

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)
) DOCKET NO. 22-08: 22:09
UNITED ACADEMICS)

FINDINGS OF FACT, OPINION, AND ORDER

United Academics (“Grievant” “Union”), representing the full and part-time faculty members of the University of Vermont and State Agricultural College (“Employer” “UVM” “the University”) grieves the decision of the Employer to implement a new Conflict of Interest and Conflict of Commitment Policy (“COI/COC”) without going through the negotiation process.

A hearing was held on April 13, 2023, at the Vermont Labor Relations Board before Vermont Labor Relations Board Members Robert Greemore, Chairperson, Karen Saudek, and David Boulanger. The Union was represented by Sue Edwards, Esq., and the University was represented by Meghan E. Siket, Esq. The parties filed post-hearing briefs on May 23, 2023.

FINDINGS OF FACT

1. On May 2, 2001, the Vermont Labor Relations Board (“Board”) certified United Academics (“Union”) as the exclusive bargaining representative of full-time faculty at the University of Vermont (“University” “Employer”). The Union was certified as representing the part-time faculty in 2003.
2. The Union on behalf of the full-time faculty and the University executed and are subject to a Collective Bargaining Agreement (“CBA”) effective May 10, 2021, to June 30, 2024.

3. The Union on behalf of the part-time faculty and the University executed and are subject to a Collective Bargaining Agreement (“CBA”) effective October 2, 2018, to June 30, 2021.
4. Article 24 of the CBA between the University and the Union’s full-time faculty unit contains the Conflict of Interest and Commitment provision and provides in its entirety: “The parties hereby incorporate by reference the University’s Conflict of Interest and Commitment Policy effective September 14, 2014, to the extent relevant to bargaining unit members.”
5. Article 23, of the CBA between the University and the Union’s part-time faculty unit provides as follows:

Article 23: EXTERNAL EMPLOYMENT

Faculty are encouraged to participate in other professional activities as a means of improving not only their own competence and prestige, but the prestige of the University as well. While engaging in these activities and/or in any external employment, either during or outside the appointment period, faculty members have the obligation to avoid ethical, legal, financial and other conflicts of interest to insure that their outside activities and interests do not conflict with their responsibilities to the University. Furthermore, any external employment will not involve or require more than incidental use of University equipment (excluding computer technology) supplies, materials, clerical services unless expressly authorized by the chair.

6. On June 8, 2020, the University proposed a change in the language of Article 24, to add “as may be amended from time to time.”
7. The Union rejected “as may be amended from time to time,” because it did not want the University to make changes that can affect Union members, without the Union being part of that conversation.

8. The proposal did not go forward to mediation and was not incorporated into the Collective Bargaining Agreement.
9. On February 5, 2021, UVM emailed the President of United Academics attaching ten “university Policies and University Operating Procedures.” The email asked the Union “in its capacity as the exclusive bargaining representative for all full-time faculty, to review the policies and to advise whether you believe the policies implicate a provision that must be bargained, or whether the terms of the policies violate any provision of the collective bargaining agreement or applicable labor law.” Joint Exhibit 6.
10. The University characterized this email as asking United Academics whether it wanted to bargain over the proposed changes.
11. Among the ten policies was the COI/COC Policy, which was the only Policy of the ten which was incorporated by reference in the CBA.
12. The University wanted to eliminate passive reporting and implement mandatory affirmative reporting of conflicts. To accomplish this goal, the University proposed expanding its conflict reporting system, called “UVMClick.” The UVMClick system was previously required only for faculty that had participated in sponsored research. The proposed change to the COI/COC policy required that all faculty use UVMClick whether or not they were engaged in sponsored research.
13. The proposed changes required faculty to provide detailed financial information from all of their family members.
14. The University agreed that these proposed changes were a mandatory subject of bargaining.

15. Mary Brodsky, former Associate Chief Human Resources Officer reached out to Keith Burt, and Katlyn Morris, of United Academics asking if they had any concerns regarding the proposed policy changes
16. On February 22, 2021, Tessa Lucey, UVM Director of Compliance Services and Chief Privacy Officer, distributed to all faculty and staff an email outlining the new requirements for complying with the COI/COC policy. As explained by Director Lucey, “[w]hile the requirement to report conflicts is not new, the requirement to submit an annual disclosure form is.” Joint Exhibit 7
17. On February 25, 2021, Keith Burt emailed Mary Brodsky highlighting items to be discussed during their upcoming March 2, 2021, meeting, including the need to treat the Conflict of Interest Policy separate from the other policies “as explicitly incorporated by reference as a separate article of the CBA.” Joint Exhibit 8.
18. On March 2, 2021, Mary Brodsky held a meeting with Keith Burt and Kaitlyn Morris during which the proposed revisions to the 2014 COI/COC Policy were discussed. During this meeting Mr. Burt and Ms. Morris conveyed the Union’s concern that the proposed changes to the COI/COC were a “big deal” and subject to bargaining.
19. On March 3, 2021, Mary Brodsky emailed University management regarding the meeting held with United Academics about the COI/COC and other policies. Regarding the COI/COC policy, Ms. Brodsky represented that “UA expressed concern that the changes were not highlighted or summarized considering it is a topic we are currently negotiating.” She also advised that United Academics was going to do a word for word comparison between the proposed policy and the 2014 policy.

20. During this time, Mary Brodsky, in addition to her own duties, filled the role of Acting Chief Human Resources officer. She assumed this added responsibility in December 2020. As a result of these added responsibilities, Ms. Brodsky felt as if she were working twenty hours a day. She felt overworked and undervalued by the University during 2021.
21. In past interactions between Mr. Burt and Ms. Brodsky, both had a practice of memorializing and documenting agreements made between the parties.
22. The parties would memorialize through email exchanges minor agreements that did not impact or involve the CBA or have wide-reaching impacts.
23. The parties would memorialize in a Memorandum of Agreement (“MOA”), changes to the contract language or conflicts to the language
24. The University did not pursue changes to Article 24 through negotiations, because it believed it could rely on Article 4 of the CBA to make changes from time to time.
25. Mary Brosky testified that she did not believe UVM needed to bargain changes to the COI policy.
26. On March 19, 2021, Keith Burt emailed Mary Brodsky the following: “Dear Mary, I’ve now had a chance to review the 2014 vs. present draft version of the COI/COC policy in more detail and I have no further concerns or discussion needed on this particular policy. Regards Keith.” Joint Exhibit 10.
27. Mary Brodsky did not respond to the March 19, 2021, email and regrets not emailing a response to Mr. Burt.
28. One week later, on March 26, 2021, Mr. Burt wrote another email in which he referenced the meeting held between Ms. Brodsky and Mr. Keith and Katlyn Morris, the Union Executive Director. The email provides the following:

Dear Mary,

We discussed at our meeting last week, but I wanted to make sure that we followed up in writing that UA is requesting that any policies that are formally written into the CBA, including the Conflict of Interest/Conflict of Commitment policy (Article 24) as well as the Intellectual Property Policy (Article 23), are inherently bargainable and should not be sent for review in a set of other policies with a short turn-around for comment. Anything related to these policies would need to be discussed as part of a formal impact bargaining process. I believe we are in agreement on this, but please let me know if you want to discuss further.

Separately, I believe that you were going to follow up in writing with any legal or statutory requirements that UVM faces related to the proposed changes in the Political Engagement . . . Policy and the Foreign Support and International Activities Policy. Let us know when we can expect that information for review.

Regards,
Keith

Joint Exhibit 11.

29. Ms. Brodsky did not respond to this email. Ms. Brodsky left her employment at UVM in September 2021.
30. There were no other communications between the Union and the University regarding the COI/COC policy after March 29, 2023.
31. Both parties agree that only one meeting occurred on the issue. Mr. Burt's reference to "one week ago" was an error and refers to the meeting held on March 2, 2021.
32. The University maintains the Union "agreed in writing to the University's proposed COI/COC policy changes." There is no agreement that the Union agreed to the proposed changes.
33. The University argues that the March 19, 2010. email is a waiver of the right to bargain over the proposed changes to the University's COI/COC Policy.

OPINION

The parties agree that the COI/COC policy was incorporated into the CBA and any proposed changes to it were a mandatory subject of bargaining. “Absent a waiver by either the terms of the contract or by actual negotiations, and except for matters prescribed or controlled by statute, the employer has a duty to bargain changes in mandatory bargaining subjects during the term of an agreement. Vermont State Colleges Fac. Fed’n v. Vermont State Colleges, 149 Vt. 546, 549 (1988). The University claims the Union waived its right to bargain over the proposed changes.

A waiver is an intentional relinquishment of a known right. In re Grievance of Gutman, 139 Vt. 574, 578 (1981). The burden of establishing a waiver is on the party asserting it. Id; Liberty Mutual Ins. Co. v. Cleveland, 127 Vt. 99, 103 (1968). As the party asserting waiver, the University must demonstrate that the Union consciously and explicitly waived its rights to negotiate changes to the COI policy. See, e.g., Burlington Board of School Commissioners, 35 VLRB 235, 245-47 (2019).

The University argues that Mr. Burt’s March 19, 2021, email was an intentional relinquishment of the right to bargain over the changes to the COI/COC policy. The email does not state that the Union waives the right to bargain over changes to the COI/COC policy. Instead, it provides, “Dear Mary, I’ve now had a chance to review the 2014 vs. present draft version of the COI/COC policy in more detail and I have no further concerns or discussion needed on this particular policy.” The email indicates Mr. Burt had no further concerns about the policy. The University claims the context of the email demonstrates its intent to waive the right to negotiate the COI.

The context, however, does not support such a conclusion or result. The University first raised the issue of revising the COI language during contract negotiations with the Union bargaining team. The Union rejected the proposal. The University did not seek to mediate the issue and the proposal was dropped. Although the University was aware that changes to the COI was the subject of mandatory negotiation or bargaining, the University included changes to the COI, along with nine other changes to policies in an email to the Union President asking for comments. Thereafter, the Director of Compliance Services and Chief Privacy Officer emailed all faculty and staff including Union Members a memo about planned changes to the 2014 COI/COC Policy. The email did not mention that changes to the policy were subject to mandatory negotiation. Instead, it was presented as a planned change to the 2014 COI/COC Policy.

During the March 2, 2021, meeting, Mr. Burt, and Ms. Morris shared that the policy was the subject of bargaining and “a big deal.” Although the University did not consider the changes to be substantial, the Union stressed that any change would need to be the subject of bargaining between the Union and University.

Professor Burt could not recall why he sent the terse March 19, 2021, email nor his intent in sending the email. At the time he was dealing with family emergencies and the need to provide support to his disabled brother. One week later, Mr. Burt sent a second email reiterating that any change in the COI/COC Policies, “are inherently bargainable and should not be sent for review in a set of other policies with a short turn-around for comment. Anything related to these policies would need to be discussed as part of a formal impact bargaining process. I believe we are in agreement on this, but please let me know if you want to discuss further.” There was no response from the University. Mary Brodsky did not respond nor dispute the need for

discussions of changes to policies incorporated into the CBA as part of formal impact bargaining.

The University has not met its burden of proving the Union intentionally and unequivocally waived its right to bargain changes to the COI. The University cannot impose a unilateral change on an issue on which the Union has a right to bargain. See generally VSEA v. State, 185 Vt. 363, 372 (2009).

The University next asserts that the Union failed to assert its right to bargain in a timely manner. The University claims the Union failed to ask to bargain changes to the COI/COC policy during the eight-month period between February 5, 2021, and October of 2021, when the Union “first expressed concerns over the substance of policy changes.” This is not factually accurate. The Union expressed concerns about the changes at the March 2, 2021, meeting, and Mr. Burt reiterated those concerns on March 26, 2021. That the University did not respond to the notification on the need to negotiate does not render the subsequent silence a waiver.

The University claims that because the part-time faculty CBA does not contain the same incorporation language as the full-time faculty CBA, and therefore the Union argument regarding a distinction between policy review process and COI/COC is without merit. The University, however, acknowledges that “whether a policy is incorporated into the CBA or not is a distinction without a difference—either way, policy changes, such as those proposed by the University regarding the COI/COC, are a mandatory subject of bargaining.” University’s post-hearing brief at 19. The University argues the Union waived its right to bargain through the March 19, 2021, email by Mr. Burt. The Board does not find the email to be a waiver of bargaining rights, nor an acceptance of the policy changes proposed by the University.

ORDER

Based on the foregoing findings of fact and reasoning, it is Ordered:

1. The Grievance of United Academics is sustained; and
2. The University shall bargain with United Academics prior to imposing changes to the COI policy.

Dated this 21st day of February, 2024.

VERMONT LABOR RELATIONS BOARD

/s Robert Greemore

Robert Greemore, Chairperson

/s/ Karen D. Saudek

Karen D. Saudek

/s/David Boulanger

David Boulanger