VERMONT LABOR RELATIONS BOARD

VERMONT STATE EMPLOYEES' ASSOCIATION, INC.	)	
v.	)	DOCKET NO. 83-76
STATE OF VERMONT (Re: Bargaining Proposal Concerning Polygraph Examinations	)	

FINDINGS OF FACT, OPINION AND ORDER

On December 22, 1983, the Vermont State Employees' Association ("VSEA") filed an unfair labor practice charge against the State of Vermont. The charge alleged the State committed an unfair labor practice under 3 VSA §961(5) by refusing to bargain over a bargaining proposal concerning polygraph examinations of employees. On January 19, 1984, the Labor Relations Board issued an unfair labor practice complaint, adopting for the purposes of the complaint the allegations contained in the charge.

The State and VSEA waived an evidentiary hearing and agreed to submit this matter for resolution to the Board based upon stipulated facts and memoranda submitted by the parties. The parties filed a Stipulation of Facts with the Board on March 9, 1984. VSEA filed a Memorandum of Law on March 27, 1984. The State filed a brief on March 29, 1984. VSEA filed a Reply to State's Brief on April 4, 1984. The State filed no reply brief.

FINDINGS OF FACT

1. VSEA is an "employee organization" within the meaning of 3 VSA §902(6), and has been certified by the Board as the exclusive bargaining representative of State employees in the Liquor Control Unit, Non-Management Unit, State Police Unit, Supervisory Unit and Corrections Unit.

2. On August 9, 1983, bargaining commenced between VSEA on behalf of the employees in each of the above-mentioned units and the State for a collective bargaining agreement to become effective on July 1, 1984. On that date, VSEA presented to the State a bargaining proposal concerning polygraph examinations of employees. The proposal provided:

> No Employee covered by the agreement shall be required to submit to a polygraph examination.

3. On December 21, 1983, the State announced its intention not to bargain the subject of polygraphs for employees, and has refused, and continues to refuse, to bargain on that subject.

4. Article 3, Section 7, Subsections (g) and (h) of the Rules and Regulations of the Vermont State Police, establish procedures for the use of polygraph tests by the State to investigate allegations of misconduct of members of the Vermont State Police. Subsections (g) and (h) provide:

> (g) A member against whom an allegation has been made may, at any time during the investigation, request to take a polygraph examination or be ordered by the Commissioner to submit to a polygraph examination. However, in the case of an allegation made by a person other than a member and which does not involve criminal conduct, if the investigator has uncovered no additional evidence or information which supports or corroborates the allegation made, the member shall not be required to submit to a polygraph examination

unless the person who made the allegation first submits to a polygraph examination. Except for control questions necessary for a valid examination, the questions which are asked and which must be answered by the member shall be specifically directed and narrowly related to the allegation under investigation.

(h) The results of any such polygraph examination may be used in disciplinary proceedings. However, the results of any such polygraph examination may not be used against the member in any criminal proceedings.

5. No regulations currently exist as to the use of polygraph examinations to investigate employee misconduct, whether criminal or departmental, with respect to employees not in the State Police Unit.

OPINION

At issue is whether the State committed an unfair labor practice in violation of 3 VSA §961(5) by refusing to bargain concerning VSEA's bargaining proposal regarding polygraph examinations.

Under the State Employee Labor Relations Act (SELRA), an employer must bargain over a subject if it is a matter "relating to the relationship between the employer and employees" and is not "prescribed or controlled by statute". 3 VSA §904(a). Vermont State Colleges Faculty Federation v. Vermont State Colleges, 138 Vt. 451 (1980). The statute does not provide that a subject is not open to bargaining if mentioned or referred to by statute, but only if prescribed or controlled thereby. The exception dealing with matters prescribed or controlled by statute precludes collective bargaining only where the outcome of any negotiations has been statutorily pre-determined or expressly committed exclusively to the discretion of one party. Id, at 457.

Whether the State shall require employees to submit to polygraph examinations clearly concerns the employer-employee relationship. The results of a polygraph examination may play a significant role in an employer's decision whether to discipline an employee or employees. Thus, mandatory polygraph examinations have potentially serious implications for the employment security of employees.

The real question here is whether the subject is prescribed or controlled by statute. VSEA's bargaining proposal concerns all the employees it represents. Since different statutory considerations apply for State Police members and employees not in the State Police, we will discuss the two groups of employees separately.

Employees Not in the State Police

The State contends that it has an inherent right to use whatever tools may legally be at its disposal to investigate the criminal and non-criminal conduct of its non-State Police employees, and that the use of such investigatory tools as polygraphs is preserved by 3 VSA §905 which, it is claimed, preserves the State's right to protect the public interest in the integrity of its employees. Section 905 of SELRA provides in pertinent part:

> Subject to rights guaranteed by this chapter... nothing in this chapter shall be construed to interfere with the right of the employer... to... carry out the statutory mandate and goals of the agency... and to utilize personnel, methods and means in the most apppropriate manner possible.

This general management rights provision lacks the requisite specificity for us to conclude the Legislature, by enacting this provision, intended to expressly commit the subject of polygraph

examinations exclusively to the discretion of the employer or predetermine the outcome of any negotiations on the subject. Vermont State Colleges Faculty Federation, supra. No other statutory provision gives the employer the unfettered right to require non-State Police employees to take polygraph examinations and we conclude the State must bargain over this subject.

Nonetheless, the State contends that even if the Board finds a duty to bargain exists with respect to non-State Police employees, VSEA's refusal to bargain charge must be dismissed because it was overly broad in that it involved criminal as well as non-criminal misconduct. The State refers us to decisions of the Massachusetts and New York labor relations boards and courts[1] for the proposition that proposals disallowing the use of polygraph tests in investigating possible employee misconduct are non-mandatory subjects of negotiations if they are not limited to procedures relating solely to ordinary departmental discipline, as they may preclude the employer from investigating suspected and actual crimes of employees in the same manner as it investigates suspected and actual crimes of others.

We decline to adopt the rationale distinguishing criminal and non-criminal misconduct. An allegation an employee has engaged in criminal activity directly impacts on the employer-employee relationship since an

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[1] Local 345, International Brotherhood of Police Officers v. Massachusetts Labor Relations Commission, Massachusetts Supreme Judicial Court, Docket No. S-3234. Buffalo Police Association v. Helsby, 9 NY PERB 7020 (NY Supreme Court, 1976). Police Benevolent Association of the City of White Plains, 12 NY PERB 3046.

employee who engages in criminal conduct can be discharged or otherwise disciplined for criminal conduct (See Article 15, Section 3, of the current collective bargaining agreement between VSEA and the State, which permits immediate dismissal of an employee for conviction of a felony). Given this intimate connnection with the employer-employee relationship, the general inadmissibility of polygraph examinations in court, and without statutory provisions prescribing or controlling the subject, the State is obligated to bargain over proposals concerning mandatory polygraph exams for non-State Police employees regardless of whether non-criminal or criminal misconduct is alleged.

Further, if the State believed VSEA's bargaining proposal was too broad, it could have suggested alternatives. Bargaining proposals are, by their very nature, subject to modifications. Yet, the record is devoid of any indication the State suggested modifications.

We note that 26 VSA §2908(2) would appear to impliedly prohibit discharge or other discipline of an employee for refusal to submit to a polygraph examination. Section 2908(2) provides the Public Safety Commissioner may refuse to issue, or may suspend or revoke the license of a polygraph examiner for failure to inform a subject to be examined that his participation in the examination is voluntary. It follows that non-State Police employees cannot be discharged for refusing to submit to a polygraph examination since it is public policy that such examinations are voluntary.[2] However, even though that is our construction of statute, VSEA's proposal is bargainable in order to make explicit what is now implied.

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[2] As discussed <u>infra</u>, different considerations apply to the State Police.

State Police

We turn to determining whether the State is required to bargain concerning polygraph examinations for State Police. The State contends that because 3 VSA §311(b) places State Police "within the classified service for purposes of job evaluation and assignment of position classes to salary ranges only" and 3 VSA §904(a)(9) exempts from bargaining "rules and regulations relating to persons exempt from the classified service under Section 311" of Title 3, the State has no duty to bargain the subject of polygraphs, which are covered by departmental rules.

However, Section 904(a)(9) of SELRA must be considered together with Section 1004 of SELRA, which provides:

> The provisions of this chapter shall apply to the state police in the department of public safety except for matters of discipline, disciplinary action, transfer or suspension and those items specifically covered by statute.

In reading these two provisions together, it is evident the Legislature intended to give State Police the full panoply of bargaining rights available to other State employees with the exception of "matters of discipline, disciplinary action, transfer or suspension and those items specifically covered by statute".

The State contends that Section 1004 clearly indicates the Legislature intended to "prescribe" and "control" the subject of polygraph examinations for State Police because the requirement that a State Police member submit to a polygraph examination is a "matter of discipline" within the meaning of Section 1004. In viewing Section 1004 and statutory provisions relating to discipline of State Police

together, and upon consideration of the use to which polygraph examinations are put for the State Police, we agree with the State.

The Legislature has set up a disciplinary procedure specific to State Police members to the exclusion of all other State employees. The procedure provides that the district court or a panel of State Police members shall determine whether charges against a member are proven, and if the charges are proved, the Public Safety Commissioner shall take appropriate disciplinary action. 20 VSA §1880. 20 VSA §1923 deals with internal investigation of allegations of misconduct against State Police members. It provides in pertinent part:

> (a) The (state police advisory) commission shall advise and assist the commissioner in developing and making known routine procedures to ensure that allegations of misconduct by state police officers are investigated fully and fairly, and to ensure that appropriate action is taken with respect to such allegations.
>
> (b) The commissioner shall establish an office of internal investigation within the department, which office shall investigate, or cause to be investigated, all allegations of misconduct by members of the department...

Thus, Section 1923 empowers the Commissioner with the authority to develop "procedures" to ensure that allegations of misconduct of State Police are fully investigated, and mandates that an office of internal investigation within the Department shall investigate such allegations. The Department rules and regulations providing for polygraph examinations of State Police members (see Finding #4) clearly were developed in response to the statutory mandates of Section 1923 since the regulations provide polygraphs are an investigatory tool with respect to discipline. The polygraph is a "routine procedure to ensure that allegations of misconduct by state police officers are

investigated fully and fairly", and as such is a "matter of discipline" within the meaning of 3 VSA §1004.

We conclude the Legislature expressly committed exclusively to the discretion of the employer the decision whether to use polygraph examinations as an investigatory tool with respect to discipline of State Police officers, and removed it as a required subject of bargaining.

We do not believe 26 VSA §2908(2) prohibits the Public Safety Commissioner from requiring State Police Officers to submit to polygraph examinations. The Legislature enacted the procedures concerning investigation of alleged misconduct and imposition of discipline of State Police (i.e., 20 VSA §1880, §1923) after 26 VSA §2908(2) was already in effect, and it is evident the Legislature viewed State Police as a special case outside the purview of 26 VSA §2908.

ORDER

Now therefore, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED:

1. The State of Vermont shall cease and desist from violating 3 VSA §961(5) by refusing to bargain with the Vermont State Employees' Association ("VSEA") concerning whether employees represented by VSEA who are not in the State Police shall be required to submit to polygraph examinations, and shall bargain collectively in good faith over that subject; and

2. That portion of the unfair labor practice charge alleging the State violated 3 VSA §961(5) by refusing to bargain with VSEA concerning whether employees represented by VSEA in the State Police shall be required to submit to polygraph examinations is DISMISSED.

Dated this 7th day of June, 1984, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney, Chairman

William G. Kemsley, Sr.

James S. Gilson