VERMONT LABOR RELATIONS BOARD

VERMONT STATE EMPLOYEES' ASSOCIATION	)	
v.	)	DOCKET NO. 14-03
STATE OF VERMONT (RE: DEPARTMENT OF FINANCE & MANAGEMENT POSITIONS	)	

MEMORANDUM AND ORDER

The Vermont State Employees' Association ("VSEA") filed an unfair labor practice charge on January 10, 2014, contending that the State of Vermont ("State") has refused to bargain collectively in good faith in violation of 3 V.S.A. §961(5), and derivatively of 3 V.S.A. §961(1) and §961(3), by unilaterally removing thirteen of the thirty-one Department of Finance & Management ("DFM") positions from the Non-Management and Supervisory Bargaining Units represented by VSEA.

In addition to this unfair labor practice charge, VSEA also filed on January 10, 2014, two designation disputes, Docket Nos. 14-06 and 14-07. These contest the actions of the State Department of Human Resources designating the thirteen Department of Finance and Management positions at issue in this unfair labor practice case as confidential employees.

The State filed a response to the unfair labor practice charge on February 20, 2014. The State contends that the re-designation of the thirteen Department of Finance and Management positions should be handled through the designation disputes filed in Docket Nos. 14-06 and 14-07, and that the Board should dismiss the unfair labor practice charge.

Timothy Noonan, Labor Relations Board Executive Director, met with VSEA Attorney Vivian Schmitter, VSEA Director Mark Mitchell, and State Assistant Attorney General Marie Salem on March 19, 2014, in furtherance of the Labor Relations Board's investigation of this unfair labor practice charge and to informally attempt to resolve issues in dispute. Noonan provided VSEA with an opportunity to file a memorandum of law by March 28 on cases supporting its contention that a unilateral change to a bargaining unit constitutes an unfair labor practice, and gave the State an opportunity to file a responsive memorandum by April 4. VSEA filed a memorandum on March 28; the State did not file a responsive memorandum.

Factual Background

The following pertinent factual background for the purpose of deciding whether to issue an unfair labor practice complaint is based on materials filed by the parties and the information gathered during the March 19 investigative meeting in this matter.

VSEA has been the exclusive bargaining representative of state employees in the Non-Management Bargaining Unit and Supervisory Bargaining Unit at all times pertinent. In October of 2013, VSEA represented approximately 31 employees in the Department of Finance & Management ("DFM"). The employees were in either the Non-Management Unit or the Supervisory Unit.

On October 15, 2013, William Rose, Classification Analyst with the State Department of Human Resources, issued Notices of Classification Action changing the designations of thirteen of the 31 DFM employees from inclusion in the Non-Management or Supervisory Unit to exclusion from any bargaining unit as confidential employees. The effective date of the actions was indicated as October 20, 2013. The

Notices of Classification Action provided: "An employee may appeal a change in management level designation and/or bargaining unit to the Vermont Labor Relations Board in accordance with the procedures of the Board." Attached to each Notice of Classification Action was a one-page document summarizing the reasons why the designation of the position was changed to confidential.

Pertinent Statutory and Rules Provisions

The State Employees Labor Relations Act[1] provides in pertinent part:

- §902(5) - "State employee" means any individual employed on a permanent or limited status basis by the State of Vermont . . . but excluding an individual:
  . . .
  (I) Employed in the Department of Finance and Management as budget and management analyst, a revenue research analyst, director of budget and management operations, director of program formulation and evaluation, and director of state information systems;
  . . .
  (K) Employed as a confidential employee.

- §902(17) – "Confidential employee" means an individual finally determined by the Board as having responsibility or knowledge or access to information relating to collective bargaining, personnel administration or budgetary matters that would make membership in or representation by an employee organization incompatible with the employee's official duties.

- §906 – The commissioner of human resources shall determine those positions in the classified service whose incumbents the commissioner believes should be designated as managerial, supervisory or confidential employees. Any disputes arising therefrom shall be finally resolved by the board.

- §961 – It shall be an unfair labor practice for an employer:
  (1) To interfere with, restrain or coerce employees in the exercise of their rights guaranteed by section 903 of this title, or by any other law, rule or regulation.
  . .
  (3) By discrimination in regard to hire and tenure of employment or any term or condition of employment to encourage or discourage membership in any employee organization.
  . . .

[1] 3 V.S.A. §§901 – 1008.

> (5) To refuse to bargain collectively with representatives of the employees subject to the provisions of subchapter 3 of this chapter.
> . . .

Section 15.1 of Labor Relations Board *Rules of Practice* provides:

> Any disputes arising from the designation of positions in the classified service by the commissioner of human resources as managerial, supervisory, confidential or non-management pursuant to 3 V.S.A. §906 shall be filed by the involved employee, if any, or exclusive bargaining representative with the Board within 30 days after receipt by the involved employee, if any, or exclusive bargaining representative(s) of notice of such designation, by the commissioner of human resources and notice of the right to appeal the designation to the Board.

Discussion

The Board has discretion whether to issue an unfair labor complaint and hold a hearing on a charge.[2] 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.[3] In determining whether to issue an unfair labor practice complaint, we view the pertinent factual background in the light most favorable to charging party VSEA.

VSEA contends that the State has refused to bargain collectively in good faith in violation of 3 V.S.A. §961(5), and derivatively of 3 V.S.A. §961(1) and §961(3), by unilaterally removing thirteen of the thirty-one Department of Finance & Management positions from the bargaining units represented by VSEA. VSEA is not claiming that the parties have to engage in bargaining over the composition of the unit. Instead, VSEA is asserting that the state committed unfair labor practices by unilaterally removing 42% of DFM positions from VSEA-represented bargaining units without notice to VSEA and

[2] 3 V.S.A. §965(a).
[3] Burke Board of School Directors v. Caledonia North Education Association, 17 VLRB 187 (1994).

without approval from the Board. VSEA indicated that such mass unilateral removal of positions could result in significant erosion of bargaining units.

The State contends to the contrary that there is no actionable unfair labor practice case here; that instead what is involved is a designation dispute pursuant to 3 V.S.A. §906. The State asserts that this matter is controlled by §906 and any attempt by VSEA to turn this designation dispute into an unfair labor practice should be denied.

Employers and unions have no obligation to bargain with each other over the bargaining unit placement of positions. An issue concerning the construction of an appropriate bargaining unit so as to exclude certain members from that unit is not a mandatory subject of bargaining.[4] The composition of a bargaining unit is for the Labor Relations Board to decide if the parties are in disagreement.[5]

VSEA has cited a number of National Labor Relations Board ("NLRB") and federal appeals court decisions standing for the proposition that once a specific job has been included within the scope of a bargaining unit by either Board action or consent of the parties, the employer cannot unilaterally remove that position from the bargaining unit without first securing the consent of the union or the Board. The general thrust of these cases is supported in VLRB precedents. The Board stated in a Vermont State Colleges case:

> Clearly, unilateral alteration of the composition of a bargaining unit violates §961(5) of the State Employees Labor Relations Act. This is so because §961(5) makes it an unfair labor practice for an employer to "refuse to bargain collectively with representatives of employees subject to the provisions of (§941) of this chapter", and §941 provides that a representative chosen by a majority of

[4] Rutland School Chapter, AFSCME Local 1201, Council 93 v. Board of Education of the City of Rutland, 17 VLRB 348, 351 (1994). AFSCME Local 490 v. Town of Bennington, 6 VLRB 88, 97 (1983).
[5] Id.

employees "shall be the exclusive bargaining representative of all employees in such unit . . ."[6]

In the State Colleges case, the Colleges had unilaterally placed two new positions in the Johnson State College library outside the faculty bargaining unit represented by the union. The union contended these positions were "ranked librarians" within the meaning of the faculty bargaining unit definition of "full-time faculty and ranked librarians". The Board majority ultimately concluded that the two positions were not "ranked librarians" and dismissed the unfair labor practice complaint.[7]

In a case arising under the Municipal Employee Relations Act, the Board concluded that a municipal employer committed an unfair labor practice by insisting on excluding an employee from the coverage of a collective bargaining contract even though the Board had placed the employee in the bargaining unit and had taken no action to remove the position from the unit. In reaching this decision, the Board relied on precedents of federal appeals courts holding that employers violated their duty to bargain in good faith by insisting on a change in a NLRB-established bargaining unit during contract negotiations over the objection of the other party.[8]

There are distinctions between these VLRB, NLRB and federal appeals court decisions and the case now before the Board. None of these cases were decided with a similar statutory scheme as is set forth in Sections 902 and 906 of the State Employees Labor Relations Act. Also, these VLRB, NLRB and federal appeals court decisions are premised on the employer unilaterally altering, or improperly insisting on altering, a

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[6] Vermont State Colleges Faculty Federation, AFT Local 3180, AFL-CIO v. Vermont State Colleges, 9 VLRB 236 (1986).
[7] Id.
[8] American Federation of State, County and Municipal Employees, Local 490 v. Town of Bennington, 6 VLRB 88 (1993).

Board-established bargaining unit. Given the statutory scheme of the State Employees Act, there needs to be more nuanced consideration of the issue of whether unilateral employer action is involved when designation decisions are made in state government.

In seeking issuance of an unfair labor practice complaint, VSEA is proceeding differently than it did in the recent State Police Lieutenants case. In that case, which VSEA filed as a designation dispute, the Board in an August 2012 decision reversed a decision by the State Department of Human Resources ("DHR") changing the designation of 28 State Police Lieutenants from supervisory employees to managerial employees. The Board held that they are supervisory employees, ordered that they remain in the Supervisory Unit represented by VSEA, and ordered that the Lieutenants be "made whole for all losses they sustained as a result of the designation".[9] The Board ordered specifically that the Lieutenants "shall be retroactively credited and restored all rights, compensation, benefits and other privileges lost as a result of the designation, including interest on such losses".[10] VSEA contends that this case differs from the Lieutenants case because there was a much higher percentage of DFM positions removed from bargaining units than Department of Public Safety employees removed from units in the Lieutenants case.

The use of the designation dispute route in the Lieutenants case is consistent with historical practice in Board jurisprudence involving changes in bargaining unit status in state government initiated by the Department of Human Resources: 1) the Commissioner of Human Resources designates positions in the classified service as managerial,

[9] Vermont Department of Public Safety Designation Dispute (Re: State Police Lieutenants), 32 VLRB 145 (2012).
[10] Id. at 177.

supervisory, confidential or non-management pursuant to 3 V.S.A. §906; 2) any disputes concerning these designations are filed by the involved employee, if any, or exclusive bargaining representative with the Board within 30 days; and 3) the Board finally decides the appropriate designation of positions after a hearing on the merits. This process has been followed in numerous cases over the years involving as many employees as the Lieutenants case and as few as one employee.

We are not inclined to diverge from this historical practice here. The practice is consistent with the statutory scheme set forth in the State Employees Labor Relations Act. This is not an appropriate case to exercise our discretion to issue an unfair labor practice complaint. VSEA has not set forth sufficient factual allegations considering the practice and the statutory scheme for the Board to conclude that the State may have committed an unfair labor practice

The appropriate designation of the 13 Department of Finance and Management positions at issue can be finally determined by the Board after a hearing on the pending designation disputes in Docket Nos. 14-06 and 14-07. Where the Commissioner of Human Resources seeks to exclude individuals from a bargaining unit and collective bargaining rights, a considerable amount of evidence must be advanced to warrant such exclusion.[11] The State must demonstrate by a preponderance of the evidence presented in a developed record that these individuals are confidential employees as defined in the

[11] Id. at 171. Agency of Transportation Designation Dispute (Re: Transportation Senior Planner), 17 VLRB 135, 141 (1994).

State Employees Labor Relations Act.[12] This provides a just process for a final determination on the proper designations of the positions.

There is an issue which has surfaced in this unfair labor practice matter concerning the point at which the designation of a position actually changes which should be addressed when the Board considers the designation disputes in Docket Nos. 14-06 and 14-07. The Notices of Action issued by the Department of Human Resources on October 15, 2013, with respect to the 13 positions stated that the effective date of the actions was October 20, 2013, five days after the notice. This effective date was selected instead of: 1) such actions becoming effective at the time the 30 day period for appealing the DHR decision to the Board expires without an appeal being filed; or 2) if an appeal is filed, the bargaining unit status of the involved position remains the same as it was before the DHR decision pending the final decision of the Board.

We expect the parties in the pending designation disputes to address the appropriate time the designations become effective in light of the provisions of the State Employees Labor Relations Act which bear on the issue. Section 902(17) provides: "Confidential employee" means an individual finally determined by the Board as having responsibility or knowledge or access to information relating to collective bargaining, personnel administration or budgetary matters . . ." Section 906 provides that any disputes arising from designation decisions of the Commissioner of Human Resources "shall be finally resolved by the board". These provisions placing final determination of designation matters with the Board present the question of when the effective date of a

[12] Vermont Department of Public Safety Designation Dispute (Re: State Police Lieutenants), 32 VLRB at 171. Designation of Calderara, 10 VLRB 261 (1987). Department of Public Safety Designation Disputes, 5 VLRB 141 (1982). Vermont State Hospital Designation Disputes, 5 VLRB 60 (1982).

designation change occurs in cases like the ones before us – i.e., when the Commissioner of Human Resources makes a decision to change the designation of a position and that decision may be, or is, subject to a dispute filed with the Board.

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 24th day of April, 2014, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Richard W. Park

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Richard W. Park, Chairperson

/s/ James C. Kiehle

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James C. Kiehle

/s/ Gary F. Karnedy

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Gary F. Karnedy