reviewed

⁴ 21 V.S.A. §1725.

⁵ 21 V.S.A. §1722(17).

⁶ 21 V.S.A. §1722(11).

⁷ Middlebury Union High School Educational Support Personnel Unit v. Middlebury Union High School Board of School Directors, 15 VLRB 397, 408-410 (1992).

⁸ St. Johnsbury Police Chapter, AFSCME Local 2413 v. Town of St. Johnsbury, 13 VLRB 1, 5-6 (1990). Castleton Education Association, Paraprofessional Unit v. Castleton-Hubbardton Board of School Directors, 13 VLRB 140, 149-150 (1990) Middlebury Union High School Educational Support Personnel

decisions in other jurisdictions considering whether public employers violated the duty to bargain with the union through entering into similar agreements as is involved in the case before us.

The Superior Court of New Jersey, Appellate Division, upheld a decision of the New Jersey Public Employment Relations Commission determining that a public employer violated its duty to negotiate terms and conditions of employment with the union representing police employees when it unilaterally imposed a requirement that police recruits agree to repay training costs, including salary and benefits costs, upon leaving employment within two years.⁹ The Court stated:

We agree with PERC that the disputed repayment agreement is literally a term or condition of employment insofar as it specifies how long employees must work in order to avoid having to repay training costs and how much of the salary they have earned will be subject to disgorgement if they choose to leave their jobs earlier. This condition restricts an employee's freedom to leave employment and reenter the labor market and effectively reduces the amount of compensation he or she has received. As such, it intimately and directly affects the work of . . . employees.¹⁰

The employer in the New Jersey case contended that the repayment agreement was non-negotiable because it effectuated a significant government policy of hiring applicants who were willing to commit to remaining in government service for at least two years. The Court determined that, while a public employer has a prerogative to determine training issues, a union may negotiate the costs connected with training without significantly impinging on the managerial prerogative. The Court concluded that the repayment agreement was subject to negotiation like other methods of employee

Unit v. Middlebury Union High School Board of School Directors, 15 VLRB at 408-409. AFSCME Local 1201, Council 93 v. City of Rutland, 18 VLRB 189, 188-202 (1995).

⁹ New Jersey Transit Authority v. New Jersey Transit PBA, Local 304, 714 A.2d 329 (N.J.Super.A.D. 1998).

¹⁰ Id. at 332-333.

retention constituting affirmative inducements to remain employed such as an automatic salary increase or a vacation enhancement for two years service.¹¹

The employer in the New Jersey case also contended that the repayment obligation was not a term or condition of employment because it did not arise until the employee had left his or her employment. The Court rejected this argument, stating “(t)he technical status of ‘non-employee’ when the agreement to repay is triggered is irrelevant to the practical effects a cost-shifting requirement has on the employees’ freedom to leave their jobs and their ability to retain the compensation they have received.”¹²

The Court also was not persuaded by the employer’s argument that the agreement to repay training costs should be viewed as an employment qualification because the agreement was entered into before a recruit becomes an employee. The Court stated:

The repayment requirement does not bear on the skills and competencies needed to do the job. Those are the qualifications reserved to management. . . . Indeed, the Act’s protections would be negated by allowing employment terms and conditions to be dictated unilaterally in pre-hire agreements simply because job applicants who have been offered employment are technically not yet “employees”. . . . In any event, P.E.R.C. reasonably determined that this dispute focuses not on the pre-employment or post-employment status of employees, but on the union’s valid representational interest in the mandatorily negotiable subjects of the duration of employment and compensation.¹³

Labor relations boards in our neighboring states likewise have determined that a requirement that new police appointees agree to repay training costs is a mandatory subject of bargaining. The New York State Public Employment Relations Board held that a city unlawfully refused to bargain with a police union concerning a training agreement under which a new appointee was required to pay certain liquidated damages to the city for the cost of his training if the appointee left employment during the probationary

¹¹ Id. at 333-334.

¹² Id. at 334.

¹³ Id.

employment or within three years after permanent appointment. The Board concluded that it was improper for the city to condition an offer to hire on a waiver by a prospective employee of his or her right to union representation in negotiations over allocation of training costs.¹⁴

The New Hampshire Public Employee Labor Relations Board considered a case involving a “condition of hire” requiring a municipal police officer in a probationary period to repay the employer for training costs at the police academy should the officer leave employment with the city during the first two years of employment. The Board determined that the “condition of hire” becomes a “condition of employment” subject to negotiations with the union when the officer becomes a member of the bargaining unit and covered by the collective bargaining agreement when the officer completes the probationary period.¹⁵

We conclude similarly in this case that the requirement in the agreement with Neary that he repay training costs if he left employment within three years of completing training is a mandatory bargaining subject. The agreement entered into with Neary directly affects conditions of employment in that it specifies how long Neary must work in order to avoid having to repay training costs and how much of the salary and benefits he has received will be subject to recoupment by the Employer if he leaves his police officer position earlier. The agreement restricts his freedom to leave employment and effectively reduces the amount of compensation he or she has received, thereby directly impacting his “economic circumstances”.

¹⁴ City of Mount Vernon and City of Mount Vernon Police Benevolent Association, 18 NYPERB 3020 (1985).

¹⁵ Franklin Police Department, State Employees Association of N.H., Inc. v. City of Franklin, Case No. S0313:10, Decision No. 84-76 (1984).

We disagree with the Employer that requiring Neary to sign the retention agreement in exchange for training making him a certified law enforcement officer falls within the Employer's managerial prerogative statutorily exempt from collective bargaining. The Employer has the managerial prerogative to hire employees and determine the training they should receive, but the Union may negotiate concerning any repayment obligations associated with training as they impact on the economic circumstances of employees whom they represent without significantly impinging on this managerial prerogative. The repayment obligation was subject to negotiation like other methods to encourage employee retention such as salary increases and improved benefits tied to length of service.

Similarly, the Employer assertion that the retention agreement is not a "condition of employment" requiring bargaining with the Union, but instead is a qualification of employment for which there is no duty to bargain, is deficient in that it fails to take into account the effect the retention agreement may have on the economic circumstances of employees represented by the Union. The Employer may determine that certain training is a qualification of employment, but it is required to negotiate with the Union over a agreement associated with the training such as is involved here because it may have a direct impact on the economic circumstances of employees represented by the Union once repayment obligations under the agreement apply.

We recognize that the Employer has a legitimate interest in maintaining and improving the quality of policing by discouraging Town police officers from leaving employment to work for other police organizations. However, in meeting that interest, the Employer cannot ignore the interest of the Union as exclusive bargaining representative

of employees in negotiating over conditions of employment directly affecting the economic circumstances of employees.

We further reject the contention of the Employer that it was under no duty to bargain with the Union over the retention agreement because Neary was not a member of the bargaining unit represented by the Union when the agreement was reached. This ignores the fact that the repayment obligations under the agreement continued for a period three years after the completion of training, the vast majority of which was after Neary completed his probationary period and would be represented by the Union. In fact, at the time the repayment obligations under the agreement were applied to Neary, he was represented by the Union.

As the U. S. Supreme Court has stated: “Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures . . . looking to collective bargaining, . . . nor may they be used to forestall bargaining”.¹⁶ Also, the Board has indicated that an employer cannot avoid its statutory duty to bargain with the exclusive bargaining representative by requiring individual employees to waive the right to bargain over a matter as a condition of employment.¹⁷ The Board determined that such practices would run contrary to the purpose of the applicable labor relations act to provide orderly and peaceful procedures to prevent management from interfering with the rights of employees.¹⁸

The Employer entered into an individual contract here which by its terms potentially affected the conditions of employment of an employee represented by the Union, thus impacting the Union’s valid interest in negotiating over conditions of

¹⁶ J.I. Case Co. v. National Labor Relations Board, 321 U.S. 332, 337 (1944).

¹⁷ VSEA v. State of Vermont, 2 VLRB at 167.

¹⁸ Id.

employment for employees whom it represents. The individual contract may not be availed of to defeat the Union's duty to bargain over these conditions of employment. This would run contrary to the purposes of MERA to "prescribe the legitimate rights of both municipal employees and municipal employers in their relations with each other; to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other; . . . to allow individuals to . . . bargain collectively".¹⁹

We next consider whether the Employer made this change in a mandatory bargaining subject at a time when it was under a legal duty to bargain in good faith over this issue with the Union. The Employer contends that it was not under such a duty to bargain because the Union waived the right to bargain over the terms of hiring police officers at issue in the agreement the Employer entered into with Neary.

The Employer contends that the Union waived its rights through the management rights article and so-called "zipper" clause in the collective bargaining agreement between the Town the Union. The Employer asserts that, by necessary implication, the right to hire and promote employees set forth in the management rights article includes the right to set qualifications and impose preconditions to employment. Further, the Employer maintains that the zipper clause contained in the collective bargaining agreement is broad and explicit enough to conclude that the parties clearly and unmistakably have waived any right that might otherwise have existed to bargain concerning the retention agreement.

¹⁹ 21 V.S.A. § 1721.

In determining whether a party has waived its bargaining rights, the VLRB has required that it be demonstrated a party consciously and explicitly waived its rights.²⁰ 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".²¹ The burden of establishing a waiver is on the party asserting it.²² A party can intentionally relinquish a known right by failing to assert it in a timely manner.²³

The fact that a matter has been omitted from a labor agreement and has not been discussed in negotiations does not, in and of itself, constitute a waiver of the parties' right to contest a unilateral change over a particular subject unless the parties have explicitly waived that right. This is particularly true where an established past practice is concerned.²⁴ The Board has stated that "(a) collective bargaining agreement cannot cover every aspect of the working relationship between management and its employees", and "(t)o a large extent that relationship is governed by past practices which are too numerous to be included in the agreement but which are relied on as much by the employer as by the employee."²⁵

In interpreting a zipper clause in a contract, which restricts the obligation to bargain during the term of the contract, the Board indicated that, while an employer may rely on the zipper clause to avoid bargaining over new subjects during the term of the contract, the employer was not free to use the provision to justify a unilateral change in

²⁰ Local 98, IUOE, AFL-CIO v. Town of Rockingham, 7 VLRB 363 (1984). VSEA v. State of Vermont, 5 VLRB at 326. Mt. Abraham, 4 VLRB at 231.

²¹ In re Grievance of Guttman, 139 Vt. 574, 578 (1981).

²² Id.

²³ VSEA v. State of Vermont, 6 VLRB 217 (1983).

²⁴ Mt. Abraham, 4 VLRB at 231.

²⁵ VSEA v. State of Vermont, 2 VLRB 26, 36 (1979).

existing conditions of employment.²⁶ The zipper clause in that case contained similar language to the zipper clause in the case before us.²⁷

The Employer has not demonstrated that the Union has consciously and explicitly waived its rights concerning the repayment obligations in the agreement which the Employer entered into with Neary through the management rights clause of the collective bargaining agreement. The Employer may determine that certain training is a qualification of employment in exercising its management rights to hire and promote employees provided for in the management rights article. However, as discussed above, it is required to negotiate with the Union over any repayment obligation associated with the training because it may have a direct impact on the economic circumstances of employees represented by the Union once the repayment obligation applies. This repayment obligation is not implied in the management rights set forth in the collective bargaining agreement to hire and promote employees.

The Employer also has not demonstrated that the Union has consciously and explicitly waived its right to negotiate concerning training repayment obligations through the zipper clause. Although the Employer may rely on the zipper clause to avoid bargaining over new subjects during the term of the collective bargaining agreement, the Employer was not free to use the provision to justify a unilateral change in existing conditions of employment.²⁸

Prior to the Employer entering into the agreement with Neary in October 2009, the Employer and the Union had no discussions concerning such agreements. The

²⁶ Burlington Area Public Employees Union, Local 1343, AFSCME, AFL-CIO v. Champlain Water District, 10 VLRB 252, 259 (1987); *Reversed on other grounds*, 156 Vt. 516 (1991).

²⁷ Id. at 254-55.

²⁸ Burlington Area Public Employees Union, Local 1343, AFSCME, AFL-CIO v. Champlain Water District, 10 VLRB at 259.

agreement with Neary was the first such agreement the Employer entered into with one of its employees. The Union did not become aware of the agreement until January 2011 when Neary informed his Union representative that the Employer had informed him that he would be required to reimburse the Employer for payroll and benefit costs incurred while he was undergoing training at the Vermont Police Academy. Under these circumstances, the Union did not waive the right to negotiate concerning the condition of employment of repayment obligations associated with training costs.

Nonetheless, the Employer contends that, if the Union is correct and the retention agreement with Neary is subject to negotiations, the Union's unfair labor practice charge is untimely filed because the Union failed to file a grievance under the collective bargaining agreement before filing an unfair labor practice charge. The Employer has not demonstrated that the grievance procedure applies to this issue. "Grievance" is defined in Section 504 of the collective bargaining agreement as "a claim by an employee or the Union that there has been a violation of the express written terms of this Agreement." Nowhere in the collective bargaining agreement is there a provision concerning repayment obligations associated with training costs. Thus, there is no alleged violation of the express written terms of the collective bargaining agreement subject to a grievance.

In sum, the actions by the Employer of entering into an agreement with Neary before employing him as a full-time police officer which required him to reimburse the Employer for training costs at the Vermont Police Academy should he leave employment with the Town within three years of completing training, and then enforcing the agreement when Neary left full-time employment with the Town, during the time it was

under a legal duty to bargain in good faith with the Union was a violation of its duty to bargain in good faith and interfered with employee rights.

In deciding what remedy to apply as a result of the Employer's unfair labor practice, we look to § 1727(d) of MERA, which authorizes the Board to require a party committing an unfair practice "to cease and desist from the unfair labor practice and to take such affirmative action as the Board shall order". The Union requests as a remedy in its unfair labor practice charge that the Employer withdraw the demand that Neary pay back any portion of the Employer's costs for Neary's training at the Vermont Police Academy, and that Neary be made whole in every way.

It is appropriate that we order the Employer to cease and desist from requiring Neary to reimburse the Employer for any portion of the salary and benefits costs incurred by the Employer associated with Neary's training at the Vermont Police Academy. This remedy would be incomplete since it would not make Neary "whole" for the Employer's unfair labor practice. In exercising its broad powers to remedy unfair labor practices, Board orders are remedial "make whole" orders, and are not punitive.²⁹ In ordering affirmative action, the task of the Board is to restore the economic status quo, and recreate the conditions and relationships, that would have existed but for the employer's wrongful act.³⁰

In this case, this means requiring the Employer to pay Neary the monies it deducted from his last paychecks to partially reimburse the Employer for Neary's payroll and benefit costs incurred while he was undergoing training at the Vermont Police

²⁹ VSCFF v. VSC, 17 VLRB 1, 17 (1994). Cavendish Town Elementary School Teachers' Association, Vermont-NEA/NEA v. Cavendish Town Board of School Directors, 16 VLRB 378, 391 (1993).

³⁰ VSCFF v. VSC, 17 VLRB at 17. Burlington Education Association v. Burlington School District, 16 VLRB 398, 410-11 (1993).

Academy. Specifically, this is \$1,191.46 for the value of unused leave time and \$1,367.20 in wages. Also, interest at the legal rate is added to these sums to make Neary whole for income losses suffered as a result of the Employer's unfair labor practice.³¹ The award of interest compensates him for the loss of the use of the money represented by the monies improperly withheld from him.³²

ORDER

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

1. The Town of Castleton ("Employer") shall cease and desist from enforcing its October 16, 2009, agreement with Eden Neary and requiring Neary to reimburse the Employer for any portion of the salary and benefits costs incurred by the Employer associated with Neary's training at the Vermont Police Academy; and
2. The Employer shall pay Neary \$1,191.46 for the value of unused leave time and \$1,367.20 in wages which the Employer withheld from Neary's paychecks in March 2011, and shall pay him interest on these sums at the legal rate of interest of 12 percent. The interest due Neary shall be

³¹ Middlebury Union High School, 15 VLRB at 416-17. International Brotherhood of Electrical Workers, Local 300 v. Enosburg Falls Water and Light Department, 8 VLRB 193, 217 (1985).

³² Grievance of Warren, 10 VLRB 154, 155-56 (1987). Grievance of Rosenberger, 29 VLRB 194, 204 (2007).

computed on gross pay and shall run from the dates the monies were
deducted from Neary's paychecks to the date Neary receives such sums.

Dated this 26th day of April, 2012, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Linda P. McIntire

Linda P. McIntire, Acting Chairperson

/s/ Louis P. Lacroix

Louis P. Lacroix

/s/ Alan Willard

Alan Willard