

Layoffs of Employees

The collective bargaining agreements between the State and the Vermont State Employees' Association recognize the right of the State to lay off employees in certain situations. There have been two major lines of cases that have come before the Board interpreting the provisions of the collective bargaining agreements.

The first line of cases involves "lack of work" or "lack of funds". The agreements provided that the employer "may determine that a reduction in force is necessary when a lack of work situation exists". The agreements defined "lack of work" as "when 1) there is insufficient funds to permit the continuation of current staffing, or 2) there is not enough work to justify the continuation of current staffing". The Board determined that disputes with respect to layoffs of employees on grounds of lack of work or lack of funds generally should be resolved through the grievance procedure, not through the unfair labor practice route, even where numerous layoffs occurring throughout state government are involved.¹

The Board has decided two types of "lack of work" or "lack of funds" cases. In the first type, the Board decided whether the work force actually has been reduced due to lack of work or lack of funds, or whether employees simply had been redirected to perform certain work, rather than other work, and the size of the work force has remained constant.² In the second type, the Board decided whether employees actually were laid off due to lack of work or lack of funds, or whether the real reason for the layoff was for an illegal reason such as union activity, age discrimination or political reasons.³

The second major line of layoff cases which have come before the Board, applying the provisions of the State - VSEA collective bargaining agreements,

¹ VSEA v. State of Vermont, 14 VLRB 141, 144-45 (1991).

² Grievance of Ulrich, 12 VLRB 230, 238 (1989); *Affirmed*, 157 Vt. 290 (1991).

³ Grievance of Santorello, 14 VLRB 203 (1991). Grievance of Day, 14 VLRB 229 (1991).

involve the contracting out of work previously done by state employees and laying off the state employees. One provision of the agreements applicable to these situations provided that "prior to any such layoff or other job elimination . . . the VSEA will be notified and given an opportunity to discuss alternatives". The Board indicated that, to comply with these provisions, the employer must engage in good faith discussions with VSEA; otherwise the provision requiring discussion on alternatives would be meaningless.⁴

This required discussing alternatives to layoff with an open mind and sufficiently in advance of the layoff so that alternatives can be adequately considered before a layoff occurs.⁵ The Board stressed that this did not mean that all the contractual obligations are placed on the employer. The contractual provision that VSEA would be "given an opportunity to discuss alternatives" necessarily implied that VSEA, in seeking to avert a layoff, had an obligation to present concrete alternatives to the layoffs of employees.⁶ There was a mutual obligation to engage in good faith discussions to seek to avert the layoffs of employees.⁷

Another provision of the agreements applicable to contracting out situations allowed employee layoffs, when the notice and discussion provisions discussed above had been satisfied, if at least one of three standards were met. One of the standards was that "the work or program can be performed more economically under an outside contract". In deciding whether the employer met this standard, the Board focused on reasonable cost estimates existing at the time the final decision whether to contract out the work was made.⁸ The Board decision generally is guided by whether the employer made a reasonable decision based on the information it had at

⁴ Grievance of VSEA, Barnard, et al, 17 VLRB 203, 228 (1994); *Affirmed*, 164 Vt. 214 (1995).

⁵ Id.

⁶ Id.

⁷ Id.

⁸ Grievance of VSEA, Barnard, et al, 17 VLRB at 232.

the time the decision was made; a deviation from these estimates occurring in actual experience under the contract is not pertinent without more.⁹ The determination of cost estimates should take into consideration the total hours needed to be worked by employees, overtime costs, and estimated unemployment compensation costs which would be incurred by the employer as a result of laying off state employees.¹⁰

Also, the State was obligated pursuant to its own promulgated policy to ensure that there was a 10 percent savings differential between a program operated by state employees and a program operated by a contractor before the contracting out of state programs was approved.¹¹ Revenue-generating measures could not be used to support more economical operation of the state-run program compared to that of the contractor where the measures would have the same economic effect whether the contractor or state employees operated the program.¹²

In addition to challenging the layoffs of employees pursuant to the collective bargaining contract's grievance procedure, the privatization of work previously done by state employees also has been subject to court challenge by the VSEA. The Vermont Supreme Court affirmed a superior court decision, and determined that the Attorney General did not clearly abuse his discretion in deciding to certify a food service contract privatizing work previously done by state employees because it did not violate the "spirit and intent" of the state classification law.

The Court concluded that the contract was not inconsistent with the historical and fundamental purpose of the civil service law and its merit system principles, which was to insulate the state workforce from political influence to improve the effectiveness and efficiency of state government, particularly considering that the

⁹ Id.

¹⁰ Id. at 233-35.

¹¹ Id. at 235.

¹² Id. at 236.

contract was subject to formal competitive bidding. The Court also held that cost savings was an appropriate factor to consider in determining whether the contract was consistent with the spirit and intent of the classification plan and merit system principles since one of the stated purposes of the merit system was to “maintain an efficient career service in state government”, and government agencies operating under the merit system “have traditionally been accorded broad latitude to eliminate jobs for economic, as opposed to political, reasons.”¹³

Subsequent to the Court decision, the Vermont General Assembly passed legislation in 2000, which was amended subsequently, which provides standards for personal service contracts and privatization contracts entered into by state government agencies. A “personal services contract” is “a contract for services that is categorized as personal services in accordance with procedures developed by the Secretary of Administration” and is consistent with statutory provisions. A personal services contract is only permitted if specified provisions are met or an exception specified by the statute applies.¹⁴

A “privatization contract” means a “contract for services valued at \$25,000 or more per year, which is the same or substantially similar to and in lieu of services previously provided, in whole or in part, by permanent, classified State employees, and which results in a reduction in force of at least one permanent, classified employee, or the elimination of a vacant position of an employee covered by a collective bargaining agreement.”¹⁵

A state government agency may not enter into a privatization contract unless all of the following are satisfied: 1) the agency provides written notice to the

¹³ Vermont State Employees’ Association v. Vermont Criminal Justice Training Council, 167 Vt. 191, 198-199 (1997).

¹⁴ 3 V.S.A. §§ 341(2), 342.

¹⁵ 3 V.S.A. § 341(3).

collective bargaining representative of the intent to seek to enter a privatization contract 35 days prior to the beginning of any open bidding process, and the collective bargaining representative has the opportunity during the 35 days to discuss alternatives to contracting; 2) the proposed contract is projected to result in overall cost savings to the state of at least ten percent above the projected cost of having the services provided by classified state employees; and 3) the expected costs of having the services provided by classified state employees and obtaining the services through a contractor are compared over the life of the contract.¹⁶

¹⁶ 3 V.S.A. § 343.