

VERMONT LABOR RELATIONS BOARD

MICHAEL DAVIDSON

v.

VERMONT STATE EMPLOYEES'
ASSOCIATION

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DOCKET NO. 14-16

MEMORANDUM AND ORDER

On March 11, 2014, Michael Davidson filed an unfair labor practice charge against the Vermont State Employees' Association ("VSEA"). Davidson alleges that the VSEA has committed unfair labor practices in violation of §903(a) and §962(1) of the State Employees Labor Relations Act, 3 V.S.A. § 901 *et seq.*, by declining to represent him in a grievance before the Labor Relations Board and through the process which it followed in making that decision. §962(1) provides that it shall be an unfair labor practice for an employee organization "to restrain or coerce employees in the exercise of the rights guaranteed to them by law, rule, or regulation." §903)(a) provides in pertinent part that "employees shall have the right to . . . appeal grievances as provided in this chapter."

Specifically, Davidson alleges that the VSEA committed unfair labor practices because: 1) VSEA has failed to exert every reasonable effort to defend the provision of the collective bargaining agreement at issue in a grievance Davidson has against the State; 2) VSEA has violated his due process rights; 3) VSEA has arbitrarily and in bad faith denied him financial support for his meritorious grievance; 4) VSEA has failed to follow established procedures in processing his grievance; and 5) VSEA has provided inadequate representation through its staff providing false information to him and restraining his rights to have fair and equitable representation.

VSEA contended in a response to the charge which it filed on April 1, 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 abused the broad discretion granted it to determine whether to participate in a grievance before the Labor Relations Board inasmuch as VSEA followed its standard procedures and acted within the requisite range of reasonableness. Davidson filed a reply to VSEA's response on April 24, 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 and other Department of Liquor Control employees sought assistance from VSEA in filing a grievance over alleged inequitable distribution of overtime opportunities. VSEA filed a grievance on behalf of the employees, and represented them, at Steps I, II and III of the grievance procedure. The Department of Liquor Control denied the grievance at Steps I and II, and the Department of Human Resources denied the grievance at Step III

on November 21, 2013. Davidson received notification of the Step III decision on November 25, 2013, from VSEA Field Representative Kelly Burns.

Davidson and other employees requested that VSEA provide representation of them in a Step IV grievance before the Labor Relations Board. Davidson sought information from Burns on the process for filing a Step IV grievance, and told Burns that he would like to provide input during the process. VSEA considered whether to represent Davidson and other employees pursuant to VSEA Policy #10-A. Policy #10-A provides in pertinent part as follows:

...
POLICY

...
2. Legal Counsel

VSEA shall employ at least one full-time, attorney licensed to practice law in the State of Vermont, to serve as Legal Counsel. VSEA's Legal Counsel shall be responsible for providing legal assistance and advice to VSEA on matters related to legislation, and representation to grievants before the Vermont Labor Relations Board, the Vermont Supreme Court, and any other appropriate forum, in accordance with this policy. . .

...
PROCEDURES TO BE FOLLOWED FOR LEGAL ASSISTANCE REVIEW:

1. STAFF ASSISTANCE REVIEW.

A. Requests for Legal Assistance.

Legal Assistance is provided in accordance with this policy to the members . . . of VSEA's bargaining units before the Vermont Labor Relations Board . . . Members . . . who desire legal assistance on matters related to their employment may submit a request for legal assistance to their field representative. The field representative shall process the request for legal assistance and submit it to members of the Staff Legal Assistance Committee, as provided for in this policy.

B. Staff Legal Assistance Committee.

There shall be a Staff Legal Assistance Committee composed of the VSEA President, General Counsel, and any other staff attorney(s), and the

VSEA Director. The Staff Legal Assistance Committee shall meet as necessary to review requests for legal assistance with the field representative who processed the request. The Staff Legal Assistance Committee shall approve or reject a request for legal assistance on the basis of whether there is a reasonable likelihood of prevailing on the merits. If the committee approves a request for legal assistance, Legal Counsel will provide such assistance in conformity with this policy. Legal Counsel will provide the Board of Trustees with a report of all approved requests for legal assistance. If the Committee rejects a request for legal assistance, Legal Counsel will notify the employee requesting such assistance of his/her rights pursuant to Section 2 B of these Procedures.

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2. BOARD OF TRUSTEES LEGAL ASSISTANCE REVIEW COMMITTEE

A. Composition.

The President shall appoint three members of the Board of Trustees to serve on the Board of Trustees Legal Assistance Review Committee.

B. Procedure.

If the Staff Legal Assistance Committee denies a request for legal assistance, the employee requesting such assistance will have the right to appeal the decision to the Board of Trustees Legal Assistance Review Committee. The Committee will meet as required on a case-by-case basis with Legal Counsel and the employee requesting assistance to review the case. Legal Counsel will present an analysis of the case and recommendations to the Committee. The Committee will decide on a recommended course of action and communicate that recommendation to Legal Counsel. Thereafter, the Committee will submit a written report of its deliberation, including its recommendation, to the Board of Trustees. The Board of Trustees shall have the authority to approve or reject a request for legal assistance in accordance with this policy, provided that it conforms with Legal Counsel's professional responsibility.

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3. SCOPE OF REPRESENTATION

The Board of Trustees recognizes that filing deadlines may expire during the course of the review process provided for in this policy. Accordingly, the Board adopts the following guidelines.

A. Vermont Labor Relations Board

When in the opinion of Legal Counsel, the deadline for filing a grievance before the VLRB may expire during the review process set forth in Procedures Sections 1 or 2 of this policy, Legal Counsel may, with the approval of the Staff Legal Assistance Committee, prepare the grievance which will be signed by the grievant. VSEA will assure that the grievance is properly prepared and filed.

...
(Attachment A to VSEA response to charge)

The VSEA Staff Legal Assistance Committee met on November 22, 2013, to decide whether to provide legal representation to Davidson and the other employees for a Step IV grievance before the Labor Relations Board. They met before Davidson had received a copy of the Step III decision on the grievance. Field Representative Kelly Burns, who had represented Davidson and the other employees, presented a request for legal assistance for them to the Committee. VSEA Assistant General Counsel Vivian Schmitter and VSEA Attorney Rebecca McBroom were among the participants in the Staff Legal Assistance Committee process. McBroom is licensed to practice law in Vermont. At all times relevant, Schmitter was not licensed to practice law in Vermont. She was appropriately providing legal services in Vermont pursuant to Rule 5.5(d)(1) of the Vermont Rules of Professional Conduct, which provides: “A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that: 1) are provided to the lawyer’s employer or its organizational affiliates and are not services for which the forum requires *pro hac vice* admission . . .” *Pro hac vice* admission provides for an out-of-state lawyer to be admitted to practice in a local jurisdiction only for a particular case. The Board is not a forum which requires *pro hac vice* admission.

Schmitter informed Davidson and other grievants by letter dated November 25, 2013, that the VSEA Staff Legal Assistance Committee had met recently, and had

“determined that your case does not have a reasonable likelihood of success at the Vermont Labor Relations Board. Therefore, VSEA will not provide legal representation at the Board for this grievance matter.” Schmitter informed Davidson that he had “the right to appeal the decision of the VSEA Staff Legal Assistance Committee to the VSEA Board of Trustees Legal Assistance Review Committee”. Schmitter further indicated to Davidson that an appeal to VSEA Board of Trustees Legal Assistance Review Committee “does not extend your deadline for filing a grievance with the VLRB”, and that he was required to “file a grievance with the VLRB on or before 30 days from the Step III grievance decision to preserve your right to proceed” (Attachment B to VSEA response to charge).

Schmitter mailed the letter dated November 25, 2013, to Davidson by certified mail on November 25, 2013 to his Castleton, Vermont, home mailing address. The U.S. Postal Service left a notice for Davidson on November 27, 2013, of the certified mail. Davidson did not retrieve the November 25 letter from the post office until December 7, 2013 (Attachment C to VSEA response to charge).

On December 9, 2013, Davidson filed an appeal of the VSEA Staff Legal Assistance Committee decision not to represent him to the VSEA Board of Trustees Legal Assistance Review Committee. He indicated that he was filing the appeal “(o)n behalf of myself, and some co-workers” (Attachment D to VSEA response to charge).

On December 20, 2013, Davidson and other Department of Liquor Control employees filed a grievance on their own behalf with the Labor Relations Board contending that the employer violated the collective bargaining contract by inequitably

distributing overtime opportunities. Schmitter provided assistance to the employees in preparing this grievance (Attachments E and F to VSEA response to charge).

Davidson met with the VSEA Board of Trustees Legal Assistance Review Committee on January 10, 2014, from approximately noon to 12:45 p.m. VSEA President Shelly Martin appointed three members of the Board of Trustees to comprise the Committee. Martin served as chairperson of the Committee meeting. VSEA Assistant General Counsel Vivian Schmitter provided a verbal summary of the VSEA Staff Legal Assistance Committee decision to not provide representation on the Step IV grievance. VSEA Director Mark Mitchell and Field Representative Burns also were present at the meeting. Davidson expressed concern during the meeting that the Staff Legal Assistance Committee process was improper because the lead attorney on the case, Vivian Schmitter, was not licensed to practice law in Vermont. Davidson asserted this was in violation of VSEA Policy #10-A. Martin rejected this assertion and continued with the meeting. Davidson had the opportunity during the meeting to state his position and present documentation concerning his request for VSEA legal assistance in the Step IV grievance (Attachment G to VSEA response to charge).

The Legal Assistance Review Committee made a written report to the VSEA Board of Trustees, and recommended that VSEA not represent Davidson and the other employees in the grievance. The Board of Trustees made the decision that VSEA would not represent Davidson and the other employees at a February 14, 2014, Board meeting.

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 VSEA has failed to fairly represent him in declining to represent him in a grievance filed with the Board and through the process which it followed in making that decision. In determining whether VSEA may have committed unfair labor practices when it declined to represent Davidson in his grievance pending before the Board, we consider whether VSEA violated its duty of fair representation. Although the State Employees Labor Relations Act does not contain an explicit duty of fair representation, a union's status as exclusive bargaining representative is the source of such a duty. Vaca v. Sipes, 386 U.S. 171, 177 (1967). Alexander v. VSEA, 32 VLRB 31, 38 (2012). Ilges v. Burlington Area Public Employees Union, Local 1343, AFSCME, AFL-CIO, 11 VLRB 235, 239 (1988).

A union has a duty to fairly and equitably represent all employees in the bargaining unit and a breach of that duty would be an unfair labor practice. Wilson v. Williamstown Staff Association, 14 VLRB 197, 200 (1991). A 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. Ilges, 11 VLRB at 239. This duty extends to both the negotiations for a contract and the enforcement of the contract provisions. Id.

When an allegation is made that a union has not fairly represented employees in handling grievances, the following standards provide guidance in determining whether an unfair labor practice has occurred: 1) an individual employee does not have the absolute right to have his or her grievance taken to arbitration, 2) a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion, 3) a union must engage in more than mere negligence to violate its duty of fair representation. Alexander v. VSEA, 32 VLRB at 39. Duran v. IBEW Local 300, 19 VLRB 256 (1996). Ploof v. Village of Enosburg Falls, 147 Vt. 196, 201 (1986).

Also, a union's grievance handling is lawful where, in denying a grievance, established procedures are followed and these procedures fall within the wide range of reasonableness afforded a union representative. Alexander v. VSEA, 32 VLRB at 39-40. A union's duty of fair representation does not require it to process a frivolous appeal, Ploof, 147 Vt. at 201; and a union need not process an employee's grievance if the chances for success are slight. Alexander v. VSEA, 32 VLRB at 39. Further, in generally assessing a union's duty of fair representation, it is recognized that union discretion is essential to the proper functioning of the collective bargaining system. Alexander v. VSEA, 32 VLRB at 39.

Davidson contends that VSEA first provided inadequate representation to him when VSEA Field Representative Kelly Burns provided false information to him on November 25 by informing him that she would prepare a legal assistance form to be used by the Staff Legal Assistance Committee in determining whether VSEA would represent him in a Step IV grievance before the Labor Relations Board when the Legal Assistance Committee already had met 3 days earlier and decided that VSEA would not represent

Davidson and other employees in the Step IV grievance. Davidson contends that he thereby was denied input into the review process in direct contravention of established VSEA policy and restrained in his rights to have fair and equitable representation.

We disagree that Davidson was denied input into the review process in contravention of established VSEA policy in this regard. VSEA Policy #10-A provides in pertinent part:

Members . . . who desire legal assistance on matters related to their employment may submit a request for legal assistance to their field representative. The field representative shall process the request for legal assistance and submit it to members of the Staff Legal Assistance Committee. . . The Staff Legal Assistance Committee shall meet as necessary to review requests for legal assistance with the field representative who processed the request. The Staff Legal Assistance Committee shall approve or reject a request for legal assistance on the basis of whether there is a reasonable likelihood of prevailing on the merits.

The Committee acted in conformance with this policy by meeting with Burns in the absence of Davidson and other employees on the request for legal assistance, and after reviewing the matter, determining there was not a reasonable likelihood of prevailing on the merits. The policy does not require input from aggrieved employees at this stage of the process. This procedure followed by VSEA in this matter falls within the wide range of reasonableness afforded a union representative. The Staff Legal Assistance Committee had the benefit of three previous steps of the grievance procedure to inform it of the merits of the grievance. The Committee consisted of individuals with high levels of responsibility with VSEA – the President, Director and VSEA attorneys. It was not unreasonable for such a key group with pertinent information to determine the likelihood of success on the merits without the input at this point from aggrieved employees.

Davidson has not demonstrated that his communication with VSEA Field Representative Burns on November 25 interfered with his right to fair representation.

Although Davidson sought input into the process at the Staff Legal Assistance Committee stage of review, Burns did not inform him that he would have input and such input was not required. Although it is unclear why Burns did not inform Davidson on November 25 that the Staff Legal Assistance Committee already had met on his grievance on November 22, this did not prejudice Davidson's rights as Burns had presented the request of Davidson and other employees for legal assistance on their Step IV grievance and VSEA policy was followed in considering the request.

Davidson contends that VSEA further violated its policies by not producing a document presented by Burns to the Staff Legal Assistance Committee in support of the request for legal assistance. Davidson contends that this violated the provision of Policy #10-A requiring that the "field representative shall process the request for legal assistance and submit it to members of the Staff Legal Assistance Committee". We disagree with Davidson that this requires preparation of a written document by the field representative. Here, there is no evidence that Burns prepared such a document. We conclude that she processed the request for legal assistance and submitted it consistent with this policy by verbally presenting a request for legal assistance for Davidson and the other employees to the Committee.

Davidson contends that VSEA further violated its policies and interfered with his rights during the subsequent proceedings of the Board of Trustees Legal Assistance Review Committee to which Davidson had appealed the Staff Legal Assistance Committee decision. Specifically, Davidson asserts the following deficiencies: 1) VSEA President Martin refused to allow employees other than Davidson to be present at the January 10 meeting of the Committee; 2) President Martin rejected Davidson's objections

to the absence at the meeting of “Legal Counsel” as defined in Policy #10-A; and 3) President Martin imposed an arbitrary and unreasonable time constraint of 45 minutes on the meeting.

Any exclusion of other employees from the meeting does not further our inquiry as to whether the rights of Davidson to fair representation were violated in this matter. Davidson is the only charging party in this matter and he indisputably was allowed to address the Committee and present documentation during the January 10 meeting. He does not have standing to claim other employees’ rights were allegedly violated under such circumstances. Also, he has not presented specific factual allegations indicating the exclusion of the employees interfered with his presentation before the Committee.

Davidson’s contention that the Staff Legal Assistance Committee process was improper is based on the fact that VSEA’s lead attorney on the case, Vivian Schmitter, was not licensed to practice law in Vermont. However, Schmitter was appropriately providing legal services in Vermont pursuant to Rule 5.5(d)(1) of the Vermont Rules of Professional Conduct, which provides that a lawyer admitted in another United States jurisdiction may provide legal services in Vermont if they are provided to the lawyer’s employer and are not services for which the forum requires *pro hac vice* admission. *Pro hac vice* admission provides for an out-of-state lawyer to be admitted to practice in a local jurisdiction only for a particular case. The Board is not a forum which requires *pro hac vice* admission.

This means that Schmitter was able to represent employees in grievances before the Board. This allowed her to advise the VSEA Legal Assistance Review Committee on the interpretation of the collective bargaining agreement at issue before the Board in

grievances and the likelihood of success on the merits of a grievance. Although the definition of “Legal Counsel” in VSEA Policy #10-A is somewhat ambiguous, Schmitter was able to provide legal services with respect to grievances before the Board and thereby complied with the policy in substance.

The rights of Davidson were not prejudiced under these circumstances by Schmitter acting as lead attorney before the Committee on whether VSEA should represent Davidson and other employees before the Board. Moreover, VSEA employed another attorney licensed to practice law in Vermont if the need arose in this grievance. Davidson has not demonstrated such a need with respect to his grievance.

We also conclude that Davidson has not presented sufficient factual allegations to demonstrate that his due process rights may have been violated by the length of the December 10 meeting. Davidson had the opportunity to make a presentation and present documentation to the Committee on his position concerning VSEA providing legal assistance to him in the Step IV grievance before the Board. He has failed to state what specific information he was unable to impart to the Committee because of the allegedly foreshortened time period.

Grievant further contends generally that VSEA otherwise failed in its duty to fairly represent him in deciding to not provide legal assistance to him in a Step IV grievance before the Labor Relations Board. He has failed to present sufficient factual allegations to support issuance of an unfair labor practice complaint in this regard.

He has not demonstrated that VSEA arbitrarily ignored his grievance and processed it in a perfunctory fashion. The VSEA Staff Legal Assistance Committee, consisting of its legal staff as well as President and Director, met with the field

representative handling the grievance after three steps of the grievance procedure to discuss the details of the grievance, and determined that the grievance did not have a reasonable likelihood of success on the merits. VSEA notified Davidson and the other employees of the right to appeal this determination to the VSEA Legal Assistance Review Committee, and also assisted him in preparing the grievance to be filed with the Board while the internal review process was pending. Davidson availed himself of the right to file the appeal, and was provided with the opportunity to make a presentation and provide documentation to the Legal Assistance Review Committee. The Committee then made a written recommendation to the VSEA Board of Trustees, which ultimately decided to not provide legal assistance to Davidson and other employees in the grievance before the Board.

VSEA substantively followed established procedures in reviewing whether to provide legal assistance to Davidson and these procedures fall within the wide range of reasonableness afforded a union representative. Davidson further has not demonstrated that VSEA may have acted unfairly, arbitrarily or in bad faith in exercising its essential discretion whether to provide such legal assistance.

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. 14-16 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