Vermont Labor Relations Board

VERMONT STATE EMPLOYEES' ASSOCIATION, INC., Complainant	]	
- and -	]	DOCKET # 77-52S
STATE OF VERMONT, HONORABLE RICHARD A. SNELLING, RALPH C. PETERS, JACQUEL-ANNE CHOUINARD, Respondents	]	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case.

This matter came before the Board on a petition or charge brought by the Vermont State Employees' Association, Inc. (hereinafter referred to as VSEA) against the Honorable Richard A. Snelling, in his official capacity as Governor, Ralph C. Peters, in his official capacity as Secretary of Administration and Jacquel-Anne Chouinard, in her official capacity as Commissioner of Personnel (hereinafter referred to jointly as STATE) under the authority of 3 V.S.A., Sec. 961. VSEA charged STATE with the commission of unfair labor practices in refusing to engage in collective bargaining in order to implement the new 40-hour work week. (No. 109, Acts of 1977). The complaint was dated 19 May 1977, filed 20 May 1977, and an Answer and Motion to Dismiss filed 31 May 1977. On 3 June 1977 the parties filed a Stipulation of Facts. The matter was heard, largely through oral argument,

on 3 June 1977, the VSEA being represented by Alan S. Rome, Esquire, and by Robert S. Babcock, its Executive Director, and the STATE by The Honorable Louis Peck, Chief Assistant Attorney General.

Discussion of Evidence and Credibility of Witnesses.

The evidence presented to the Board consisted almost entirely of an agreed statement of facts. The first witness was Mr. Babcock, who testified as to his part in the introduction and passage through the Vermont General Assembly of No. 109, Acts of 1977 (the so-called "pay bill"). He identified State's Ex. A, a memorandum he had sent to all state employees. Steven A. Zuanich, Director of Payroll Services for the State, also presented evidence as to the impact of No. 109 fiscally.

Findings of Fact.

1. VSEA brought its unfair labor practice charges on 19 May 1977.

2. VSEA is located at 79 Main Street, Montpelier, Vermont. It brings this complaint on behalf of its members, as exclusive bargaining representative for the non-management, management and liquor field store units.

3. STATE filed its Answer and Motion to Dismiss 31 May 1977.

4. The parties filed their Stipulation of Facts 3 June 1977, the same date as the hearing.

5. Pursuant to the actions of the 1977 Legislative session, No. 109, Acts of 1977 was signed into law by Governor

Richard A. Snelling, on 6 May 1977.

6. As a result of No. 109, Acts of 1977, Section 1 (d), State employees are mandated, as of fiscal year 1978, to work 40 hours per week, rather than the former 37 1/2 hours per week.

7. It is stipulated that this dispute does not pertain to the actual change in the number of working hours, but to the implementation of the new working hours for State employees.

8. The correspondence or documents authored by Secretary Peters, and Mr. Robert S. Babcock, Executive Director of the Vermont State Employees' Association, have been identified, and are stipulated to by the parties. They were appended as Complainant's Exhibits B through E, to its Unfair Labor Practice Charge. It is the position of the State that it need not bargain with the VSEA on the issue of the implementation of the 40-hour week. It is the position of VSEA that this issue must be bargained with the Union.

9. Respondents, Honorable Richard A. Snelling, Honorable Ralph C. Peters, and Jacquel-Anne Chouinard are located in Montpelier, Vermont and are the employers and agents of the State of Vermont, pursuant to 3 V.S.A., §902(7).

10. Pursuant to the actions of the 1977 Legislative session, H.253, was signed into law by Governor Richard A. Snelling, and became No. 109, Acts of 1977, declaring in part:

"The normal work schedule of employees now scheduled to work 37 1/2 hours per week shall be 40 hours per week through June 30, 1979, after which date minimum hours per week shall be subject to collective bargaining and may involve a flexible work-time program. Similarly, the normal work schedule of employees now scheduled to work 75 hours in a bi-weekly period shall be 80 hours in a bi-weekly period. Classified employees scheduled to work additional hours as provided for in this sub-section may work those additional hours during their lunch period, or other time, as arranged with their appointing authority." (Emphasis added)

11. Also a part of the bill is the following language:

"Implementation of this compensation plan shall be in accordance with procedures developed by the secretary of administration subject to collective bargaining rights and collective bargaining agreements between the state and the state employees' representatives. (Emphasis added) H.253, Section 1(f).

12. On April 14, 1977, Ralph C. Peters, Secretary of Administration, sent a memorandum to all Agency and Department Heads, pertaining to the implementation of the 40-hour week. In this memorandum, the Secretary stated as follows:

"3. That you as management have the final decision should an employees' preference conflict with the department's or State's needs..."

13. Mr. Peters, also, on April 25, 1977, wrote to Mr. Robert S. Babcock, Jr., Executive Director of VSEA, and stated

as follows:

> "I believe this memo reflects adequately that the employees will be consulted and their preferences will be considered in establishing working hours, but at the same time recognizing that the establishment of working hours is the prerogative of management." (Emphasis added)

14. After having received Mr. Peter's letter, supra, on May 6, 1977, Mr. Babcock responded as follows:

> "Pursuant to 3 V.S.A. Section 904 (a) (2), the VSEA hereby officially requests to begin bargaining with the Administration on the implementation of the scheduled 40-hour work-week."

15. Mr. Peters, on May 10, 1977, responded to Mr. Babcock's request for bargaining, with the following response:

> "We feel this matter is controlled by statute and accordingly is not subject to collective bargaining...
>
> "If, however, all preferences cannot be accommodated, management will make final scheduling decisions and will determine the hours employees must work to meet the needs of the public."

16. STATE, through Mr. Peters, declared the implementation of the 40-hour work-week to be a non-bargainable subject and refused to bargain it.

17. 5,164 state employees are affected by the increase in working hours from 37 1/2 hours per week to 40 hours per week.

18. The estimated amount of money involved in the extra work hours is a factor of employee productivity, and equals $71,564.

19. There exists a collective bargaining agreement currently in force and to remain in force after 1 July 1977 between VSEA and STATE for Management Units, Non-management Units and State Liquor Store employees.

20. No. 109, Acts of 1977, becomes effective 3 July 1977.

21. The exhibits and transcript are made a part of these Findings for purposes of review by the Supreme Court.

Conclusions of Law and Opinion.

The problem now existing arises out of the passage by the Vermont General Assembly of No. 109, Acts of 1977, which provides, inter alia, for a pay raise for virtually all State employees of over 16 per centum above existing levels. As a portion of the political quid pro quo for enactment, a provision was inserted into H.253 to "correct" a situation whereby 5,164 workers enjoyed a 37 1/2-hour work week, while others worked a 40-hour week. Quoting from §1 (d) of the Act:

> "(d) The normal work schedule of employees now scheduled to work 37-1/2 hours per week shall be 40 hours per week through June 30, 1979, after which date minimum hours per week shall be subject to collective bargaining and may involve a flexible work-time program. Similarly, the normal work schedule of employees now scheduled to work 75 hours in a bi-weekly period shall be 80 hours in a bi-weekly period. Classified employees scheduled to work additional hours as provided for in this subsection may work those additional hours during their lunch period, or other time, as arranged with their appointing authority. Implementation of the 40 hours per week work schedule will commence for each employee at the beginning of the first full pay period following July 1, 1977.

Section 1 (f) provides the ammunition for the dispute

which has arisen and which we now decide:

> "(f) Implementation of this compensation plan shall be in accordance with procedures developed by the secretary of administration subject to collective bargaining rights and collective bargaining agreements between the state and the state employees' representatives. Implementation of this plan shall not be subject to the provisions of chapter 25 of Title 3."

The last reference to "chapter 25 of Title 3" (sic) is made to the Administrative Procedures Act, and which may assume relieves the Secretary of Administration, the respondent Peters, from such requirements of the Act as publication of rules and regulations designated to implement the changes to a 40-hour work week for the great majority of State workers. Key words in subsection (d) are "...40 hours per week through June 30, 1979, after which date minimum hours per week shall be subject to collective bargaining...."

There is absolutely no dispute between the parties as to the 40-hour week but only as to its implementation, and whether Complainant has the right to bargain collectively with STATE over the procedures and substantive rights, if any, of employees who may be dissatisfied with the implementation of the new law. The two sides initiated the warfare with broadsides to their people. Mr. Babcock fired off a comprehensive memorandum (State's Ex. A) in which he suggested that in effect workers could set their own hours with respect to the extra 1/2 hour per work day needed to reach a total of 40 hours. Secretary Peters touched off his own salvo in his memorandum of 14 April 1977 (Complainant's Ex. B). The

two chiefs exchanged further volleys (Complainant's Ex. C, D and E), resulting in a formal request that the issues involved in the budding dispute be made the subject of collective bargaining under the various agreements between VSEA and STATE.

The issue presented here is very simple: Is STATE required to engage in collective bargaining over the implementation of the 40-hour work week as a matter of law?

The Board concludes that there is a current duty to bargain under the requirements of 3 V.S.A., § 904, which reads as follows:

> "§ 904. Subjects for bargaining
>
> "(a) All matters relating to the relationship between the employer and employees shall be the subject of collective bargaining except those matters which are prescribed or controlled by statute. Such matters include but are not limited to:
>
> (1) wage and salary schedules to the extent they are inconsistent with rates prevailing in commerce and industry for comparable work within the state;
>
> (2) work schedules relating to assigned hours and days of the week;"
>
> * * *

The question of bargaining is slightly complicated by the language of § 1 (d) of the Act (Op. cit., supra, p. 6): "Classified employees scheduled to work additional hours ... may work their additional hours during their lunch period, or at other time, as arranged with their appointing authority." The dispute raged over whether Secretary Peters, not an appointing authority except as to his own employees, would make the arrangements or whether they should be made with

the Department Heads, and, if so, what part VSEA should have the right to play in such negotiations. We do not see this language as a real problem, and feel that the negotiations between each affected employee and his Department Head is administrative in nature and not a part of the collective bargaining process.

It seems clear that under existing law there is a duty to bargain any "matter relating to the relationship between the employer and employees [including] ... (2) work schedules relating to assigned hours and days of the week; ..." 3 V.S.A., § 904. Accordingly, we must decide, and therefore hold, that STATE was wrong in refusing to bargain the issues surrounding the implementation of the new work week. We further hold that STATE and VSEA have a present and continuing duty to bargain in good faith as to these issues from the date hereof to 3 July 1977, the effective date of the new law.

A charge of the commission of an unfair labor practice on or after 3 July 1977 would be premature. It would be unwise and improper for the Board to decide in advisory fashion, questions which may or may nor arise under No. 109, Acts of 1977. We note in passing that the General Assembly has amended § 904, which describes the statutory basis for collective bargaining in the state employee area of the total public sector. We note that "work schedules" are no longer included as an item to be the subject of bargaining. Noteworthy, also, is the language of § 1 (d):

"...June 30, 1979, after which date minimum hours per week shall be subject to collective bargaining...," which certainly give us a strong legislative inference that hours are not intended to be bargainable during the period 3 July 1977-30 June 1979. On the other hand, it may well be that the general language of § 904, Sec. 5 of the new Act, will permit bargaining as to the implementation of new statutory work schedules even where it does not permit, as matter of right, bargaining as to the hours or schedules themselves. No. 109, § 1 (f), Acts of 1977 contains another clear-cut admonition to the parties:

> "Implementation of this compensation plan shall be ... subject to collective bargaining rights and collective bargaining agreements ..."

These questions we do not decide herein, but suggest that the parties should not find it difficult to work out reasonable and workable solutions in these rather narrow areas.

Order.

NOW, THEREFORE, it is hereby ORDERED that STATE and VSEA commence bargaining forthwith as to the issues surrounding implementation of the new 40-hour work week. This order is expressly limited in its effect to the period from date hereof through midnight, 2 July 1977.

Dated at Brattleboro, Vermont this 17th day of June, 1977.

Appeal dismissed 12/7/77

VERMONT LABOR RELATIONS BOARD

By _____
JOHN S. BURGESS, CHAIRMAN

_____
WILLIAM G. KEMSLEY, SR.

_____
H. JAMES WALLACE

Vermont Labor Relations Board

VERMONT STATE EMPLOYEES' ASSOCIATION, INC.	)	VERMONT LABOR RELATIONS BOARD
and	)	Docket No. 77-52S
STATE OF VERMONT, HONORABLE RICHARD A. SNELLING, RALPH C. PETERS, JACQUEL-ANNE CHOUINARD	)	

OPINION AND ORDER

Statement of Case.

On June 17, 1977, this Board issued "Findings of Fact, Opinion and Order" holding that the State of Vermont had committed an unfair labor practice. On June 21, 1977, the State of Vermont filed a "Motion to Set Aside Order and Dismissal." A hearing on the State's Motion was heard on July 1, 1977. The State was represented by Louis P. Peck, Chief Assistant Attorney General, and Paul F. Hudson, Assistant Attorney General, and the Vermont State Employees' Association, Inc. was represented by Alan S. Rome, Esq.

Opinion.

The State's Motion is based upon the contention that

> "[T]he Board erred in concluding that 3 V.S.A. §904, as it presently exists and will continue in effect until July 3, 1977, imposes 'a current duty to bargain' implementation of the 40-hour work week."

If the State did not have a duty to bargain implementation of the 40-hour work week, then it would not have committed an unfair labor practice.

The issue in this case is whether the State had a duty to bargain the implementation of the 40-hour work week which was promulgated by the Legislature (No. 109, Acts of 1977). The Act was effective July 3, 1977. The Act further specified that all employees shall work 40 hours per week through June 1979, after which date minimum hours per week shall be subject to collective bargaining. At the time of the filing of the unfair labor practice complaint and this Board's decision, that law was not in effect. However, the State was planning to implement the 40-hour work week as of July 3, 1977, and the VSEA contended that the State had a duty to bargain the implementation. Work schedules were, at the time of the charge and hearing, a mandatory duty for collective bargaining. 3 V.S.A. §904(a)(2) The contract between the State and the VSEA is silent as to the required work week. Article XIII provides that an employee's basic salary and overtime shall be based on a 40-hour work schedule. The contract does not say that all employees must work 40 hours. Certain special agreements in the contract refer to work weeks ranging from 37-1/2 hours to 42 hours for particular groups of employees. The evidence is clear and uncontradicted that many employees worked only 37-1/2 hours

even though the basic salary and eligibility for overtime were based on a 40-hour work schedule. With the exception of certain groups of employees covered by the collective bargaining agreement, the work schedules, that is, number of work days and working hours per day, are not covered by the collective bargaining agreement. With the exception of those few employees specifically covered in the agreement, the contract does not require employees to work a certain number of hours.

By virtue of No. 109, Acts of 1977, the Legislature has in effect amended or superseded the collective bargaining agreement by requiring all employees to work 40 hours per week. The Legislature could, if it wished, have mandated the specific work hours. In lieu thereof, the Legislature provided

> "Classified employees scheduled to work additional hours as provided for in this sub-section may work those additional hours during their lunch period, or other time, *as arranged with their appointing authority.*" (Section 1(d) of No. 109, Acts of 1977)

At the time of the filing of the unfair labor practice the Act was not in effect. Therefore, the employer could not "arrange" additional hours with the employees. To do so would have been an unfair labor practice.

Working hours are too important an item to be omitted from a collective bargaining agreement. The Board has observed in the evidence of this case and other cases before

it, that the parties, through their conduct, certainly expected that the work week for many State employees was 37-1/2 hours. In entering into the collective bargaining agreement both the State and the employees expected the work week and work schedule to remain the same. The State would contend that because the work schedule was not reduced to writing and included in the collective bargaining agreement, it is not subject to collective bargaining as specified in 3 V.S.A. §982. The Board disagrees with this analysis. The work schedule and work days of State employees had been established for such a long time that it was unnecessary to include them in the contract, except for those employees whose schedules were being changed from the past practice.

Unfortunately, the collective bargaining agreement does not have a "zipper clause" providing that management shall have the right to change all conditions of employment not specifically covered by the collective bargaining agreement or that all conditions of employment not covered by the collective bargaining agreement will be subject to future negotiation if the need should arise. The language of Article II, which sets forth certain employer's rights, is taken almost verbatim from 3 V.S.A. §905(b). Article II does not give the State greater rights with regard to its labor relations than those permitted by law. The law specifically provides

> "Subject to rights guaranteed by this chapter and subject to all other applicable laws, nothing in this chapter shall be construed to interfere with the right of the employer to:
>
> (1) carry out the statutory mandate and goals of the agency, or of the colleges, and to utilize personnel, methods and means in the most appropriate manner possible.
>
> (2) with the approval of the governor, take whatever action may be necessary to carry out the mission of the agency in an emergency situation."

The law specifically requires that work schedules shall be a subject for bargaining. 3 V.S.A. §904(a)(2). The law does not require the parties to agree; the law merely requires them to bargain. 3 V.S.A. §925 and §981 The State does not have the right to unilaterally change working conditions, except through acts of Legislature. The State has relied upon the hours of work as though they were included in the collective bargaining agreement. In fact, the overall performance evaluations of some employees have been downgraded because of their refusal to work the customary working hours. There was no question that the employees worked as long or longer than other employees; however, they did not work the particular hours that the State agency required (see Grievance of Sandra S. Dooley, Docket No. 73-10; Grievance of Susan LaGasse, Docket No. 73-7). The parties, through their past conduct, clearly established certain hours of work in each agency and relied upon such conduct in

entering into the present collective bargaining agreement.

Although this Board is not bound by decisions of the National Labor Relations Board, it certainly believes that they have significant value as precedent. In Williamette Industries, Inc., et al., 1975-1976 CCH NLRB No. 16283, the National Labor Relations Board held that the change of working schedules without negotiations with the Union representing the employees is an unfair labor practice. The Board recognized that the change was based upon economic circumstances.

The State contends that because the law was not in effect at the time of the hearing, the State had no obligation to bargain over the implementation of the law. This argument flies in the face of the fact that the State, prior to the effective date of the law, was actually making plans for its implementation and the VSEA was requesting that the State bargain. The State was preparing to implement the 40-hour week and it should have been doing so only after proceeding through the collective bargaining process. The State claims that the contracts between the State and the VSEA are in full force and effect and are not by their own terms subject to renegotiations, at least not before July 3, 1977. However, the working hours were clearly a part of an understanding between the parties based upon past practice. To unilaterally attempt to change those schedules during the

life of the contract is to snatch from the employees one of the assumptions on which the collective bargaining agreement between the parties was based. The Board does not believe that the State entered into collective bargaining with the VSEA with the intent of deluding them into false security. The Board believes that the terms of the contract probably should be reformed to match the intent of the parties or that there was mutual mistake of fact so that there was no meeting of the mind. In any event, the State had a duty to bargain the implementation of the new 40-hour work week.

Order.

NOW, THEREFORE, the Motion to Set Aside Order and for a Dismissal is hereby DENIED. This Order affirms the notice of decision given orally to the parties on July 1, 1977, immediately following the hearing. The vote by members of the Board on the motion was two to one, Chairman John S. Burgess and Member William G. Kemsley voting to deny the motion and Member H. James Wallace to grant the motion.

Dated this 23rd day of September, 1977.

Attested is most
true & correct
Dec 1977

JOHN S. BURGESS, CHAIRMAN

WILLIAM G. KEMSLEY, SR.

H. JAMES WALLACE