VERMONT LABOR RELATIONS BOARD

CHESTER EDUCATION ASSOCIATION	)	
	)	
v.	)	DOCKET NO. 78-95R
	)	
CHESTER-ANDOVER SCHOOL BOARD OF DIRECTORS	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of the Case

On September 12, 1978 the Chester Education Association (hereinafter "Association") filed an unfair labor practice charge against the Chester-Andover Board of School Directors (hereinafter "School Board") with the Vermont Labor Relations Board. The charge alleged that the School Board had violated 21 V.S.A. §1726(a)(1) & (5) by unilaterally implementing interim policies which changed the terms and conditions of employment for the teachers while the School Board was negotiating a new agreement with the Association. The School Board filed its answer to the charge on October 5, 1978.

The matter came for a hearing before the Board on October 12, 1978. Chairman Kimberly B. Cheney and Members William G. Kemsley, Sr., and Robert H. Brown, Esquire were present. The Association was represented by Charles Ochmanski, Executive Director of the Vermont Education Association, and the School Board was represented by R. Bruce Freeman, Esquire.

At the commencement of the hearing the parties stipulated that the charge brought by the Association would be treated as a complaint issued in the name of the Board pursuant to the procedures outined in 21 V.S.A. §1727(a). At the close of the evidence the Board ordered briefs and requests for findings to be submitted

no later than October 27, 1978.

FINDINGS OF FACT

1. The Complainant, the Chester Education Association, is the exclusive bargaining representative of the teachers employed by the Chester-Andover School Board at the Chester-Andover Elementary School in Chester, Vermont.

2. The Association and the School Board entered into a collective bargaining agreement, effective July 1, 1976, setting forth the terms and conditions of employment for the teachers at the elementary school.

3. Article 28 of the Agreement provides for automatic renewal of the Agreement for one year periods beginning each succeeding July 1 unless either party gives notice of its desire to terminate or amend according to the regulation procedures of 16 V.S.A., Ch. 57 (Petitioner's Exhibit 1).

4. On August 24, 1977 Paul Stagner, Chairman of the Teachers Negotiations Committee, notified the School Board of the Association's desire to negotiate a new agreement for the 1978-79 school year (Petitioner's No. 2). This letter was acknowledged by the School Board's negotiator, Harry S. Gale, Jr., on August 30, 1977, confirming the commencement of negotiations (Petitioner's No. 3).

5. The request to commence negotiations was made no later than 120 days prior to the school district's annual meeting in accordance with 16 V.S.A. §2003.

6. During the period from October, 1977 through the date of the hearing in this case, the parties have met between eighteen and twenty times in collective bargaining and negotiating sessions. To the date of the hearing the parties have been unable to reach agreement on a successor contract.

7. The master agreement of July, 1976 terminated on June 30, 1978 in accordance with provisions of Article 28 of that agreement as cited in Paragraph 3 above.

8. On May 16, 1978 Mr. Stagner wrote to Mr. Gale stating that in the event no agreement had been finalized between the parties by the commencement of the 1978-79 school year, it was the Association's position that the School Board could not make any unilateral changes in the terms and conditions of employment of the teachers until the negotiations process had been completed. (Petitioner's No. 5). On June 2, 1978 Mr. Stagner again wrote Mr. Gale stating that since he had received no response to his letter of May 16, he assumed that the School Board concurred with the Association's position as stated in that earlier letter (Petitioner's No. 6).

9. During the summer of 1978 the School Board, being aware of the likelihood that the parties would not reach agreement on a successor contract prior to the opening of school, directed the Superintendent, Dr. Paul Ippolito, to consider the problem and make a recommendation. The Superintendent recommended the adoption of an interim policy to govern teacher-personnel relations until a new contract had been negotiated.

10. On August 21, 1978 at a regular meeting of the Chester-Andover Board of School Directors, the Superintendent recommended to the Board that an interim policy should be adopted. The interim policy was discussed at the meeting, and it was decided to warn the policy, as a regulation, the next day, to be adopted at the next regular meeting (Petitioner's No. 7).

11. A letter dated August 21, 1978 was sent from the Superintendent to the faculty and staff of the Chester-Andover Elementary School stating that negotiations between the teachers and the School Board were still in process and that in the meanwhile: "as operational needs develop, the Board will publish policies to ensure that the system functions in a sound fashion and to ensure a continuation of a quality education for the children of our school district" (Employer's Exhibit C).

12. On August 30, 1978 the agenda of the September 5, 1978 School Board meeting was warned. One of the items on the agenda was the finalization of the "interim operational policy - teacher personnel" (Petitioner's No. 9).

13. At the regular scheduled meeting of the School Board on September 5, 1978, the "interim operational board policy - teacher personnel" was adopted by the full board unanimously (Petitioner's No. 10 & No. 11).

14. At both the School Board meeting of August 21 and the meeting of September 5, 1978, Mrs. Marion Milanese was in attendance. Mrs. Milanese is a member of the Association and is a member of their negotiating committee.

15. It was a custom and practice of the School Board to allow persons in attendance at School Board meetings to make comments concerning business that was under discussion by the Board. No comments or objections to the interim policy were raised by any of the teachers in attendance at the September 5th meeting of the School Board.

16. The interim policy as adopted by the School Board on September 5th made the following changes in the provisions of the old master agreement which had expired:

a. The first article of the "interim operational policy states that the employment for the 1978-79 school year shall be in accordance with the 1977-78 individual teacher contract. In other words the teachers were to be paid at the same salaries as they had received in 1977-78 rather than move up the salary schedule in the expired agreement which raises the teachers' salaries by incremental steps for each year taught.

b. Article 3 of the "interim operational policy" provides that the School Board will make the final disposition in the grievance procedure. The old master agreement had provided for binding arbitration as the final step in the grievance procedure.

c. Article 4(2) relating to personal leaves provides that eligibility for personal leave must be approved at the sole discretion of the superintendent and that a written request for a personal leave must be presented to the

superintendent at least 24 hours prior to any such personal leave. The old master agreement provided for three paid personal leave days, however it did not require the teacher to request leave in advance nor did it leave the granting of that request to the sole discretion of the superintendent (Petitioner's No. 11 and Petitioner's No. 1).

17. A copy of the interim policy was never sent to the Association prior to its adoption on September 5 or after that time.

18. No objections to the interim policy, either formally by the Association or informally by any individual teacher were made to either the superintendent or any school board member. The Chairman of the School Board stated that, if any objections had been raised to the contents of the interim policy, the policy would have been reconsidered in light of the objections, and may have been revised. The Chairman of the School Board further stated that the Board considered the adoption of the policy to be necessary in order to soundly administer the school district during the between contract period and as separate from negotiations.

19. On September 11, 1978 Mr. Gale sent a letter to Mr. Stagner stating that:

> As promised and in response to your questions at our negotiating sessions of August 30th, this is to advise you that the Association should feel free to raise any questions or issues which you consider negotiable in connection with the adoption of interim operational policy by the Chester-Andover School Board.

At the next negotiations session between the parties on September 13, the interim policy was not discussed and impasse was declared by the Association.

21. On September 14, 1978 Mr. Stagner sent a letter to Mr. Gale confirming the Association's declaration of impasse.

The letter stated that the Association preferred to by-pass mediation and go directly to fact-finding and that the Association would send Mr. Gale a detailed list of items which the Association considered to be unsettled (Petitioner's No. 12).

22. On October 4, 1978 Mr. Gale wrote a letter to Mr. Stagner suggesting that the parties hold a negotiation session to attempt to identify specific issues which remained unresolved and "to discuss possible ways in which settlement could be reached".

23. The teachers organization accepted the proposal made by the School Board and agreed to meet to attempt to sort out the outstanding differences between the parties. There is no evidence of the results of that meeting.

24. Grievance procedure, salaries and personal leave policies were subjects under discussion by the parties in their negotiations for a successor agreement.

25. The School Board denies that the policies were adopted pursuant to 16 V.S.A. §2008.

26. To the date of this order, this Board has received no information that the parties have succeeded in reaching agreement on a successor contract.

OPINION

The unfair labor practice complaint brought by the Association charges that the School Board violated 21 V.S.A. §1726(a)(1) and (a)(5) by:

> 1. Unilaterally adopting interim policies which change the existing terms and conditions of employment, before full compliance with Chapter 57 of Title 16; and
>
> 2. The unilateral implementation of such policies in a manner which circumvented the recognized collective bargaining agent.

The Association argues that the interim policy was unilaterally adopted by the School Board at the September 5 School Board meeting and that they changed the terms and conditions of employment as they existed under the expired contract. While the Association concedes that the School Board may make unilateral changes after a contract has expired, they maintain that such changes may not be adopted prior to completing the negotiating process by complying with the collective bargaining statutes for teachers contained in 16 V.S.A. Chapter 57. Since the parties in this case were still in the process of negotiating and neither side had declared an impasse or invoked fact-finding, the Association asserts that the School Board's actions were an unfair labor practice in violation of 21 V.S.A. §1726(a)(5). Furthermore, the Association argues that the School Board's implementation of the policies circumvented the Association in violation of §1726(a)(1).

The School Board, on the other hand, maintains that since the policies were adopted as regulations pursuant to 16 V.S.A. §563 rather than as a final decision under 16 V.S.A. §2008, there

was no requirement that an impasse be reached or fact-finding invoked prior to their adoption. The School Board argues that the changes were not unilateral since the policies were adopted at a public meeting of the School Board at which a member of the Association's bargaining team was present. According to the School Board, the interim policies were necessary to regulate teacher personnel matters on an interim basis in the absence of a new contract and that their adoption was not outside the scope of their authority by virtue of their duty to bargain. The School Board maintains that absent a showing of improper motive on their part or actual prejudice to the teachers, no unfair labor practice was committed.

The unfair labor practice statutes contained in Vermont's Municipal Labor Relations Act, as well as the definition of the duty to bargain in Vermont's labor relations act for teachers (16 V.S.A. §2001), reflect similar provisions in the National Labor Relations Act. In prior labor decisions involving parallel federal legislation, the Vermont Supreme Court and this Board have consistently looked to federal decisions interpreting the N.L.R.A. for guidance. In re Southwestern Education Association (#199-77; June Term 1978); Ohland v. Dubay 133 Vt. 300, 336 A.2d 203 (1975).

As a general principle, federal courts have upheld N.L.R.B. rulings that unilateral changes in working conditions following termination of a collective bargaining agreement and during negotiations for a successor agreement, are permitted only after the parties have reached an impasse in negotiations. 18C Business Organizations, Kheel, Labor Law §1604(5) at 16-68 (1978).

In N.L.R.B. v. Katz 369 U.S. 736, 82 S.Ct. 1107, 8 L.Ed 230 (1960), the U.S. Supreme Court held that an employer which, unilaterally granted merit increases, changed sick leave policy and policy concerning increases in wages, while it was carrying on contract negotiations with the union concerning those very matters, violated the statutory duty to bargain:

> "An employer's unilateral change in conditions of employment under negotiations is a .. violation of §8(a)(5), for it is a circumvention of the duty to negotiate which frustrates the objectives of §8(a)(5) much as does a flat refusal." id, 82 S.Ct. at 111.

Section 8(a)(5) of the N.L.R.A., like 21 V.S.A. §1726(a)(5), makes it an unfair labor practice for an employer to refuse to bargain in good faith. In Katz id, the U.S. Supreme Court ruled that 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 whatever the subjective good faith of the parties may be.

This is not to say that an employer is never free after termination of a contract to unilaterally change conditions previously established by the old contract. The question is when and under what circumstances are the parties relieved from the statutory duty to bargain. The duty imposed on the parties to bargain collectively does not obligate a party to make concessions or yield a position fairly maintained. If the parties have bargained in good faith and are unable to reach an agreement, then either party is free to declare an impasse. Federal courts have ruled that once the parties are deadlocked and an impasse exists, the employer is then free to unilaterally change the conditions and

terms of employment. N.L.R.B. v. Tex Tan, Inc. 318 F.2d 472, 482 (1963).

"A collective bargaining agreement is not an ordinary contract" N.L.R.B. v. Cone Mills Corporation 373 F.2d 595, 598 (1967). Under ordinary contract law, the parties are relieved of their obligations to each other once the contract has expired. However, to the extent that labor law governs the actions of the parties to a collective bargaining agreement after the expiration of a contract, the parties are under an obligation to bargain in good faith over matters which are set forth in the statutes as mandatory subjects of bargaining. While this obligation does not necessarily prevent the employer from implementing decisions which change the conditions of employment as they existed under the expired contract, it does restrict how and when the employer may do so (id at 598). This obligation is not derived from the survival of the old contract, but from the statutory provisions which impose on both parties a duty to bargain in good faith.

With these general principles in mind, we must now view the charge brought by the Association in light of Vermont's own labor law. 21 V.S.A. §1735 of the Municipal Labor Relations Act provides that certified teachers are covered by the provisions of 21 V.S.A. §1726-29 for the purposes of representation in, and prevention of, unfair labor practices. This section states that nothing in it shall be taken to alter or repeal the provisions of Chapter 57 of Title 16 relating to labor relations for teachers.

Chapter 57 of Title 16 provides statutory guidelines for collective bargaining between school boards and recognized teacher organizations. If the parties are not able to reach an agreement after bargaining in good faith, then under 16 V.S.A. §2007, either party may request that any or all unresolved issues be submitted to a fact-finding committee. The report of the fact-finding committee is advisory only and is not binding on either party. However, the statute does provide that the report shall be made public by the fact-finding committee if the issues in dispute have not been resolved within ten days of delivery of the report. Once the provisions of Chapter 57 have been fully complied with, then under 16 V.S.A. §2008 the school board may make final decisions regarding matters in dispute under negotiations. N.C. Education Association v. Brighton School Board (VLRB opinion Jan. 23, 1976)

The legislative intent in adopting these statutory procedures was to provide for the orderly resolution of labor disputes between teachers and school boards in a manner which does not interfere with the necessity of on-going public education. Under 16 V.S.A. §2003 the teacher organization must request the commencement of negotiations on a new contract no later than 120 days prior to the school district's annual meeting. This time frame allows the union and the school board ample time to negotiate a successor contract or invoke the fact-finding procedures under §2007 and, if necessary, finality of decisions under §2008, prior to the school district's annual meeting. Accordingly, any budget increases

resulting from the new contract can be properly approved prior to the expiration of the old contract.

In the instant case, negotiations for a successor contract have been in process for over a year and to our knowledge no agreement has been reached by the parties. Prior to the adoption of the interim policy in September neither side had declared an impasse or requested fact-finding under §2007. Neither party has accused the other of subjective bad faith. Yet each, for its own reasons, has carefully avoided setting in motion the statutory machinery by which the School Board can unquestionably impose unilateral terms on the teachers. The teachers undoubtedly feel they can improve their position by negotiation and want to avoid having the terms of employment dictated by the Board. The Board, on the other hand, may be inclined to feel an imposed settlement will generate animosity and resistance, whereas a negotiated one would not, and hence would lead to a better educational process. Thus, although the Gordian knot could have been cut by either party within the time set by the Legislature, the parties have preferred delay, each seeking advantage by the passage of time, or on-going bargaining. In short, no impasse has been declared.

Although no subjective bad faith has been claimed to exist, we must still determine if an unfair labor practice has occurred in violation of 26 V.S.A. §1726(a)(5). (cf Katz, supra) In making that determination, we must initially answer two questions based on the evidence before us: the first is whether the policies changed terms and conditions of employment which were mandatory bargaining subjects; and the second is whether the policies were adopted unilaterally.

There is no question that freezing wages, altering the grievance procedure and the procedure for taking personal leave changed the terms and conditions of employment. Furthermore, wages, grievance procedure and personal leave are all subjects of mandatory bargaining under 16 V.S.A. §2004 and were, in fact, under negotiation by the parties during their bargaining sessions for a new contract prior to the adoption of the interim policies.

The School Board argues that the changes were not unilaterally adopted since members of the negotiating team were present at the School Board meetings at which the policies were discussed and were adopted. The Chairman of the School Board maintains further that had any objections been voiced by the teachers or the Association either formally or informally, the policies would have been reconsidered and might have been revised.

While we do not doubt the Chairman's sincerity, we believe the action should be regarded as unilateral. The presence of a member of the teachers' negotiating team at a School Board meeting is not distinguishable from the presence of any other member of the general public. While a teacher, or any member of the general public, may be free to voice an objection or an opinion at such a meeting, the School Board is under no obligation to consider the objections or justify their subsequent decisions in light of them. In short, the School Board is under no legal duty to bargain or negotiate in that context.

Even if we accept as true the School Board's contention that modification of the policies would have been made if objections had been raised, this does not alter the fact that the removal of the decision making process out of the collective bargaining forum and into the regulatory process, places the union or its representatives on such unequal footing with the employer as to discourage honest discussion. Unlike the situation at the bargaining table, the School Board has the last word at its own meetings and, therefore, almost by definition, decisions made in that context are unilateral.

Moreover, in our opinion the School Board does not have the statutory authority to make labor relations decisions through the regulatory procedures established in 16 V.S.A. §563 if the Board has recognized a collective bargaining agent. Wages and terms of employment which are mandatory subjects of bargaining are required to be established either through collective bargaining or under 16 V.S.A. §2008. By implication they are not "regulations" which may be adopted by the School Board under 16 V.S.A. §563. Hence, we conclude that the interim policies were unilaterally adopted in fact and that the process for adoption was not authorized by statute.

In N.C. Education Association v. Brighton School Board (Jan. 23, 1976), this Board found that the school board had committed an unfair labor practice by making unilateral changes in personnel policy pursuant to 16 V.S.A. §2008 prior to completing the fact-finding process provided for in 16 V.S.A. §2007. [1] In that case

[1]The Vermont Supreme Court subsequently dismissed an appeal in this case brought by the school board on the grounds that since the parties had in the interim reached agreement on a successor contract, the issue was moot. N.C. Education Association v. Brighton School Board 135 Vt. 451.

the school board made unilateral changes in personnel policy by invoking §2008 after declaring an impasse and invoking fact-finding under §2007. The fact-finders' report, however, had not been made public prior to the school board invoking §2008 and it was this failure to complete the negotiations process as mandated by the statute which caused the Board to find an unfair labor practice. While the School Board in this case has made unilateral changes by invoking §563 rather than §2008, the results are the same. Although the procedure may be different, the substantive result is to circumvent the collective bargaining procedures as set forth in 16 V.S.A. Chapter 57.

In their brief, the School Board cites V.S.E.A. v. State of Vermont 134 Vt. 195, 357 A.2d 125 (1976), in which the Supreme Court overruled a finding by this Board that the State of Vermont had committed an unfair labor practice by unilaterally reducing the work week and wages of Highway Department employees after the expiration of a contract and prior to declaring impasse in negotiations for a successor agreement. That case, however, is clearly distinguishable from this case in that it arose under the State Labor Relations Act, 3 V.S.A. §901 et seq, and not under the Municipal Labor Relations Act.

In conclusion, we find that the School Board in this case did commit an unfair labor practice by implementing the interim policies which changed the terms and conditions of employment. Under the Teachers Labor Relations Act, the School Board is obligated to bargain in good faith over mandatory subjects of bargaining until the parties reach impasse and invoke the

fact-finding process under §2007. By statute it can only make unilateral decisions which affect the terms and conditions of employment after compliance with the procedures of the Teachers Labor Relations Act. Implementing unilateral changes which directly affect subjects which are being negotiated at the bargaining table while maintaining that good faith negotiations are continuing, is contradictory in fact and in law, and is a per se violation of the duty to bargain that action, therefore, an unfair labor practice under 21 V.S.A. §1726(a)(5). In view of this conclusion we find that it is unnecessary to determine if the School Board's actions also constitute a violation of 21 V.S.A. §1726(a)(1).

The School Board in its brief urges this Board not to unduly intrude in the bargaining process and cites American Shipbuilding Company v. N.L.R.B. 380 U.S. 300, 85 S.Ct. 955, 13 L.2d 855 (1965) in which the Court admonished the N.L.R.B. against attempting to equalize the bargaining positions of parties to the bargaining process. That case, however, is distinguishable from this case in that the employer did not unilaterally change the conditions of employment until after impasse had been reached. Thus there was no per se violation of the duty to bargain since bargaining was not going on.

In N.L.R.B. v. Katz, supra, the Supreme Court remanded the case to the Court of Appeals to enforce the N.L.R.B.'s order to cease and desist from implementing unilateral changes; stating that:

> "The Board is authorized to order the cessation of behavior which is in effect a refusal to negotiate." Id, 82 S.Ct. at 114

Similarly, we view our duty here to carry out the Vermont Legislative mandate that good faith bargaining occur. If that mandate equalizes the bargaining positions, it is far different from this Board fashioning an economic weapon for teachers. Thus in light of our finding of an unfair labor practice and in light of the ruling in Katz as cited above as well as this Board's authority under 21 V.S.A. §1727(d) to prevent unfair labor practices, we conclude that the Chester-Andover School Board must cease and desist from enforcing interim policies which change the conditions of employment until such time as the provisions of Chapter 57, Title 16 have been complied with.

The School Board's position in this case is an attempt to have it both ways: to claim they are bargaining in good faith with their employees while at the same time imposing terms on them. In our view this position not only short circuits the collective bargaining process as it has been established by statute and by law but is also the antithesis of good human relations.

ORDER

In view of our authority to prevent unfair labor practices under 21 V.S.A. §1727(d), it is hereby ORDERED that the Respondent, Chester-Andover School Board shall:

1. Cease and desist from:

   (a) Refusing to negotiate collectively in good faith with the Chester Education Association concerning terms and conditions of employment.

(b) Unilaterally altering terms and conditions of employment of its teachers during the course of collective negotiations with the Chester Education Association.

(c) Enforcing the interim policies adopted on September 5, 1978 which change conditions of employment that existed previously until such time as the provision of Chapter 57, Title 16 has been complied with.

2. Take the following affirmative action:

(a) Negotiate collectively in good faith with the Chester Education Association concerning terms and conditions of employment.

(b) During the course of collective negotiations with the Chester Education Association, pay its teachers increments pursuant to the 1977-78 salary schedule.

(c) Pay its teachers the monetary difference between the amounts they would have received had their increments not been unilaterally withheld, and the amounts they were in fact paid since the commencement of the 1978-79 school year.

Dated this 21st day of December, 1978 at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney, Chairman

William G. Kemsley, Sr.

Robert H. Brown

Appeal Dismissed pursuant to Stip. June 1979 44