STATE OF CONNECTICUT
LABOR DEPARTMENT\

CONNECTICUT STATE BOARD OF LABOR RELATIONS

In the matter of	
STATE OF CONNECTICUT (DEPARTMENT OF CHILDREN AND YOUTH SERVICES - CENTRALIZED HOMEFINDING UNIT)	Case No. SPP-5867
- and -	Decision No. 2160
LOCAL #2663 OF COUNCIL #4, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO	October 26, 1982

APPEARANCES:

Scott Schwartz, Labor Relations Advisor,
for the State of Connecticut

J. William Gagne, Jr., Esq., and
George DeMartino, Staff Representative,
for the Union

DECISION and ORDER

On June 23, 1980, Local 2663 of Council #4, AFSCME, AFL-CIO (Union) filed with the Connecticut State Board of Labor Relations (Board) a complaint alleging that the State of Connecticut, Department of Children & Youth Services (Respondent) had engaged and was engaging in practices prohibited by the Act Concerning Collective Bargaining for State Employees (the Act) in that:

> On or about May 1, 1980 the Respondent altered the method of reimbursement to the employees of the Centralized Homefinding Unit for use of their personally owned vehicles by denying payment for a portion of their mileage.

On July 18, 1980, an informal conference was held with Kenneth Hampton, an assistant agent of the Board. At that time, the parties agreed to full stipulation of facts and exhibits in the case. On May 6, 1981, the Board informed the parties that further facts were required in order to decide the case. Thereafter on September 11, 1981, the parties signed a supplemental stipulation of facts. Both parties filed written briefs.

On the whole record before us we make the following findings of fact, conclusions of law, and order, Findings of fact l-17 are taken verbatim from the stipulations submitted by the parties.

Findings of Fact

1. The State of Connecticut, Department of Children and Youth Services (D.C.Y.S.) is an employer within the meaning of the State Employee Relations Act (the Act).

2. Local 2663 of Council #4, AFSCME, AFL-CIO, is an employee organization within the meaning of the Act.

3. Since late 1977, there has existed within D.C.Y.S. a Central Homefinding Unit. In 1977-1978 there were 29 professional bargaining unit members, in 1978-1979, 26 such employees, and 38 during 1979-1980.

4. The employees are responsible for finding and investigating permanent and foster homesites for orphans and wards of the State.

5. As of October 15, 1980, the official duty station for all employees Of the unit whose duty station had been Meriden is D.C.Y.S.' Hartford office. For all other employees their duty station continues to be the same as prior to October 15, 1980 (i.e., regional office closest to home).

6. Six state cars are assigned to the homefinding unit but this number is and has been insufficient to cover all field personnel.

7. The September 1, 1976 state travel rules entitled "Use of Personally Owned Motor Vehicles on Official State Business and Personally Owned Motor Vehicle Reimbursements" published by the Department of Transportation, states in relevant part that, "No payment for use of personally owned vehicles is permitted for (a) home to office travel . ..the employee shall be reimbursed at the established rate for each mile in excess of the number of miles from the employee's home to official duty station and return. Mileage published by the state Public Utilities Commission will be regarded as official." (Ex. 3)

8. The 1976 rules were continued in force by 1979 rules published by the Department of Administrative Services, which states in relevant part that,

> f. Transportation by Motor Vehicle
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> 1. Personally-Owned Motor Vehicle Travel by personally owned vehicle must be properly authorized in accordance with the regulations covering the Use of State-Owned Motor Vehicles and Personally-Owned Motor.Vehicles published by the Director of Fleet Operations. A reimbursable rate of twenty cents per mile, unless otherwise provided by law and Collective Bargaining Agreements, will be authorized.
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> Mileage published by the State Public Utilities Control Authority will be regarded as official.
>
> Charges for the use of personally-owned vehicles in inter-state travel will be limited to the prevailing lowest common carrier rate. If it can be shown that the use of a personally-owned vehicle is more economical when more than one employee rides in the vehicle, full mileage reimbursement will be authorized.
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> Parking charges and toll charges incurred in the use of a personally-owned vehicle are not reimbursable. These charges are included in the mileage reimbursement rate.
>
> Charges for road service, repairs, towage, and other similar expenses will not be allowed.

9. Both the 1976 and 1979 publications were enacted as internal departmental rules applicable to all state agencies and have not been enacted by the General Assembly as formal regulations of Connecticut State Agencies. (Ex. 5)

10. From 7/1/77 to 6/30/80, some employees of the Department of Children and Youth Services Central Homefinding Unit requested and received portal to portal reimbursement when they went from their home to field appointments, but did not request or receive portal to portal reimbursement when going from home to official duty station and back.*

11. From 7/1/77 to 6/30/80, other employees'never requested or received portal to portal reimbursement.*

12. The parties cannot agree on the number involved in the above two groups.*

* Findings 10, 11, and 12 are taken from the parties' supplemental stipulation of facts (Ex. 2A).

13. On or about March 4, 1980, the State of Connecticut Auditor issued results of an audit conducted during fiscal year 1977 and 1978 in O.C.Y.S. The report stated in relevant part that,

> 4. The Department should comply with the Standard State Travel Regulations as set forth by the Department of Administrative Services.
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> Our examination of mileage reimbursements for use of personally owned motor vehicles revealed that the Department adopted a policy of reimbursing personnel of the Home Finding Unit in Meriden contrary to State travel regulations. The method, as explained previously, reimburses one group of employees for travel to the Centralized Home Unit in Meriden and denies reimbursement to other employees of the 'unit performing the same duties solely on the basis of when the employees were hired. State travel regulations permit no home to official duty station reimbursement unless specifically authorized by the Commissioner of Administrative Services.... (Ex. 8).

14. There is a collective bargaining agreement in effect between the parties effective from July 1, 1979 to June 30, 1982 which states in Article 39, Section 2 that,

> Section Two An employee who is required to use his/her personal vehicle in the performance of duty shall be reimbursed at the rate of $.20 per mile.
>
> Employees shall be notified of the minimum insurance requirements prior to using their personal vehicles in the performance of duties. In an emergency situation, an employee who uses his/her personal vehicle to transport a client/resident shall be reimbursed regardless of the insurance requirement.
> (Ex. 9, 9a).

15. The supersedence appendix to the collective bargaining agreement provides that, "Travel allowance governed by contract and the regulations of the Commissioner of Administrative Services." (Ex. 9a)

16. On or about June 30, 1980, D.C.Y.S. stopped paying portal to portal reimbursement to those employees who had been receiving such payments for use of their personal cars and has since that date allowed reimbursement only for mileage in excess of each employee's round trip distance from home to duty station. (Ex. 10)

17. On June 5, 1980, the Union filed a class grievance of the State's May 20, 1980 action which grievance was denied at Step 1. (Ex. 11)

Conclusions of Law

1. An employer's unilateral change in a condition of employment involving a mandatory subject of bargaining during the term of an existing collective bargaining agreement will constitute a refusal to bargain and a prohibited practice unless the employer proves an adequate defense.

2. Mileage reimbursement concerns a term or condition of employment and a mandatory subject of bargaining.

3. The Union has met its burden of proof demonstrating a change in an existing term or condition of employment.

4. Respondent's failure to pay portal to portal mileage reimbursement to those CHU employees who had been receiving such payments for the use of their personal cars was inconsistent with past practice and thus a change in an existing term or condition of employment.

Discussion

The Union argues that the Respondent unilaterally changed the practice of reimbursing employees of the Centralized Homefinding Unit (CHU) of D.C.Y.S. for the use of their personal automobiles from a portal to portal system to one which reimburses employees only for mileage in excess of each employee's round trip from home to duty station. The effect of this change is that employees now receive less compensation and this constitutes a refusal to bargain in violation of 5-272(a)(4) of the Act.

An employer's unilateral change in an existing condition of employment which involves a mandatory subject of bargaining will constitute an illegal refusal to bargain and a prohibited practice under Section 7-470(a)(4) of the Act unless the employer proves an appropriate defense. NLRB v. Katz, 369 U.S. 736 (1962); Town of Newington, Dec. No. 1116 (1973), aff'd in Town of Newington v. Connecticut State Board of Labor Relations, et al, Dk 109301, Court of Common Pleas; Hartorrd County (December 11, 1973); Town of Westport, Decision No. 1602 (1977), summarily aff'd in Town of Westport v. Westport Municipal Employees Association, Dk 168495, Superior Court, Fairfield County J.D. at Bridgeport (October 13, 1978); Town of East Haven, Decision No. 1279 (1974), aff'd in Town of East Haven, et al v. East Haven Police Union, et al, Dk 142400, Superior%& New Haven (June 17, 1975); Bethel Board of Ed., Dec. No, 1920 (1980). This is true whether or not the existing condition is guaranteed by the contract. City of Milford, Decision No. 1168 (1973); Town of Newington, supra. In the present case, there is no doubt that mileage reimbursement constitutes compensation and is a mandatory subject of bargaining. West Hartford Education Association, Inc. v. DeCourcy, 162 Conn. 582 (1972). As part of its prima facie case the Union must prove that there has in fact been an actual change effected by the Respondent.

On September 1, 1976, Respondent issued state-wide travel rules which in effect prohibited portal to portal payment to employees required to use their personally owned vehicles for official State business (Finding 7, Ex. 3). It is not clear from the record whether there was a similar rule in effect before September 1, 1976 or what the practice was for paying mileage reimbursement before September 1, 1976. The September 1, 1976 travel rules were never adopted as regulations pursuant to the Uniform Administrative Procedure Act and therefore are not rules or regulations within the legal sense of these words. They are merely official statements of policy on behalf of the Respondent.

Notwithstanding the September 1, 1976 travel rules, the following practice obtained within the CHU of D.C.Y.S.:

10. From 7/1/77 to 6/30/80, some employees of the Department of Children and Youth Services Central Homefinding Unit requested and received portal to portal reimbursement when they went from their home to field appointments, but did not request or receive portal to portal reimbursement when going from home to official duty station and back.

11. From 7/1/77 to 6/30/80, other employees never requested or received portal to portal reimbursement.

12. The parties cannot agree on the number involved in the above two groups.

(Findings of Fact 10-12, supra)

The evidence is unclear concerning why CHU treated these groups of employees differently. An auditors' report (Ex. 8) strongly suggests that some sort of grandfathering arrangement was in effect.* The auditors recommended that the Respondent cease CHU's practice of paying portal to portal mileage reimbursement because it was contrary to the September 1, 1976 travel rules. Respondent concurred and on June 30, 1980, CHU stopped making portal to portal reimbursement of mileage.

From the above, the following is clear. The Respondent had an official policy prohibiting portal to portal mileage reimbursement. In CHU, this policy was not applied to a specific group of employees. Instead, these employees were actually given mileage reimbursement on a portal to portal basis for three years.

* The Respondent argued in its brief that the payment of portal to portal mileage reimbursement described in finding 10 was "clerical error."

The Respondent then unilaterally changed that practice on June 30, 1980. These facts show that an actual practice existed of giving the portal to Portal reimbursement benefit to the group in question and that the actual practice was unilaterally changed by the Respondent. The Union has therefore shown a prima facie case of violation of the duty to bargain by the Respondent and to avoid a finding that it committed a statutory prohibited practice, the Respondent must show an appropriate defense.

The Respondent argues first that the portal to portal reimbursement resulted from "a clerical error of the person responsible for doing the paperwork involved with requests for travel reimbursement...". This does not square with the findings of the auditors who found that a seniority standard was being applied in CHU and this indicates a conscious decision rather than mere clerical error. The Respondent could, of course, still argue that whether the payments were mere clerical error or consciously made, they were unauthorized and the Respondent should not be bound by the unauthorized acts of its agent. This argument, however, will not suffice. We were presented with a similar argument in Town of Westport, supra, wherein an administrator had knowingly allowed a practice regularly scheduled overtime to continue despite his superiors' express directive that it cease. When the administrator's superiors subsequently discovered the continuation of the overtime and stopped it, we found the unilateral change to be a refusal to bargain and a prohibited practice despite the fact that the practice had been created by unauthorized action of the administrator. In that case we stated:

> There remains the problem raised by Blau's unauthorized conduct in perpetuating the 48 hour schedule for the 1974, 1975 and 1976 seasons when he had been expressly directed to limit regular schedules to 40 hours. We are satisfied that such a direction was given and that it was disobeyed. The question is whether this insulated the Town from the legal consequences of a custom or practice that in fact existed. We hold it does not. Perhaps it would if the employees were shown to have been guilty participants in the flouting of orders but there is not one shred of evidence to suggest this. In its absence we think it only fair that the Town, which had clothed Blau with apparent authority so far as these employees could see, . should bear the consequences of its department head's infidelity. Surely the Town was in a better position to detect this fault than the workers were and indeed the Town discovered it soon enough once a question was raised. Where a custom or practice is as open and as regular as this one the Town should not be able to avoid its effect on labor relations by invoking the technicalities of the law of agency. And here even these technicalities probably would not help the Town. See Keeler v. General Products, Inc., 137 Conn. 247, 251; Supreme Lodge v. Kenny, 198 Ala. 332, 340, 73 So. 519; Restatement 1 Agency § 161.
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> Town of Westport. Accord City of Bridgeport, Dec. No. 1500 (1977).

Similarly, in the present case there is no evidence that the group of CHU employees who were receiving the portal to portal benefit upon request for a period of over three years were aware that the payments were unauthorized. As the auditors recognized in their report, the Commissioner of Administrative Services may specifically authorize portal to portal mileage reimbursement despite the general prohibition in the travel rules. Surely it is not a burden which should be placed on the employees to investigate whether the employer is properly authorized when extending benefits. As in Westport, the Respondent here was in a better position to detect any errors in the application of reimbursement payments and the practice in question was open and notorious for a period of over three years.

The Respondent also argues that it "should not be forced to perpetuate a situation which is clearly repugnant to the spirit of the parties' collective bargaining agreement and expressly prohibited by applicable state regulations...". We would find an adequate defense on the part of the Respondent if the collective bargaining agreement between the parties entitled Respondent unilaterally to cut off the portal to portal reimbursement in June of 1980. Windsor Board of Ed., Dec. No. 1644 (1978); Ridgefield Bd. of Education, Dec. No. 1516 (1977); City of Waterbury, Dec. No. 1278 (1975). However, the Contract contains no language which can be reasonably construed to give the Respondent such a right in thfs

case. The Contract is silent on this subject* and the Respondent admits as much on page two of its brief wherein it states "the applicable provisions of the parties' collective bargaining contract which are silent on the matter...". Furthermore, as we stated earlier, the so-called regulations (actually, merely policies) concerning travel reimbursement are not controlling under the Act where they conflict with actual practice. No citation need be given to support the proposition that where an official policy of the Respondent conflicts with the requirements of a general statute (especially one with broad remedial purposes, such as the Act), it is the latter which must prevail. The duty to bargain under all four of the bargaining statutes of this State have been repeatedly interpreted by this Board and the courts to prohibit unilateral changes in actual conditions of employment.

The existence of the practice of paying the portal to portal benefit has been clearly proven by the Union. Its unilateral withdrawal is uncontested. Having considered the totality of the circumstances of the case, we find no defense shown by the Respondent which could avoid the finding that Respondent violated its duty to bargain when it unilaterally removed the portal to portal benefit from the CHU employees who had historically and consistently been receiving that benefit upon request.

Finally, the record before us does not show whether the practice of paying portal to portal mileage for driving to field appointments resulted in instances of arguably undeserved enrichment of employees or whether the change in practice resulted in requiring employees unfairly to subsidize personally the operation of State government. The answer to these questions would require evidence concerning how far the employees in question live from their duty station, their usual mode of transportation to their duty station, how far they have to drive to field appointments, the frequency of being required to drive personal vehicles to field appointments, etc. These types of factors no doubt would be thoroughly discussed in negotiations between the parties on the subject of mileage reimbursement. The Respondent's taking of unilateral action illegally removed the question from the crucible of reasoned discussion and argument which is essential to the process of collective bargaining and which is mandated by the Act.

ORDER

By virtue of and pursuant to the powers vested in the Connecticut State Board of Labor Relations by the Act Concerning Collective Bargaining for State Employees, it is hereby

ORDERED, that the State of Connecticut

I. Cease and desist from refusing to pay portal to portal mileage reimbursement to the CHU employees who had regularly received such payment during the period from July 1, 1977 to June 30, 1980, unless and until such change has been negotiated with the Union or final impasse in such negotiations has been reached.

II. Take the following affirmative steps which the Board finds will effectuate the purposes of the Act:

(a) Upon their request, continue to pay said employees portal to portal mileage for use of personal vehicles used to drive to field appointments in the same manner that such employees received such payments during the period July 1, 1977 to June 30, 1980;

(b) Make whole the said employees for any losses they sustained by the refusal to pay portal to portal mileage during the period July 1, 1977 to the present.

(c) Post immediately and leave posted for a period of sixty (60) consecutive days from the date of posting, in a conspicuous place where the employees customarily assemble, a copy of this Decision and Order in its entirety; and

* The relevant provision of the Contract is Article 39, Section 2, which merely provides that employees who utilize their personal automobiles will be reimbursed at 204 per mile. No mention is made of travel rules,

(d) Notify the Connecticut State Board of Labor Relations at its office in the Labor Department, 200 Folly Brook Boulevard, Wethersfield, Connecticut, within thirty (30) days of the receipt of this Decision and Order, of the steps taken by the State of Connecticut to comply therewith.

CONNECTICUT STATE BOARD OF LABOR RELATIONS

By s/ Kenneth A. Stroble
Kenneth A. Stroble

s/ Patricia V. Low
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