Dispute Resolution Procedures, The Right to Strike and Unilateral Changes

The Vermont General Assembly has provided for dispute resolution machinery in all six public sector statutes in Vermont to assist the parties in resolving their negotiations disputes. The interplay between impasse resolution procedures and when, if ever, employers may make unilateral changes in conditions of employment has been a subject of much litigation under the Labor Relations for Teachers Act, the Municipal Employee Relations Act and the State Employees Labor Relations Act. In two leading cases, employees' right to strike has been involved as well, resulting in important developments in case law in this area.

As a starting point, it is clear under all Acts that the unilateral imposition of terms of employment during the time the employer is under a legal duty to bargain in good faith is the very antithesis of bargaining and is a per se violation of the duty to bargain.[1] It is improper for an employer to make a unilateral change in an established past practice; an established practice is one that management has accepted and employees have relied upon for a significant period of time.[2] However, due to differences in dispute resolution procedures, the Acts differ as to the specific time, if ever, unilateral changes can be made.

A. Labor Relations for Teachers Act

The Teachers Act requires, upon request of either party, the use of mediation and fact-finding to resolve negotiations disputes. Mediation may be bypassed if not requested by either party, at which point the parties proceed to fact-finding. It further

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[1] Burlington Fire Fighters Association v. City of Burlington, 142 Vt. 434, 435-436 (1983).
[2] Lamoille North Education Association v. Hyde Park Elementary School Board, 22 VLRB 115, 130-31 (1999). Castleton Education Association, Vermont-NEA v. Castleton-Hubbardton Board of School Directors, 13 VLRB 60, 66 (1990).

provides that "all decisions of the school board regarding matters in dispute in negotiations shall, after full compliance with this Section, be final".[3] In cases arising under this Act, the VLRB has held that the school board may not take unilateral action on matters in dispute until 30 days after receipt of the fact-finder's report.

The Board has drawn a distinction between statutory "impasse" and genuine deadlock. An impasse in the public sector, unlike the private sector, does not mean the parties have reached a deadlock; that they have irreconcilable differences. Declaration of impasse simply means a determination by either or both parties to use statutory dispute resolution procedures; it represents a realization that third-party assistance is needed to continue productive bargaining. Genuine deadlock is not reached until the parties have exhausted the mandated dispute resolution procedures and it is not appropriate for management to make unilateral changes until then.[4] Once "finality" is invoked by a school board, the VLRB has determined that the duty to bargain terms of the contract for that year is ended.[5] The Board stated in one decision:

> Once "finality" is invoked under § 2008, the duty to bargain terms of the contract for that year is ended. The clear purpose of § 2008, which has no parallel we know of in either the private or public sector, is to put an end to the negotiations process. It designates a point in time when mandatory negotiations will conclude for that year. . .
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> Of course, this does not mean school boards may not negotiate further once they have imposed finality. The pressure of a strike may cause a school board to agree to provisions different than its unilaterally-imposed policy to settle a strike and get teachers back to work.[6]

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[3] 16 V.S.A. §§2006-2008.

[4] Barre Town Education Association v. Barre Board of School Commissioners of City of Barre and Spaulding High School Union District Board of School Directors, 31 VLRB 323, 327-29 (2011). Rutland Education Association v. Rutland School Board, 2 VLRB 250 (1979). Chester Education Association v. Chester-Andover Board of School Directors, 1 VLRB 426 (1978).

[5] Barre Town Education Association, 31 VLRB at 327-29. Chittenden South Education Association, Hinesburg Unit v. Hinesburg School District and Hinesburg School Board, 8 VLRB 219, 247 (1985); *Affirmed,* 147 Vt. 286 (1986).

[6] Hinesburg, 8 VLRB at 247 (emphasis in original).

Under the Teachers Act, teachers have a limited right to strike. The VLRB has determined that, upon construing the statutes relating to teacher labor relations, teachers have the same limited right to strike as municipal employees; a strike is permitted if it is timely and does not "endanger the health, safety or welfare of the public".[7] The VLRB has concluded, just as it has concerning the right of the school board to invoke finality, that the Vermont General Assembly intended at least a 30-day cooling off period after receipt of the factfinder's report before a strike is permitted.[8] In one case, the Board concluded that an economic strike by teachers within eight days of receipt of a factfinder's report constituted an unfair labor practice.[9]

Also, a court may issue a restraining order or injunction against a strike pursuant to the Labor Relations for Teachers Act if the court concludes after a hearing that "the commencement or continuance of the action poses a clear and present danger to a sound program of school education which in the light of all relevant evidence it is in the best public interest to prevent."[10] Nonetheless, it should be noted that this standard to be applied by a court in the event of teacher strikes is not applied by the VLRB in unfair labor practice proceedings in determining whether teachers should be ordered to cease and desist from a strike.[11] This is because the unfair labor practice provisions applicable to teachers expressly provide that enforcement of a board order relating to unfair labor practices is not subject to the

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[7] 21 V.S.A. §1730; Green Mountain Union High School Board of Directors and Chester-Andover Elementary Union Board of Directors v. Chester Education Association and Vermont Education Association, 2 VLRB 90, 99-101 (1979).
[8] Id.; Rutland, 2 VLRB at 266-273.
[9] Rutland, supra.
[10] 16 V.S.A. §2010.
[11] Green Mountain, 2 VLRB at 101.

provision of the Teachers Act concerning courts issuing an injunction or a restraining order.[12]

An issue arose in one case whether teacher associations violated the duty to bargain in good faith, through sending of an e-mail to the school board chairperson concerning picketing the chairperson's law office in the event of a strike, during a period after the school board had imposed finality and prior to the teachers deciding whether to engage in a strike. The Board determined that the school board had not met its burden of establishing that the associations failed to act in good faith where the school board did not allege that the picketing would have been illegal and the e-mail was sent to seek a return to negotiations that hopefully would result in a collective bargaining agreement and avert a strike.[13]

Another issue which may arise is whether teachers actually have engaged in a strike. In one case, teachers withheld their services with respect to extra-curricular and co-curricular activities pursuant to "work to rule" guidelines distributed by teacher associations. The teacher associations contended that the "work to rule" action was not a strike. The Board disagreed, concluding that the concerted action of withholding such services constituted a strike.[14] The Board determined that the teacher associations committed an unfair labor practice because the "work to rule" action organized by the Association occurred prior to the completion of the factfinding process.[15]

In another case, a school board alleged that the teachers' association had engaged in a functional equivalent of a strike within 30 days of the delivery of a fact-finder's report by unlawfully engaging in a campaign to oppose the election of

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[12] Id.; 21 V.S.A. §1735.
[13] South Burlington Board of School Directors v. South Burlington Educators' Association and Vermont-NEA, 32 VLRB 56, 86-90, 94-95 (2012).
[14] Green Mountain, 2 VLRB at 97-99.
[15] Id. at 102.

school board members during work hours through use of computers, telephones and communication equipment. In declining to issue an unfair labor practice complaint on this issue, the Board stated:

> The School Board has made no factual allegations specifying instances where Association members have engaged in a concerted refusal or failure to perform certain tasks, or engaged in a concerted slowdown when performing required tasks, which has interfered with or impeded school functions or services. In the absence of such allegations, the School Board has set forth an insufficient basis for us to conclude that the Association may be conducting an illegal strike.[16]

In other cases under the Teachers Act, the issue has been the content of the teacher employment policy imposed by the school board. In the private sector, the subject of a unilateral action must be discussed during negotiations and an employer bargains in bad faith by taking action without prior consultation with the union with respect to conditions of employment substantially different from what the employer had proposed during negotiations;[17] or by taking action without providing the exclusive representative with notice and an opportunity to negotiate.[18] The employer need not always implement changes absolutely identical with its last offer on a given issue. However, the unilateral adoptions must be reasonably comprehended within the pre-impasse proposals.[19]

The VLRB has determined, and the Supreme Court has concurred, that it is evident the Vermont Legislature acted consistent with these private sector precedents when it enacted the provision of the Teachers Act limiting school boards

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[16] Hyde Park Elementary School Board v. Lamoille North Education Association, 22 VLRB 78, 81 (1999).
[17] NLRB v. Crompton-Highland Mills, 337 U.S. 217 (1949).
[18] PERB v. Modesto City School District, 136 Cal. App. 3rd 888, 900 (5th District, 1982).
[19] Taft Broadcasting Co., 163 NLRB 55; *enforced sub nom,* American Federation of Television and Radio Artists v. NLRB, 395 F.2d 622 (D.C. Cir. 1968).

to taking unilateral action on "matters in dispute in negotiations".[20] This allows a school board to make final decisions regarding matters in dispute after the parties have failed to reach agreement through the process of negotiation, mediation and fact finding.[21] Matters that are not in dispute have not been made part of the bargaining process, and thus cannot be unilaterally deleted or added pursuant to a declaration of finality.[22]

The school board has the final "hammer" in negotiations, provided it has bargained in good faith and the negotiations process survives the Board's scrutiny.[23] The "matters in dispute" language is construed so as to not allow school boards to hurry through negotiations and engage in shadow bargaining, and then unilaterally dictate whatever terms they desire.[24]

An example of such bad faith bargaining by a school board is making no proposals on the second year of a contract until after the completion of the fact finding process, then making predictably unacceptable proposals on the terms of a second year at a post-fact finding negotiations session, and subsequently imposing finality incorporating such terms without any further negotiations or dispute resolution procedures being invoked.[25] The Board concluded that such actions made a mockery of good faith bargaining.[26]

Another “finality” issue is whether a school board can impose terms and conditions of employment for more than one year. The Board has concluded that unilateral imposition may be for one school year only.[27] The Labor Relations for

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[20] 16 V.S.A. §2008; Hinesburg, supra.
[21] Hinesburg, 147 Vt. at 290.
[22] Id.
[23] Hinesburg, 8 VLRB at 247.
[24] Id. at 241. Cavendish Town Elementary School Teachers' Association, Vermont-NEA/NEA v. Cavendish Town Board of School Directors, 16 VLRB 378, 389 (1993).
[25] Cavendish, 16 VLRB at 389-90.
[26] Id. at 390.
[27] Burke, 18 VLRB at 72-73.

Teachers Act, like other public sector labor relations statutes in Vermont, is designed to promote the reaching of mutual agreements by employers and employee organizations.[28] If agreement is not reached by the completion of dispute resolution procedures, and the school board imposes finality and/or a strike occurs, the negotiations process has failed.[29] A negotiated agreement is the norm and the preferred result, and a unilateral imposition and/or strike is the exception and the disfavored result.[30] The Board indicated that, if school boards were allowed to implement for more than one year, the exception and disfavored result inappropriately would be allowed to take precedence over the norm and preferred result.[31]

An employer unfair labor practice at the time of imposition of finality can have far-reaching consequences. In one case, the VLRB concluded that the school board's deletion of grievance arbitration and an article on Association rights from its teacher employment policy, which provisions were part of the school board's final offer to the Association and were not matters in dispute, constituted improper unilateral action on matters not in dispute during negotiations.[32]

The VLRB then decided whether the school board's actions converted a strike by teachers, which was economic at its inception, into an unfair labor practice strike. The VLRB determined that a strike at least partly motivated by employer unfair labor practices can be an unfair labor practice strike. That a strike also has economic objectives and may stem from mixed motives does not prevent the strike from being an unfair labor practice strike, so long as the employer's conduct was a contributory

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[28] Id. at 72.
[29] Id.
[30] Id.
[31] Id. at 73.
[32] Hinesburg, supra.

cause.[33] An economic strike is converted into an unfair labor practice strike if it is prolonged or aggravated by the employer's unfair labor practice.[34] The VLRB concluded that the school board's improper actions upon implementing its teacher employment policy, particularly its deletion of grievance arbitration, converted the strike into an unfair labor practice strike.[35]

As a remedy, the Board ordered the school board to reinstate the striking teachers, and discharge replacements, once the strikers unconditionally offered to return to work. As a further remedy, the Board did not issue a bargaining order since the school board had no further obligation to bargain under the Teachers Labor Relations Act once it imposed "finality" by implementing the teachers' employment policy on the first day of the strike. The Board instead ordered that the provisions on Association rights and grievance arbitration, as contained in the final offer to the Association, be added to the teachers' employment policy.[36] The Vermont Supreme Court affirmed the Board's decision on appeal.[37]

In a subsequent decision resulting from compliance proceedings to determine the reinstatement rights of the striking teachers, the Board concluded that picketing at the home of a replacement teacher by one of the teachers and two allegedly threatening letters written by another teacher did not reasonably tend to coerce or intimidate the replacement teachers. Thus, the Board concluded that the strikers' actions did not constitute serious strike misconduct justifying denial of back pay and other damages.[38] In affirming this decision on appeal, the Vermont Supreme Court stated:

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[33] Hinesburg, 8 VLRB at 248.
[34] Id.
[35] Id. at 248-249.
[36] Id. at 250-251.
[37] 147 Vt. 286 (1986).
[38] 9 VLRB 251 (1986).

> We recognize that a strike is not a game of tiddlywinks played according to the rules of a Victorian salon. Some confrontations between strikers and nonstrikers will inevitably occur. An employer is justified in refusing or delaying the reinstatement of strikers who have engaged in serious strike misconduct. Serious strike misconduct, however, does not include behavior which does not reasonably tend to coerce or intimidate, even though it may be abusive and uncalled for.[39]

In a number of decisions, the Vermont Labor Relations Board has addressed the issue whether employing school boards commit an unfair labor practice by failing to pay teachers experience step increases during the school year following the expiration date of the collective bargaining agreement that provided for such increases, in the absence of a successor agreement and prior to the completion of mandated dispute resolution procedures. The Board specifically applied the standards regulating unilateral changes by employers to conclude that school boards have committed unfair labor practices by failing to pay teachers experience step increases under such circumstances.[40]

This precedent was at issue in three subsequent decisions of the Board. In one decision, the Board concluded that a school board did not commit an unfair labor practice by providing no step salary increases based on experience for the school year following expiration of the contract, and the parties had not exhausted impasse resolution procedures for the successor contract, given that the expired agreement had not provided for experience step increases.[41] The Board made it clear that there is no inherent right to step increases, and the status quo would not be maintained by

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[39] Hinesburg School District v. Vermont-NEA, 147 Vt. 558, 562 (1986).
[40] Windham Southwest Education Association v. Readsboro Board of School Directors, 15 VLRB 268 (1992). Chester Education Association, 1 VLRB 426 (1978).
[41] North Country Union Education Association v. North Country Union Board of School Directors, 18 VLRB 581 (1995).

granting post-expiration experience step increases when none were provided during the life of the agreement which constitutes the status quo.[42]

A 1995 decision of the Board involved step increases and addressed many issues with significant implications for teacher-school negotiations. The school board complied with its obligation to pay step increases during the school year following the expiration of a contract, pending the completion of the dispute resolution process, but then acted effectively to erase the payment of step increases by retroactively imposing its salary terms which provided for no salary increases during that year. In concluding that this retroactive imposition was an unfair labor practice, the Board stated:

> Consideration of the purposes behind the unilateral change rules which we have adopted leads us to conclude that the School Board should not be able to retroactively impose financial terms of employment on teachers which resulted in teachers paying back to the School Board salary and financial benefits already received by teachers. If we were to permit such action by a school board, we would be inhibiting the actual process of discussions, and discouraging meaningful bargaining.
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> The implied threat to teachers of potentially having to pay back school boards for salaries and financial benefits already received creates the potential of management having a much stronger ability to effect an agreement on terms substantially dominated by management once the parties are operating under an expired agreement. Such a result is contrary to a system of good faith bargaining established by the Labor Relations for Teachers Act, and something we have guarded against in our unfair labor practice jurisprudence. . .
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> The balance of power would shift substantially to the unfair advantage of management. Management would be able effectively to get around the status quo doctrine established in (other) cases . . . and eviscerate the significance of maintaining the status quo until the completion of mandated dispute resolution procedures. The receiving of step salary increases . . . was an entitlement of teachers under the legal requirement of maintaining the status quo, and management should not be able to take action to effectively eliminate this entitlement. This leads us to the conclusion that school boards should be able

[42] Id.

> to impose financial terms of employment on teachers which constitute an economic loss to them only prospectively, not retroactively.[43]

The issue of step increases following expiration of a contract arises due to contract negotiations not proceeding expeditiously and extending beyond the expiration date of the contract. The Board recognized this problem in the decision, and stated:

> Our ruling should not have an unfair impact on school boards. It is true in this case that the School Board is required to pay step increases for an entire school year even though its consistent bargaining position throughout negotiations was not to pay such step increases for that year. Nonetheless, this case is a classic example of a negotiations process which simply has not worked as well as intended by the Legislature.
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> The parties were not only unable to reach a collective bargaining agreement, but the negotiations process dragged on until the end of the school year for which they were negotiating. Unilateral imposition by the School Board occurred approximately 19 months after the parties began negotiating. In the future, school boards can avoid results similar to this case by taking affirmative steps, in conjunction with the teacher organizations with which they are negotiating, to ensure negotiations proceed in a more expeditious fashion. Both parties have a good faith obligation to not unduly prolong the negotiations process. It is in neither party's long-term interests to hinder the progress of negotiations.[44]

The Board also made it clear in this decision that school boards were allowed to prospectively impose financial conditions of employment on teachers which resulted in their pay being reduced, so long as the school board otherwise was acting in good faith and consistent with statutory requirements. This meant that the school board's unilateral imposition of lower salary rates, without provision for step salary increases, was valid insofar as it had prospective application.[45]

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[43] Caledonia North Education Association v. Burke Board of School Directors, 18 VLRB 45, 63-64 (1995).
[44] Id. at 65-66.
[45] Id. at 66.

In a 1996 case, the employing school boards requested that the Board reverse its precedents on teacher step increases. In considering its own precedents as well as decisions issued in other jurisdictions, and being mindful of the changed economic environment and the severely restrained budgets prevailing in public schools, the Board ultimately concluded that reversing its precedents would be unfair to the parties who relied on it in their negotiations.[46]

The Board set forth the following "important qualifications" to the general requirement to pay experience step increases upon expiration of the contract: 1) there is no requirement to provide step salary increases based on experience where the expired contract has not provided for such increases; 2) there is no requirement to pay experience step increases, or any other salary schedule increases, if the expired contract specifically contains a provision that, upon expiration of the contract, no salary schedule advancement of any nature shall be provided unless and until such movement is expressly provided for in the successor agreement; 3) if negotiations conclude without a successor agreement being reached, school boards are allowed to impose salary rates without provision for step salary increases so long as the school board otherwise was acting in good faith and consistent with statutory requirements; and 4) teachers' entitlement to experience step increases upon expiration of the contract may be waived if the teachers' union is responsible for an unreasonable delay in the negotiations process; this can be enforced through the Board's unfair labor practice jurisdiction.[47]

Another issue which the Board has decided in a teacher case is whether a school board violated its duty to bargain in good faith by refusing to proceed to grievance arbitration on a dispute arising after the termination date of a collective

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[46] Northeast Kingdom Elementary Teachers Association v. Brighton Board of School Directors, et al, 19 VLRB 146, 161-62(1996).
[47] Id. at 162-64.

bargaining agreement, but before the school board was permitted to make unilateral changes in conditions of employment since the parties were in the midst of using dispute resolution procedures in negotiations for a successor agreement. The Board held that, whenever the parties commence bargaining and no proposal is offered to change the arbitration procedure, there is a tacit agreement by the parties that the arbitration procedure survives expiration of the contract when the parties have not completed mandated statutory dispute resolution procedures.[48]

In another teacher case, a school board alleged that the teachers' association committed unfair labor practices by: 1) appointment of a Vermont-NEA employee, rather than a neutral individual, as a member of a fact-finding panel in a negotiations dispute, and 2) communications between that member of the fact-finding committee and the teachers' association negotiation representative on issues involved in fact-finding outside the presence of the school board's representative. The VLRB concluded that neither action of the teachers' association constituted unfair labor practices.[49]

In ruling on the claim that the teachers' association was required to appoint a neutral as its choice on the fact-finding panel, the VLRB cited the Teachers Act provision for fact-finding being conducted by a three-member panel – one member selected by the school board, one member selected by the teachers' association, and the third member (who would serve as chairperson) to be chosen by the other two members[50] – and stated:

> The very nature of the selection process mandated by the Legislature . . . indicates the Legislature did not intend the members selected by each party to act as neutrals. A person selected by one party with a vested interest in the outcome of negotiations . . . cannot be expected to act as an impartial and

[48] North Country Education Association v. Board of School Directors of North Country School District, 5 VLRB 395 (1982).
[49] Unified School District #36 Board of School Directors v. Vermont-NEA, 8 VLRB 77 (1985).
[50] 16 V.S.A. §2007(b).

> unbiased "judge" of the dispute. That function is served by the chairperson selected by the parties' representatives. . .[51]

The VLRB also rejected the school board's contention that communications between a party's selected member on the fact-finding panel and advocates of that party is an unfair labor practice, stating:

> There is no indication in the Teachers Act the Legislature intended to prohibit such communication. Moreover, one of the fundamental purposes of a fact-finding panel is to make a recommendation that the parties will accept or reject as the basis for reaching an agreement. . . Parties' representatives on a fact-finding panel, who have been briefed by their respective parties, have "inside" information which may be of great assistance in coming up with recommendations the parties will accept as a settlement of their dispute.[52]

B. Municipal Employee Relations Act

The Municipal Employee Relations Act provides, upon request of either party, for the use of mediation and then factfinding to resolve negotiations disputes if the parties are at impasse. It further allows the parties to voluntarily submit a dispute to binding arbitration or for a municipality by referendum to adopt binding arbitration, and permits a limited right to strike if arbitration is not invoked.[53]

The Legislature amended the Municipal Act in 2019 to require a municipal employer and the exclusive bargaining agent for municipal public safety employees to submit their contract impasse to final and binding arbitration if an impasse continues for 20 days after a fact finder has made his or her report public. Municipal public safety employees are firefighters, law enforcement officers, ambulance services, emergency medical personnel, or first responder services. The requirement

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[51] Unified School District #36 Board of School Directors v. Vermont-NEA, 8 VLRB at 80.
[52] Id. at 81.
[53] 21 V.S.A. §§1730-1733.

does not apply if the applicable bargaining unit includes both municipal public safety employees and other municipal employees.[54]

In a case arising under this act, the VLRB adopted the distinction between statutory impasse and genuine deadlock applied under the Teachers' Act, and held the employer could not make unilateral changes in conditions of employment until mandated dispute resolution procedures were exhausted.[55] In the case, the parties submitted negotiations disputes to binding arbitration. In such a situation, the VLRB determined that the employer is prohibited from ever making unilateral changes in conditions of employment.[56]

The Board determined in another municipal case that, in situations where parties are negotiating over the impact of a decision on a mandatory subject of bargaining, an employer is required to engage in impact negotiations through the completion of statutory dispute resolution procedures, or until agreement is reached, and the employer may not take final action to unilaterally implement the decision until that time.[57]

In a case involving a municipal water and light department, the Board established precedent in the area of municipal employee strikes.[58] The strike in this case was indisputably legal. Issues in the case addressed by the Board included the distinction between economic and unfair labor practice strikes, and the rights of employees discharged for engaging in an unfair labor practice strike.

The Board concluded that the employer refused to bargain in good faith based on the totality of conduct by failing to appear at negotiations sessions, failing to

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[54] 21 V.S.A. §1733(a)(2).
[55] Burlington Fire Fighters v. City of Burlington, 4 VLRB 379 (1981).
[56] Burlington, 4 VLRB at 387.
[57] Milton Education and Support Association v. Milton Board of School Trustees, 20 VLRB 114, 129 (1997).
[58] IBEW, Local 300 v. Enosburg Falls Water and Light Department, 8 VLRB 193 (1985).

empower a representative to bargain and engaging in surface bargaining by making wage proposals based on dishonest claims and having no basis in economic reality. These unfair labor practices made the resultant strike an unfair labor practice strike. The employer committed further unfair labor practices after the commencement of the strike by discharging the employees engaged in the strike and conditioning reinstatement of an employee upon her resignation from the union. As a remedy, the Board ordered the employer to offer the striking employees reinstatement to their jobs with back pay dating from their discharge. The Supreme Court affirmed the Board decision on appeal.[59]

C. State Employees Labor Relations Act

Under the State Employees Act, the VLRB has determined that there is no such thing as final negotiations "deadlock" permitting permanent unilateral management action.[60] The dispute resolution procedures, which can be invoked upon declaration of impasse by either party, are successively: mediation, factfinding, and selection of one of the parties' last best offers by the Board.

This provision of the Act was amended during the 2019 legislative session. The 2019 legislation provides that, in negotiations covering state employees or State's Attorneys' employees, selection of one of the parties' last best offers is done either by the Board or, alternatively, by an arbitrator if one of the parties so requests.[61]

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[59] 148 Vt. 26 (1987).
[60] VSEA v. State of Vermont (re: Implementation of "6-2" Schedule at Vermont State Hospital), 5 VLRB 303, 321 (1982).
[61] Act No. 61 (2019).

In the case of state employees and State's Attorneys' employees, the Board or arbitrator selection between last best offers is subject to appropriations by the general assembly.[62] In contrast, the Board selection of a last best offer in disputes arising from the University of Vermont and the Vermont State Colleges is final.[63] Under the State Employees Act, employees are prohibited from striking.[64]

These dispute resolution procedures of the State Employees Act distinguish it from the Teachers Labor Relations Act, under which the school board has the final "hammer" since it can take unilateral action on matters in dispute 30 days after receipt of the factfinder's report.[65] The procedures under the State Employees Act make it comparable to a situation existing under the Municipal Act where the parties submitted negotiations disputes to binding arbitration. In such a system, there is never a legal deadlock since the parties are required to continue to use dispute resolution procedures until agreement is reached or a settlement is imposed, and management may never take permanent unilateral action.[66]

In situations where parties are negotiating over the impact of a decision on a mandatory subject of bargaining, an employer is required to engage in impact negotiations through the completion of statutory dispute resolution procedures, or until agreement is reached, and the employer may not take final action to unilaterally implement the decision until that time.[67]

As indicated above, the Board may be called upon under the State Employees Labor Relations Act to become involved in negotiations disputes by selecting

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[62] 3 V.S.A. §925(k); 3 V.S.A. §982(d).
[63] 3 V.S.A. §925(k).
[64] 3 V.S.A. §903(b).
[65] Rutland Education Association v. Rutland School Board, 2 VLRB 250 (1979).; 16 V.S.A. §§2006-2008.
[66] VSEA v. State, 5 VLRB at 321.
[67] VSEA v. State of Vermont, 5 VLRB at 328-29.

between the last best offers of the parties.[68] In so choosing, the Board considers which offer is most reasonable and in the public interest.[69]

Among the factors to be considered in evaluating wage proposals in state employee negotiation disputes are the comparability of state employees' wages with that of other employees, as well as contractual wage increases received by state employees in recent years.[70] The Board has looked to how state employees are currently positioned relative to other employees and whether comparability will be significantly altered by a wage determination.[71] The wage terms negotiated in recent collective bargaining agreements in the public and private sectors also are pertinent in evaluating wage proposals; cost of living is another relevant factor.[72]

In evaluating the merits of wage proposal, the Board in two state government last best offer decisions has not drawn a distinction between step increases and across the board increases. The Board reasoned that a step increase is a wage increase by another name, and there is no less fiscal impact to such step pay increases as opposed to other types of increases.[73]

Also, in considering which offer to select in state government disputes, one factor not considered by the Board is ability to pay.[74] The Board stated: "We do this not only because there is no statutory direction that we consider (ability to pay), but also because ability in this case is a political, rather than a financial, issue."[75] The

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[68] 3 V.S.A. §925(i).
[69] VSEA and State of Vermont, 15 VLRB 107, 111-12 (1992). VSEA and State of Vermont, 33 VLR B 357, 364 (2016). VSCFF and Vermont State Colleges, 35 VLRB 275 (2019).
[70] VSEA and State, 15 VLRB at 113. VSEA and State of Vermont, 19 VLRB 114, 123 (1996). VSEA and State, 33 VLRB at 365. VSCFF and Vermont State Colleges, 35 VLRB at 280, 281-83.
[71] VSEA and State, 15 VLRB at 113. VSEA and State, 33 VLRB at 365. VSCFF and Vermont State Colleges, 35 VLRB at 280, 281-83.
[72] VSEA and State, 33 VLRB at 365.
[73] VSEA and State, 19 VLRB at 123. VSEA and State, 34 VLRB 219, 230 (2018).
[74] VSEA and State, 15 VLRB at 113. VSEA and State, 33 VLRB at 365.
[75] VSEA and State, 15 VLRB at 113.

Board indicated that it is up to the Vermont General Assembly to determine the funds it wishes to make available to support State government.[76]

In a last best offer decision issued in 2018, the majority of a three-member panel participating in the decision stated: "In considering which offer to select in state government disputes, an additional factor of which we are mindful is the historical trend of state revenues. Although it is beyond our jurisdiction to project future funds which will be made available to support state government, or to determine the appropriate mix or allocation of funds, the recent record on state General Fund revenues informs our consideration of the sustainability of wage and other economic proposals."[77]

In a last best offer decision issued in 2019 involving the Vermont State Colleges and the full-time faculty union, the Board held that the financial situation of the State Colleges was a factor that weighed in the determination. The Board stated: "Examination of the fiscal health and financial prospects of the Colleges is significant to judge the sustainability of the respective proposals."[78]

The Board has indicated a reluctance to disturb status quo language on significant issues; reasoning that a change in status quo language is better achieved through negotiations agreement by the parties, not by fiat of the Board.[79] Nonetheless, the Board will disturb the status quo where appropriate, such as in a case where both of the last best offers submitted by the parties involve changing the status quo.[80]

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[76] Id. VSEA and State, 33 VLRB at 365.
[77] VSEA and State, 34 VLRB at 227.
[78] VSCFF and Vermont State Colleges, 35 VLRB at 281, 283.
[79] Id. VSCFF and Vermont State Colleges (Re: Part-Time Faculty Unit Negotiations), 22 VLRB 89, 97 (1999).
[80] Vermont State Colleges Faculty Federation, UPV, AFT Local 3180, AFL-CIO and Vermont State Colleges, 28 VLRB 28, 48-49 (2005).

In a case where the State proposed a two year agreement as part of its last best offer, even though both parties only presented proposals for a one year agreement throughout negotiations and to the factfinder, the Board concluded that the State's offer was seriously flawed.[81] The State Employees Act provides that, if the negotiations "dispute remains unresolved 15 days after transmittal of findings and recommendations" of the factfinder, "each party shall submit as a single package its last best offer on all disputed issues to the board". The Board is to "select between the last best offers of the parties, considered in their entirety without amendment".[82] In applying these provisions, the Board stated:

> This statutory scheme is designed to encourage the parties to narrow their differences and make hard choices on their priorities so that, hopefully, agreement can be achieved. If agreement is not achieved, the desired outcome is that the last best offers submitted to the Board bring the parties closer together. The last best offer stage is not the appropriate time to enlarge the issues in dispute. Section 925(i) explicitly prohibits this.[83]

The Board also has indicated that, in considering last best offers, the Board gives some weight, although not controlling, to the factfinder's recommendations and that one of the parties has submitted a last best offer consistent with such recommendations.[84]

D. Judiciary Employees Labor Relations Act

The Judiciary Employees Labor Relations Act provides for the dispute resolution procedures of mediation, factfinding, and selection of one of the parties'

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[81] Id.
[82] 3 V.S.A. §925(i).
[83] VSEA and State, 15 VLRB at 122.
[84] VSCFF and Vermont State Colleges (Re: Part-Time Faculty Unit Negotiations), 22 VLRB at 98. VSEA and State of Vermont, 33 VLRB at 368. VSCFF and Vermont State Colleges, 35 VLRB 280, 282.

last best offers by the Board. The Board selection between last best offers is final and binding on the parties.[85] Alternatively, the parties may agree in advance of negotiations to a mediation and arbitration procedure. The parties mutually agree on an arbitrator; failing agreement, the Board appoints an arbitrator. The determination by the arbitrator is binding and final on the parties except under limited circumstances.[86]

E. Independent Direct Support Providers Labor Relations Act

The Independent Direct Support Providers Labor Relations Act provides for the dispute resolution procedures of mediation, fact-finding, and selection of one of the parties' last best offers by the Board. The Board selection between last best offers is subject to appropriations by the general assembly.[87]

F. Early Care and Education Providers Labor Relations Act

The Early Care and Education Providers Labor Relations Act provides for the dispute resolution procedures of mediation, fact-finding, and selection of one of the parties' last best offers by the Board. The Board selection between last best offers is subject to appropriations by the general assembly.[88]

[85] 3 V.S.A. §1018.
[86] 3 V.S.A. §1019.
[87] 21 V.S.A. §1636.
[88] 33 V.S.A. §3611.