VERMONT LABOR RELATIONS BOARD

MICHELLE BOLESKI	)	
	)	
v.	)	DOCKET NO. 11-47
	)	
HARTFORD EDUCATION ASSOCIATION/VERMONT-NEA	)	

MEMORANDUM AND ORDER

On August 10, 2011, Michelle Boleski filed an unfair labor practice charge against the Hartford Education Association, Vermont-NEA ("Association"), alleging that the Association violated 21 V.S.A. § 1726(b)(1) and (3) by ignoring or processing grievances on her behalf in a perfunctory fashion. Boleski asserts that, once Vermont-NEA Uniserv Director Robert Raskevitz realized that grievances were not timely filed, he intimidated her to resign her teaching position and she resigned under duress.

The Association contended in a September 6, 2011, response to the charge that the charge was untimely filed. The Association further asserts that, should the Board consider the merits of the charge, Boleski released the Association from any claims and causes of action which Boleski may have against the Association based on its representation of her through an agreement she reached with the Association and the Hartford School Board ("Employer") on February 9, 2011.

Labor Relations Board Executive Director Timothy Noonan met with Boleski and James Fannon, Vermont-NEA General Counsel, on May 21, 2012, in furtherance of the Board's investigation of the charge and to informally attempt to resolve issues in dispute. The parties have not resolved this matter. On December 3, 2012, Boleski's recently retained attorney, Siobhan McCloskey, filed a Memorandum of Law concerning whether the charge was timely filed. The Association filed a response to the charge on December

10, 2012. Attorney McCloskey filed a reply to the Association's reply on December 14, 2012.

Pertinent Factual Background

The following pertinent factual background for the purpose of deciding whether to issue an unfair labor practice complaint is based on written materials provided by Boleski and the Association and information provided during the May 21, 2012, investigatory meeting.

Boleski was a teacher in the Hartford School District for several years. During the 2009-2010 and 2010-2011 school years, the Employer expressed concerns in writing on multiple occasions with Boleski's performance and conduct. The Employer placed these documents in Boleski's personnel file. The Association filed multiple grievances on Boleski's behalf concerning these matters.

On February 8, 2012, Boleski sent an e-mail message to Vermont-NEA Uniserv Director Robert Raskevitz, which provided: "Bob, I am done fighting. Please see if you can work out a deal so I leave and get paid with insurance until the end of the year. I would love not to come back after February vacation. Michelle".

Boleski, the Employer and the Association entered into a signed and dated agreement on February 9, 2011. The February 9 agreement provided in pertinent part as follows:

EMPLOYMENT SEPERATION AND RELEASE AGREEMENT

This Agreement is made by, between and among Michelle Boleski ("Employee"), the Hartford School District ("Employer"), and the Hartford Education Association ("Association") and is for the purpose of severing their employment relationship and resolving all existing or potential disputes arising out of the employment relationship or its severance, without an admission of liability by any party or resort to litigation.

For good and valuable consideration, and the mutual covenants herein contained, the parties agree as follows:

1. Employee shall resign from her employment with the Employer and submit a non-revocable letter of resignation for personal/health reasons to be effective June 30, 2011.

2. For the remainder of the 2010/2011 school year, the Employee will be on paid administrative leave. Employer will pay for the remaining tuition costs for the graduate course "Skills in Facilitation, Collaboration and Coaching" in which she is currently enrolled. During the February school vacation Employee will participate in the Ventures program in which she is currently involved. Employee will be reimbursed for her mileage during the first semester of the 2010/2011 school year as provided by the collective bargaining agreement.

3. The Employer will remove from Employee's personnel file all reference to performance/conduct issues placed in the file during the 2009-2010 and 2010-2011 school years. These documents will be secured in a separate private file until June 30, 2018 at which time they will be destroyed.

4. The Employer and Association have carefully explained that this document is a general release that releases all claims and causes of action which Employee ever had, now has, or may have relating to Employee's employment and representation by the Association. The Employer has carefully explained that once Employee signs this Agreement, Employee and the Association legally waives and releases any and all rights and claims Employee and Association may have under the terms of any applicable employment contract and collective bargaining agreement, the numerous state and federal laws and regulations regulating employment, including, without limitation, 16 V.S.A. § 1752, Title VII of the Civil Rights Act of 1964, as amended, the Age Discrimination and Employment Act, the Americans with Disabilities Act, 42 U.S.C. § 1981, any state fair employment practices law, and other statutes, as well as under any common law tort or contract theory.

5. Employee knowingly and voluntarily specifically waives any rights or claims arising under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 et seq., as amended by the OWBPA and, more specifically, any right or claims under 29 U.S.C. § 626. Employee specifically states and acknowledges that:

    a. This waiver is part of an Agreement written in a manner calculated to be understood by Employee.
    b. Employee does not waive rights or claims that may arise after the date that this Agreement is executed.

c. Employee is receiving consideration in addition to anything of value to which Employee would already have been entitled prior to executing this Agreement.
d. Employee has been and is hereby advised, in writing, to consult an attorney prior to executing this Agreement.
e. Employee further acknowledges that Employee has been given a period of up to 21 days within which to consider this Agreement.

6. The Employer has advised Employee of her right to seek legal counsel and/or advice from the Association prior to executing this Agreement. Employee has had an opportunity to do so since the time she was first given this document.

. . .

Prior to signing this agreement, Boleski discussed it with Raskevitz. Raskevitz specifically discussed with her the provisions of paragraph 4 of the agreement. Raskevitz also asked her if she wished to discuss the agreement with a lawyer before signing it. She indicated she was prepared to sign the agreement without discussing it with a lawyer.

Pursuant to the agreement, Boleski sent a letter to the Hartford School Board dated February 9, 2011, stating in part: "For personal and health reasons, I resign my position with the Hartford School District effective June 30, 2011." Also, Boleski was placed on administrative leave with pay from February 9, 2011, through the end of the school year in June. She received health insurance coverage through the Hartford School District through June 30, 2011. Boleski has not alleged failure of the Employer to comply with any other provision of the agreement.

On Friday, August 5, 2011, Boleski sent by certified mail an unfair labor practice charge to the Labor Relations Board from the White River Junction post office. Boleski alleged in the charge that the Association committed an unfair labor practice in its representation of her culminating in her resignation on February 9, 2011. A delivery receipt form indicates that the Montpelier post office received the charge on Tuesday,

August 9. The Labor Relations Board received the charge on August 10, 2011, and signed the delivery receipt form on this date.

Discussion

The Labor Relations Board has discretion whether to issue an unfair labor practice complaint and hold a hearing on a charge. 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 charged party may have committed an unfair labor practice.[1] In determining whether to issue an unfair labor practice complaint, we view the pertinent factual background in the light most favorable to Boleski.

There is a threshold issue whether this unfair labor practice charge was timely filed. Under the applicable statute, the Municipal Employee Relations Act, "no (unfair labor practice) complaint shall issue based on any unfair labor practice occurring more than six months prior to the filing of the charge with the board unless the person aggrieved thereby was prevented from filing the charge by reason of service in the armed forces."[2] In applying this provision, the Labor Relations Board has declined to issue unfair labor practice complaints in cases where the charge was filed more than six months after the alleged unfair practice.[3] The meaning of the word "file" is synonymous with "receipt"; that it indicates the receiving party actually has the submitted material in its possession.[4]

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[1] *Burke Board of School Directors v. Caledonia North Education Association*, 17 VLRB 187 (1994).
[2] 21 V.S.A. §1727(a).
[3] *Davis v. Town of Williston*, 32 VLRB 43, 45 (2012). *AFT Local 3333, VFT, AFL-CIO v. U32 High School Board of Directors, et al.*, 6 VLRB 115, 117 (1983).
[4] *Grievance of Mason*, 15 VLRB 428, 430 (1992). *Grievance of Amidon*, 6 VLRB 83, 85 (1983).

Although there are no unfair labor practice cases where the Board has permitted an exception to the filing requirement, there was one grievance case where the Board permitted an exception to the requirement of Board *Rules of Practice* that a grievance be "filed within 30 days after receipt of notice of final decision of the employer". The employee sent a grievance to the Board by certified mail five days before the deadline, but it was not received by the Board until the day after the deadline. In denying the employer's motion to dismiss the grievance as untimely filed, the Board stated:

> . . . Under ordinary circumstances, we would agree with the Employer that receipt of a grievance one day after the deadline warrants dismissal of a grievance. However, the circumstances of this case are not ordinary.
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> Grievant made a good faith effort to ensure that the grievance be received by the deadline by sending it certified mail on (Thursday,) January 16, five days before the deadline. She was entitled to reasonably presume that the Board would receive the letter by the fifth day, January 21, even with the intervening weekend and holiday. The Vermont Rules of Civil Procedure presume that a letter should take no more than three days to deliver and thus allows an additional three days to answer a document which has been mailed to a party. VRCP Rule 6(e). Although the Board has not formally adopted Rule 6(e), we believe it sets forth a reasonable presumption upon which a person can rely.
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> The Board *Rules of Practice* do not require that grievances be hand-delivered to the Board, and in practice it is not unusual for grievances and other original process to be received by the Board through the mail. Accordingly, the risk exists that a filing may be inordinately delayed due to events beyond the control of the person filing the action. We conclude that it would be unfair and unreasonable to construe our *Rules* to never excuse late receipt of a grievance by the Board. Under the circumstances, where Grievant was entitled to reasonably presume that her grievance would be received by the Board within five days of mailing it, the fact that the Board actually received the grievance on the sixth day does not result in Grievant losing her right to grieve the merits of her dismissal.[5]

We similarly conclude in this case that Boleski made a good faith effort to ensure that the Board would receive the unfair labor practice charge by the deadline by sending it certified mail on Friday, August 5, 2011, four days before the deadline of Tuesday, August 9, 2011, six months after the February 9, 2011, agreement. She was entitled to

5 *Grievance of Mason*, 15 VLRB at 431-32.

reasonably presume that the Board would receive the charge by August 9, even with the intervening weekend. Under the circumstances, the fact that the Board actually received the charge on the day after the deadline does not result in Boleski losing her right to pursue her charge on timeliness grounds.

We turn to discussing the merits of the charge. Boleski contends that the Association committed unfair labor practices by not processing her grievances in a timely manner and, upon realizing its errors in this regard, intimidating her to resign her teaching position, which resulted in her resigning under duress. The Association responds that the Board should dismiss the charge because Boleski released the Association from any claims and causes of action which Boleski may have against the Association based on its representation of her when she entered into the February 9, 2011, agreement with the Association and the Employer. The Association asserts that that this release should be given the meaning the parties, including the Association, contemplated when they signed the release agreement, chiefly that Boleski was paid but not required to work, and in exchange she agreed to resign and release the Association and Employer from any claims she had, or may have, against them stemming from her employment.

In viewing the pertinent factual background in the light most favorable to Boleski, we conclude that she has not set forth sufficient factual allegations warranting our issuance of an unfair labor practice complaint. Her allegation that Vermont-NEA Uniserv Director Robert Raskevitz intimidated her to resign her teaching position, which resulted in her resigning under duress, is belied by the e-mail message which she sent to Raskevitz the day prior to her resignation.

She requested Raskevitz in the e-mail to "see if you can work out a deal so I leave and get paid with insurance until the end of the year", and informed him "I would love not to come back after February vacation". This indicates that she actively promoted the reaching of a quick agreement whereby she would immediately resign and receive wages and insurance without working for the remainder of the school year. The fact that such an agreement was reached with the assistance of Raskevitz the day following her e-mail is evidence that her desire was achieved rather than she was intimidated into reaching the agreement and resigned under duress.

Our conclusion in this regard is bolstered by the provision in the Employment Separation and Release Agreement signed by Boleski stating: "Employee further acknowledges that Employee has been given a period of up to 21 days within which to consider this Agreement." The 21 day period provided her with ample opportunity to address any duress she was experiencing. Also, she was provided the opportunity to consult with an attorney before signing the agreement. The fact that she did not consult with an attorney, and the fact that she signed the agreement quickly without exercising her right to consider it for 21 days, is inconsistent with a claim that she was intimidated into reaching the agreement and resigned under duress.

In sum, there is strong evidence that Boleski was not under duress when she signed the agreement. Boleski has not countered this evidence by setting forth specific evidence supporting her claim that she resigned under duress. Thus, Boleski has not set forth sufficient factual allegations in this regard warranting our issuance of an unfair labor practice complaint.

Moreover, even leaving aside our conclusion on duress, Boleski has not set forth sufficient factual allegations warranting the issuance of an unfair labor practice complaint in this matter. It is the general rule in Vermont that when one has received anything of value as consideration in settlement of a right of action, the contract of settlement, even if it is obtained by duress or fraud, is a bar to recovery on any claim covered by the contract as long as it is not rescinded by an offer to return the consideration insofar as it lies within the person's power to do so.[6]

A release is a contract.[7] As with any contract, our task in interpreting it is to ascertain the intent of the parties at the time of its execution.[8] Releases must be specific in order to be valid and are interpreted narrowly, as a general matter.[9] A release is not effective unless the party giving the release receives something of value to which the party was not otherwise entitled.[10] A valid release is a bar to recovery on the claim released so long as it is not rescinded by an offer to return anything received of value as consideration insofar as it lies within the power of the person who has executed the release.[11]

In applying these standards, we conclude that Boleski is barred from obtaining any remedy before us on her claim that the Association committed unfair labor practices in its representation of her. The February 9, 2011, agreement entered into by Boleski, the Association and the Employer provided that "this document is a general release that

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[6] *Brown v. City of South Burlington*, 393 F.3d 337 (2nd Cir. 2004). *Economou v. Economou*, 136 Vt. 611, 620 (1979). *Caledonia Sand & Gravel Co. v. Bass Co.*, 121 Vt. 161, 165 (1959). *Brainard v. Van Dyke*, 71 Vt. 359, 362-363 (1899).
[7] *Northern Security Ins. Co. v. Mitec Electronics, Ltd.*, 184 Vt. 303, 313 (2008). *Economou*, 136 Vt. at 619. *Caledonia Sand & Gravel Co.*, 121 Vt. at 165.
[8] *Northern Security Ins. Co.*, 184 Vt. at 313.
[9] *Id.*
[10] *Brown v. City of South Burlington*, supra.
[11] *Economou*, 136 Vt. at 619. *Caledonia Sand & Gravel*, 121 Vt. at 165.

releases all claims and causes of action which Employee ever had, now has, or may have relating to Employee's employment and representation by the Association". Boleski, by agreeing to this, specifically released the Association from any claims and causes of actions which she had or may have with respect to the Association's representation of her.

This release was valid and effective as Boleski received something of value to which she was not otherwise entitled in giving the release. This included most notably nearly five months of pay without working, as well as removal from her personnel file of all references to performance and conduct issues during the 2009-2010 and 2010-2011 school years.

The release bars Boleski from recovering on a claim against the Association concerning its representation of her unless it was rescinded by an offer to return these things of value which she received in giving the release. During the six months between entering into the agreement containing the release and filing the unfair labor practice charge, Boleski received pay for nearly five months without working and the removal from her personnel file of references to performance and conduct issues. She made no offer to return these things of value prior to filing the unfair labor practice charge against the Association and seeking a remedy.

Thus, Boleski cannot receive any remedy from the Board for any claim against the Association concerning its representation of her. This result is consistent with our mission to promote employees, employers and unions reaching and maintaining agreements resolving disputed matters which arise during the course of labor relations.

These agreements need to be adhered to and enforced absent a compelling reason not to do so. Such a reason does not exist in this case.

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

Dated this 31st day of December, 2012, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Richard W. Park

Richard W. Park, Chairperson

/s/ James C. Kiehle

James C. Kiehle

/s/ Gary F. Karnedy

Gary F. Karnedy