VERMONT LABOR RELATIONS BOARD

VERMONT STATE EMPLOYEES' ASSOCIATION	)	
v.	)	DOCKET NO. 16-34
STATE OF VERMONT (RE: NO-SOLICITATION POLICIES)	)	

MEMORANDUM AND ORDER

The Vermont State Employees' Association ("VSEA") filed an unfair labor practice charge under the State Employees Labor Relations Act ("SELRA") on June 2, 2016, contending that the State of Vermont ("State") has unlawfully interfered with, coerced and restrained employees in the exercise of their rights protected by 3 V.S.A. §903(a), in violation of 3 V.S.A. §961(1), by promulgating and maintaining no-solicitation policies that prohibit employees and non-employees from soliciting employees concerning protected concerted activities on non-work time and in either work or non-work areas. The contested no-solicitation policies are in the State Personnel Policies Manual and the Vermont Veterans' Home Personnel Policies Manual. The Veterans' Home Manual provides in pertinent part:

> The soliciting of money, contributions, subscriptions, organizational or group membership, commercial soliciting and vending of all kinds, the display or distribution of commercial advertising, pamphlets, handbills and flyers, or the collection of premiums, payments or private debts, and campaigning in or on State property, both during and after normal working hours, is prohibited, unless and otherwise permitted by law or State building rules. This policy does not apply to newspaper boys or girls, farmers selling homegrown produce, VtShares, or personal notices posted on authorized bulletin boards by State employees. Solicitation and/or distribution of literature or products for any purpose by non-employees in any areas of the Home are strictly prohibited.

The no-solicitation policy in the State Personnel Policies Manual contains essentially the same provisions except that it does not include the last sentence in the Veterans' Home Policies Manual cited above. VSEA asserts that these policies, on their face, prohibit employees or staff

of the VSEA from soliciting unit members on non-work time and in non-work areas to engage in protected concerted activity, while at the same time permitting other entities to solicit in both work and non-work areas and on working time, and therefore impermissibly discriminate against union activity. VSEA further contends that these policies have a chilling effect on the rights of employees to solicit other employees in the exercise of their protected rights during non-work time and in work areas, or for non-employee union activists or staff to solicit in non-work areas in the same manner and on the same terms as certain other non-employees.

The State filed an answer to the unfair labor practice charge on June 21, 2016. The State contends that the charge was filed well after the statutory six-month period to file a charge since the applicable policies have been in place for many years. The State further asserts that the doctrine of *res judicata* also requires that the charge be dismissed since VSEA could have raised the issue of an alleged unfair labor practice in the underlying action in Grievance of VSEA (Re: Vermont Veterans Home Petition), 33 VLRB 435 (May 27, 2016). VSEA filed a response to the State's answer on July 5, 2016.

The Board has discretion under SELRA whether to issue an unfair labor complaint and hold a hearing on a charge. 3 V.S.A. §965(a). In exercising its 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).

We begin our consideration of whether to issue an unfair labor practice complaint by deciding whether the charge should be dismissed on *res judicata* grounds. Under the doctrine of *res judicata*, a final judgment in previous litigation bars subsequent litigation if the parties, subject matter, and cause(s) of action in both matters are the same or substantially identical.

Faulkner v. Caledonia County Fair Association, 2004 Vt. 123. Grievances of Choudhary, 15 Vt. 118, 176 (1992). The cause of action is the same if the same evidence will support the action in both cases. Carlson v. Clark, 2009 Vt. 17, ¶15. Choudhary, 15 Vt. at 176.The doctrine bars a party from subsequent litigation of not only those claims and issues that were previously litigated, but also those that could have been litigated in a prior action. Carlson v. Clark, 2009 Vt. 17, ¶13. Choudhary, 15 Vt. at 176.

The following excerpt from the Board decision in Grievance of VSEA (Re: Vermont Veterans Home Petition, supra, relied on by the State in its answer to the charge, informs the Board consideration of whether this unfair labor practice charge should be dismissed on *res judicata* grounds:

> VSEA contends in Docket No. 15-36 that the State violated the right to organize under Article 3 of the Contract; and interfered with, restrained and coerced employees engaged in concerted activity protected by the Contract and the State Employees Labor Relations Act; by prohibiting covered employees from circulating a petition during non-work time and in non-working areas of the Vermont Veterans Home.
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> The VLRB has such adjudicatory jurisdiction as is conferred on it by statute. In re Grievance of Brooks, 135 Vt. 563, 570 (1977). In deciding grievances, the VLRB is limited by the statutory definition of grievance, which provides:
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> > "Grievance" means an employee's, group of employees', or the employee's collective bargaining representative's expressed dissatisfaction, presented in writing, with aspects of employment or working conditions under a collective agreement or the discriminatory application of a rule or regulation, which has not been resolved to a satisfactory result through informal discussion with immediate supervisors. 3 V.S.A. §902(14).
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> Statutory provisions are not encompassed within the definition of "grievance" unless they are incorporated into a collective bargaining agreement, rule or regulation. Boynton v. Snelling, 147 Vt. 564 (1987). In re McMahon, 136 Vt. 512 (1978). Grievance of VSCSF and Laflin, 16 VLRB 276 (1993).
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> Our adjudicatory jurisdiction to decide grievances precludes us in this grievance from addressing VSEA's claim that the State interfered with, restrained and coerced employees engaged in concerted activity protected by the State Employees Labor Relations Act ("SELRA"). Section 903(a) of SELRA provides that employees "shall have the right . . . to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection". Section 961(1) of SELRA makes it an unfair labor practice for an employer "to interfere with, restrain or coerce employees in the exercise

> of their rights guaranteed by section 903, or by any other law, rule or regulation". Sections 903(a) and 961(1) of SELRA are not incorporated into any provision of the Contract or any rule or regulation cited by VSEA to have been violated in this grievance. Thus, such provisions of SELRA are not encompassed within the definition of "grievance".
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> VSEA has not filed an unfair labor practice charge alleging violations of these provisions of SELRA, and the deadline for filing one has passed. Unfair labor practice charges must be filed within six months of the occurrence of the alleged unfair labor practice. 3 V.S.A. Section 965(a). More than six months have passed since the circulating of the petition at the Veterans' Home. Thus, we have no jurisdiction to address VSEA's claim that the State interfered with, restrained and coerced employees engaged in concerted activity protected by SELRA.
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> This leaves the remaining question for us to decide as whether VSEA has established its allegation that the State violated Article 3 of the Contract by prohibiting covered employees from circulating a petition during non-work time and in non-working areas of the Veterans' Home. . .
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> . . . (W)e conclude that the State did not violate Article 3, Section 6, of the Contract by prohibiting covered employees from circulating a petition during non-work time and in non-working areas of the Vermont Veterans Home.
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> We disagree with VSEA that this interpretation of the Contract itself interferes with, or limits, VSEA members' protected rights. Instead, we simply conclude that the Contract does not cover the petitioning engaged in by VSEA at the Veterans' Home. The rights of VSEA and employees to engage in such petitioning would be adjudicated through the unfair labor practice provisions of SELRA. As already discussed, VSEA has not filed a timely unfair labor practice charge, leaving us without adjudicatory jurisdiction in the matter. 33 VLRB 448-450, 452.

The parties in this grievance decision were the same as in the pending unfair labor practice case: VSEA and the State, including the Veterans' Home. Both cases concern the two no-solicitation policies in the State Personnel Policies Manual and the Veterans' Home Personnel Policies Manual that have been in place many years, and their effect on the employees' right to engage in concerted activities. Thus, they involve the same subject matter. The essential cause of action is the same in both cases as the same evidence on the two no-solicitation policies would support the action in both instances. The unity of parties, subject matter and cause of action in both cases is illustrated by the following excerpt from page 23 of the post-hearing brief of VSEA in the grievance case when discussing the provisions of the two no-solicitation policies:

> . . . (B)oth of these identical statements of rule or policy exempt solicitation that is: "otherwise permitted by law or State building rules." This exclusion would seem to answer the question: since the union solicitation is protected by SELRA and permitted by agreement, it is not prohibited by either document. While the statements are imperfect, the end result is the same: VSEA can lawfully solicit its members on State property during non-working hours.
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> If SELRA and the contract were not exempted, however, this policy or rule would be illegal as written and applied. The exemption for solicitation that is "otherwise permitted by law or State building rules" does not provide explicit notice to employees that they may engage in solicitation related to protected concerted activity or self-organization on non-work time and in non-patient areas. Moreover, this policy is explicitly discriminatory, in that it permits certain forms of solicitation but does not explicitly permit union solicitation. . . This policy is facially discriminatory, and therefore violates SELRA.

The subject matter and cause of action covered by VSEA in this grievance post-hearing brief of the effect of the no-solicitation policies on the employees' right to engage in concerted activities, including whether the policies are facially discriminatory on employees' concerted activity rights, are the same as raised in the pending unfair labor practice charge.

In its response to the State's answer to the unfair labor practice charge, VSEA makes the following statement in support of its contention that the charge should not be dismissed on *res judicata* grounds: "Had (VSEA) filed a separate unfair labor practice (charge) at the time it filed the grievance, the charge would most likely have been deferred to the grievance process." VSEA misreads our precedents in making this statement. The Board has deferred to the grievance procedure in lieu of issuing an unfair labor practice complaint 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). Winooski Police Employees' Association v. City of Winooski, 28 VLRB 102 (2005).

International Union of Public Employees, Hartford Police Union v. Town of Hartford, 32 VLRB 357, 361 (2013).

As stated in the excerpt from the Board grievance decision set forth above, our adjudicatory jurisdiction to decide grievances precluded the Board from addressing VSEA's claim in the grievance that the State interfered with, restrained and coerced employees engaged in concerted activity protected by Sections 903(a) and 961(1) of SELRA, since Sections 903(a) and 961(1) were not incorporated into any provision of the Contract or any rule or regulation cited by VSEA to have been violated in the grievance. Thus, the Board would not have deferred the unfair labor practice charge to the grievance procedure because the right of employees to engage in concerted activity did not involve the interpretation of a collective bargaining agreement and employees did not have an adequate redress for the alleged wrongs through the grievance procedure.

VSEA asserts that its unfair labor practice charge is not barred as *res judicata* because the no-solicitation policies' legality under SELRA was never decided by the Board in the earlier grievance. VSEA is correct that the Board never decided the policies' legality under SELRA. However, this does not mean the charge may not be dismissed on *res judicata* grounds. As discussed above, the doctrine of *res judicata* bars a party from subsequent litigation of not only those claims and issues that were previously litigated, but also those that could have been litigated in a prior action. VSEA could have had the policies' legality under SELRA adjudicated by the Board by filing an unfair labor practice charge along with the earlier grievance. In failing to do so, VSEA is now barred on *res judicata* grounds from prevailing on the pending unfair labor practice charge. Our conclusion makes it unnecessary to decide the question whether the charge should be dismissed as untimely filed.

We stress that our conclusion does not diminish the ability of VSEA and employees to protect the fundamentally important right provided by SELRA to engage in concerted activities. It is true that the way VSEA has proceeded has precluded a valid challenge to the policies on their face without evidence of enforcement. Nonetheless, VSEA and employees can challenge the policies as applied by the State and the Veterans' Home where there is a new case or controversy where the policies are relied on to restrict alleged new circumstances and protected concerted activities. VSEA and employees may do so by filing an unfair labor practice charge under SELRA's 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 the Vermont State Employees' Association in this matter is dismissed.

Dated this 11th day of August, 2016, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD
/s/ Gary F. Karnedy

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Gary F. Karnedy, Chairperson
/s/ Richard W. Park

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Richard W. Park
/s/ James C. Kiehle

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James C. Kiehle
/s/ Alan Willard

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Alan Willard
/s/ Edward W. Clark, Jr.

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Edward W. Clark, Jr.
/s/ Robert Greemore

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Robert Greemore