

VERMONT LABOR RELATIONS BOARD

VERMONT STATE EMPLOYEES'
ASSOCIATION

v.

STATE OF VERMONT, OFFICE OF
THE SECRETARY OF STATE

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DOCKET NO. 01-56

MEMORANDUM AND ORDER

At issue is whether to issue an unfair labor practice complaint in this matter. On August 21, 2001, the Vermont State Employees' Association ("VSEA") filed an amended unfair labor practice charge against the State of Vermont, Office of the Secretary of State ("Employer"). Therein, VSEA alleged that the Employer was engaging in discrimination, harassment and retaliation against two employees of the Employer, Merrill Cray and Stephen Kennedy, due to their complaint and grievance activities, and thereby interfered with, coerced and/or restrained these employees in the exercise of their rights in violation of Sections 903 and 961(1) of the State Employees Labor Relations Act, 3 V.S.A. Section 901 *et seq.* VSEA also alleged in the charge that the Employer unilaterally changed fundamental terms and conditions of employment for employees without bargaining those changes with VSEA in violation of Sections 903, 904 and 961(1) and (5) of the State Employees Act. The Employer filed a response to the charge on September 4, 2001.

Subsequent to the filing of the charge, VSEA moved to withdraw as legal representative of Cray in the unfair labor practice charge based on an agreement with Cray that Cray would be represented by counsel of her choice. Cray retained Attorney Vincent Illuzzi to represent her in connection with this charge. In acting on this unfair labor practice charge, we accept the substitution of Attorney Illuzzi for VSEA as

representing Cray in connection with this matter. VSEA remains involved in other aspects of the unfair labor practice charge.

One issue in the unfair labor practice charge is whether actions of the Employer culminating in Cray's dismissal constituted discrimination, harassment and retaliation against Cray due to her complaint and grievance activities. This issue has been addressed through the grievance procedure through grievances filed on behalf of Cray. Three grievances ultimately were filed with the Board, with Cray alleging in the third grievance that her dismissal violated the non-discrimination provisions of the collective bargaining agreement because it constituted the culmination of a campaign of harassment, intimidation, discrimination and retaliation against her for engaging in protected complaint and grievance activities. Cray further alleged that just cause did not exist for her dismissal. The Board did not take action on the unfair labor practice charge, and proceeded with consideration of the grievances by the Board. The Board has decided the grievances, concluding that Cray did not establish her claims of discrimination based on complaint and grievance activities, and determining that just cause existed for Cray's dismissal. Grievances of Cray, 25 VLRB 194 (2002).

Given these circumstances, we exercise our discretion to not issue an unfair labor practice complaint on this issue. We do so on three grounds, each of which standing by themselves are sufficient to warrant not issuing a complaint.

First, 3 V.S.A. Section 965(f), contained in the unfair labor provisions of the State Employees Labor Relations Act, provides that "(n)o order of the board shall require the reinstatement of any individual as an employee who has been suspended or discharged or the payment to him of any back pay, if such individual was suspended or discharged for

cause, except through the grievance procedure.” The remedy requested in the unfair labor practice charge due to alleged discrimination against Cray due to complaint and grievance activities is reinstatement to her position with back pay and benefits. This is the same remedy requested by Cray in the grievances filed by her, in which the Board rejected Cray’s discrimination claims and concluded that just cause existed for her dismissal. Thus, 3 V.S.A. Section 965(f) precludes the Board from ordering the remedy sought by Cray in the unfair labor practice charge. Choudhary v. State of Vermont (Department of Public Service and Department of Personnel), 15 VLRB 185, 186 (1992). It would be a futile act to issue an unfair labor practice complaint given such circumstances. Id.

Second, issuance of an unfair labor practice complaint on this issue is barred under the doctrine of *res judicata*. Under this doctrine, a judgment bars a subsequent hearing if the parties, subject matter and causes of action are identical or substantially identical. Choudhary, 15 VLRB at 185. For *res judicata* purposes, the cause of action is the same if the same evidence will support the same action in both instances. Id. A party will be barred from subsequent litigation as to all issues which the party could have brought in the initial action. Grievances of Choudhary, 15 VLRB 118, 176 (1992). The parties, subject matter and cause of action on this unfair labor practice issue are substantially identical to those in the grievances decided by the Board. The same evidence will support Cray’s claim of discrimination based on complaint and grievance activity in the unfair labor practice case as was the case in her claim of discrimination based on complaint and grievance activity with respect to the grievances. Cray had the opportunity during the Board grievance hearings to present evidence on factual

allegations contained in the unfair labor practice charge to support her grievance claim that dismissal was the culmination of discrimination against her due to complaint and grievance activity.

Third, we take judicial notice of the entire record in the grievance cases, consuming four days of hearings, and decline to issue an unfair labor practice complaint. In several cases in which both a grievance and an unfair labor practice charge has been filed contesting actions taken by an employer, the Board has concluded that a dual process of review is not warranted where issues raised in the charge are also raised in the grievance. VSEA, Barney, et al v. Department of Public Safety, 21 VLRB 230 (1998). Choudhary v. State of Vermont (Department of Public Service and Department of Personnel, 15 VLRB 185 (1992). Swett and Vermont State Colleges Faculty Federation, Local 3180, VFT, AFT, AFL-CIO v. Vermont State Colleges, 3 VLRB 344 (1980). In those cases, the Board has exercised its discretion to not issue an unfair labor practice complaint and has deferred the matter to the Board's grievance proceedings. Id.

Here, the issue of alleged discrimination against Cray based on complaint and grievance activities has been raised in both the unfair labor practice case and the grievance cases. Cray had the opportunity to present evidence in the grievance cases to support her discrimination claim that would be applicable in the unfair labor practice case to support a discrimination claim. The Board considered such evidence that was presented and concluded that Cray had not established discrimination. Accordingly, the unfair labor practice issue was raised in the grievance procedure and addressed there. Under these circumstances, we conclude that a dual process of review is not warranted and exercise our discretion to not issue an unfair labor practice complaint.

Another issue in the unfair labor practice charge is whether the Employer unilaterally changed fundamental terms and conditions of employment for employees without bargaining those changes with VSEA; in violation of Sections 903, 904 and 961(1) and (5) of the State Employees Act; by requiring employees to complete self-evaluation forms of their performance. We conclude this issue is moot. As discussed in the Board's decisions on the Cray grievances, 25 VLRB at 215, the Employer rescinded the requirement for employees to complete the form, and made completion of the form voluntary for employees. The most that the Board would order as a remedy in this case is to order the Employer to cease and desist from requiring employees to complete the performance form. Since the Employer has already taken that action, the issue is moot.

The remaining issues in the unfair labor practice charge relate to employee Stephen Kennedy. One issue is an allegation that the Employer discriminated against Kennedy based on his complaint and grievance activities, and implemented an improper unilateral change in terms and conditions of his employment, by requiring Kennedy to type his investigative reports. Kennedy filed a grievance concerning the requirement that he type investigative reports. Included among the allegations in the grievance was that the typing requirement constituted discrimination against Kennedy due to his complaint and grievance activities. The grievance ultimately was filed with the Board, but the parties entered into an agreement settling the grievance prior to it being heard by the Board. Given the parties' resolution of this issue through the grievance procedure, we conclude the unfair labor practice issue is moot. The underlying dispute in the unfair labor practice case concerning the imposition of the typing requirement has been resolved, and there is

no longer an actual controversy between the parties. VSEA and Danforth v. Department of Public Safety, 20 VLRB 112 (1997).

The remaining issue involving Kennedy is an allegation that the Employer discriminated against Kennedy based on his complaint and grievance activity by moving his work station and providing him with workspace that is severely cramped and inferior to that of other employees within the office. Given the passage of time since this unfair labor practice charge was filed, and given that Kennedy did not mention this as an example of retaliation for complaint and grievance activity when asked to give examples during the Cray grievance hearings, there is a need to verify whether there is an ongoing dispute with respect to this allegation. Accordingly, we will defer action on this allegation and require VSEA to notify the Board whether there is an ongoing dispute concerning this issue.

Finally, we note that Catherine Frank, who was on the Board panel hearing and deciding the Cray grievances, has not participated in this decision. She has completed her term as Board member, and the Board has decided this matter with the two remaining members of the panel in the Cray grievances.

Based on the foregoing reasons:

- 1) We defer action on the allegation in this unfair labor practice charge that the Employer discriminated against Stephen Kennedy based on his complaint and grievance activity by moving his work station and providing him with workspace that is severely cramped and inferior to that of other employees within the office. The Vermont State Employees' Association shall notify the Board by December 2, 2002, whether there is an ongoing dispute concerning this issue; and

2) We decline to issue an unfair labor practice complaint on all other allegations in this unfair labor practice charge, and it is ordered that the unfair labor practice charge is dismissed on those issues.

Dated this ____ day of November, 2002, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Richard W. Park, Chairperson

John J. Zampieri