

VERMONT LABOR RELATIONS BOARD

VICTOR LaBERGE

v.

AFSCME COUNCIL 93,
LOCAL 1201, AFL-CIO

)
)
)
)
)
)

DOCKET NO. 07-37

MEMORANDUM AND ORDER

The Labor Relations Board needs to decide whether to issue an unfair labor practice complaint in this matter. Town of Middlebury employee Victor LaBerge filed an unfair labor practice charge on November 28, 2007, under the Municipal Employee Relations Act, 21 V.S.A. Section 1721, *et seq.* LaBerge contends that AFSCME Council 93, Local 1201, AFL-CIO (“Union”) violated 21 V.S.A. Section 1726(b)(3), which makes it an unfair labor practice for an employee organization or its agents “to cause or attempt to cause an employer to discriminate against an employee in violation of this title or to fail or refuse to represent all employees in the bargaining unit without regard to membership in such organization.”

LaBerge asserts that the Union violated its duty to fairly represent him pursuant to this subsection by negotiating a collective bargaining contract providing that he would not receive a wage increase like other employees. In response to the charge, the Union asserts that it acted consistent with its duty to represent all employees in the bargaining unit by correcting through negotiations wage inequities created by a unilateral wage adjustment previously granted by the Town to LaBerge and another employee.

Board Executive Director Timothy Noonan met with LaBerge and Union representatives George Lovell and Michael Blair on February 15 to investigate the charge

and to informally attempt to resolve matters in dispute. The issue was not informally resolved and the Board needs to decide whether to issue a complaint.

Factual Background

The pertinent factual background to decide this issue is as follows:

The collective bargaining agreement between the Union and the Town of Middlebury (“Town”) effective July 1, 2004 – June 30, 2007 provided in pertinent part as follows:

ARTICLE 1 – GENERAL PROVISIONS

SECTION 101 – RECOGNITION

In accordance with the certification of the State Labor Board, dated June 6, 1996, the Town recognizes the Union as the sole and exclusive collective bargaining agent for . . . all patrol officers, corporal, sergeant, lieutenant, secretary/dispatcher, office employees (including custodial staff), Department of Public Works (i.e., highway, water and garage), Wastewater Treatment Plant, Recreation Department and Library employees (Library Assistant I, Library Assistant II, Operations Manager and Janitor/Maintenance positions), excluding all other employees, including but not limited to, Town Manager’s Secretary, Administrative Assistant, Accounting Services Manager, Director of Operations, Planning Officer, Recreation Director, Highway/Equipment Superintendent, Foreman, Utilities Superintendent, Police Chief, Business Manager, Library Director, Adult Services Librarian and Youth Services Librarian.

...

ARTICLE II – MANAGEMENT RIGHTS

SECTION 201

Except as specifically limited by an express written provision of this Agreement, the Town, its Manager . . . reserve and retain all rights granted by law and customarily belonging to or exercised by public management.

Such rights include but are not limited to the following:

...

to establish and modify the number, types, and grades of all Town positions and employees . . .

...

to hire, promote and assign employees

...

to determine the policies affecting the hiring, promotion and retention of employees, consistent with the specific provisions of this Agreement

...

ARTICLE V – COMPENSATION

SECTION 501 – RATE OF PAY ...

...

II. Non-Police Department Employees

- A. Each regular full-time police department employee shall receive wages in accordance with Addendum A.
- B. Each employee shall advance one wage level effective on each individual employee's anniversary date of employment with the Town. . .
- C. Effective July 1, 2004 the following shall apply:
Assistant Town Clerk/Treasurer will be reclassified at the Accounting Clerk I pay scale and the current Assistant Town Clerk/Treasurer will be paid at Level D of that classification. The Public Works Secretary will be reclassified at the Accounting Clerk I pay scale and the current Public Works secretary shall receive pay at Level E of that classification. Water Maintainer II shall be reclassified at the WWTF Maintainer II pay scale and current Water Maintainer II shall be paid at the Level H of that classification. WWTF Operator will move up to the WWTF Operator's II Level once certified by the State of Vermont and shall be placed in at least a 2.5% increase.

...

ADDENDUM A

...

UNION PAY CHART – JULY 1, 2004 – JUNE 30, 2005

Classification	Lev A	Lev B	Lev C	Lev D	Lev E	Lev F	Lev G	Lev H . .
-----------------------	--------------	--------------	--------------	--------------	--------------	--------------	--------------	------------------

...

Clerical Assist. II	13.04	13.37	13.70	14.04	14.39	14.75	15.12	15.50
---------------------	-------	-------	-------	-------	-------	-------	-------	-------

...

Water Maintainer I	14.52	14.89	15.26	15.64	16.03	16.43	16.84	17.26
Accounting Clerk I								

...

Water Maintainer II	16.28	16.69	17.11	17.54	17.97	18.42	18.88	19.36
---------------------	-------	-------	-------	-------	-------	-------	-------	-------

...

3% COLA

...

The Assistant Town Clerk/Treasurer, Annie Gebo, was classified as a Clerical Assistant II prior to July 1, 2004. She was at Level G of this classification. As of July 1, 2004, her position was reclassified to Accounting Clerk I, and she was placed at Level D

of this classification. If her position had not been reclassified, her pay rate would have been \$15.12 per hour effective July 1, 2004. Due to the reclassification, her pay rate was \$15.64 per hour effective July 1, 2004.

The Public Works Secretary, Verna Watson, was classified as a Clerical Assistant II prior to July 1, 2004. She was at Level H of this classification. As of July 1, 2004, her position was reclassified to Accounting Clerk I, and she was placed at Level E of this classification. If her position had not been reclassified, her pay rate would have been \$16.47 per hour effective July 1, 2004. Due to the reclassification, her pay rate was \$17.00 per hour effective July 1, 2004. Her pay rate was higher than the rates of pay indicated in Addendum A of the collective bargaining contract due to longevity pay that she received as a result of her 23 years of service in addition to these rates of pay.

Ralph Hayes was classified as a Water Maintainer II prior to July 1, 2004. He was at Level H of this classification. As of July 1, 2004, his position was reclassified to WWTF Maintainer II, and he was placed at Level H of this classification. If his position had not been reclassified, his pay rate would have been \$20.31 per hour effective July 1, 2004. Due to the reclassification, his pay rate was \$20.43 per hour effective July 1, 2004.

During negotiations which led to the 2004-2007 collective bargaining contract, the Union proposed that employees whose positions were reclassified to a higher paid classification would be placed on the same level they were on in the lower-paid position prior to reclassification. For example, if an employee was at Level D of the previous classification, the employee would be placed at Level D of the reclassified position. The Town rejected this proposal, and it did not become part of the negotiated contract.

The Town has three positions in its Water Division. During the period August 2004 through July 10, 2005, the position of Water Division Chief was vacant. In the absence of a Chief, the remaining two employees in the Water Division, Victor LaBerge and Jason Shepard, performed all of the duties of the Water Division. During this period, LaBerge and Shepard were classified as Water Maintainer I's, and in June of 2005 they were at Level D of this classification. On June 20, 2005, Town Manager William Finger sent a memorandum to Union representative George Lovell which provided as follows:

Just for your information, I am writing to update you on staffing of our Water Department.

We have selected a new Water Division Chief, William G. Glen. Mr. Glen has agreed to begin work for the Town of Middlebury on July 11, 2005, and will be placed on the Union pay chart at the WWTP III pay grade.

Effective immediately, our other valued members of the Water Department, Victor LaBerge and Jason Shepard, will have the job title of Water Maintainer II, and will be compensated at Level D of that pay grade.

Additionally, in recognition of the service of Victor LaBerge and Jason Shepard in the absence of a supervisor during the selection process, we will compensate them retroactively from September 22, 2004, based on the hourly pay for Water Maintainer II, Level A. Based on preliminary estimates, Mr. Shepard will receive additional compensation of roughly \$1,630, and Mr. LaBerge will receive additional compensation of roughly \$1,710.

Upon reclassification, LaBerge's pay increased from \$15.64 to \$17.54 per hour. Shepard received a comparable increase.

Lovell and other union representatives met with Finger on December 7, 2005, to discuss the wage rates paid to LaBerge and Shepard. The Union complained to Finger about the unilateral action by the Town increasing the rate of pay of LaBerge and Shepard by such a large amount. Specifically, the Union did not object to the reclassification of the two employees from Water Maintainer I to Water Maintainer II,

and did not have a problem with the retroactive pay that LaBerge and Shepard received. The Union objected to LaBerge and Shepard being placed at the same level D in the new classification as they were on when they were in the lower Water Maintainer I position.

On December 23, 2005, Finger sent a letter to Lovell which provided:

On December 7, 2005, I met with you, Verna Watson and Kathleen Ramsey to hear the Union's proposal for adjusting the level of compensation of two DPW/Water Division employees. The Union alleges that the compensation for these employees is inequitable with other Union employees. We understand that the Union agrees with the Town's decision to reclassify the employees but disagrees with the level at which they entered the new pay grade. The Union proposes to freeze level (step) increases for these employees until other employees have "caught up" with them. This would mean a three or four year period without step increases for two employees while all other employees would continue to advance on the pay scale per the current contract.

The Town's decision to re-classify the two Water Maintainer positions was made on June 20, 2005. The decision was faxed to you and Verna Watson on that date. There was no Union response to that decision. No grievance has been filed by the Union or any employee covered by this agreement.

Therefore my decision to reclassify the two DPW/Water Division employees stands. The pay grade or level within that pay grade will not be changed. The procedure for annual advancement in pay levels (steps) will be in accordance with the agreement.

On December 19, 2005, the Union filed with the Labor Relations Board an unfair labor practice charge against the Town. Therein, the Union alleged that the Town violated its duty to bargain in good faith by unilaterally reclassifying LaBerge and Shepard and placing them at Level D of their new position classification. On March 23, 2006, the Union withdrew this unfair labor practice charge. The Labor Relations Board issued an order on March 30, 2006, dismissing the matter.

The Union and the Town began negotiations in February 2007 for a successor collective bargaining agreement to the 2004-2007 agreement. During internal Union discussions concerning negotiations, there was dissatisfaction expressed concerning the

wage increases granted to LaBerge and Shepard in June of 2005. In negotiations, the Union sought to address this dissatisfaction in reaching an agreement on wages for all employees in the bargaining unit.

The Union and Town entered into a collective bargaining agreement effective July 1, 2007- June 30, 2010 which provided in pertinent part as follows concerning wages:

ARTICLE V – COMPENSATION

SECTION 501. – RATE OF PAY . . .

- I. COLA – For the purpose of Cost of Living Adjustments (COLA) on July 1, 2008 and July 1, 2009, COLA shall be defined as the percentage increase of the Consumer Price Index, CPI-U, US city average, not seasonally adjusted, or successor index, as calculated by the U.S. Department of Labor or successor agency for the 12 months preceding September 1 subsequent to that year’s date of increase. Such COLA shall not exceed 3.5%. The parties agree that the use of CPI-U to determine COLA in this agreement shall not constitute a precedent for subsequent negotiations between the parties.

. . .

III. Non-Police Department Employees

- A. July 1, 2007
Public Works and Clerical Custodian/Groundskeeper – The pay grid in effect for Custodian on June 30, 2007 shall increase by a 3% COLA. Level B shall become Level A with a new Level K established at 1% greater than Level J. Custodian/Groundskeeper shall roll back one level on July 1 but advance to the next higher level upon anniversary date of hire.

All other Public Works and Clerical positions pay grids effective June 30, 2007 shall be increased by a 3% COLA. Employees in these positions shall advance to the next higher level upon anniversary date of hire. For fiscal years 2008 and 2009, Water Maintainer II’s Shepard and LaBerge shall not advance in level.

. . .

July 1, 2009
All Non-Police Employees – The pay grid in effect for all non-police positions shall be increased by an amount as described in COLA above. Employees shall advance to the next higher level upon anniversary date of hire.

...

Discussion

Section 1727 of the Municipal Employee Relations Act provides the Board with discretion whether to issue an unfair labor practice complaint. The Board will not issue a complaint unless the charging party sets forth sufficient factual allegations for the Board to conclude that the charged party may have committed an unfair labor practice. Burke Board of School Directors v. Caledonia North Education Association, 17 VLRB 187 (1994).

The Union has a duty to fairly and equitably represent all employees in the bargaining unit in its negotiations with management, and a breach of that duty would be an unfair labor practice. Wilson v Williamstown Staff Association, 14 VLRB 197, 200 (1991). The Union's duty of fair representation means that it must serve the interests of all employees without hostility or discrimination, exercise its discretion in good faith, and avoid arbitrary conduct. Id.

In a case like the one before us, where at issue is how the terms of a collective bargaining agreement affect an individual employee, the complete satisfaction of all who are represented is hardly to be expected in the give and take of the negotiations process. Lary v. Upper Valley Teachers' Association, 3 VLRB 416, 420-421 (1980). Legacy v. Southwestern Vermont Education Association, Educational Personnel Unit, Vermont-NEA, NEA, 17 VLRB 181, 185-86 (1994). Differences inevitably arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees, the mere existence of which does not make them invalid. Id.

In applying these standards to this case, we exercise our discretion to decline to issue an unfair labor practice complaint. We conclude that the Union has not breached its duty of fairly representing LaBerge. It is true that LaBerge and the other employee occupying the Water Maintainer II position are to receive a smaller wage increase for two of the three years of the collective bargaining contract than all other employees in the bargaining unit represented by the Union. However, when viewed in light of the larger wage increases received by LaBerge and the other Water Division employee from 2004 through 2007, the smaller increase for them for 2008 and 2009 does not reflect unfair, arbitrary or discriminatory action by the Union.

The decision of the Union to request and accept lower wage increases for LaBerge and the other Water Division employee was consistent with the duty of the Union to represent all employees in the bargaining unit. LaBerge and the other employee had received disproportionately higher wage increases than other employees in the bargaining unit due to a reclassification action of the Town which placed them at a higher level in their newly reclassified position than was typical in other reclassification actions.

During internal Union discussions in subsequent collective bargaining contract negotiations, dissatisfaction was expressed concerning the wage increases granted to LaBerge and the other Water Division employee. In negotiations, the Union sought to address this dissatisfaction in reaching an agreement on wages for all employees in the bargaining unit. The lower wages increases for LaBerge and the other Water maintainer resulted.

In situations involving internal union strategy in collective bargaining negotiations, a union will be found to have breached its duty of fair representation only if

its actions can be fairly characterized as so far outside a wide range of reasonableness that it is wholly irrational or arbitrary. Brittner v. Lovell, AFSCME Council 93, Local 3797, 24 VLRB 250, 253-54 (2001). We conclude that LaBerge has not demonstrated that the Union's actions were wholly irrational or arbitrary. As the exclusive bargaining representative of all employees in the bargaining unit, the Union did not act arbitrarily and irrationally when it proceeded to seek to reduce wage increase disparities that resulted in dissatisfaction among its represented employees. LaBerge may be dissatisfied with his wage increases resulting from the negotiated agreement, but the Union acted reasonably in balancing his interests with those of all other employees in the bargaining unit.

Based on the foregoing reasons, we decline to issue an unfair labor practice complaint, and it is ordered that the unfair labor practice charge filed by Victor LaBerge is dismissed.

Dated this 9th day of April, 2008, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Edward R. Zuccaro, Chairperson

Leonard J. Berliner

James C. Kiehle