

VERMONT LABOR RELATIONS BOARD

VERMONT STATE)	
EMPLOYEES' ASSOCIATION)	
and NORMA BARNEY)	
)	
v.)	DOCKET NO. 98-24
)	
DEPARTMENT OF PUBLIC)	
SAFETY, LIEUTENANT BRUCE)	
LANG)	

MEMORANDUM AND ORDER

At issue is whether we should issue an unfair labor practice complaint in this matter. On April 10, 1998, the Vermont State Employees' Association ("VSEA") and Norma Barney, a Clerk Dispatcher for the Department of Public Safety assigned to the Bethel Barracks, filed an unfair labor practice charge. Therein, VSEA and Barney alleged that the Department of Public Safety ("Employer") and Bruce Lang, Barney's immediate supervisor, violated §961(1),(3) and (4) of the State Employees Labor Relations Act ("SELRA"), 3 V.S.A. §901 *et seq.*, through various alleged actions. The Employer filed a response to the charge on April 28, 1998. VSEA and Barney filed a reply to the State's response on May 11, 1998. Board Executive Director Timothy Noonan met with the parties' attorneys on September 10, 1998, in furtherance of the Board's investigation of this unfair labor practice charge and to explore the possibility of informally resolving issues in dispute. The meeting did not result in resolution of the charge.

The Board has discretion whether to issue an unfair labor practice complaint and hold a hearing on an unfair labor practice charge. 3 V.S.A. §965(a). In exercising this discretion, the Board will not issue a complaint unless the charging party sets forth

sufficient factual allegations for the Board to conclude that the charging party may have committed an unfair labor practice. Burke Board of School Directors v. Caledonia North Education Association, 17 VLRB 187 (1994).

Upon review and investigation of this matter, we conclude that an insufficient basis exists to issue an unfair labor practice complaint. VSEA and Barney allege that the Department and Lang by their actions have violated Section 961(1) and (3) of SELRA by restraining and coercing Barney in connection with her VSEA membership and service as a VSEA steward, and have discriminated against her to discourage her membership and activities in VSEA. The factual allegations made in the charge provide an insufficient basis for us to conclude that alleged actions of the Department and Lang may have resulted from Barney's VSEA membership and activities.

The unfair labor practice charge alleges that Barney was initially discriminated against by Lang, and was subjected to a hostile working environment, because it was mistakenly thought by Lang and others in the Bethel Barracks that Barney had reported to Department Headquarters that Lang was submitting false memoranda to the Department of Buildings on hours worked by a custodian. The charge further alleges that Barney subsequently suffered continuing discrimination from Lang, and a continuing hostile working environment, after she did discuss the issue regarding the custodian's hours with a Department of Buildings official in September of 1997, and was treated as the "complainant" in a Department internal affairs investigation into the issue.

The only alleged fact in the unfair labor practice charge linking Barney's union membership and activities to the issue regarding the custodian's hours is an allegation that, during an August 5 conversation between Lang and Barney, "Lang advised Barney that he did not want VSEA to get involved in these matters." However, it does not follow that this conversation affected subsequent actions taken against Barney which she cites in the unfair labor practice charge - i.e., a lower rated performance evaluation than she had previously received, denials of details and training opportunities, and creation of hostile environment - since there is no indication in the charge that Barney involved the VSEA in this issue. Thus, we conclude that VSEA and Barney have not set forth sufficient factual allegations to support issuing an unfair labor practice complaint on discrimination against Barney due to her VSEA membership and activities.

VSEA and Barney's remaining allegation in the charge is that the Department and Lang violated §961(4) of SELRA by discriminating against Barney, and creating a hostile work environment, in retaliation for her complaint and grievance activity. The problem with this allegation is that there is no factual allegation in the charge providing support for a conclusion that Barney was discriminated against, and subject to a hostile work environment, for engaging in complaint and grievance activity as that activity is defined in SELRA.

§961(4) of SELRA makes it an unfair labor practice for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or complaints or given testimony under this chapter". "(T)his chapter" refers to SELRA. A "complaint" is defined in §902(15) of SELRA, "for purposes of this

chapter”, as “an employee’s, or group of employees’, informal expression to the immediate supervisor of dissatisfaction with aspects of employment or working conditions under a collective bargaining agreement”. *This essentially is the same definition of “complaint” contained in the VSEA-State collective bargaining contract, under which filing a complaint with the immediate supervisor is the first step of the grievance procedure. Under both SELRA and the contract, a complaint precedes the filing of a written grievance and is the first step of the grievance procedure.*

The allegations in the charge are that Barney was discriminated against, and subjected to a hostile work environment, due to the initial mistaken belief that she *had made a complaint to Department of Public Safety Headquarters with respect to the allegations against Lang concerning false reporting of the custodian’s hours, and due to the subsequent report she actually made to the Department of Buildings on the issue regarding the custodian’s hours. This type of “complaint” activity is not what is protected by §961(4) of SELRA. Barney was not involved in initiating a complaint with her immediate supervisor under the grievance procedure, expressing dissatisfaction with aspects of employment or working conditions under a collective bargaining agreement. Instead, she was involving in making a report outside the grievance procedure about alleged improprieties by her immediate supervisor. Thus, any “complaint” activity engaged in by Barney referenced in the unfair labor practice charge was not protected by §961(4).*

This leaves the question - What recourse does an employee have under the circumstances in which Barney allegedly found herself? She could have filed a grievance under Article 65 of the Contract, which protects “whistleblowers”. Article

65 defines whistleblower as a "person covered by this Agreement who makes public allegations of inefficiency or impropriety in government", and provides that an employee may not be discriminated against for exercising such rights. In Grievance of Choudhary, 15 VLRB 118, 160 (1992), the Board concluded that the employee was engaging in protected whistleblowing activity when he contacted the Governor's office and claimed that he was being discriminated against by his employer, the Public Service Department. Barney would have been considered as a whistleblower at least from the time she contacted the Department of Buildings official in September 1997 to discuss the issue regarding the custodian's hours.


VSEA and Barney seek to excuse Barney's failure to file a grievance on the grounds that it would have been futile to achieve a resolution through the grievance procedure, prior to filing a grievance with the Board. VSEA and Barney base this assertion on their view that the Department of Public Safety chain of command had done nothing to halt the hostile environment in which Barney found herself as a result of the issue regarding the custodian's hours. We do not find such excuse persuasive. Employees may not bypass the grievance procedure on the grounds that they do not expect to receive a result satisfactory to them. Grievance of McCort, 19 VLRB 319, 322-325 (1996). Employees are required to adhere to the requirements of the Contract with respect to filing grievances; failure to do so means they waive the right to grieve the issues. Id.

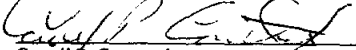
NOW THEREFORE, based on the foregoing reasons, we decline to issue an unfair labor practice complaint and it is hereby ORDERED that the unfair labor practice charge filed by the Vermont State Employees' Association and Norma Barney is DISMISSED.


Dated this 19th day of November, 1998, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Catherine L. Frank, Chairperson


Leslie G. Seaver


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