

VERMONT LABOR RELATIONS BOARD

ORLEANS CENTRAL EDUCATION)
ASSOCIATION)

v.)

ORLEANS CENTRAL SUPERVISORY)
UNION BOARD OF SCHOOL)
DIRECTORS)

DOCKET NO. 18-28

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

The Orleans Central Education Association (“Association”) filed an unfair labor practice charge on June 8, 2018, alleging that the Orleans Central Supervisory Union Board of School Directors (“Employer”): 1) failed to bargain in good faith in violation of 21 V.S.A. §1726(a)(5) and 16 V.S.A. §2001 by ending the provision of a Health Reimbursement Arrangement (“HRA”) debit card for payment of prescriptions and payment to medical providers, unilaterally implementing a more financially onerous arrangement, and not bargaining in good faith with the Association over this issue; and 2) committed an unfair labor practice by wrongfully conditioning bargaining with the Association upon the Association’s agreement to withdraw a previously filed grievance against the Employer.

The Employer filed a response to the charge on June 28, 2018. Labor Relations Board Executive Director Timothy Noonan met with the parties on October 16, 2018, in furtherance of the Board’s investigation of the charge.

The Labor Relations Board issued a Memorandum and Order on the charge on November 27, 2018. Therein, the Board declined to issue an unfair labor practice complaint on the portion of the unfair labor practice charge by the Association alleging that the Employer wrongfully conditioned bargaining with the Association upon the Association’s agreement to withdraw a

previously filed grievance against the Employer. The Board issued an unfair labor practice complaint on the portion of the charge by the Association alleging that the Employer failed to bargain in good faith in violation of 21 V.S.A. §1726(a)(5) and 16 V.S.A. §2001 by ending the provision of an HRA debit card for payment of prescriptions and medical providers, unilaterally implementing a more financially onerous arrangement, and not bargaining in good faith with the Association over this issue.

The Board held a hearing on the complaint on January 17, 2019, in the Board hearing room in Montpelier before Board Members Richard Park, Chairperson; Alan Willard and David Boulanger. Wanda Otero-Weaver, Vermont-NEA General Counsel, represented the Association. Attorney Pietro Lynn represented the Employer.

The filing of post-hearing briefs was delayed to allow the parties to engage in efforts after the hearing to attempt to settle the matter. These efforts were unsuccessful. The Association filed a brief on March 8, 2019. The Employer did not file a post-hearing brief.

FINDINGS OF FACT

1. The Association is the exclusive bargaining representative of the teachers and support staff of the Orleans Central Supervisory Union. The Association and the Employer are parties to a collective bargaining agreement covering the teachers effective July 1, 2017, to June 30, 2019, that provides in pertinent part:

...

ARTICLE XIII BENEFITS

...

B. Effective January 1, 2018, the Board shall offer the following VEHI Health Plans to employees who participate in the District's health insurance program:

1. VEHI Platinum

2. VEHI Gold
3. VEHI Gold – CDHP
4. VEHI Silver – CDHP

The District will contribute to full-time personnel in year one (January 1 2018 – June 30, 2018) 83% of the premium cost for the VEHI Gold-CDHP Plan for single, 2 Person (2 Adult), Parent/Children or family coverage and in year two (July 1,2018-June 30, 2019)) the district will contribute to full time personnel 81% of the premium cost for the VEHI Gold – CDHP Plan for single, 2 Person (2 Adult), Parent/Children or family coverage. The Board contribution to the premium for the VEHI Platinum, VEHI Gold or Silver-CDHP plans shall be limited to a dollar amount equal to the dollar amount of the Board contribution for the VEHI Gold-CDHP Plan; the teacher shall pay any difference in the premium cost. The employee shall pay the remaining premium through automatic payroll deduction.

C. Health Reimbursement Arrangement: The teacher may elect to participate in a Health Reimbursement Arrangement (“HRA”) if enrolled in a VEHI health plan. The District shall offer an integrated HRA, including both Rx (prescription) and medical expenses to teachers enrolled in a VEHI health plan. The HRA shall cover all medical deductibles, co-insurance, copays, and Rx costs (“medical expenses”).

Year 1	Board 1 st	Employee 2 nd	Board 3 rd
Single	500	400	Balance equivalent to Gold CDHP total out of pocket exposure
2 Person	800	600	Balance equivalent to Gold CDHP total out of pocket exposure
Parent/Child	800	600	Balance equivalent to Gold CDHP total out of pocket exposure
Family	800	600	Balance equivalent to Gold CDHP total out of pocket exposure

Year 2	Board 1 st	Employee 2 nd	Board 3 rd
Single	600	400	Balance equivalent to Gold CDHP total out of pocket exposure
2 Person	1000	600	Balance equivalent to Gold CDHP total out of pocket exposure
Parent/Child	1000	600	Balance equivalent to Gold CDHP total out of pocket exposure
Family	1000	600	Balance equivalent to Gold CDHP total out of pocket exposure

The District shall select an HRA administrator and shall pay the monthly administrative costs. The HRA shall not include a rollover from one year to the next year, but shall provide for a 90 day run out for expenses from one year to the next year. The HRA may allow for a debit card. The Board shall have the authority to determine all other administrative determinations regarding the HRA.

...

E. In the event that, during the life of this agreement, the Districts are no longer able to obtain health insurance through VEHI and/or the District is required to obtain employee health insurance through the Vermont Health Exchange, or there is significant change in benefits due to health reform mandates at the state (Vermont) or federal level, the parties agree to reopen Article XIII of this Agreement and negotiate a new employee health insurance plan.

...

ARTICLE XVIII FINAL RESOLUTION

18.1 This Agreement represents the final resolution of all negotiable matters in question between the parties and shall not be changed or altered unless the change or alteration has been agreed to and evidenced in writing by the parties hereto.

...

(Employer Exhibit A)

2. Although the effective date of this collective bargaining agreement is July 1, 2017, the agreement was not finalized until the Fall of 2017. The negotiation of the health benefits article of the agreement occurred in the context of health insurance plans that VEHI offered to school employees substantially changing effective January 1, 2018. When the language of the health insurance provisions in Article XIII was being negotiated, the Employer and Association understood that it was possible, but not certain, that the administrator of the HRA provided for in Article XIII would offer a debit card to employees to cover the expenses of the integrated HRA for which the Employer was responsible, including both prescription and medical expenses. It was uncertain whether a debit card would be compatible with the new healthcare plans or feasible to provide. The Employer proposed the language in Article XIII, Section (D), stating: “The HRA may allow for a debit card.” The Association agreed to this language (Employer Exhibit B).

3. The Employer selected Future Planning Associates (“FPA”) to administer the HRA. FPA indicated that it would provide a debit card to employees to cover the prescription and medical expenses of the HRA for which the Employer was responsible (Employer Exhibits C, D).

4. FPA had significant problems administering the HRA beginning with its implementation on January 1, 2018, including a delay in providing some employees with debit cards. The Association filed a grievance in January concerning problems that had arisen with FPA administering the HRA. FPA announced in March 2018 that it was withdrawing from administering the HRA in May 2018 (Association Exhibits 1, 2, 3, 4, 5, 6, 9, 10, 13, 14, 16, 17, 18; Employer Exhibits F, G, I, K, L, M, N)

5. The Employer selected Datapath to replace FPA as HRA administrator effective in May 2018. Datapath did not provide debit cards to employees. It does not provide debit cards in HRA’s such as involved here with a so-called “donut hole” arrangement in which the employer is

responsible for paying first up to a certain dollar amount, then the employee pays second up to a certain dollar amount, and then the employer pays third up to a maximum amount.

6. The result of Datapath not providing debit cards to employees was that employees had to make direct payments for prescription drugs for which the Employer was responsible, and then seek reimbursement from Datapath. This required employees in some cases to spend considerable time tracking bills and reconciling payments. It also exposed some employees to interest charges and late payments on credit card charges. Some employees were threatened with being sent to collection agencies. It took from three weeks to several months for employees to be reimbursed by Datapath.

7. Vermont-NEA Uniserv Director Matthew Polk contacted Heather Wright, Attorney for the Employer, on May 14, 2018, and informed her that the Association would be willing to accept terms in a memorandum of agreement on issues arising from the transition to Datapath similar to what was agreed to in a nearby school district. Wright ultimately informed Polk that the Employer was not willing to reopen negotiations on Article XIII of the collective bargaining agreement to address this issue (Joint Exhibit 1, Association Exhibit 19).

OPINION

The Labor Relations Board needs to decide whether the Employer committed an unfair labor practice in this matter. The Association contends that the Employer failed to bargain in good faith by unilaterally changing employees' conditions of employment by no longer providing employees with a debit card to cover prescription drug and medical provider expenses attributable to the employer, requiring employees to make direct payments for such expenses and seek reimbursement, and not bargaining in good faith with the Association over this issue.

The Employer asserts that it has not failed to bargain in good faith because: 1) it is complying with the collective bargaining agreement by providing an integrated Health Reimbursement Arrangement (“HRA”) in which the employer pays the agreed upon prescription and medical expense; and 2) the collective bargaining agreement does not require providing a debit card to employees to cover these expenses.

In determining whether the Employer committed an unfair labor practice, we apply the standards governing the duty to bargain during the term of a collective bargaining agreement. Absent a waiver by either the terms of the collective bargaining contract or by actual negotiations, the employer has a duty to bargain changes in mandatory bargaining subjects during the term of a contract if contract negotiations are ongoing or not ongoing. VSCFF v. Vermont State Colleges, 149 Vt. 546, 549 (1988). Burlington Firefighters Association, Local 3044, IAFF v. City of Burlington, 10 VLRB 53, 59 (1987). Mt. Abraham Education Association v. Mt. Abraham Union High School Board, 4 VLRB 224, 231-232 (1981). 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. Burlington Firefighters, *supra*. Mt. Abraham, *supra*. VSEA v. State, 5 VLRB 303, 324-329 (1982).

In determining whether a party has waived its bargaining rights, the VLRB has required that it be demonstrated a party consciously and explicitly waived its rights. AFSCME Council 93, Local 1201, AFL-CIO v. Town of Castleton, 32 VLRB 98, 115 (2012). Local 98, IUOE, AFL-CIO v. Town of Rockingham, 7 VLRB 363 (1984). VSEA v. State of Vermont, 5 VLRB at 326. Mt. Abraham, 4 VLRB at 231. In such matters, the Board is further guided by the Vermont Supreme Court, which defines a waiver as the "intentional relinquishment of a known right". In

re Grievance of Guttman, 139 Vt. 574, 578 (1981). The burden of establishing a waiver is on the party asserting it. Id.

Also, in interpreting a so-called "zipper" clause in a contract, which restricts the obligation to bargain during the term of the contract, the VLRB has indicated that an employer may rely on the "zipper" clause to avoid bargaining over a subject that is clearly addressed in the collective bargaining agreement. IBEW Local 300 v. Town and Village of Ludlow, 27 VLRB 92, 94-95 (2004).

In applying these precedents here, we conclude the Employer has established that the Association has consciously and explicitly waived the right to bargain over the issue of not providing employees with a debit card to cover prescription drug and medical provider expenses attributable to the Employer. The parties explicitly bargained over this issue in negotiations leading to the current collective bargaining agreement, and agreed in Article XIII that "(t)he HRA may allow for a debit card". When this language was negotiated, the Employer and Association understood that it was possible, but not certain, that the administrator of the HRA would offer a debit card to employees to cover the expenses of the integrated HRA for which the Employer was responsible, including both prescription and medical expenses. The use of the word "may" meant the parties agreed that the use of a debit card was not required under the HRA.

The parties further agreed in Article XVIII of the collective bargaining agreement that "(t)his Agreement represents the final resolution of all negotiable matters in question between the parties and shall not be changed or altered unless the change of alteration has been agreed to . . . by the parties." The Employer may rely on this "zipper" clause to avoid reopening the agreement to bargain over the issue of provision of debit cards which was clearly addressed and

finally resolved by the parties. The parties knew how to include language signaling the possibility of reopening the agreement since they did so elsewhere in Article XIII concerning changes in availability of health plans or significant changes in benefits. The absence of such language with respect to debit cards means the Employer has no obligation to reopen the agreement to negotiate with the Association over the provision of debit cards.

In sum, the Association waived the right to bargain over the issue of provision of debit cards through agreeing to the terms of the collective bargaining agreement stating that debit cards “may” be allowed under the HRA. The Employer did not commit an unfair labor practice when the use of debit cards was discontinued and the Employer declined to reopen the collective bargaining agreement to negotiate over this issue with the Association.

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered that the unfair labor practice charge filed by the Orleans Central Education Association in this matter is dismissed.

Dated this 19th day of April, 2019, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Richard W. Park

Richard W. Park

/s/ Alan Willard

Alan Willard

/s/ David R. Boulanger

David R. Boulanger