VERMONT LABOR RELATIONS BOARD

HARTFORD CAREER FIRE FIGHTERS ASSOCIATION, LOCAL 2905, IAFF	)	
	)	DOCKET NO. 18-52
v.	)	
TOWN OF HARTFORD	)	

MEMORANDUM AND ORDER

The Labor Relations Board needs to decide whether to issue an unfair labor practice complaint in this matter. The Hartford Career Fire Fighters Association, Local 2905, IAFF ("Association") filed an unfair labor practice charge on November 20; 2018, alleging that the Town of Hartford ("Employer") interfered with employees in the exercise of their rights, and refused to bargain in good faith, in violation of 21 V.S.A. §1726(a)(1) and (5) by: 1) making an improper unilateral change in a condition of employment by implementing a Telematics Vehicle Management System in its vehicles that can be used for disciplinary purposes; 2) making an improper unilateral change by placing the Fire Inspector's desk and work area in a day room used by employees; and 3) implementing a new performance evaluation system involving subjective reviews that changes the performance evaluation system based on established criteria that had been in effect for many years.

The Employer filed a response to the charge on December 14, 2018. Labor Relations Board Executive Director Timothy Noonan met with the parties on January 30, 2019, in furtherance of the Board's investigation of the charge.

The Labor Relations Board has discretion whether to issue an unfair labor complaint and hold a hearing on a charge. 21 V.S.A. §1727(a). In exercising its discretion, the Board will not issue a complaint unless the charging party sets forth sufficient factual allegations for the Board

to conclude that the charged party may have committed an unfair labor practice. Burke Board of School Directors v. Caledonia North Education Association, 17 VLRB 187 (1994).

The Association alleges that the Town Fire Chief has violated the duty to bargain in good faith by unilaterally implementing various changes that involve mandatory subjects of bargaining without bargaining with the Association. The unilateral imposition of terms of employment during a contract term when the employer is under the legal duty to bargain in good faith is the very antithesis of bargaining and is a per se violation of the duty to bargain. Washington Northeast Supervisory Union v. Cabot Teachers' Association and Twinfield Teachers' Association, Cabot Teachers' Association and Twinfield Teachers' Association v. Washington Northeast Supervisory Union, 34 VLRB 4, 31 (2017). Burlington Firefighters Association v. City of Burlington, 142 Vt. 434, 435-436 (1983). Mt. Abraham Education Association v. Mt. Abraham Union High School Board, 4 VLRB 224, 231-232 (1981). VSEA v. State, 5 VLRB 303, 324-329 (1982).

Under the Municipal Employee Relations Act, "wages, hours and other conditions of employment" are mandatory bargaining subjects. 21 V.S.A. §§1722(4), 1725(a). "Wages, hours and other conditions of employment" means "any condition of employment directly affecting the economic circumstances, health, safety or convenience of employees but excluding matters of managerial prerogative." 21 V.S.A. §1722(17).

The Association first alleges that the Chief improperly made a unilateral change in a condition of employment by implementing a Telematics Vehicle Management System in its vehicles. The Union asserts that this change involves a mandatory subject of bargaining because the information collected by the VMS system can be used for disciplinary purposes.

In its response to the charge, the Employer asserted among other things that the Board should defer this issue to the grievance procedure in the collective bargaining agreement. A threshold issue which has been decided in unfair labor practice cases is whether the Board should defer to a contract's grievance procedure in lieu of issuing an unfair labor practice complaint. The Board has not ruled on unfair labor practice charges where the Board believed the dispute involved the interpretation of a collective bargaining agreement and employees had an adequate redress for the alleged wrongs through the grievance procedure. Burlington Education Association v. Burlington Board of School Commissioners, 1 VLRB 335 (1978). AFSCME Local 490 v. Town of Bennington, 9 VLRB 195 (1986). Fair Haven Graded School Teachers Association, Vermont-NEA v. Fair Haven Board of School Directors, 13 VLRB 101, 109-110 (1990). Winooski Police Employees' Association v. City of Winooski, 28 VLRB 102 (2005). International Union of Public Employees, Hartford Police Union v. Town of Hartford, 32 VLRB 357, 361 (2013).

Deferral is not appropriate in this case because the Employer has not pointed to any provision of the parties' collective bargaining agreement which relates to implementation of a VMS system. Thus, the underlying dispute does not involve the interpretation of a collective bargaining agreement and employees do not have an adequate redress for the alleged wrongs through the grievance procedure.

We conclude that the Association has set forth sufficient factual allegations for the Board to conclude that the Employer may have committed an unfair labor practice with respect to this portion of the unfair labor practice charge. Thus, we exercise our discretion to issue an unfair labor practice complaint on this issue.

The second allegation of the Association is that the Fire Chief made an improper unilateral change by placing the Fire Inspector's desk and work area in the day room on the second floor of the fire station used by employees. The Association asserts that the "day" or "front" room has served the purpose of a "living room" for employees for many years and this is no longer the case during the hours that the fire inspector is on duty.

In examining this issue, we first summarize the pertinent factual background. The fire inspector position was recently created and it was necessary to provide him with work space. There was little available space in the building. The Fire Chief placed the fire inspector's desk and work area in the front room which was the least-utilized part of the building. The space where the inspector's desk and office area are located previously was largely taken up by file cabinets. The Association has not pointed to other space in the fire station that was readily available to locate the fire inspector.

The inspector works 32 hours a week, generally during day-time working hours Monday through Thursday. The fire inspector is often performing work outside the Fire Department building but it is unknown to employees working these hours when he will be at his desk and when he will be performing work outside the building. The Fire Department is a 24 hour, 7 days a week, operation. When the fire inspector is not on duty, employees are able to use the front room area the way they did prior to the inspector's desk and work area being moved into that room.

It is apparent that the effect on employees due to this change has been minimal. Although the Association refers to the front room being used as a living room, the employees represented by the Association typically watch television in the room in which they sleep, not the front room. Also, there is a large kitchen on the first floor of the fire station with a table and chairs where

they can congregate and have meetings. Further, the employees continue to have use of the front room as they did previously for over 80 percent of the hours during the week that the fire inspector is not working. Additionally, employees have access to a training room in the building that is shared with the police department.

The Board has previously indicated under the Municipal Act that issuance of an unfair labor practice complaint was not warranted where the actual impact on workers of a change appeared to be *de minimus*. International Brotherhood of Police Officers, Local 475 v. City of Burlington, 7 VLRB 354 (1984). We reach the same conclusion here where the impact on employees of the placement of the fire inspector's desk and office area in the front room appears to be minimal.

The final allegation of the Association is that the Fire Chief made an improper unilateral change by implementing a new performance evaluation system involving subjective reviews that substantially changes the performance evaluation system based on established criteria that had been in effect for many years. Specifically, the Association contests a new evaluation form involving a subjective review that was implemented in the Fire Department in July 2018 to replace an evaluation form based on numerical grading that had been in place for more than 20 years.

The Association cites two National Labor Relations Board decisions for the proposition that performance evaluations are a mandatory subject of bargaining as they have the potential to impact several aspects of an individual's employment. Ampersand Publishing, LLC d/b/a Santa Barbara News-Press and Graphic Communications Conference, International Brotherhood of Teamsters, 358 NLRB 1415, 1473 (2012). Puerto Rico Junior College, 265 NLRB 72, 77-78 (1982).

The Labor Relations Board looks to experience under the National Labor Relations Act ("NLRA"), 29 U.S.C. §§141-187, for guidance in determining whether particular areas are mandatory subjects of bargaining. Resort to Federal precedent is a practice that has been approved by the Vermont Supreme Court in construing the Municipal Act's provisions that reflect similar provisions in the NLRA. Burlington Firefighters Association, 142 Vt. 434, 435 (1983). Both the Municipal Act and the NLRA mandate bargaining over "wages, hours and other conditions of employment". 29 U.S.C. 158(d).

The two NLRB cases cited by the Association do not support the proposition that a change in the evaluation form itself involves a mandatory subject of bargaining. In Ampersand Publishing, the National Labor Relations Board held that a change in the timing of a supervisor meeting with an employee after the supervisor conducted an evaluation of an employee was a mandatory subject of bargaining because the resulting delay may affect the amount of the annual bonus an employee may receive. 358 NLRB at 1473.

In Puerto Rico Junior College, the Board determined that the evaluation of faculty members for purposes of probation, rank and tenure is a mandatory subject of bargaining, and that the employer committed an unfair labor practice by unilaterally terminating such evaluations without prior notice to, or bargaining with, the union, and by thereafter refusing to bargain about the inclusion of such evaluation procedures in the collective bargaining agreement being negotiated at that time. 265 NLRB at 72, n.1, and 77-78.

In both cases, it was not a change in the evaluation form itself that was a mandatory subject of bargaining. It was the effect of a change in evaluation procedures on wages, hours and/or other conditions of employment that resulted in the bargaining obligation. Here, too, the change in the evaluation form by itself does not implicate the duty to bargain. It is the impact

that such change has on wages, hours and conditions of employment. The Association has not set forth sufficient factual allegations for the Board to conclude that the change in the evaluation form has had an impact to date on wages, hours and conditions of employment. Thus, we decline to issue an unfair labor practice complaint with respect to this issue.

This is not to say that this issue may not ripen in the future to one that could warrant issuance of an unfair labor practice complaint. The most recent collective bargaining agreement between the Employer and the Association covers the period July 1, 2016 to June 30, 2018. The parties are still in negotiations for a successor agreement to the 2016-2018 agreement. During negotiations, the Employer has proposed that wage increases be tied to performance. Presently, wage increases are not tied to performance. The Association has rejected this Employer proposal. The parties currently are at impasse. The parties have proceeded through mediation and are awaiting the fact-finding process. The parties are required to negotiate in good faith over the issue of wage increases being tied to performance, and would risk being found to have committed an unfair labor practice if they fail to do so. However, at this juncture the issue is premature.

Based on the foregoing reasons, it is ordered:

1. The Vermont Labor Relations Board declines to issue an unfair labor practice complaint on the portions of the unfair labor practice charge by the Hartford Career Fire Fighters Association, Local 2905, IAFF, alleging that the Town of Hartford interfered with employees in the exercise of their rights, and refused to bargain in good faith, by placing the Fire Inspector's desk and work area in the front or day room used by employees, and by implementing a new performance evaluation form; and
2. The Labor Relations Board issues an unfair labor practice complaint on the portion of the charge by the Hartford Career Fire Fighters Association, Local 2905, IAFF, alleging that the Town of Hartford interfered with employees in the exercise of their

rights, and failed to bargain in good faith, in violation of 21 V.S.A. §1726(a)(1) and (5) by making a unilateral change in a condition of employment through implementing a Telematics Vehicle Management System in its vehicles. The Vermont Labor Relations Board adopts for purposes of this complaint the allegations contained in this portion of the charge. This complaint is scheduled for a hearing on April 18, 2019, at 9 a.m., in the Labor Relations Board hearing room, 13 Baldwin Street, Montpelier, Vermont.

Dated this 28th day of February 2019, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Alan Willard
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Alan Willard

/s/ Robert Greemore
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Robert Greemore

/s/ David R. Boulanger
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David R. Boulanger