VERMONT LABOR RELATIONS BOARD

VERMONT STATE EMPLOYEES' ASSOCIATION	)	
v.	)	DOCKET NO. 84-8
STATE OF VERMONT (re: BARGAINING PROPOSAL CONCERNING PROBATIONARY EMPLOYEES	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On February 8, 1984, the Vermont State Employees' Association ("VSEA") filed an unfair labor practice charge against the State of Vermont, alleging that the State's refusal to bargain over proposals concerning employees serving initial probationary periods violated 3 VSA §961(5). On May 7, 1984, the Board, taking the verified allegations contained in the charge as true, issued an unfair labor practice complaint.

A hearing was held before the full Board on June 7, 1984. VSEA Staff Attorney Michael Zimmerman represented VSEA. Special Assistant Attorney General Scott Cameron represented the State.

The State filed Requested Findings of Fact and a Memorandum of Law on July 20, 1984. The VSEA filed Proposed Findings of Fact and Conclusions of Law on July 23, 1984. The VSEA filed a Reply Memorandum on July 27, 1984.

On August 7, 1984, the State filed a motion to admit two documents showing how the Secretary of Administration had exercised his authority to extend contract benefits to employees excluded from the Contract.

The State filed its motion in order to correct what it viewed as an inaccuracy in VSEA's Reply Memorandum. On August 13, 1984, VSEA filed a response to the State's Motion. The State filed a response to VSEA's response on August 15, 1984.

FINDINGS OF FACT

1. VSEA is the exclusive bargaining representative of State employees in the Corrections Unit, Liquor Control Unit, Non-Management Unit, State Police Unit, and Supervisory Unit.

2. The State classified service consists of two types of positions: 1) permanent positions, and 2) limited service positions. There are no probationary positions in State service.

3. When a successful applicant for a permanent position is appointed to the position, he or she must serve a probationary period. Upon successful completion of a probationary period, the employee acquires permanent status.

4. On August 9, 1983, bargaining commenced between VSEA and the State for a successor collective bargaining agreement to the agreement in effect July 1, 1982 to June 30, 1984.

5. On that date, VSEA submitted its initial bargaining proposal among which was the following proposal under contract "Definitions":

> PERMANENT STATUS BASIS - Appointment to a classified position which has been authorized and funded in the State budget.
>
> (VSEA Exhibit 13)

6. VSEA intended this proposal to clearly state that any employee occupying a permanent classified position, even during an original probationary period, is a "State employee" covered by the State Employee Labor Relations Act ("SELRA") and is entitled to the benefits of collective bargaining thereunder.

7. In January, 1984, the State indicated to VSEA it would not bargain concerning the subject matter of this proposal.

8. SELRA provides, in pertinent part, as follows:

> 3 VSA 902(4) - "Employee" means state employee as defined by subdivision (5) of this section except as the context requires otherwise.
>
> 3 VSA §902(5) - "State employee" means any individual employed on a permanent or limited status basis by the State of Vermont...
>
> 3 VSA §904(a) - All matters relating to the relationship between the employer and employees shall be the subject of collective bargaining except those matters which are prescribed or controlled by statute. Such matters appropriate for collective bargaining to the extent they are not prescribed or controlled by statute include but are not limited to:
>
> > ...(9) Rules and regulations for personnel administration, except the following: rules and regulations relating to persons exempt from the classified service under Section 311 of this title and rules and regulations relating to applicants for employment in state service and employees in an initial probationary status including any extension or extensions thereof provided such rules and regulations are not discriminatory by reason of an applicant's race, color, creed, sex or national origin.
>
> 3 VSA §961 - It shall be an unfair labor practice for an employer:
>
> > ...(5) to refuse to bargain collectively with representatives of his employees...
>
> 3 VSA §1001 -
>
> > (a) Persons who are applicants for state employment in the classified service and classified employees in their initial probationary period and any extension or extensions thereof may appeal to the state labor relations board if they believe themselves discriminated against on account of their race, color, creed, sex, age or national origin.
> >
> > (b) Permanent classified employees excluded from bargaining units shall be deemed to have the right of appeal in the same manner and to the same extent as those employees represented by a bargaining representative except that they may not be represented by a bargaining representative.

9. Chapter 13, entitled "Classification of State Personnel", of Title 3 of Vermont Statutes provides in pertinent part as follows:

3 VSA §310 -

...(e) Subject to bargaining rights as set forth in chapter 27 of this title, the commissioner of personnel shall make such regulations and adopt such methods of qualifying employees for positions as will make the plan effective, and shall prescribe rules governing appointments, probation, promotions, demotions, transfers, separations, vacations, sick leave and hours of employment applicable to persons in the classified service.

(f) The classification and compensation plan and the rules and regulations for personnel adminitration shall be based on merit system principles...

3 VSA §312 -

(a) The term "merit system" means the system developed to maintain an efficient career service in state government under public rules, which, among other provisions, includes appointment through competitive examination; nondiscrimination because of race, sex, politics, national origin, or religion; an equitable and adequate compensation plan; tenure, contingent on successful performance; and promotion, contingent on evaluated capacity and service.

(b) Merit system principles are:

(1) Recruiting, selecting, and advancing employees on the basis of their relative ability, knowledge, and skills, including open consideration of qualified applicants for initial appointment;

(2) [Repealed]

(3) Training employees, as needed, to assure high-quality performance;

(4) Retaining employees on the basis of the adequacy of their performance, correcting inadequate performance, and separating employees whose inadequate performance cannot be corrected;

(5) Assuring fair treatment of applicants and employees in all aspects of personnel administration without regard to political affiliation, race, color, national origin,

sex, or religious creed and with proper regard for their privacy and constitutional rights as citizens; and

(6) Assuring that employees are protected against coercion for partisan political purposes and are prohibited from using their official position for the purpose of interfering with or affecting the result of an election or a nomination for office.

10. During the 1982 legislative session, the General Assembly of the State of Vermont passed Act. No. 249. This Act, which is commonly referred to as the "Pay Act", funded all increases in expenditures relating to the State's employment relationship with its employees. Section 3 of that Act provided:

Sec. 3. PROVISIONS RELATING TO NONMEMBERS OF BARGAINING UNIT

(a) Original probationary employees at the minimum of their pay scales shall be adjusted to the new minimum rate. Employees in original probationary periods in pay scales, 1, 2 or 3 or who were hired within range shall receive a five percent increase in salary, even though it places them at an amount in excess of the new minimum.

(b) The secretary of administration may extend the provisions of the collective bargaining agreement as necessary or appropriate to other state employees who are not members of any collective bargaining unit.

11. The "Pay Act" passed by the General Assembly during the 1984 legislative session, Act No. 243, provided in pertinent part as follows:

Sec. 6. PROVISIONS RELATING TO NONMEMBERS OF BARGAINING UNIT

(a) Original probationary employees at the minimum of their pay scales shall be adjusted to the new minimum rate, effective with the adjustment of pay scale minimums.

(b) The secretary of administration may extend the provisions of the collective bargaining agreement as necessary or appropriate to other state employees who are not members of any bargaining unit.

OPINION

State's Motion to Admit Documents

Before deciding the merits, we first rule on the State's motion filed subsequent to the hearing to admit two documents indicating the Secretary of Administration has exercised his authority to extend contract benefits to employees excluded from the contract. We take notice of these exhibits to show the Secretary extended certain contract benefits to probationary employees, but given our opinion that this case is decided on statutory provisions and not by actions of the parties taken in regard to probationary employees, we do not deem the exhibits relevant and deny the State's motion.

Merits

At issue is whether the State committed an unfair labor practice in violation of 3 VSA §961(5) by refusing to bargain with VSEA concerning proposals relating to probationary employees.

Under 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.

In reviewing the entire legislative scheme, we believe the legislature intended to preclude employee organizations from bargaining on behalf of employees serving in an original probationary period. 3 VSA §904(a)(9) removes from collective bargaining all matters relating to the relationship between the State and probationary employees contained in "rules and regulations relating to... employees in an initial probationary status including any extension or extensions thereof". §904(a)(9), in effect, gives the State the right to promulgate rules and regulations covering conditions of employment for probationary employees, free from the obligation to bargain.

However, the legislature did not give the State unfettered discretion in dealing with probationary employees. The legislative scheme provides probationary employees with substantial rights. First, the State's discretion in dealing with its probationary employees is limited by the statutory requirement to adopt rules and regulations for probationary employees. 3 VSA §310(e) provides the Commissioner of Personnel "shall prescribe rules governing appointments, probation, promotions, demotions, transfers, separations, vacations, sick leave and hours of employment applicable to persons in the classified service", and probationary employees occupying a classified position are "persons in the classified service". 3 VSA §1001(a). Second, rules and regulations for personnel administration must be based on merit system principles. 3 VSA §910 (f). The merit system includes appointment through competitive examination; non-discrimination because of race, sex, politics, national origin, or religion; an equitable and adequate compensation plan; tenure, contingent on successful performance; and promotion, contingent on evaluated capacity

and service. 3 VSA §312(a). Third, probationary employees may appeal to this Board if they believe themselves discriminated against on account of their race, color, creed, sex, age or national origin. 3 VSA §1001(a).

Finally, it is evident the rules and regulations for personnel administration promulgated by the Commissioner of Personnel must conform to the requirements of the Administrative Procedures Act (APA), 3 VSA §801 et seq., which provides for public hearing and comment and legislative review of proposed rules. The APA defines a rule as an agency statement of general applicability which implements, interprets or prescribes law or policy, 3 VSA §801(b)(9), and provides that where a statute directs an agency to adopt rules, regulations or both, it shall be construed as requiring the agency to adopt rules in the manner provided in the APA unless that statute expressly provides to the contrary. 3 VSA §831(a). Chapter 13 of Title 3 of Vermont Statutes is directory in requiring the Commissioner of Personnel to adopt personnel rules and regulations, 3 VSA §310(e), provides those rules and regulations shall be based on merit system principles, 3 VSA §310(f), and specifies the merit system operates under public rules. 3 VSA §312(a). Thus, it is clear these rules and regulations must conform to the APA.

In construing the statutory provisions in their entirety, we conclude the legislature specifically removed terms and conditions of employment from bargaining and left it to the rule-making provisions of the APA. It is evident the legislature intended to retain oversight over the State's dealings with its probationary employees but not give probationary employees bargaining rights. We note that it is not our intent or responsibility in the context of this case to tell the Commissioner of

Personnel to go through the APA to promulgate rules concerning probationary employees. We only mention the APA to indicate that legislative intent appears to be that rules and regulations regarding probationary employees should be established through the APA and not through bargaining.

We also note that the legislature, through the provisions of the 1982 and 1984 "Pay Acts", has given the Secretary of Administration the discretion to extend the provisions of the collective bargaining agreement as necessary or appropriate to "other state employees who are not members of any bargaining unit". We construe this as allowing the contract to be made applicable to probationary employees, but if rules and regulations not in the contract are going to be made applicable to probationary employees, then there must be compliance with the APA.

The parties have presented much evidence and argument concerning treatment of probationary employees historically under collective bargaining agreements, personnel rules and regulations and Board orders establishing State employee bargaining units and through unilateral employer actions to lend support to their respective positions. We do not believe this relevant. Whatever the history of the parties' construction of statutory requirements, the pertinent and controlling consideration is that the statutes exempt rules and regulations regarding probationary employees from bargaining.

Finally, VSEA contends that the fact that the Vermont State Colleges and Vermont State Colleges Faculty Federation have considered untenured faculty members to be entitled to collective bargaining supports its view that probationary employees should be so entitled since both groups of employees fall under SELRA and are in the same situation regarding

job tenure. We do not believe the legislature intended that faculty members with a six-year tenure track be compared to probationary employees who normally are on a six-month tenure track.

ORDER

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

The unfair labor practice complaint issued in this matter is DISMISSED.

Dated this 20th day of September, 1984, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney, Chairman

William G. Kemsley, Sr.

James S. Gilson