VERMONT LABOR RELATIONS BOARD

UNIFIED SCHOOL DISTRICT #36 BOARD OF SCHOOL DIRECTORS	)	
V.	)	DOCKET NO. 85-3
NORMAN BARTLETT and GREGORY ANDRUSCHKEVICH of VERMONT-NEA	)	

MEMORANDUM AND ORDER

On January 7, 1985, the Unified District #36 Board of School Directors ("School Board") filed an unfair labor practice charge against Norman Bartlett and Gregory Andruschkevich of Vermont-NEA ("Respondents"), alleging Respondents violated 21 VSA §1726(b). Respondents filed a response to the charge on January 28, 1985.

The substance of the School Board's charge is as follows: The School Board and its teachers, represented by Vermont-NEA, have reached an impasse in contract negotiations and have requested fact-finding pursuant to 16 VSA §2007. Norman Bartlett, a Vermont-NEA Uniserv Director in northern Vermont and representative of the teachers in bargaining, has named Gregory Andruschkevich, a Vermont-NEA Uniserv Director in southern Vermont, as the teachers' member on the fact-finding committee. Bartlett has discussed with Andruschkevich the issues involved, the position of the teachers on the issues and the identity of the third member of the fact-finding committee. All these communications have been made out of the presence of the representatives of the School Board. The School Board alleges the appointment of a Vermont-NEA employee as a fact-finder to the negotiations dispute and the communications between that member of the fact-finding committee and an advocate for the teachers out of the presence of the other party constitute unfair labor practices. The School Board requests Andruschkevich

be disqualified to serve on the fact-finding committe and that the Board issue an order restraining the parties from communicating with fact-finding committee members prior to the fact-finding hearing.

The issues raised by the School Board in its charge concern the composition and functions of a fact-finding panel formed pursuant to 16 VSA §2007(b), which provides:

> The fact-finding committee, which shall be activated as soon as practicable upon request, shall be composed of one member selected by the school board, one member selected by the negotiating organization, and one member who shall serve as chairman, to be chosen by the other two members. In the event that agreement cannot be reached on a third member for the fact-finding committee, the American Arbitration Association shall be asked to appoint the third member.

In essence, the School Board argues all three members of a fact-finding panel selected pursuant to 16 VSA §2007 must be impartial; that they sit as judges of a negotiations dispute and must be unprejudiced and unbiased. Respondents contend only the member chosen by the other two members acts as a neutral, and the procedure followed by Vermont-NEA here is the same as has been historically used in Vermont teacher negotiations.

In order to decide this issue and determine whether to issue an unfair labor practice complaint, it is necessary to review the purpose and structure of fact-finding as it has evolved in public sector labor relations. Fact-finding is one of the procedures established in the public sector to assist parties in resolving their negotiations disputes. The term "fact-finding" implies the process is limited to an objective determination of facts underlying a dispute. However, in practice it also involves an active effort to resolve the dispute. As stated by Thomas Kochan:

> Every discussion of fact-finding in the public sector has noted that the term is a misnomer. The fact-finding process involves more than the searching-out of the factual basis of parties' positions; it also involves an effort to identify an acceptable compromise settlement..(T)he effort to frame a recommendation that the parties will accept or use as the basis for negotiating an agreement captures the heart of the fact-finding process in the public sector.[1]

To accomplish these objectives, state legislatures have statutorily provided for fact-finding structures which follow one of two models: the "neutral" model or the "tripartite" model. The neutral model provides for the appointment of a single fact-finder who is neutral or a fact-finding panel that consists entirely of neutrals. The tripartite model provides for representatives of the employee organization and the employer in equal numbers serving on a panel with a neutral or neutrals.

The Taylor Law (enacted 1967), which governs public employment relations in the State of New York, follows the neutral model. In the event mediation is unsuccessful in resolving a dispute, it provides for the Public Employment Relations Board to "appoint a fact-finding board of not more than three members, each representative of the public, from a list of qualified persons maintained by the Board" to make public recommendations for the resolution of the dispute. Section 209(3)(b). When the Vermont Legislature enacted the Municipal Employee Relations Act in 1973, it too followed the neutral model, in providing that if mediation does not resolve an impasse, the commissioner of labor and industry "shall appoint a qualified factfinder." 21 VSA §1732(a). No provision is made for parties to appoint representatives to a fact-finding panel.

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1. Public Sector Bargaining, ed. by Benjamin Aaron, Joseph Grodin, James Stern (Industrial Relations Research Association Series, 1978, Bureau of National Affairs), Chapter 5, "Dynamics of Dispute Resolution in the Public Sector," Thomas Kochan, pg. 182-183.

However, when it enacted the Teachers Labor Relations Act in 1969, the Legislature opted for the tripartite model. It provided fact-finding would be conducted by a three member panel - one member selected by the school board, one member selected by the employee organization, and the third member, who would serve as chairperson, to be chosen by the other two members. 16 VSA §2007(b).

The very nature of the selection process mandated by the Legislature in §2007(b) indicates the Legislature did not intend the members selected by each party to act as neutrals. A person selected by one party with a vested interest in the outcome of negotiations, without the other party with a vested interest being involved, cannot be expected to act as an impartial and unbiased "judge" of the dispute. That function is served by the chairperson selected by the parties' representatives. If the Legislature intended the entire panel to be impartial, it could have followed the example of the Taylor Law enacted two years earlier and have an impartial person or agency select the fact-finding panel, as it did a few years later when it enacted the Municipal Act.

Accordingly, we reject the School Board's argument all members of a fact-finding panel must be impartial under the Teachers Act. We believe the Legislature intended each party has a right to appoint its representative to a fact-finding panel without that appointment being subject to the approval of the other party. If we accepted the School Board's argument, the parties would be constantly engaged in arguments over their appointees' neutrality.

We also reject the School Board's argument that communications between a party's representative on a fact-finding panel and advocates

of that party is an unfair labor practice. There is no indication in the Teachers Act the Legislature intended to prohibit such communication. Moreover, one of the fundamental purposes of a fact-finding panel is to make a recommendation that the parties will accept or use as the basis for reaching an agreement. 16 VSA §2007(c) and (d). Parties' representatives on a fact-finding panel, who have been briefed by their respective parties, have "inside" information which may be of great assistance in coming up with recommendations the parties will accept as a settlement of their dispute. In a discussion on the usefulness of tripartite panels in fact-finding and arbitration, the U.S. Department of Labor in its publication, Understanding Fact Finding and Interest Arbitration in the Public Sector (1980), pages 20-21, expressed it this way; which we find applicable here:

> Three member panels provide the parties with an additional "bite of the apple" by permitting the further pressing of claims at the executive sessions. They also provide an opportunity for the neutral to use mediation, although in executive session rather than with the parties' spokespersons, to seek a unanimous or even a majority award. The privacy of executive sessions frequently encourages the designees of the parties to "let their hair down" and honestly set forth their respective priorities. This, in turn, may lead to trade-offs and unanimous awards in disposing of a number of peripheral or petty issues that clog the machinery. Such trade-offs may be particularly crucial to the neutral with a middle ground position if there is a danger of not securing endorsement of the award by at least one of the parties.

Now therefore, based on the foregoing reasons, we decline to issue an unfair labor practice complaint and it is hereby ORDERED:

> The unfair labor practice charge filed by the Unified District #36 Board of School Directors on January 7, 1985, is DISMISSED.

Dated this 12th day of March, 1985.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney, Chairman

James S. Gibson