THE CREATION OF EMPLOYMENT TERMS TO GOVERN PUBLIC EMPLOYEES IN THE INTERIM BETWEEN COLLECTIVE BARGAINING AGREEMENTS—*VERMONT STATE EMPLOYEES ASS'N V. STATE*

The past two decades have witnessed the rapid and accelerating growth of collective bargaining rights for public employees on both the state and federal level.[1] In 1969 Vermont joined this trend by enacting a comprehensive State Employees Labor Relations Act.[2] Following the practice of other states, Vermont modeled its statute to a large extent after the National Labor Relations Act (NLRA),[3] the federal labor statute which governs employees in the private sector.[4] One section, however, title 3, section 982 of the

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1. McCann & Smiley, *The National Labor Relations Act and the Regulation of Public Employee Collective Bargaining*, 13 HARV. J. LEGIS. 479, 495-96 (1976) [hereinafter cited as McCann & Smiley]. This article provides an excellent in-depth review of the growth of collective bargaining in the public sector.

2. VT. STAT. ANN. tit. 3, §§ 901-1007 (1972 & Cum. Supp. 1977).

3. 29 U.S.C. §§ 151-168 (1970). For examples of other jurisdictions which have modeled their public employee labor relations acts after the NLRA, see ALASKA STAT. §§ 23.40.070-.260 (1972 & Supp. 1977); HAW. REV. STAT. §§ 89-1 to 20 (Supp. II 1975); PA. STAT. ANN. tit. 43, §§ 1101.101-.2301 (Purdon Cum. Supp. 1977).

The extent to which Vermont modeled its Public Employees Labor Relations Act after the NLRA can be seen by a comparison of the two Acts. Of particular significance to this note are those sections which state the purpose of each Act (compare VT. STAT. ANN. tit. 3, § 901 (1972) with 29 U.S.C. § 151 (1970)), and those sections which define unfair labor practices (compare VT. STAT. ANN. tit. 3, §§ 961-962 (1972) with 29 U.S.C. §§ 158(a)-158(b) (1970)).

4. In discussing the NLRA and its similarity to the Vermont Act, one potentially confusing point should be clarified. The NLRA deals exclusively with employees in the private sector, whereas the Vermont Act relates solely to Vermont employees in the public sector. The question thus arises whether general labor law as developed under the NLRA can properly be applied to the public sector. With certain limited exceptions, *see* text accompanying notes 53-57 *infra*, the answer is yes.

In Giguere v. Whiting Co., 107 Vt. 151, 177 A. 313 (1935), the Vermont Supreme Court was called upon to interpret a provision of the Vermont Employer's Liability and Workmen's Compensation Act. VT. STAT. ANN. tit. 21, §§ 601-709 (1967 & Cum. Supp. 1977). The court, after noting that the Act had been modeled after the British Workmen's Compensation Act, stated:

> It is a settled doctrine of interpretation that, when a statute is adopted in this state from another state or country, if it has received a judicial interpretation there prior to its enactment here, it is to be taken that the language of our statute is used in the sense given to it by such prior adjudication, unless some other sense is indicated by attendant provisions of the statute.

Id. at 157-58, 177 A. at 316; *accord*, Yates v. United States, 354 U.S. 298, 309 (1957). The

Vermont Statutes Annotated,[5] has no comparable section in the

court in *Giguere* used English judicial interpretations as precedent for its interpretation of the Vermont Workmen's Compensation Act.

A comparison of the two labor Acts clearly demonstrates the extent to which the Vermont legislators modeled the Vermont Act after the NLRA, and under the "settled doctrine of interpretation" stated in *Giguere*, decisions under the NLRA are valid (although obviously not binding) precedent.

A recent case in which the Vermont Supreme Court construed the Vermont Municipal Labor Relations Act, VT. STAT. ANN. tit. 21, §§ 1721-1735 (Cum. Supp. 1977), provides an example of the application of NLRA decisions to Vermont labor cases. Ohland v. Dubay, 133 Vt. 300, 302-03, 336 A.2d 203, 205 (1975) (the court relied upon NLRA decisions to uphold a decision of the Vermont State Employees Labor Relations Board). *Cf.* Local Union No. 300 v. Burlington Elec. Light Dep't, 133 Vt. 258, 261-62, 336 A.2d 178, 180 (1975) (the court found NLRA decisions inapplicable only because they were distinguishable on their facts).

Other jurisdictions which have enacted labor relations acts for state employees have also modeled their acts after the NLRA. The courts of those states have specifically found decisions under the NLRA to be precedent for their own decisions. *See, e.g.*, Town of Windsor v. Windsor Police Dep't Employees Ass'n, 154 Conn. 530, 536, 227 A.2d 65, 67-68 (1967); Lullo v. International Ass'n of Fire Fighters Local 1066, 55 N.J. 490, 262 A.2d 681 (1970).

There are very few Vermont decisions construing the Vermont Act. The NLRA, on the other hand, was enacted in 1935 and provides a wealth of decisional law from the National Labor Relations Board, the Circuit Courts of Appeals, and the United States Supreme Court. It was undoubtedly for these reasons that the parties in *Vermont State Employee Ass'n* and the State Employees Labor Relations Board extensively cited labor cases decided under the NLRA. In its Memorandum and Request for Findings, the State contended that: "Due to the paucity of State decisional law in this area much reliance must be placed upon precedents established at the Federal level." Printed Case at 13. The Board in its Order Regarding Motion to Set Aside Order for Dismissal stated that, "[t]his Board will give considerable weight to the precedent established by courts interpreting the National Labor Relations Act." Printed Case at 64.

5. VT. STAT. ANN. tit. 3, § 982 (1972) (current version at Cum. Supp. 1977) originally provided in pertinent part:

> Agreements; limitations; renegotiation and renewal
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> . . . .
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> (b) Collective bargaining agreements shall be for a specified term not to exceed three years and shall not be subject to cancellation or renegotiation during the term except with the mutual consent in writing of both parties, . . .
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> . . . .
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> (d) Such an agreement shall terminate at the expiration of its specified term . . . .
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> (e) In the event the employer and the collective bargaining unit are unable to arrive at an agreement and there is not an existing agreement in effect, [the Secretary of Administration] with the approval of the governor may make such temporary rules and regulations as may be necessary to insure the uninterrupted and efficient conduct of state business. Such rules and regulations shall terminate and be of no further force and effect, except for any rights arising thereunder, as soon as an agreement is reached.

To avoid confusion to the reader, "the Secretary of Administration" has been inserted into the statute in place of "the personnel board" which was originally given the authority

NLRA or in the Vermont Acts governing the rights of Vermont's teachers[6] and municipal employees.[7]

In *Vermont State Employees Ass'n v. State*,[8] the Vermont Supreme Court interpreted section 982 for the first time. The court in reversing the decision of the State Employees Labor Relations Board held that if the termination date of a collective bargaining agreement is reached and the parties to the expiring agreement have not arrived at a new agreement, section 982 dictates that only the Secretary of Administration, with the approval of the Governor, is to provide interim employment terms to be effective until a new agreement is reached. In sharp contrast, general principles of labor law developed under the NLRA provide that the terms of the expiring contract which are considered mandatory subjects of bargaining are extended and cannot be altered by either party until the new agreement is reached or until an impasse[9] develops between the negotiating parties.

It is submitted that these general labor law principles provide an approach which is more consistent with the purpose of the Vermont Act as a whole—the extension of collective bargaining rights to Vermont's public employees. Because the terms of an expiring agreement are the result of arms-length bargaining between the parties, the extension of those terms to fill the void between contracts is preferable to the imposition of terms by the Secretary of

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under section 982 to provide interim terms. By the time *Vermont State Employees Ass'n* reached the Vermont Supreme Court, the court accurately noted that "[u]nder the provisions of 3 V.S.A. § 301(1), and §§ 2202(a)(2) and 2203(a) . . . the secretary of administration has succeeded to the powers of the Personnel Board given by 3 V.S.A. § 982(e)." *Id.* at 198, 357 A.2d at 128. The remainder of section 982 is as it originally appeared when the Vermont Act was promulgated in 1969. The Act was amended generally in 1971 and again in 1977. The portions of section 982 with which this note deals, however, were not significantly altered. (A minor addition was made to (d), and (d) and (e) were relettered (e) and (f) respectively.)

6. Vermont Municipal Labor Relations Act, VT. STAT. ANN. tit. 21, §§ 1721-1735 (Cum. Supp. 1977).

7. Labor Relations For Teachers Act, VT. STAT. ANN. tit. 16, §§ 1981-2010 (Cum. Supp. 1977).

8. 134 Vt. 195, 357 A.2d 125 (1976).

9. An impasse has been described as "that point at which the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless." R. GORMAN, LABOR LAW 448 (1976). "Impasse" has also been defined as a "state of facts in which the parties, despite the best of faith, are simply deadlocked." NLRB v. Tex-Tan, Inc., 318 F.2d 472, 482 (5th Cir. 1963).

Administration. The purpose of this note, therefore, is to indicate the problems that can arise when section 982 is applied to a labor dispute and to demonstrate that the alternative approach developed under the NLRA is more desirable.

I

When *Vermont State Employees Ass'n* was decided by the State Employees Labor Relations Board, the Board inexplicably chose to ignore section 982 completely and decided the case solely under general labor law principles. On appeal, the Vermont Supreme Court ignored general labor law principles and decided the appeal solely under section 982. This case thus provides an opportunity to examine the application of both approaches to the same labor dispute.

On December 17, 1973, the State of Vermont and certain of its nonmanagement employees[10] entered into a collective bargaining agreement which was to expire on June 17, 1975. One term of the agreement, the overtime provision,[11] guaranteed forty-five hours of employment per week, with all hours over forty to be paid at straight time rates. In May 1974, amendments to the Federal Fair Labor Standards Act[12] brought these state nonmanagement employees within its coverage for the first time.[13] The Act provided that all hours over base forty must be compensated at a time and one-half rate. As a result of these amendments, the State unsuccessfully attempted to reopen negotiations as early as September of 1974 in

10. The nonmanagement employees were Category IV Highway Department employees.

11. The overtime provision in the contract provided that each employee would receive 112.5% of his weekly salary per week, in exchange for keeping himself *available* to work overtime. Printed Case at 26, Vermont State Employees Ass'n v. State, 134 Vt. 195, 357 A.2d 125 (1976). Overtime pay was guaranteed whether or not the employee worked over 40 hours per week.

12. 29 U.S.C. § 206 (1970), *as amended by* Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 2, 88 Stat. 55.

13. These employees were subsequently placed outside the coverage of the Fair Labor Standards Act by the United States Supreme Court which found this expansion of the Act to be an unconstitutional extension of Congressional power under the commerce clause. National League of Cities v. Usery, 426 U.S. 833 (1976). Although *Vermont State Employees Ass'n* would not have arisen after *Usery*, the Vermont case nevertheless provides a comprehensive example of the application and interpretation of section 982. Therefore, the *Usery* decision has no effect on this note's examination and critique of section 982.

order to reduce the work week to forty hours.[14] In April 1975, the Vermont State Employees Association (VSEA) and the State began negotiating a new contract. On June 12, when it became apparent that a new agreement would not be reached, the existing agreement was extended by consent of the parties.[15] The State refused, however, to extend the provision of the old agreement relating to the guaranteed minimum overtime payments beyond July 5, 1975, a date the State had unilaterally set.[16]

Although neither party had acted in bad faith, collective bargaining broke down on the overtime issue.[17] Before the expiration of the extended contract, the VSEA filed an unfair labor practices complaint with the State Labor Relations Board claiming that the State's unilateral action in reducing the employees' overtime payments constituted a refusal to bargain collectively and as such was an unfair labor practice under section 961(5) of the Vermont Act.[18]

II

The arguments derived from general labor law principles submitted to the Board, and upon which the Board based its decision, focused on two labor law concepts: the distinction between mandatory and permissive bargaining terms; and the general prohibition against the unilateral change of a mandatory bargaining term.

A. *Mandatory Versus Permissive Bargaining Terms*

If a proposed term is the subject of mandatory bargaining, the

14. Upon refusal of the Vermont State Employees Association (VSEA) to renegotiate the overtime provision, the state attempted to unilaterally reduce the work week during the term of the contract. The VSEA filed an unfair labor practices complaint with the State Board. The Board upheld the guaranteed overtime provision and ordered that the employees continue to receive 112.5% of their base pay per week while keeping themselves available for 43 ½ hours of work per week instead of 45. Printed Case at 26.

15. The existing contract was extended "first by agreement of the parties, and thereafter by the directive of the Secretary of Administration under the authority of 3 V.S.A. § 982(e)." Brief of the Appellant at 4.

16. The State in its brief conceded the termination was a unilateral act. Brief of the Appellant at 4.

17. Printed Case at 28 (Vermont State Employees Labor Relations Board, Finding of Fact, Opinion and Order).

18. The State explicitly waived the issue of premature action by the VSEA which filed its charges on June 25, 1975, and by the Board which issued its complaint on July 3, 1975—all before the July 6, 1975, termination date of the contract. Brief of the Appellant at 8.

parties are obligated to bargain in good faith until either an impasse in negotiations or an agreement is reached.[19] If, however, a term is merely a permissive bargaining subject, neither party is required to bargain to impasse or agreement, or to bargain at all, prior to unilateral change.[20]

Mandatory terms are defined in section 8(d) of the NLRA, as those which relate to "wages, hours, and other terms and conditions of employment."[21] The National Labor Relations Board and the federal courts, using section 8(d) as a guideline, are continually defining on a case-by-case basis those employment terms which will be considered mandatory subjects of bargaining.

The Vermont Act attempts to distinguish between mandatory and permissive terms by using more specific language. Section 981 of the Vermont Act provides that the employer and the employee representative have the obligation to meet and bargain in good faith "with respect to all matters bargainable under the provisions of this chapter."[22] Within the same chapter, section 904 outlines those matters which "shall be the subject of collective bargaining."[23] At the time *Vermont State Employees Ass'n* was decided in 1976 wages and salary schedules, work schedules, and overtime practices were considered mandatory bargaining terms.[24] In 1977, this list was broadened to include wages and salaries, minimum hours per week, and "overtime compensation and related matters."[25] Thus, by statute, the overtime provision in the VSEA contract would be considered a mandatory bargaining term.

B. *Restrictions on Unilateral Acts*

Once a term is deemed mandatory, the parties are generally required to bargain to impasse before either may unilaterally alter

19. *See* Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 185-86 (1971); NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 348-49 (1958).

20. Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 210 (1964); NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 348-49 (1958).

21. 29 U.S.C. § 158(d) (1970).

22. VT. STAT. ANN. tit. 3, § 981 (1972).

23. *Id.* § 904 (current version at Cum. Supp. 1977).

24. *Id.*

25. VT. STAT. ANN. tit. 3, § 904 (Cum. Supp. 1977).

that employment term. Under certain circumstances, however, unilateral change may be permitted prior to impasse.

The leading case under the NLRA regarding unilateral acts is *NLRB v. Katz.*[26] In that case, an employer, while in the process of negotiating a contract with a union representing his employees, unilaterally and without consulting the union, enacted a new system of wage increases, changed sick leave benefits, and provided numerous merit increases, even though such matters were mandatory subjects of pending negotiations.[27] The United States Supreme Court held that "an employer's unilateral change in conditions of employment under negotiation 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."[28] It was found that bad faith on the part of the employer was not a prerequisite to a violation and that unilateral action "will rarely be justified by any reason of substance."[29] The Court, however, stopped short of finding unilateral act to be a *per se* violation of the NLRA, concluding that there might be circumstances which the NLRB could or should accept as excusing or justifying unilateral action.[30]

One circumstance which justifies unilateral action on the part of the employer is the reaching of a bona fide impasse in negotiations.[31] Changes in a collective bargaining agreement after an impasse, however, may not be more favorable than the best offer made to the union during negotiations.[32] The offering of more favorable

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26. 369 U.S. 736 (1962).

27. It should be noted that in *Katz*, the parties were negotiating a contract for the first time, immediately after the union had won a representation election. In Vermont State Employees Ass'n v. State, 134 Vt. 195, 357 A.2d 125 (1976), the VSEA and the State were negotiating after the expiration of their prior contract. The cases subsequent to *Katz* held that the prohibition against unilateral action applied under either circumstance. Hinson v. NLRB, 428 F.2d 133, 136 (8th Cir. 1970); Industrial Union of Marine and Shipbuilding Workers v. NLRB, 320 F.2d 615, 620 (3d Cir. 1963), *cert. denied*, 375 U.S. 984 (1964). *See* Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964).

28. NLRB v. Katz, 369 U.S. 736, 743 (1962). The Vermont counterpart to section 8(a)(5) is VT. STAT. ANN. tit. 3, § 961(5) (1972).

29. 369 U.S. at 747.

30. *Id.* at 748.

31. *See* NLRB v. United States Sonic Corp., 312 F.2d 610, 615 (1st Cir. 1963); NLRB v. Andrew Jergens Co., 175 F.2d 130, 136 (9th Cir. 1949), *cert. denied*, 338 U.S. 827 (1949).

32. *See* NLRB v. Crompton-Highland Mills, Inc., 337 U.S. 217, 225 (1949); NLRB v. United States Sonic Corp., 312 F.2d 610, 615 (1st Cir. 1963).

terms directly to the employees rather than to the union during negotiations tends to disparage the union in the eyes of its members and is considered inconsistent with the principles of collective bargaining.[33] In addition, an employer's unilateral action has been held to be unlawful where the impasse resulted from the employer's refusal to bargain in good faith.[34] Furthermore, some courts have held that an impasse is not an absolute prerequisite to a valid unilateral change in employment terms.[35] Thus, if a change is proposed with sufficient notice and opportunity to bargain, and the opposing party delays negotiations or refuses all overtures toward negotiations, the unilateral change may be permissible.[36]

C. *Conflicting Decisions*

Although the State in *Vermont State Employees Ass'n* argued at length for the application of section 982, the Board unaccountably chose to completely ignore the statute and decided the case under the above general labor principles. The Board held that under the Vermont Act the overtime provision was a mandatory bargain-

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33. NLRB v. Crompton-Highland Mills, Inc., 337 U.S. 217, 225 (1949); May Dep't Stores Co. v. NLRB, 326 U.S. 376, 383-85 (1945). Another reason why the employer cannot initiate changes more favorable than those previously submitted to the union is that there could not have possibly been an impasse over terms the union has never seen.

34. Industrial Union of Marine and Shipbuilding Workers v. NLRB, 320 F.2d 615 (3d Cir. 1963), *cert. denied*, 375 U.S. 984 (1964); NLRB v. Yutana Barge Lines, Inc., 315 F.2d 524, 529-30 (9th Cir. 1963).

The duty to bargain in good faith has not been rigidly defined in the case law. Essentially, good faith bargaining requires that the parties manifest an attitude conducive to reaching an agreement. The courts will not mandate that the parties ultimately reach an agreement, nor will they dictate the terms of the agreement. Rather, the conduct of the parties will be examined to determine whether negotiations were conducted with an open mind and a sincere desire to reach an agreement. Edwards, *The Emerging Duty to Bargain in the Public Sector*, 71 MICH. L. REV. 885, 894 (1973).

35. *See* NLRB v. Cone Mills Corp., 373 F.2d 595 (4th Cir. 1967) (where the union knew of the employer's change in policy with respect to employee seniority for over a year after the expiration of the contract and did nothing, the unilateral change was permissible); NLRB v. Intracoastal Terminal, Inc., 286 F.2d 954 (5th Cir. 1961) (where the employer informed the union of its willingness to negotiate further and the union made no response for more than six months, the unilateral action was permissible); Laclede Gas Co., 171 N.L.R.B. 1392 (1968) (where the union contended that the employer's changes had been proposed in the form of a *fait accompli*, notwithstanding the employer's expressed desire to negotiate, and the union did not negotiate but rather filed a complaint with the Board, it was held that the union's action was inappropriate and the unilateral change was permissible).

36. *See* cases cited note 34 *supra*.

ing term. Furthermore, the Board concluded that since no genuine impasse had been reached,[37] the State's action in reducing overtime was an unwarranted unilateral action and an unfair labor practice.[38] The ensuing order required that the parties continue good faith bargaining with respect to the overtime issue and that overtime hours be restored and continued pending a new agreement or the reaching of a bona fide impasse in the negotiations.[39]

The State appealed the Board's decision to the Vermont Supreme Court[40] claiming that although the general labor principles upon which the Board based its opinion might ordinarily be valid precedent, section 982, which the Board's decision failed to mention, dictated a contrary result.[41] The Vermont Supreme Court agreed with the State's argument and overturned the Board's decision, dismissing the VSEA complaint. The majority, without mentioning general labor law principles, based its decision entirely on section 982. The court held:

> [T]he statutory pattern is clear that collective bargaining agreements expire at the end of their specified terms. When they have so expired, the statutory authority to provide for interim employment arrangements lies in the secretary of administration, with the approval of the governor, not in the Labor Relations Board . . . .
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> It follows from all this that the Board's order relating to employment terms for the interim period until a new agreement is reached was beyond its authority, as a matter of law. Such relief must be sought before the secretary of administration.[42]

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37. The Board held that an impasse is reached only after the parties have exhausted the relevant issues in good faith negotiations. Printed Case at 31 (Vermont State Employees Labor Relations Board, Findings of Fact, Opinion and Order).

38. *Id.*

39. It should be noted that the Board's decision under the facts of this case may have been generous toward the VSEA. The record indicates that the State informed the Association that it was willing to negotiate the overtime provision. The Association chose to litigate the issue before the Board, however, instead of pursuing negotiations. Under these circumstances, the Board could reasonably have held that the State's unilateral action was justified. *See* Laclede Gas Co., 171 N.L.R.B. 1392 (1968).

40. VT. STAT. ANN. tit. 3, § 1003 (Cum. Supp. 1977), provides that an aggrieved party may appeal a labor board decision directly to the supreme court on questions of law.

41. Appellant's Supplemental Brief at 8.

42. Vermont State Employees Ass'n v. State, 134 Vt. at 198, 357 A.2d at 128. The majority concluded that the State's action in reducing the work week and wages of its employ-

III

Although the statutory language may have clearly dictated the court's decision in this case,[43] there are a number of forceful arguments in favor of the application of the labor law concepts employed by the Board rather than the procedures of section 982.

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ees at the termination of the agreement was not a violation of section 982(e). Surprisingly, there was no indication that the Secretary of Administration must at least approve such an action. The dissent dealt exclusively with this seemingly obvious contradiction. The dissenting judges disputed the majority's implication that the right of the State to change the overtime provision was an absolute one, reasoning that such a change in the terms of employment at the expiration of the agreement, as required by statute, could only be effected by, or with, the approval of the Secretary of Administration.

The ambiguity in the majority opinion is highlighted by the following:

> In its conclusions of law, the Board finds the central issue to be the question of whether or not the State had the right to unilaterally reduce the work week and wages of the employees upon termination of the agreement. It concluded that the answer to that question is "no". Under the law of the State of Vermont as embodied in the State Employees Labor Relations Act, Title 3, Chapter 27, V.S.A., the only enforceable arrangements relating to employment practices after termination of a collective bargaining agreement and before the agreement upon a new one are those established under the authority of 3 V.S.A. § 982(e) by the secretary of administration and the governor. Therefore, the Board's answer was in error.

134 Vt. at 199, 357 A.2d at 128-29.

A reading of the above reveals that the last sentence is a non-sequitur unless the majority considered the State and the Secretary of Administration to be the same entity. Because of the contradiction in this part of the decision it is unclear what actions are permitted the State at the termination of a contract and thus the case provides minimal guidance to the State in future labor disputes.

43. As a general rule, "the definitive source of [legislative] intent is the language of the enactment itself, if that language plainly sets it forth." Hambley v. Town of St. Johnsbury, 130 Vt. 204, 206-07, 290 A.2d 18, 20 (1972). *See* Marsh v. Dep't of Employment Security, 133 Vt. 425, 427, 340 A.2d 93, 95 (1975); State v. Santi, 132 Vt. 615, 617-18, 326 A.2d 149, 151 (1974). In interpreting a statute, a presumption obtains against a construction that would render it meaningless or ineffective. Menut & Parks Co. v. Village of St. Johnsbury, 114 Vt. 41, 45, 93 A.2d 342, 345 (1944). The State argued that the intent of the legislature to restrict the collective bargaining rights of the State's employees was apparent from the language of section 982 which provided that collective bargaining agreements "shall" expire at the end of their specified term, and that interim employment terms could be imposed.

Applying the above principles of statutory construction, the court was correct in adopting the State's argument. Furthermore, its decision was consistent with the legislative intent to limit collective bargaining rights through section 982, as demonstrated by the lack of a comparable provision in the Vermont Municipal Labor Relations Act, VT. STAT. ANN. tit. 21, §§ 1721-1735 (Cum. Supp. 1977), the Labor Relations For Teachers Act, VT. STAT. ANN. tit. 16, §§ 1981-2010 (Cum. Supp. 1977), and the NLRA, 29 U.S.C. §§ 151-168 (1970).

Finally, it should be noted that the legislature had the opportunity in 1977, just one year after the decision in *Vermont State Employees Ass'n*, to amend section 982 when the State Labor Relations Act was amended, but made only minor alterations. *See* note 5 *supra*.

Prior to the enactment of legislation such as the Vermont Act, public employees on both state and federal levels were viewed as servants of the state to whom employment terms were dictated on a take-it-or-leave-it basis.[44] These early restrictions on collective bargaining rights were based on paternalistic notions on the part of the government toward its employees, and on a fear of disruption of necessary governmental services if public employees were given the freedom and power to bargain.[45] In enacting the NLRA, however, Congress for the first time declared by statute that the proper means to settle labor disputes and insure industrial peace was through collective bargaining.[46] In 1962, this concept was extended to federal public employees by executive order.[47]

At the state level, the first statutes granting collective bargaining rights to public employees were enacted in the late 1950's.[48] By 1975, thirty-seven states and the District of Columbia had enacted at least one statute encompassing the labor relations of one or more categories of public employees;[49] and twenty-five of those states, among them Vermont, provided comprehensive coverage to all public employees.[50] In 1973, Vermont granted its municipal employees the right to strike,[51] thus joining six other states in eliminating a restriction once thought to be necessary in the public sector.[52]

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44. *See generally* Brown, *Public Sector Collective Bargaining: Perspective and Legislative Opportunities,* 15 WM. & MARY L. REV. 57, 58 (1973).

45. In 1892, Justice Holmes summarized the attitude at that time toward public employees in McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517, 517-18 (1892), by stating in dictum that they had no constitutional right to their jobs and that they were subject to all reasonable restrictions imposed by their employers.

46. *See* NLRB v. Jones & McLaughlin Steel Corp., 301 U.S. 1, 42 (1937).

47. Exec. Order No. 10,988, 3 C.F.R. 521 (1962), *revoked by* Exec. Order No. 11,491, 3 C.F.R. 254 (1974), *reprinted in* 5 U.S.C. § 7301 (1970). Executive Order 10,988 was promulgated by President Kennedy. Executive Order 11,491, promulgated by President Nixon in 1969, was a comprehensive updating of the Kennedy Order. It provided, among other things, for the creation of a Federal Labor Relations Council to administer the procedures established by the two orders. Since 1969, Executive Order 11,491 has been amended three times: Exec. Order No. 11,838, 3A C.F.R. 126 (1975), *reprinted in* 5 U.S.C. § 7301 (1976); Exec. Order No. 11,616, 3 C.F.R. 262 (1973), *reprinted in* 5 U.S.C. § 7301 (1976); and Exec. Order No. 11,636, 3 C.F.R. 202 (1971), *reprinted in* 5 U.S.C. § 7301 (1976).

48. For a listing of these statutes, see Edwards, *supra* note 34, at 886.

49. McCann & Smiley, *supra* note 1, at 495-96.

50. *Id.* at 496.

51. VT. STAT. ANN. tit. 21, § 1730 (Cum. Supp. 1977).

52. The six states that permitted certain public employees to strike were Alaska, Hawaii, Minnesota, Montana, Oregon and Pennsylvania. McCann & Smiley, *supra* note 1, at 513.

The enactment of these statutes indicates that the need for a paternalistic approach toward public employees has dissipated along with the fear that granting such rights to public employees would cause a breakdown in the provision of needed services by the state and federal governments. Arguably, then, the continuing expansion of collective bargaining rights on both the federal and state levels indicates that the restrictions imposed by section 982 of the Vermont Act are unnecessary.

In addition, a conflict of interest question is created because section 982 provides that an interested third party furnish interim terms. It has been suggested by a number of writers that the federal government should extend the National Labor Relations Act to state public employees.[53] One reason for this extension of the NLRA is that when the state establishes the procedural rules for collective bargaining, it assumes conflicting roles. This conflict raises serious questions regarding credibility and fairness on the part of the state/employer and the acceptability of the results to its employees.[54] The same problem is inherent in section 982 because it permits the Secretary of Administration, a state official, to provide interim terms to the state's employees. *Vermont State Employees Ass'n* highlights this problem since the Secretary of Administration made the initial decision in 1974 that the overtime provision would not be continued after the expiration date of the contract.[55] Under such circumstances, it would seem that the integrity of the collective bargaining system established by the Vermont Act would be enhanced significantly by the elimination of section 982.

In 1955, the report of the American Bar Association Committee on Labor Relations of Governmental Employees observed that "a government which imposes upon private employers certain obligations in dealing with their employees, may not in good faith refuse to deal with its own public servants on a reasonably similar basis modified, of course, to meet the exigencies of public service."[56] The two common exigencies which are generally thought to require dif-

53. *See, e.g.*, McCann & Smiley, *supra* note 1.

54. *Id.* at 523-26.

55. Brief of the Appellant at 2.

56. Edwards, *supra* note 34, at 885 (quoting ABA COMM. ON LABOR RELATIONS OF GOVT'L EMPLOYEES 89, 90 (1955)).

ferent treatment of public employees are reflected in the general prohibition against state employee strikes[57] and the need to keep the monetary provisions of an agreement within the state's limited budget.[58] Arguably, section 982 can be used as a bargaining tool to help keep the wages of state employees within the state's budget. Another section of the Vermont Act provides, however, that all agreements are subject to approval by the General Assembly.[59] If the wage agreement is excessive, that portion of the agreement is returned to the parties for renegotiation.[60] Therefore, there is no compelling reason for Vermont to impose collective bargaining obligations on employers in the private sector and not bargain with its own employees on a similar basis.

In *Vermont State Employees Ass'n,* the State's brief suggested that section 982 was included in the Vermont Act because the legislature was proceeding cautiously in "committing *State government* into the field of labor relations to a depth never before authorized."[61] The State further suggested that the legislators may have believed that "absolute termination [of the contract] would serve as an inducement to more diligent bargaining and preclude dilatory tactics designed to keep concessions or benefits alive as long as possible."[62] These reasons may have been valid in 1969 when the Vermont Act was first promulgated because at that time the only provision for impasse resolution consisted of a fact-finding/mediation panel whose recommendations were non-binding.[63] In 1977, however, the Act was amended to provide a *binding* impasse resolution procedure under a fixed and limited time schedule.[64] This procedure, which can be invoked by either party to the agreement, prevents delaying tactics of any significant length.[65] Therefore, the rea-

57. *Id.* at 891-92.

58. *See* Brown, *Public Sector Collective Bargaining: Perspective and Legislative Opportunities,* 15 WM. & MARY L. REV. 57, 87 (1973).

59. VT. STAT. ANN. tit. 3, § 982(c) (Cum. Supp. 1977).

60. *Id.*

61. Brief of the Appellant at 57-58. (Emphasis in original).

62. Printed Case at 40. (Motion to Set Aside Order and for Dismissal).

63. VT. STAT. ANN. tit. 3, § 925 (1972) (current version at Cum. Supp. 1977).

64. VT. STAT. ANN. tit. 3, § 925 (Cum. Supp. 1977).

65. Along these lines, Professor Harry Edwards has suggested that the duration of the duty to bargain in the public sector may extend beyond impasse because of the elaborate impasse resolution mechanisms found in most states and in the federal public employee

sons for the legislature's initial caution have become much less compelling because of this amendment to the Act.

CONCLUSION

While legislative caution may have been a valid consideration when the statute was enacted, there are valid reasons for re-evaluating section 982. It is contrary to the national labor policy of promoting collective bargaining and conflicts with the clear trend to extend collective bargaining rights to public employees. Furthermore, permitting the Secretary of Administration to impose interim employment terms creates serious questions of credibility, fairness and integrity in the state's relations with its workers. Accordingly, the Vermont General Assembly should consider deleting section 982 from the Vermont Act.

Tod Travis

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statute. 5 U.S.C. § 7301 (1976). He further reasons that such impasse procedures clearly contemplate further "negotiations" by both parties and thus a public employee may not be able to act unilaterally with regard to a mandatory subject, if at all, until after all impasse procedures have been exhausted. Edwards, *supra* note 34, at 924.

Since the 1977 amendment to the Vermont Act provides that disputes must be resolved under the last best offer provision, unilateral acts would be completely proscribed under Professor Edwards' interpretation.