VERMONT LABOR RELATIONS BOARD

VERMONT STATE EMPLOYEES' ASSOCIATION	)	
v.	)	DOCKET NO. 83-38
STATE OF VERMONT (Re: INVOLUNTARY TRANSFER OF FISH AND GAME WARDEN RONALD GONYAW	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On June 9, 1983, the Vermont State Employees' Association ("VSEA") filed an unfair labor practice charge with the Labor Relations Board against the State of Vermont. VSEA alleged that the involuntary transfer of Department of Fish and Game Warden Ronald Gonyaw, and its consequences, did not constitute the utilization by the employer of personnel, methods and means in the most appropriate manner possible, and that the employer's refusal to negotiate that issue and to delay the implementation of the Gonyaw transfer until the completion of negotiations to the extent required by law constituted violations of 3 VSA §961(1), 3 VSA §961(5) or 3 VSA §982(g). VSEA further alleged the employer changed a past practice by not seeking volunteers for the transfer to the Enosburg District prior to ordering Gonyaw's transfer, and that since the change in past practice was not bargained for, the employer thereby violated 3 VSA §961(1) or 3 VSA §961(5) or 3 VSA §982(g).

On August 11, 1983, the Labor Relations Board issued an unfair labor practice complaint, adopting for purposes of the complaint the allegations contained in the charge.

Hearings were held before the full Board on September 8, 1983, and September 29, 1983. The State was represented by Special Assistant Attorney General Michael Seibert. Michael Zimmerman, VSEA Staff Attorney, represented VSEA.

VSEA filed Requested Findings of Fact and Memorandum of Law on October 13, 1983. The State filed a Memorandum and Argument on October 25, 1983. Reply Memoranda were filed by the State and VSEA on October 31, 1983, and November 2, 1983, respectively.

FINDINGS OF FACT

1. Edward Kehoe served as the Commissioner of the Vermont Department of Fish and Game from August 15, 1965 to September 1, 1982, and as Deputy Commissioner from September 1, 1982 until his retirement on October 1, 1982.

2. During Kehoe's tenure as Commissioner, the number of Game Wardens in the State gradually increased from about 28 (when he began) to about 40 or 42 (when he retired). During the same period, the number of Game Warden Supervisors increased from three to five. In addition, by the time of his retirement, the Department had two Training Officers and five Hunter Safety Coordinators (State's Exhibit 6, Page 18).

3. The general result of the increase in Game Warden positions during Kehoe's term of office was that the individual geographic areas covered by Game Wardens (called "Warden Districts") gradually were reduced (State's Exhibit 6, Pages 20 and 21).

4. At all times relevant, there has been a Departmental policy requiring that Game Wardens live within their assigned Warden Districts.

5. Prior to Kehoe's assumption of duties as Commissioner, the Department had a policy of involuntarily transferring Game Wardens every few years, or so. Kehoe changed that policy. He felt that one way to improve the morale of the Warden force was to allow the Wardens to establish (and keep) roots in an area. Consequently, his policy was that once a Game Warden Trainee (a probationary status) had successfully completed probation and become a Game Warden, the Warden would be assigned a Warden District, and would remain there unless: 1) the Warden was promoted to a higher position (eg., Warden Supervisor), 2) there were disciplinary or performance reasons for transferring the Warden elsewhere, 3) the Warden had personal problems making a transfer desirable; or 4) the Warden requested a voluntary transfer to another Warden District. (State's Exhibit 6; Pages 1 and 2, 4 - 11, and 13).

6. The result of Kehoe's policy change was that once a Warden Trainee completed probation and was involuntarily assigned to a Warden District, approximately 90 percent of them remained in their first assigned Warden District.

7. On June 3, 1969, Warden Collins was involuntarily transferred from the Barton District, where he had been permanently assigned since 1959, to the Fairfax District. Chief Warden Walter Cabell told Collins he was a good fish and duck man and that was what the Fairfax District consisted of. Cabell told Collins he could either be transferred to the Vergennes District or the Fairfax District; Collins selected the Fairfax District. Part of the reason why Collins was transferred was that he had family problems (State's Exhibit 6, Page 22).

8. Before he was transferred, Collins was involved in a situation in Irasburg where a man was accused of "shooting up" a black minister's house. Collins had told the State Police confidentially who had "shot up" the house, but the State Police had publicly revealed Collins as the source of the information. As a result, Collin's contacts in his warden work no longer trusted him and his effectiveness was diminished. Collins felt the Irasburg situation played a role in his transfer, although Cabell did not tell Collins that was a reason for his transfer.

9. Warden Robert Mumley was involuntarily transferred from the Essex Junction District, where he had been permanently assigned since 1962, to the Brattleboro District on August 3, 1970. Commissioner Kehoe told Mumley he was transferred for the following reasons: he was causing a slowdown in the Essex Junction District because wardens were listening to him and not their supervisor; he was moonlighting which was cutting into working hours; and he had misused a State vehicle when he was assigned to Island Pond. Kehoe told Mumley if he did not want to be transferred to Brattleboro, he could quit (State's Exhibit 6, Page 25).

10. Warden Leon Litchfield was involuntarily transferred from the Waterbury District, where he had been permanently assigned since 1959, to the St. Albans District on August 8, 1972. Chief Warden gave Litchfield a choice of three locations to be transferred to; Litchfield chose St Albans. Kehoe or Cabell suggested to Litchfield that he was being transferred because he was not doing his work and a change of scenery might help (State's Exhibit 6, Page 28).

11. During Kehoe's tenure as Commissioner, when an opening in existing Warden Districts occurred (eg., through promotion of the existing

Game warden to another position), or when new Warden Districts were created, word was put out to the Warden force inviting expression of interest in transfer to the open District prior to the filling of that vacancy (State's Exhibit 6, Pages 20 and 21, 30 through 34). In determining what warden should be transferred to the open district, Kehoe considered the advice of the Chief Warden and the Warden Supervisor. In determining whether an eligible warden would be transferred to the open district, Kehoe considered whether the warden's present district would be hurt if the warden was transferred out.

12. During Kehoe's tenure as Commissioner, there was always, except for a brief period, a Game Warden assigned to the Enosburg District. The last warden (before Gonyaw) to be assigned to the Enosburg District was Warden Lawrence, who was assigned there upon completion of his probationary period in 1981. In approximately July of 1982, Lawrence, in response to the posting of an opening in the Randolph District, requested transfer to that District, which request was, some time thereafter, granted. This transfer left the Enosburg District vacant (State's Exhibit 6, Page 34).

13. While he was Commissioner, Kehoe never faced a situation where there were more Warden Districts than there were available Wardens.

14. Ronald Gonyaw has been continuously employed by the Department of Fish and Game since July of 1964. From July 13, 1964 to July 13, 1965, Gonyaw was employed as a Game Warden Trainee, and from July 13, 1965 to the present he has been employed as a Game Warden (Pay Scale 12). At present, Gonyaw is the fifth most senior Game Warden in the Department.

15. In July of 1965, Gonyaw, upon completion of his probationary period, was assigned to the Warden District known as the Montpelier District, which then consisted of the Towns of Woodbury, Worcester, Calais, East Montpelier, Berlin, Northfield, Roxbury, and the eastern portions of Middlesex and Moretown. Gonyaw remained assigned to that District until the transfer order herein at issue (State's Exhibit 6, Page 13; VSEA Exhibit 5).

16. Since 1965, Gonyaw and his family have, in accordance with Department policy, resided in the Montpelier District, first in the City of Montpelier, then (since 1969) in East Montpelier. Gonyaw owns his home in East Montpelier. Gonyaw's two children attend U32 High School in East Montpelier, and his wife has been employed at the Montpelier branch of the Chittenden Trust Company for 11 years.

17. During the period from July, 1981, to November, 1981, bargaining took place between the State of Vermont and VSEA on the contract to be effective for the period July 1, 1982, to June 30, 1984. On November 13, 1981, the parties, following mediation, reached a tentative agreement. That agreement was ratified by VSEA members during the week of December 14, 1981, was executed on May 6, 1982, and went into effect on July 1, 1982.

18. At no time during bargaining for the 1982-84 contract did the subject of involuntary transfers of Game Wardens arise.

19. On June 23, 1982, Fish and Game Chief Warden Roger Whitcomb sent a draft copy of the Department of Fish and Game's new Standard Operating Procedure (SOP) to Judy Rosenstreich, Executive Director of VSEA, and requested that VSEA review and comment on the draft. Whitcomb

informed Rosenstreich that he intended to institute the SOP "pursuant to the VSEA Contract, Article 24." (State's Exhibits 1 and 2; Article 24 of 1981-82 Contract).

20. Article 24 (entitled "Agency, Department and Institution Work Rules") of the contracts in effect from July 1, 1981 to June 30, 1982, and from July 1, 1982 to June 30, 1984, provided in pertinent part:

> 1. Promulgation of Rules
>
> a. Each agency, department or institution shall promulgate and put into writing those rules of conduct and procedure it deems necessary for its efficient operation. All changes to these rules must be in writing.
>
> b. Agency, department and institution work rules shall not be in conflict with existing law, contract provisions or with the Rules and Regulations for Personnel Administration.
>
> 2. Notification and Distribution of Rules
>
> a. All employees affected by the agency, department or institution work rules must be notified in writing, by posting or otherwise, of those rules and changes to those rules at least 15 days prior to the date they become effective, except that the 15-day notice shall not apply in case of emergency...
>
> b. The State shall provide written notification to the Association of all new rules and changes to existing rules concurrent with the notice to employees...
>
> 3. Reasonableness and Application of Rules
>
> a. An employee or the Association may grieve the reasonableness of any rule promulgated under this Article and, further, may grieve any action taken against an employee based upon any such rule. In either case, the grievance may include a claim that the rule is unreasonable in its application to the employee or group of employees so aggrieved. The time limits for any claim that the rule is inherently unreasonable shall run from the date the rule becomes effective...

21. Section 3.37 of the draft SOP provided, in pertinent part, as follows:

a) Wardens, Supervisors, Training Officers and Warden Trainees will be assigned to such territories as the Commissioner or Director of Law Enforcement may specify and to any special details as they may deem necessary for the good of the Department.
(State's Exhibit 2, Page 5)

22. Although Richard Curtiss, VSEA Chief Field Representative, met with Whitcomb before the SOP was finalized, and offered comments with respect to various items in the draft SOP, VSEA did not object to the language contained in Section 3.37.

23. The final version of the Department's SOP was promulgated and distributed to all Game Wardens in September of 1982. Section 3.37 of the final version was identical to Section 3.37 of the draft version.

24. Gary Moore served as Commissioner of the Department of Fish and Game from September 1, 1982 until August 31, 1983. Prior to becoming Commissioner, he served as Deputy Commissioner under Kehoe from February 1, 1982 to September 1, 1982. In addition, he served as a member of the Fish and Game Board from 1977 to February 1, 1982.

25. Shortly after the beginning of 1983, Moore, who was attending a meeting of the Vermont Federation of Sportsmen's Clubs in Brandon, Vermont, was approached by a delegation from the Enosburg Fish and Game Club, who wanted to know why they did not have a permanently assigned Game Warden in the Enosburg District (Lawrence having been recently transferred to the Randolph District. See Finding 8). Moore told the delegation he would look into the matter.

26. In late January of 1983, Moore told Whitcomb to make a recommendation as to how to fill the vacancy in the Enosburg District. Moore instructed Whitcomb to select an experienced Game Warden who could handle deer jacking.

27. At some subsequent point, Whitcomb orally recommended that Moore assign Gonyaw to the Enosburg District. Whitcomb told Moore his reasons for the recommendation. Moore asked Whitcomb whether Gonyaw was the best man for the transfer and whether the Montpelier District could be adequately covered in Gonyaw's absence. The only information Moore had in making his decision was what Whitcomb told him. Moore did not review Gonyaw's personnel file. He did not know what kind of performance evaluations Gonyaw had received over the years, although Whitcomb told Moore that Gonyaw had a "very good" performance record, and otherwise described Gonyaw's performance in glowing terms. Moore did not consider sending any other Game Warden to the Enosburg District.

28. Moore did not consult with Warden Supervisor Bruce Dawson, Gonyaw's immediate supervisor, before he made his decision to transfer Gonyaw.

29. The opening in the Enosburg District was not advertised before Moore made his decision to transfer Gonyaw.

30. Under the plan recommended by Whitcomb and approved by Moore, the Montpelier District would be absorbed by the four Game Wardens in adjacent Districts (i.e., Wardens Baird, Kapusta, Lawrence, Marcell).

31. Warden Baird has been employed by the Department of Fish and Game since 1970 or 1972. Warden Kapusta has been employed by the Department of Fish and Game since 1966 or 1967. Warden Marcelle has been employed by the Department of Fish and Game since 1968 or 1969. Warden Lawrence has been employed by the Department of Fish and Game since 1981 (State's Exhibit 6, Pages 18, 19 and 28).

32. At 10:00 p.m. on March 24, 1983, Gonyaw received a telephone call from Bruce Dawson, his immediate supervisor, who told Gonyaw to meet him at 11:00 a.m. the following morning at the Department's central office.

33. At 11:00 a.m. on March 25, 1983, Gonyaw met Dawson at the Department's central office. Together they entered Chief Warden Whitcomb's office. Whitcomb handed Gonyaw Special Order #1, dated March 24, 1983, addressed to Gonyaw from Commissioner Moore, which read as follows:

> Effective July 1, 1983, you will be transferred from the Montpelier District to the Enosburg District and assume all State Warden duties within that District. You will work directly for Supervisor Wheatleigh Wheelock.
>
> A telephone will be installed at State expense upon notification of this office of the Station location.
>
> Moving expenses will be paid by the Department. Three bids shall be submitted to the Department for determination of who shall do the move.

34. During the period from February 1982 to August 1983, there were, not taking into account the Gonyaw transfer, seven transfers within the Department of Fish and Game. Five of those transfers were involuntary first assignments of Game Warden Trainees who had completed probationary periods. The remaining two transfers were voluntary transfers of Game Wardens to Districts requested by them.

35. On March 28, 1983, three days after Special Order #1 was delivered to Gonyaw, Whitcomb gave Moore a memorandum, the subject of which was "Transfer of Warden Gonyaw". That memorandum provided, in pertinent part, as follows:

> My recommendation is made for the following reasons:
>
> 1. Experience as investigator, especially with deer and handling of evidence for Lab determination. Excellent relationship with Lab.

2. Excellent cooperation from and with public i.e., on 10/21 from a Mr. Hudson and Mr. Martin on 3/28/83.

3. Excellent working relationship with prosecutors, which currently is a problem in Franklin County.

4. Runs an efficient deputy program.

5. Extremely fussy with State equipment and appearance.

6. Can easily handle district in excess of 4-6 towns.

7. The Montpelier District is abutted by four excellent officers that can handle the breakdown of towns that would be added to their districts with no problem.

8. In District 4, in which the Enosburg District lies, four officers are handling roughly the same area handled by eight officers in District 3, where the Montpelier District is located.

9. If a warden is to be moved to Enosburg, I believe it should be a warden of notable experience in all areas, and that can turn the historic Enosburg situation around.

10. Therefore, in light of the above reasons, I feel that it will be to the benefit of the Department and State to transfer Warden Gonyaw to Enosburg.

36. The reasons contained in that memorandum were the reasons Whitcomb had orally given Moore earlier when he told Moore he was recommending that Gonyaw be transferred.

37. To that memorandum was attached the following: 1) a copy of Article 5 of the Contract; 2) a partial job description for the position of Game Warden; 3) an excerpt from the Department's Standard Operating Procedures, including Section 3.37; 4) a map showing the then-present composition of Warden Districts throughout the State; 5) a map showing the composition of Warden Districts after the Gonyaw transfer to Enosburg; 6) a map showing the four Warden Districts in and around Enosburg superimposed on Warden Districts in Central Vermont (including the Montpelier District) (VSEA Exhibit 6).

38. Until the Gonyaw transfer, the Department of Fish and Game, in varying the size of Warden Districts, has always reduced the size of such districts.

39. By letter dated March 30, 1983, Thomas S. Whitney, Executive Director of VSEA, informed Moore that VSEA, in accordance with Article 5, Section 5, of the Contract, wished to begin negotiations on the involuntary transfer of Gonyaw. Whitney asked Moore to set a date for the beginning of negotiations (VSEA Exhibit 7).

40. By letter dated April 1, 1983, Moore advised Whitney that he lacked the authority to collectively bargain with VSEA under 3 VSA §905(a) (VSEA Exhibit 8).

41. By letter dated April 8, 1983, to David Wilson, Secretary of Administration, Whitney, again citing Article 5, Section 5, of the Contract, informed Wilson that VSEA wished to begin negotiations over the Gonyaw transfer. Whitney asked Wilson to inform him when he or his representative could meet to begin negotiations (VSEA Exhibit 9).

42. By letter dated April 20, 1983, Moore informed Gonyaw that he had until May 27, 1983 to decide whether or not to comply with the transfer order and that should he decide not to comply, he would be given Reduction-in-Force (RIF) rights. In essence, Moore's letter advised Gonyaw that if he declined to be transferred to the Enosburg District, he would be placed in a layoff status with mandatory re-employment rights under Article 47 of the Contract (VSEA Exhibit 10).

43. On April 27, 1983, Whitney wrote to Scott Cameron, Deputy Commissioner of Personnel, as follows:

> VSEA has requested negotiations in accordance with Article 5, Section 5 of the Contract... VSEA disputes the relocation of the Game Warden and reassignment of the

> responsiblities of the Game Warden District known as Montpelier to the Game Warden Districts known as Waterbury, Barre, Hardwick and Randolph as utlization of personnel, methods and means in the most appropriate manner possible.
>
> VSEA requests the State delay implementing the relocation of... Gonyaw and reassigning the responsiblities of the... (Montpelier) District... to (adjoining Warden Districts)... until the negotiations are complete.
>
> The impact of this decision not only affects the employee being reassigned and relocated, but also the employees who will be assigned to fulfill the duties of the area from which the individual in (sic) transferred. There is further projected impact on other employees in contiguous assignments if there is an overwhelming workload with the additional assignments in the new areas.
>
> In order to negotiate the utilization of personnel, methods and means in the most appropriate manner possible, VSEA requests the Fish and Game Department provide an explanation and all documents used in determining the responsibilities in Montpelier District should be transferred to other Wardens. We also request all documents used in determining the need of the new District known as Enosburg. Upon receipt of the requested documents and explanation VSEA will evaluate and determine its negotiating position.
>
> (VSEA Exhibit 11)

44. Also on April 27, 1983, there was a meeting attended by Whitney, Richard Curtiss, VSEA Chief Field Representative, Barbara Morrissey, VSEA Field Representative, Whitcomb and Moore. At that meeting, Whitcomb offered his explanation for the transfer of Gonyaw.

45. On May 9, 1983, Whitcomb issued a memorandum to all District Chiefs and Game Wardens, informing them that if any Game Warden wished to be transferred to the Enosburg District, he should notify the Commissioner, in writing, by 4:30 p.m. on May 23, 1983. The memorandum bore the date March 9, 1983, but the date was incorrect. After it was discovered that the memorandum was misdated, a second memorandum, substantially identical to the first, was issued by Whitcomb. The second memorandum bore the date of May 9, 1983 (VSEA Exhibit 12).

46. Following the May 1983 announcement of the Enosburg District opening (VSEA Exhibit 12), the Department received no indication of interest among Game Wardens in being transferred to the Enosburg District.

47. By letter dated May 23, 1983, Whitney advised Moore that, in connection with Moore's letter to Gonyaw concerning RIF rights (VSEA Exhibit 10), it was premature for Gonyaw to make a decision concerning RIF rights until negotiations were complete (VSEA Exhibit 13).

48. In a letter dated May 24, 1983, Whitney advised Cameron that VSEA, after having evaluated Whitcomb's explanation of the reasons for Gonyaw's transfer, still disputed that "decision as the utilization of personnel in the most appropriate manner possible". Whitney also put forth the following proposal as the basis for further negotiations to resolve the dispute:

> The base criteria for establishment of Game Warden Districts will include population, acres and geographic characteristics, fish related responsibility, game related responsibility (deer harvest, incidental deer kill, complaints and fur take).
>
> When a reassignment of a Game Warden District is required the Fish and Game Department will initially attempt to reassign geographic responsibility without the need for relocation.
>
> In accordance with past practice when an existing Game Warden District becomes vacant or a new District is created the Department will post a notice among Game Wardens to determine if any existing staff is interested. Assignment to the District shall be made by Department rules presently in effect.
>
> If a Game Warden District is caused to be vacated by the above procedures, the newly vacated area shall be posted.
>
> When it is finally determined that the vacant or new District will not be assigned by existing staff on a voluntary basis each supervisory district will be evaluated to determine which District can most equitably support the reduction of a Warden or reassignment.

> When it is determined which Supervisory District can most equitably adjust to the reduction of a Game Warden the least senior Game Warden in the Supervisory District selected will be assigned and reloacted to the vacant or new District.
>
> (VSEA Exhibit 14)

49. In response to Whitney's letter of May 23, 1983 (VSEA Exhibit 13), Moore, by letter dated June 1, 1983, informed Whitney that he declined to extend the effective date of Gonyaw's transfer (i.e., July 1, 1983), and that Gonyaw still was required to make an election to either comply with the transfer or accept RIF rights (VSEA Exhibit 15).

50. By letter dated June 7, 1983, Cameron informed Whitney that the State did not view the transfer of Gonyaw and the absorption of his District as giving rise to a duty to bargain, and that even if a duty to bargain existed, there was no contractual bar to implementation of the transfer order while negotiations proceeded (VSEA Exhibit 16).

51. On June 9, 1983, VSEA filed the unfair labor practice charge in this matter. Following the filing of the charge, VSEA also brought an action for, among other things, a temporary restraining order and preliminary injunction in the Washington Superior Court barring the Gonyaw transfer pending resolution of the unfair labor practice charge by this Board. VSEA and the State reached a temporary settlement of that action, as follows:

> 1. That the settlement would remain in effect until resolution of this matter by the Board;
>
> 2. That effective July 1, 1983, Gonyaw would be temporarily assigned to the Enosburg District, but that he would not be required to relocate his family during that temporary assignment;
>
> 3. That during this arrangement, Gonyaw would not be required to make an election concerning RIF rights.

In accordance with that settlement, Gonyaw is now, and has been since July 1, 1983, working in the Enosburg District, and his family is still residing in East Montpelier.

52. Article 5 (entitled "Management Rights") of the Contract in effect from July 1, 1982 to June 30, 1984 provides, in pertinent part as follows:

> 1. Subject to law, rules and regulations, or terms set forth in this Agreement, nothing in this Agreement shall be construed to interfere with the right of the Employer to carry out the statutory mandate and goals of the Agency, to restrict the State in its reserved and retained lawful and customary management rights, powers and prerogatives, including the right to utilize personnel, methods and means in the most appropriate manner possible...
>
> 5. The parties will negotiate to the extent required by law over any dispute arising under Paragraph 1. With respect to any dispute under Paragraphs 2, 3 or 4, the parties agree that they have fully bargained and any disputes thereunder will be processed according to the grievance procedure.

Article 5 of the Contract in effect from July 1, 1981 to June 30, 1982, and Article V of the Contract in effect from July 1, 1979 to June 30, 1981, contained identical language (VSEA Exhibit 4, Page 1; VSEA Exhibits 2 and 3).

53. The State concedes that there is a genuine dispute between the parties as to whether the transfer of Gonyaw (and its consequences) represents the utilization of personnel, methods and means in the most appropriate manner possible.

54. Article 47 (entitled "Reduction in Force") of the Contract in effect from July 1, 1982 to June 30, 1984 provides, in pertinent part, as follows:

Section 20.

> A permanent status employee who refuses to accept an involuntary transfer outside of his/her geographic area with a 30-day notice prior to effectuation of the transfer shall have reduction in force rights under this Article as long as (s)he has not applied for unemployment compensation.
>
> (VSEA Exhibit 4)

OPINION

For 17 years, the policy of the Department of Fish and Game was to not transfer Wardens involuntarily, from one Warden District to another, except to correct performance or personal problems or as a disciplinary action. Accordingly, a Warden who performed well could normally expect his job location would not be changed against his wishes.

Thus, one of the most critical aspects of a person's job - where it would be performed, which in turn determined where an employee's family could live, where his/her children would go to school and affected the many other intangibles which add satisfaction or dissatisfaction to life - was a choice left to the employee during Commissioner Kehoe's tenure. This was the situation when the existing Contract was negotiated. Of course, no one can expect his/her job will never change. Circumstances may require change, and inevitably do. However, in a system regulated by collective bargaining, changes of significant magnitude ordinarily are negotiated, or otherwise made consistent with a collective agreement.

This case requires us to determine whether the involuntary transfer of Warden Ronald Gonyaw from the Montpelier District to the Enosburg District and the reassignment of portions of the Montpelier District to the four Wardens occupying the Districts surrounding the Montpelier District was made consistent with the State Employees' Relations Act

(SELRA) and the existing Contract. At issue is whether the State committed an unfair labor practice by refusing to engage in mid-term bargaining on the subject of involuntary transfer of Game Wardens.

A. Required Subject of Bargaining

To analyze these issues, we find it helpful to first determine whether the subject matter of negotiations requested by VSEA is a required subject of bargaining, and if so, then turn to the specific facts of this case to determine whether any circumstances are present which would not require the State to bargain.

The subject matter VSEA seeks to negotiate, the involuntary transfer of Fish and Game Wardens and the reassignment of work territories to Wardens, are clearly areas relating to the "relationship between the" State and its employees. At issue is whether these matters are "prescribed or controlled by statute." 3 VSA §904(a).

The Secretary of Administration contends 3 VSA §905(b) prohibits bargaining. It states:

> Subject to rights guaranteed by this chapter and subject to all other applicable laws, rules, and regulations, nothing in this chapter shall be construed to interfere with the right of the employer to:
>
> (1) ...utilize personnel, methods and means in the most appropriate manner possible.

We believe it is a fair interpretation of this provision that the authority to determine the need to transfer an employee and to determine the size of districts employees must cover is a management right, but that Section 905(b) is not inconsistent with the idea of bargaining about

the process by which employees will be selected for involuntary transfer and the process by which an employee's geographic responsibilities may be expanded. Those matters, which form the crux of VSEA's proposal, are not statutorily predetermined or expressly committed exclusively to the discretion of one party" by §905(b). Vermont State Colleges Faculty Federation v. Vermont State Colleges, 138 Vt. 451, 457 (1980). Hackel v. Vermont State Colleges, 140 Vt. 446, 449 (1981).

We note that 32 VSA §1261(a) refers to employee transfers by providing:

> Whenever it shall be necessary to effect the transfer of an employee of the State... by direction of the head of a department, said employee shall be reimbursed for... moving expenses.

However, this section does not "prescribe or control" the process by which transfers will be made, but simply acknowledges transfers do occur and recognizes management's general right to transfer. It does not, however, give management an unfettered right to transfer without negotiating the process by which transfers will occur.

Accordingly, we conclude the subject matter of negotiations requested by VSEA is a required subject of bargaining. We now examine whether the State's duty to bargain is eliminated by the specific circumstances of this case.

B. Mid-Term Bargaining

VSEA's request for negotiations occurred during the term of the collective bargaining agreement. 3 VSA §982(a) provides:

> Collective bargaining agreements... shall not be subject to cancellation or renegotiation during the term except with the mutual consent in writing of both parties.

We believe §982(a) precludes mid-term bargaining over terms and conditions which are either included in the Agreement or which are discussed during the negotiations for the Agreement, VSEA v. State of Vermont, 2 VLRB 26, 34-35, 1979. Where a past practice is concerned, a union's failure to anticipate a change in that practice and negotiate a specific provision in the contract covering the subject matter of that practice does not waive the union's right to bargain the issue during the term of the Agreement. VSEA v. State, supra.

When the existing Contract was negotiated, the Department had a practice of not involuntarily transferring permanent Wardens unless the Warden had disciplinary, performance or personal problems. The subject of involuntary transfers of Game Wardens was not discussed at any time during negotiations for the existing Contract. Accordingly, unless the subject matter VSEA seeks to negotiate, involuntary transfers and their consequences is specifically covered in the Contract or VSEA specifically waived its right to bargain the issue during the Contract term, the parties must bargain the issue.

C) Contract Provisions

We turn now to whether involuntary transfers and their consequences is specifically covered in the Contract. Article 5 of the Contract reinforces the statutory duty to bargain the issue but adds nothing independently to change the obligations of the parties to engage in mid-term bargaining in this matter. Section 1 of Article 5 is in substance a restatement of 3 VSA §903(b)(1), the statutory provision on management rights. Article 5, Section 3, provides the "parties will negotiate to the extent required by law over any dispute arising under Paragraph 1".

Since there is a dispute between the parties as to the involuntary transfer policy of the Department, and since we have determined involuntary transfers and their consequences are a required subject of bargaining under such a provision, the parties, absent any other restriction on bargaining the subject, must negotiate the issue during the term of the Contract.

However, the State maintains that employee transfers, and the consequences thereof, are specifically covered in the 1982-84 Contract by the provisions of Article 47, Section 20. Article 47, Section 20 provides that an employee who refuses to accept an involuntary transfer outside of his/her geographic area shall have reduction in force rights.

This language, the State argues, means VSEA has waived its right to bargain over the proposed subject matter of negotiations. In determining whether a party has waived its bargaining rights, we have required that it be demonstrated a party consciously and explicitly waived its rights; that the waiver must be in clear and unmistakable language. VSEA v. State of Vermont (Re: Implementation of "6-2" Schedule at Vermont State Hospital), 5 VLRB 303, 326 (1982). VSEA v. State of Vermont, 2 VLRB 155, 160-161 (1979). In such matters, we are further guided by our Supreme Court, which defines a waiver as the "intentional relinquishment of a known right". In re Grievance of Selma Guttman and Walter Minaert, 139 Vt. 574 (1981).

The language of Article 47, Section 20 is not sufficient for us to conclude VSEA consciously and explicitly waived its right to bargain over involuntary transfers and their consequences. Instead, that provision defines what rights an employee has after a management decision to

transfer had been made. It does not address the situation present here, when it is the very decision to transfer which is disputed. Just as 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, Vermont State Colleges Faculty Federation and Vermont State Colleges, supra, so too does a party not waive its right to bargain over a subject if the subject is merely mentioned or referred to in the contract and not prescribed or controlled by it.

D. Promulgation of SOP by Department

Nonetheless, the State Contends VSEA has waived its right to bargain over the Department's transfer policy by untimely filing any objection to the Department of Fish and Game's promulgation of its Standard Operating Procedures ("SOP") in September, 1982. It is the State's position that the enactment of the SOP represented clear notice to VSEA of what the Department's practice was regarding transfers of Wardens, and since the unfair labor practice charge was filed more than six months after the SOP was promulgated, VSEA waived its right to dispute the practice.

We disagree. The SOP gave no clear notice as to the transfer policy of the Department or whether there was a change in the existing policy. Prior to the promulgation of the SOP, the Department had a practice of not involuntarily transferring permanent Wardens unless the Warden had disciplinary, performance or personal problems. The section of the SOP relied on by the State, Section 3.37, provides that Wardens "will be assigned to such territories as the Commissioner or Director of Law Enforcement may specify and to any special details as they may deem necessary for the good of the Department". This section does not

clearly indicate the Department was changing the policy regarding transferring permanent Wardens and did not provide clear notice to VSEA how the Department would fill a vacancy such as the Enosburg vacancy. Perhaps the "good of the Department" was to be achieved by continuing the existing policy. In any event, we cannot find VSEA "consciously and explicitly" waived any bargaining rights regarding a significant issue such as involuntary transfers of Wardens by not objecting to the Department's promulgation of this rather vague, unspecific section where the newly-announced policy had not been applied to any individual.

Also, we note that while the SOP was instituted by Department Chief Warden Roger Whitcomb "pursuant to... Article 24" of the Contract, VSEA was not obligated to file a grievance under Article 24 upon promulgation of the SOP to preserve any objection to the Department's transfer policy.

Nor do the substantive provisions of Article 24 apply to this dispute. Article 24, by its terms, deals with work rules. Even if Section 3.37 of the SOP had clearly established a new transfer policy, that change is not a "work rule". Work rules are defined as "rules of conduct and procedure (a department) deems necessary for its efficient operation". "Work rules" usually relate to incidental aspects of employment - e.g., where to park car, how to request leave, procedures when sick, etc. - and not to fundamental conditions of work - e.g., location, salary, disciplinary procedures. We decline to hold that the "procedures" contemplated in Article 24 go to such a fundamental aspect of employment as to where the job will be done.

Also, as a policy matter, we do not believe the parties bargained that fundamental changes in jobs could be unilaterally instituted under Article 24. That Article permits grievances over "reasonableness".

Presumably if the State is "reasonable", it prevails. In bargaining though, both sides may be "reasonable" and the bargaining result is usually to modify both positions. Also, if Article 24 is given that effect, the result would be to give no effect to Article 5. Therefore, the instituting of the SOP under Article 24 does not settle the problem nor lead to a waiver because the State could not take the action of changing the transfer policy under the label of a "work rule".

E. Past Practice

It is evident a managerial problem arose during the term of the Contract which had not been anticipated by either party during negotiations for the present Contract. At that time, the Department transfer policy apparently was working well. The policy had been consistently applied during the tenure of Department Commissioner Kehoe; such tenure spanning a period of 17 years. This was a significant term of employment which Wardens relied upon and permitted them to settle their families in an area and establish roots.

However, that practice developed during a period where the number of Wardens gradually increased and Commissioner Kehoe was never faced with a situation where there were more Warden Districts than there were available Wardens. When the vacancy in the Enosburg District arose during the term of the present Contract, the Department was faced with a situation of having more Warden Districts than available Wardens. The Gonyaw transfer arose out of such a situation, and it was only with that transfer VSEA realized the Department was changing its past practice.

However, before changing its established practice, the Department was required to negotiate. In VSEA v. State, 2 VLRB 155 (1979),

we required the State to bargain during the term of the Contract before altering the established work schedules of nurses, stating: "In short, because the schedules were a past practice, the union could not reasonably have anticipated any necessity to insure their continuation through a specific provision in the Agreement". Similarly here, the parties must bargain before any change in the established practice is made.

We note that VSEA has made no claim that the established past practice of the Department could not be altered during the term of the Contract. Compare Grievance of Gray, 6 VLRB 307, 6 VLRB 409; Grievance of Cronan, 6 VLRB 347. Instead, VSEA has taken the more moderate position that negotiations must occur before the past practice may change. This indicates an apparent recognition of the Department's need to address a significant problem.

F. The Volunteer Issue

VSEA has further alleged the Department changed a past practice by not seeking volunteers for the transfer to the Enosburg District prior to ordering Warden Gonyaw's transfer, and that since the change in past practice was not bargained for, the Department thereby violated 3 VSA §961(1), 3 VSA §961(5) or 3 VSA §982(g).

It is apparent that the past practice prior to the Gonyaw transfer was to make Wardens aware of open districts and to give them an opportunity to express an interest in filling the vacancy, and that practice was not followed prior to Gonyaw being informed he was involuntarily transferred. However, given the fact that the Department did subsequently post the vacancy seeking expressions of interest from Wardens in the Enosburg vacancy prior to the effective date of the transfer of Warden Gonyaw to Enosburg, and given our ultimate resolution of this case, we find no

substantive harm to Warden Gonyaw and conclude the deviation from past practice in this regard is not a significant issue.

G. Conclusion

We conclude the State committed an unfair labor practice in violation of 3 VSA §961(5) by refusing to engage in mid-term bargaining pursuant to Article 5, Section 5 of the Contract on the policy and procedures regarding involuntary transfer of Wardens and their consequences. The parties must negotiate this issue through the completion of statutory dispute resolutions procedures or until they reach agreement. We do not now hold the parties are required to bargain the appropriateness of individual transfers, but only the overall transfer policy of the Department. To resolve this case, we do not need to go so far.

We address one final contention raised by the State. The State contends if Article 5 of the Contract gives VSEA the right to negotiate this issue, then this dispute is governed by the Contract, and thus VSEA should have filed a grievance, not an unfair labor practice charge. We disagree. This dispute goes to the heart of SELRA; the duty to engage in collective bargaining. It is an unfair labor practice for an employer, pursuant to 3 VSA §961(5), to refuse to bargain collectively pursuant to the provisions of SELRA. Accordingly, an unfair labor practice charge alleging refusal to bargain is an appropriate vehicle for presentation of the issue to the Board. This dispute could have been brought as a grievance, but since it involves an issue central to the system of collective bargaining set up by SELRA, we believe this issue may also be brought as an unfair labor practice charge.

We note that the State may not unilaterally implement the transfer of Warden Gonyaw and its consequences until the negotiations process is complete, unless it has legally followed the provisions of 3 VSA §982(f) regarding temporary implementation by the Secretary of Administration. Such temporary implementation may not occur at least until declaration of impasse in negotiations pursuant to 3 VSA §925(a). VSEA v. State of Vermont (re: Implementation of "6-2" Schedule), supra. The parties must negotiate the issue through the completion of statutory impasse resolution procedures, if necessary. Id.

ORDER

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

1. The State shall cease and desist from violating 3 VSA §961(5) by transferring Fish and Game Warden Ronald Gonyaw from the Montpelier District to the Enosburg District and reassigning portions of the Montpelier District to the four Wardens occupying the Districts surrounding the Montpelier District, and shall reinstate Warden Gonyaw to the Montpelier District.

2. The State and VSEA shall negotiate issues concerning the process by which Department of Fish and Game Wardens will be selected for involuntary transfer and the process by which a Department of Fish and Game Warden's assigned territory may be expanded.

3. The State shall not involuntarily transfer a Fish and Game Warden to the Enosburg District and reassign districts or portions of districts to Wardens due to the Enosburg vacancy until agreement is reached or the mandated statutory impasse resolution procedures are

exhausted; or alternatively, unless and until it has legally followed the provisions of 3 VSA §982(f).

Dated this 17th day of January, 1984, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney, Chairman

William G. Kemsley, Sr.

James S. Gilson