VERMONT LABOR RELATIONS BOARD

MICHAEL DAVIDSON	)	
	)	
v.	)	DOCKET NO. 14-26
	)	
VERMONT STATE EMPLOYEES' ASSOCIATION	)	

MEMORANDUM AND ORDER

On April 8, 2014, Michael Davidson filed an unfair labor practice charge against the Vermont State Employees' Association ("VSEA"). Davidson alleges that the VSEA violated §903(a),§962(1), (2) and (9), and §963(2)of the State Employees Labor Relations Act, 3 V.S.A. § 901 *et seq.* ("SELRA") , by: 1) threats, retaliation and restraining of the rights afforded him under state and federal law; 2) retaliating against him for allegedly exercising his legal rights to organize by removing him from elected and appointed positions within VSEA based on allegations that he had petitioned the Labor Relations Board seeking certification of the New England Police Benevolent Association ("NEPBA":); and 3) retaliating against him for seeking to and filing an unfair labor practice charge with the Labor Relations Board.

The provisions of SELRA cited by Davidson provide in pertinent part:

> 3 V.S.A. §903(a): Employees shall have the right to self-organization; to form, join, or assist employee organizations; to bargain collectively through representatives of their own choice, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities . . .
>
> 3 V.S.A. §962: It shall be an unfair labor practice for an employee organization or its agents:
>
> (1) To restrain or coerce employees in the exercise of the rights guaranteed to them by law, rule or regulation. However, this subdivision shall not impair the right to an employee organization to prescribe its own rules with respect to the acquisition or retention of membership therein, provided such rules are not discriminatory.

(2) to restrain or coerce an employer in the selection of his or her representatives for the purpose of collective bargaining or adjustments of grievances.
. . .
(9) to engage in activities unlawful under section 903 of this title.

3 V.S.A. §963: An employee organization entering into an agreement shall not:
. . .
(2) Penalize a member for exercising a right guaranteed by the Constitution or laws of the United States or the state of Vermont.
. . .

VSEA contended in a response to the charge which it filed on April 28, 2014, that the Board should dismiss the charge because Davidson has failed to set forth sufficient factual allegations for the Board to conclude that VSEA may have committed an unfair labor practice. VSEA asserts that Davidson has failed to establish that VSEA has interfered with his right to engage in protected activity or has retaliated against him in any way; rather VSEA has merely exercised its right to engage in appropriate acts of self-governance that in no way implicate the unfair labor practice provisions of SELRA. Davidson filed a reply to VSEA's response on May 27, 2014.

The Labor Relations Board needs to decide whether to issue an unfair labor practice complaint against VSEA.

Pertinent Factual Background

The following pertinent factual background for the purpose of deciding whether to issue an unfair labor practice complaint is based on factual allegations made in the charge filed by Davidson, the response to the charge filed by VSEA, and the reply Davidson filed to VSEA's response.

Davidson has been employed by the State Department of Liquor Control since 2002. He has been a member of VSEA at all times pertinent to this grievance. Davidson is a member of the Non-Management bargaining unit represented by VSEA.

Davidson held several positions in VSEA: a) he was elected in 2013 as the Vice-Chair of the Non-Management Bargaining Unit ("NMU") by NMU members; b) he was elected in 2011, and re-elected in 2013, as Chair of the VSEA Rutland Chapter; c) he was appointed Steward for the NMU around 2004; and d) he was Vice-Chair of the NMU Executive Committee.

In early December 2013, Davidson informed VSEA Director Mark Mitchell that VSEA members who were law enforcement officers in the NMU were speaking with the NEPBA. Mitchell told Davidson that if he had any involvement with the NEPBA he would be removed from his VSEA positions.

The NEPBA filed a petition for election of collective bargaining representative with the Labor Relations Board on January 30, 2014, to represent the sworn law enforcement officers of the Vermont Department of Fish and Wildlife, the Vermont Department of Liquor Control and the Vermont Department of Motor Vehicles. The employees in the proposed unit in this petition are among the employees in the NMU represented by VSEA. Davidson was included among the law enforcement officers covered by the election petition.

Article Three, Section 3, of VSEA Articles of Association provides:

> Restriction, Dual Membership:
> (a) No VSEA member may hold any office or position in VSEA or any Bargaining Unit as the representative of employees in any capacity if s/he is also a member of any other rival organization having the potential to represent employees through legal challenge to the Vermont State Employees' Association as the collective bargaining representative. A waiver from this

rule may be granted upon written application to, and approval of, the VSEA Board of Trustees, which may also revoke such approval.

(b) Any office or position held by such member in the Vermont State Employees Association, Inc. shall automatically become vacant in the event such dual membership exists, unless a waiver has been approved by the VSEA Board of Trustees.

VSEA President Shelley Martin sent a letter to Davidson dated February 25, 2014, which provided:

Dear Mr. Davidson:

It has come to our attention that you are acting on behalf of the New England Police Benevolent Association (NEPBA) in that organization's attempt to decertify a portion of the NMU bargaining unit. The evidence is sufficient to further establish that you have authorized NEPBA to act as your exclusive representative for purposes of collective bargaining, which amounts to a pledge of membership in that organization.

As you may be aware, Article 3, Section 3 of the Articles of Association of the VSEA states the following:

(a) No VSEA member may hold any office or position in VSEA or any Bargaining Unit as the representative of employees in any capacity if s/he is also a member of any other rival organization having the potential to represent employees through legal challenge to the Vermont State Employees' Association, Inc., as the collective bargaining representative. A waiver from this rule may be granted upon written application to, and approval of, the VSEA Board of Trustees, which may also revoke such approval.

(b) Any office or position held by such member in the Vermont State Employees' Association, Inc. shall automatically become vacant in the event such dual membership exists, unless a waiver has been approved by the VSEA Board of Trustees.

Based on the evidence alluded to above, it is my intent to notify the Board of Trustees that your offices and positions in the VSEA have automatically become vacant pursuant to Article 3, Section 3(b) above. This would include the positions of President of the Rutland Chapter, Vice-Chair of the NMU Executive Committee, Vice-Chair of the NMU Bargaining Unit, and Union Steward.

As the Articles of Association allow you the opportunity to seek a waiver from the Board of Trustees to retain your offices and positions despite your dual unionism, I invite you to attend the meeting of the Board on March 14, 2014, for such purpose. If you intend to address the Board on this matter, please notify me by March 5, 2014, so that I may include you on the agenda for the Board meeting.

(Attachment B to VSEA response to charge)

Davidson sent a letter to Martin dated March 3, 2014, which provided in pertinent part:

> I have received your email dated 2/24/2014 outlining your concerns that I am now a member of another union, specifically New England Police Benevolent Association (NEPBA). Rest assured, **I AM NOT** a member of NEPBA or any other union or organization, other than VSEA.
>
> I am not surprised that you have taken this retaliatory tactic in an attempt to influence or coerce my future decision-making in regards to the law enforcement members within the NMU unit seeking representation from another union. . . I am not a member of NEPBA and when, and if I do vote on the issue of joining NEPBA, I will personally reassess my positions within VSEA.
>
> . . . I decline to seek a meeting with the Board of Trustees to seek a waiver. I do not have any reason to request such a waiver as I am not a member of NEPBA or other organization as you suggest. I hope I have made that clear. If still in question, I suggest you contact NEPBA and ask if I am a member.
>
> Now that I have provided you with this fact, any pursuit of this issue to deprive me of my elected positions and the members of their rights to election of a representative will be based on willful malice by you and I will take the necessary actions to address it.
> . . .
> (emphasis in original, Attachment B to unfair labor practice charge)

Martin sent Davidson a letter dated March 7, 2014, which provided in pertinent part:

> I write in response to your letter of March 3, 2014.
>
> Please be advised that VSEA will consider whether someone is a "member" of a rival union as described in the VSEA Articles of Association based on its own assessment of membership and not on the other union's definition of membership. In this regard, while you denied being a member of the (NEPBA), you have pointedly *failed* to deny that you have agreed to allow NEPBA to act as your representative for purposes of collective bargaining (even though the VSEA is the certified exclusive representative of employees in your job title). VSEA takes the position that such activity is tantamount to membership in violation of the principles of dual unionism. That said, as I indicated in my letter of February 25, I intend to notify the Board of Trustees in our March 14 meeting that your positions have become vacant.

> You are mistaken when you suggest that these actions are retaliatory or in any way interfere with your rights under State law to seek the representative of your choosing. You have every right to support NEPBA or any other organization in an attempt to replace VSEA as your exclusive representative. However, in choosing to do so, you forfeit your right to retain a leadership position on VSEA – a right that you hold pursuant to and thus subject to the provisions of the Union's governing documents.
>
> That said, I reiterate my invitation to you to address the Board of Trustees to seek a waiver in order to retain your positions despite your thus-far unrefuted dual unionism. . . .
> (emphasis in original, Attachment C to unfair labor practice charge)

Davidson sent a letter to Martin dated March 13, 2014, which provided in pertinent part:

> I write in response to your response letter dated March 7, 2014.
>
> It concerns me that you, as President, have taken on an unilateral application and interpretation of the policies of VSEA. This leadership method of bullying in your role as President has become apparent . . .
>
> Your continued harassment in singling me out based on my being in a police job description, some of whom have exercised their rights to seek a petition with the VLRB to change certification, has become apparent. . .
>
> In your letter you state that I "pointedly failed to deny that (I) have agreed to allow NEPBA to act as your representative for purposes of collective bargaining"
>
> If you are not familiar with how assignment of the exclusive representation certification process works, I encourage you to seek out advice from a competent attorney. If you had, I expect they would have told you that only the VLRB can make such certification . . .
>
> . . . I am hopeful that the Board of Trustees will see through your totalitarian tactics and act accordingly. If the Board of Trustees wishes to grant me a waiver for any possible future affiliation with NEPBA, I would have no objection and welcome their remedy to this attack.
> . . .
> I again decline to seek a waiver as you have proposed (see above alternative). Your statement that I have a "thus-far unrefuted dual unionism" is beyond ridiculous. . .
> (Attachment D to unfair labor practice charge)

On March 11, 2014, Davidson filed an unfair labor practice charge against VSEA (VLRB Docket No. 14-16). Davidson alleged that VSEA had committed unfair labor practices in violation of SELRA by declining to represent him in a grievance before the Labor Relations Board and through the process which it followed in making that decision.

On March 14, 2014, the VSEA Board of Trustees held a meeting. President Martin informed the Board that the VSEA positions held by Davidson had become vacant for the reasons she had specified in her February 25 and March 7 letters to Davidson.

The Labor Relations Board issued a Memorandum and Order on March 28, 2014, dismissing as untimely filed the petition for election of collective bargaining representative filed by the NEPBA on January 30, 2014, to represent the law enforcement officers currently included in the NMU. 33 VLRB 4.

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. Burke Board of School Directors v. Caledonia North Education Association, 17 VLRB 187 (1994). In determining whether to issue an unfair labor practice complaint, we view the pertinent factual background in the light most favorable to the charging party, in this case Davidson.

Davidson alleges in this case that the VSEA has coerced, restrained and retaliated against him for allegedly exercising his right to seek certification of a different union as

representative by threatening to remove him from any VSEA position which he held, and then following through on this threat by removing him from these positions. Davidson contends that VSEA has violated 3 V.S.A. §962(1). It provides:

> It shall be an unfair labor practice for an employee organization or its agents . . . to restrain or coerce employees in the exercise of the rights guaranteed to them by law, rule, or regulation. However, this subdivision shall not impair the right of an employee organization to prescribe its own rules with respect to the acquisition or retention of membership therein, provided such rules are not discriminatory.

We have not been called upon in the past to apply this provision of SELRA under circumstances similar to the case before us. However, Section 8(b)(1)(A) of the National Labor Relations Act ("NLRA") is substantively identical to 3 V.S.A. §962(1). We look to decisions of the federal courts and the National Labor Relations Board interpreting this section of the NLRA for guidance in interpreting the parallel provision of SELRA. In re Whitney, 168 Vt. 209, 215-16 (1998). Alexander v. VSEA, 32 VLRB 31, 39 (2012). Burlington Fire Fighters Association v. City of Burlington, 142 Vt. 434, 435 (1983).

In construing Section 8(b)(1)(A) of the NLRA, the U.S. Supreme Court held in NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175 (1967), that "Congress did not propose any limitations with respect to the internal affairs of unions, aside from barring enforcement of a union's internal regulations to affect a member's employment status." Id. at 195. The Court found enforceable a union rule forbidding a union member from crossing a picket line during a strike by expulsion or reasonable fine.

In Office & Professional Employees Local 251 (Sandia National Laboratories), 331 NLRB 1417 (2000), the National Labor Relations Board determined that Section 8(b)(1)(A) does not proscribe wholly intraunion conduct and discipline. The Board held

that a union did not violate this section when it imposed internal union discipline against its members for opposing the policies of the union's president. The Board stated:

> What is of critical significance in our judgment is that the only sanctions visited on the charging parties by the victorious union faction were internal union sanctions, such as removal from union office and suspension or expulsion from union membership. The relationship between the charging parties, and their employer, Sandia, was wholly unaffected by the discipline. Nor are any policies specific to the National Labor Relations Act implicated by the union discipline at issue. Id.

Similarly, the Board in Service Employees Local 254 (Brandeis University), 332 NLRB 1118 (2000), determined that there was no Section 8(b)(1)(A) violation where a union removed a member from his positions as a shop steward and union representative on the labor-management committee. The Board concluded that the removal did not impact the member's relationship with his employer, impair his access to the Board's processes, involve unacceptable methods of coercion (such as violence), or otherwise impair policies imbedded in the Act. Id. at 1120.

The NLRB in Tawas Tube Products, 151 NLRB 46 (1965), specifically upheld the penalty of expulsion from union membership for those who seek to have their union decertified as their exclusive representative. The Board found that expulsion was lawful because retention of membership would have allowed the employee to remain privy to union strategy and tactics in opposition to the petition.

We find these decisions of the United States Supreme Court and the National Labor Relations Board persuasive in determining whether VSEA may have committed an unfair labor practice in this matter. We concur that the unfair labor practice provisions of SELRA do not reach the internal affairs of VSEA at issue in this case if they do not affect a member's employment status and relationship as an employee with his employer and do

not impair any policy embedded in SELRA. We further agree that VSEA was free to enforce a properly adopted rule which reflects a legitimate union interest and impairs no policy embedded in SELRA.

Here, the removal of Davidson from various VSEA positions was wholly an internal union matter of governance which had no effect on Davidson's employment status and his relationship as an employee with his employer. VSEA was free to enforce its Articles of Association generally prohibiting holding VSEA positions while also being a member of a rival union. This provision reflects a legitimate union interest because Davidson's retention of VSEA positions would have allowed him to remain privy to union strategy and tactics in opposition to the election petition filed by the NEPBA. VSEA has a legitimate interest in not having a person hold VSEA positions where the potential exists for the person to use these positions to provide information to a rival union detrimental to VSEA's interests.

Davidson contends in essence that this provision of the Articles of Association impairs a policy embedded in SELRA because he was retaliated against by VSEA based on the presumption of exercising his legal rights to petition the Labor Relations Board to change his exclusive bargaining representative. We disagree that Davidson has established that VSEA may have interfered with his rights to file a petition to replace VSEA as representative. Davidson maintains the right to support NEPBA or another organization to replace VSEA as his exclusive representative through participating in the filing of an election petition with the Labor Relations Board.

However, SELRA further provides that a union may prescribe its own membership rules as long as they are not discriminatory. This proviso applies to a union's

right pursuant to its rules to remove a member from a union position as well as to regulate acquisition and retention of union membership. Service Employees Local 254 (Brandeis University), supra. VSEA is not prohibited from enforcing the membership rule which reflects the legitimate union interest that is at issue in this case. SELRA protects the right of Davidson to petition to change his exclusive bargaining representative, and removal of Davidson from his VSEA positions did not interfere with this right.

Nonetheless, Davidson further alleges that VSEA committed an unfair labor practice by retaliating against him for filing an unfair labor practice charge against VSEA on March 11, 2014. The U.S Supreme Court has held that a union violates Section 8(b)(1)(A) of the NLRA by fining or expelling a member for filing unfair labor practice charges because this frustrates the basic policy of free and uncoerced access to the NLRB. NLRB v. Marine & Shipbuilding Workers Local 22, 391 U.S. 418 (1968). We concur that a union would violate Section 962(1) of SELRA if it retaliates against a member for filing an unfair labor practice charge against the union because it would interfere with the member's right to file an unfair labor charge guaranteed by SELRA.

In determining whether Davidson has set forth sufficient factual allegations to support issuance of an unfair labor practice complaint on this issue, the Board needs to consider the facts concerning the timing of VSEA's actions on removal of Davidson from VSEA positions compared to the timing of the filing of the charge.

The pertinent factual background in this case indicates that VSEA President Martin informed Davidson on two separate occasions prior to Davidson filing the unfair labor practice charge that VSEA considered the VSEA positions held by Davidson to be

automatically vacated pursuant to the VSEA Articles of Association. She informed him in her February 25, 2014, letter that it was her intent "to notify the Board of Trustees" at the Board's March 14 meeting "that your offices and positions in the VSEA have automatically become vacant". In her March 7, 2014, letter, she reiterated that she "intend(ed) to notify the Board of Trustees in our March 14 meeting that your positions have become vacant". Davidson did not file his unfair labor practice charge until March 11, 2014, after both of these letters had been sent.

Although President Martin did notify the Board of Trustees on March 14, 2014, three days after the filing of the charge by Davidson, that the VSEA positions held by Davidson had been automatically vacated, this does not support issuance of an unfair labor practice complaint. The removal of Davidson from the VSEA positions was a decided issue by this point as a practical matter. Martin had informed Davidson prior to the meeting that she would inform the Board that he had vacated his VSEA positions. The VSEA Articles of Association do not contemplate or require a vote by the Board of Trustees in instances of automatic vacating of VSEA positions due to dual union membership. The only action of the Board of Trustees contemplated pursuant to the VSEA Articles of Association was a waiver of the prohibition on holding VSEA positions due to dual union membership. However, Davidson had made it clear in his March 3 and 13, 2014, letters to Martin that he was not seeking such a waiver. Davidson has not set forth sufficient factual allegations to support issuance of an unfair labor practice complaint on this issue.

Davidson made a general allegation in his unfair labor practice charge that VSEA also retaliated against him for "seeking to . . . file" an unfair labor practice charge with

the Board. This allegation by Davidson is not supported by his own March 3 and 13 letters to Martin regarding the vacating of VSEA positions. In both of these letters, Davidson alleged retaliation against him linked only to seeking representation from the NEPBA.

In the March 3 letter, he stated to Martin that "you have taken this retaliatory tactic in an attempt to influence or coerce my future decision-making in regards to the law enforcement members within the NMU unit seeking representation from another union". Similarly, in his March 13 letter to Martin, he stated: "Your continued harassment in singling me out based on my being in a police job description, some of whom have exercised their rights to seek a petition with the VLRB to change certification, has become apparent." Nowhere in these letters did he mention retaliation against him because of his appeal of VSEA declining to provide legal assistance to him in his grievance, or because of his intent to file an unfair labor practice charge. Based on his own letters, he has failed to demonstrate that VSEA may have retaliated against him because he was seeking to file an unfair labor practice charge.

We can summarily dismiss Davidson's remaining allegations that VSEA violated 3 V.S.A. §962(2) and (9), and §963(2). §962(2) concerns a union coercing an employer in the selection of the employer's representatives, and has no applicability to the issues in this case. §962(9) concerns unlawful strike activities prohibited by 3 V.S.A. §903, which also has no applicability to the issues in this matter. §963(2) concerns a union not penalizing a member when the union is entering into an agreement, and there is no issue before us concerning VSEA entering into an agreement.

In sum, we conclude that Davidson has not set forth sufficient factual allegations for us to conclude that VSEA may have committed an unfair labor practice. Our holding should not be construed as resolving the disagreement between Davidson and VSEA whether he has violated the dual membership provision of the VSEA Articles of Association. Instead, we are concluding that this is a wholly internal union matter which does not implicate SELRA's unfair labor practice provisions.

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 Michael Davidson in Docket No. 14-26 is dismissed.

Dated this 22nd day of July, 2014, 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