VERMONT LABOR RELATIONS BOARD

WINOOSKI POLICE EMPLOYEES ASSOCIATION	)	
	)	DOCKET NO. 05-28
v.	)	
CITY OF WINOOSKI	)	

MEMORANDUM AND ORDER

The issue before the Labor Relations Board in this case is whether to issue an unfair labor practice complaint on an unfair labor practice charge filed by the Winooski Police Employees' Association ("Association") on August 18, 2005, against the City of Winooski ("Employer"). The Association alleges that the Employer involuntarily transferred police officer Michael Brouillette in retaliation for his asserting rights protected by the Municipal Employee Relations Act.

Timothy Noonan, Labor Relations Board Executive Director, met with the parties on October 4, 2005, in furtherance of the Board's investigation of the charge and in an attempt to settle the matter. He had two follow-up telephone conference calls with the parties on October 18 and 25 to discuss settlement of the case. The case has not settled, thus requiring the Board to determine whether to issue an unfair labor practice complaint.

The Association alleges that this case is a continuation of an unfair labor practice charge filed in November 2003. Then, the Association filed an unfair labor practice charge alleging that Brouillette was involuntarily transferred from a night shift to a day shift in retaliation for his leadership role as Association President during a period when Association members had voted "no confidence" in Police Chief Stephen McQueen. The Employer and Association entered into a stipulation and agreement in settlement of that charge in March 2004 in which, "without admitting liability", the Employer agreed "not

to discriminate or otherwise retaliate against employees for the exercise of rights protected by the Vermont Municipal Labor Relations Act."

In the charge now before the Board, the Association alleges that, notwithstanding the agreement, the Employer has again singled out Brouillette, now Vice President of the Association, by involuntarily transferring him from the night shift to the evening shift without consideration of his seniority as retaliation for asserting rights protected by law. The Association is requesting that Brouillette be reinstated to the night shift.

In response to the charge, the Employer contends that Brouillette has been transferred as part of an overhaul of the schedule required to meet the needs of the police department and is not being discriminated against due to his Association activities. Alternatively, the Employer maintains that this dispute should be controlled by the grievance procedure in the collective bargaining agreement.

Brouillette was on disability leave from late July of this year to early November. He was scheduled to return to work around Veterans Day, at which point he would be assigned to the evening shift. Thus, during the times Noonan met with the parties and had follow-up conference calls, Brouillette had yet to work the changed shift assignment.

The collective bargaining agreement between the Association and the City provides in pertinent part as follows:

> Article II, Non-Discrimination: . . . 2.2. Neither the City nor the Union shall interfere with the right of employees covered by this Agreement to become or not become members of the Union, and there shall be no discrimination against any such employees because of lawful Union membership or non-membership activity or status. . .
>
> Article XI, Work Hours: 11.1 The City and Union agree to ensure a minimum of two uniformed officers are on duty at all times. It is recognized that employee's daily and weekly work schedules and assignments are based on operating requirements and subject to change. The City retains the right to schedule straight

time, overtime hours, number of shifts and shift assignments, and to make unscheduled shift assignments, except that schedules shall not be altered to avoid payment of overtime. . .

Article XVII, Grievance Procedure: 17.1. A grievance is a dispute of difference of opinion raised by an employee . . . covered by this Agreement against the City involving the meaning, interpretation or application of the express provisions of this Agreement. . .

17.3 A grievance shall be processed in the following manner:

Step 1: The employee shall, within fifteen (15) weekdays after first having knowledge of its occurrence, take up his grievance with the Chief. . . When an employee has been prevented from presenting his grievance within the above time limit because of an excused absence, he will be given two (2) weekdays from the time of his return from such absence to present the grievance.

Step 2: If the grievance is not settled in Sept 1, either the Chief or the grievant may request that the City Manager intervene in an effort to resolve the grievance. . .

Step 3: If the City Manager is unable to negotiate a settlement or adjustment of the grievance . . . the employee or the Union may submit the grievance to the City Council . . .

. . .

17.4 The parties agree to follow the foregoing Steps in the processing of a grievance. All time limits contained in the grievance procedures shall consist of working days. Failure by the grievant to adhere to the specified time periods shall render the grievance null and void.

. . .

17.7 If the grievance is not settled pursuant to the aforementioned grievance procedure . . . the Union may . . . appeal to the American Arbitration Association . . .

17.10 The decision of the arbitrator on the matter at issue shall be final and binding on all parties.

. . .

17.15 It is understood that the function of the arbitrator shall be to interpret specific provisions of this Agreement. He shall have no power to decide on any issue that is defined in this agreement to be non-arbitrable or to add to or subtract from or to modify and extend any of the terms of this Agreement.

. . .

The threshold issue in this case is whether the Board should defer to the grievance procedure in the collective bargaining agreement between the Employer and the Union in lieu of issuing an unfair labor practice complaint. The Employer contends that since the

issue herein concerns a shift assignment given Brouillette, and Article XI of the agreement specifically governs shift assignments, then a grievance regarding the shift assignment should be pursued through the agreement's grievance procedure. The Employer states that Brouillette voiced a grievance with the police chief, received a response, but then failed to request intervention by the City Manager pursuant to Step Two of the grievance procedure. The Employer contends that the Association and Brouillette were obliged to follow the grievance procedure prior to presenting a claim to the Labor Relations Board. The Employer moves that we remand this matter to the City Manager so that it can proceed through the grievance procedure in the collective bargaining agreement.

The Association contends that the issue in this case is central to the system of collective bargaining and issuance of an unfair labor practice complaint is warranted, rather than deferring this matter to the grievance procedure. The Association states the charge in this case is a continuation of a charge that was first made in November 2003 concerning changing Brouillette's shifts in continuing retaliation for his leadership role in advocating for the rights of Association members. Given these allegations, the Association contends that the Labor Relations Board should apply its own principles of interpretation of the labor relations statutes it administers and not defer to the grievance procedure.

The Board has deferred unfair labor practice charges to the grievance procedure where the Board believed the dispute involved the interpretation of a collective bargaining agreement and employees had an adequate redress for the alleged wrongs through the grievance procedure. Burlington Education Association v. Burlington Board

of School Commissioners, 1 VLRB 335 (1978). AFSCME Local 490 v. Town of Bennington, 9 VLRB 195 (1986). Fair Haven Graded School Teachers Association, Vermont-NEA v. Fair Haven Board of School Directors, 13 VLRB 101, 109-110 (1990). Parties to a collective bargaining agreement are required to exhaust available contractual remedies before a statutory unfair labor practice complaint will lie. Burlington Area Public Employees Union, Local 1343, AFSCME, AFL-CIO v. Champlain Water District, 156 Vt. 516, 518 (1991).

The Board begins its analysis by considering if the issue contained in the charge is subject to arbitration without regard to whether it might also be an unfair labor practice. Id. at 519. If the issue is subject to arbitration, the contract grievance procedure should be applied, barring an overriding statute or deferral policy. Id. In Champlain Water District, the Vermont Supreme Court cited with approval the following statement by the Board in Burlington, 1 VLRB at 340:

> If this Board hears as an unfair labor practice a complaint which is a grievance without first requiring the complainant to utilize the dispute resolution procedures agreed to in the collective bargaining agreement, the collective bargaining process would be undermined . . . (A)n exhaustion of contract remedies doctrine . . . insures the integrity of the collective bargaining process by requiring the parties to collective bargaining agreements to follow the procedures they have negotiated to resolve contract disputes. This policy also encourages the parties to negotiate grievance procedures to resolve contract disputes which is sound labor relations policy. Labor relations stability depends on the parties working together to resolve disputes which directly affect them.

Abstention cannot be equated with abdication of the Board's statutory duty to prevent and remedy unfair labor practices; instead the parties are directed to seek resolution of their disputes under the provisions of their own contract, thus fostering the collective relationship and the policy favoring voluntary arbitration and dispute settlement. Champlain Water District, 156 Vt. at 519-520; *citing* National Radio Co., 198

N.L.R.B. 527, 531 (1972). Where contract interpretation may resolve the dispute, deferral to the arbitration procedure is "merely the prudent exercise of restraint, a postponement of the use of the Board's processes to give the parties' own dispute resolution machinery a chance to succeed." Milton Education and Support Association v. Milton Board of School Trustees, 171 Vt. 64, 72 (2000); *citing* United Technologies Corp., 268 N.L.R.B. 557, 560 (1984).

The exhaustion doctrine does not bind the parties if the issue raised before the Board does not qualify as a matter of contract interpretation. Champlain Water District, 156 Vt. At 520. The exhaustion doctrine also does not bind the parties if an overriding statute negates deferral, or if the Board's own deferral guidelines indicate that deferral would not serve the purpose of the statute. Champlain Water District, 156 Vt. At 520. In Mt. Abraham Education Association v. Mt. Abraham School Board, 4 VLRB 224, 230 (1981), the VLRB stated:

> The charge made by the Association involves an issue central to the system of collective bargaining. In these instances, we will apply our own principles of interpretation of the collective bargaining statute we are empowered to administer. Our mandate is to enforce a statutorily-determined system of collective bargaining; this duty differs from that of the arbitrator who looks to contract interpretation alone.

In applying these standards to this case, we believe it is appropriate to defer to the grievance procedure and not rule on the unfair labor practice charge. It is apparent that the disputed shift assignment can be addressed through the collective bargaining agreement's grievance procedure. A grievance is defined under Article XVII of the agreement as "a dispute . . . involving the meaning, interpretation or application of the express provisions of this Agreement." Such disputes are resolved through a four-step grievance procedure culminating in binding arbitration. Article II of the agreement

protects employees from discrimination based on Association membership and activities, and Article XI specifically addresses shift assignments. Given these provisions, it is apparent that Brouillette and the Association have an adequate redress to resolve their claim that the shift assignment given Brouillette resulted from discrimination against him due to his leadership activities in the Association.

Since the Employer has moved to remand this matter to the second step of the grievance procedure, and we view a challenge to the shift assignment as a continuing grievance for the duration of the assignment, we conclude that it is appropriate to require the parties to exhaust the available remedies provided through grievance arbitration before proceeding with an unfair labor practice complaint. Teamsters Local 597 v. Chittenden County Transportation Authority, 23 VLRB 240, 243 (2000). Champlain Water District, supra. This fosters the parties' collective relationship and the policy favoring voluntary arbitration and dispute settlement. Id.

Further, there is no overriding statute or deferral policy that leads us to not defer to the grievance procedure. Obviously, the Association's allegation of discrimination based on union activities involves a claim central to the protections afforded employees by the Municipal Employee Relations Act. Nonetheless, this does not result in a conclusion that deferral to the grievance procedure would not be appropriate.

As referenced above, the Vermont Supreme Court cited with approval the National Radio and United Technologies decisions of the National Labor Relations Board to support deferral of unfair labor practice cases to the grievance procedure. National Radio and United Technologies involved cases where unions filed unfair labor practice charges alleging discrimination against employees for union activities and interference

with employees' exercise of their rights protected by the labor relations statutes. In both cases, the NLRB deferred the unfair labor practice charges to resolution through the grievance procedures of the collective bargaining agreements. Deferral by the NLRB in such cases has been upheld by the District of Columbia Circuit Court of Appeals. Hammontree v. NLRB, 925 F.2d 1486 (1991).

Likewise, in the case now before us it is appropriate to defer to the grievance procedure the resolution of the Association's allegation of discrimination based on protected union activities. This may resolve the dispute between the parties, making it unnecessary to proceed with the unfair labor practice charge. Since contract interpretation may resolve the dispute, deferral to the grievance procedure is "merely the prudent exercise of restraint, a postponement of the use of the Board's processes to give the parties' own dispute resolution machinery a chance to succeed." Milton Education and Support Association v. Milton Board of School Trustees, supra; *citing* United Technologies, supra.

Such deferral does not necessarily bar the Board's later consideration of this matter. The Board retains jurisdiction for the purpose of entertaining a motion that grievance arbitration of the underlying issue in this matter has failed to meet the following criteria necessary for the Board to defer to an arbitrator's award: 1) fair and regular arbitration proceedings; 2) agreement by all parties to be bound; 3) the decision is not repugnant to the purpose and policies of the Municipal Employee Relations Act; 4) the arbitrator clearly decided the unfair labor practice issue; and 5) the arbitrator decided issues within his or her competency. Bennington, 9 VLRB at 195-96.

Based on the foregoing reasons, it is ordered:

a. The Labor Relations Board declines to rule on this unfair labor practice charge at this time and defers this matter to the grievance procedure; and

b. The Labor Relations Board retains jurisdiction in this matter for the purpose of entertaining a motion that grievance arbitration has failed to meet the applicable criteria set forth above, which motion shall be filed within 30 days of issuance of the final arbitration decision of the underlying issues in this matter.

Dated this ____ day of December, 2005, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

_____
Edward R. Zuccaro, Chairperson

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Carroll P. Comstock

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Richard W. Park

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John J. Zampieri