VERMONT LABOR RELATIONS BOARD

VERMONT STATE EMPLOYEES' ASSOCIATION	)	
	)	DOCKET NO. 88-49
v.	)	
STATE OF VERMONT	)	

MEMORANDUM AND ORDER

On October 17, 1988, the Vermont States Employees' Association ("VSEA") filed an unfair labor practice charge against the State of Vermont ("State"). VSEA alleges that the State has committed an unfair labor practice in violation of 3 VSA §961(1) and 3 VSA §903(c) in that it has failed and refused to maintain its agreement with respect to the authority of the Board to reduce disciplinary penalties. VSEA further alleges that the State committed an unfair labor practice in violation of 3 VSA §961(5) by bargaining in bad faith with respect to language in the 1988-90 Contract between the State and VSEA concerning the authority of the Board to reduce disciplinary penalties. The State filed a response to the charge on October 28, 1988.

In determining whether to exercise our discretion to issue an unfair labor practice complaint pursuant to 3 VSA §965(a), we first summarize the relevant background to the charge.

The collective bargaining agreement entered into by the State and VSEA, effective for the period July 1, 1984 to June 30, 1986, provided in pertinent part as follows:

> In any case involving a suspension or dismissal, should the Vermont Labor Relations Board find just cause for discipline, but determine that the penalty was inappropriate or excessive, the Vermont Labor Relations Board shall have the authority to impose a lesser form of discipline.

This identical language has been included in contracts negotiated by the parties succeeding the 1984-86 Contract. In Grievance of Sherman, 7 VLRB 380, decided on December 31, 1984, the Board for the first time interpreted this provision of the Contract. Therein, the the Board concluded that, given the pertinent history, it was evident the parties intended that the Board make an independent judgment whether a penalty imposed by management was "inappropriate or excessive". Id, at 398-404. The Board further concluded that, in so doing, the parties contracted that the Board would substitute its judgment for management and not simply ensure that management was exercising its discretion within tolerable limits of reasonableness. Id, at 404. In Sherman, the Board ultimately upheld the dismissal of the involved employee and no appeal was taken from that decision.

The Board applied this scope of review in disciplinary cases decided subsequent to Sherman, including Grievance of Gorruso, 9 VLRB 14 (1986), where the Board reduced the dismissal of a State correctional officer to a suspension. The State appealed that decision to the Vermont Supreme Court. On appeal, the State contended that the Board exceeded its statutory and contractual authority by substituting its judgment for that of the State in ordering the reinstatement of the correctional officer.

The Supreme Court, in its decision in Grievance of Gorruso, ___ Vt. ___, decided May 27, 1988, disagreed with the Board's interpretation of the disciplinary provisions of the Contract with respect to the Board's scope of review. The Court concluded that, although the Contract language does indeed give the Board the

authority to impose a lesser disciplinary penalty than that imposed by the State, the Board may exercise this power only after finding both that the State had just cause for disciplining the grievant, and that there was no just cause for the choice of discipline imposed by the State. Gorruso, supra. The Board may not arbitrarily substitute its judgment for that of the State and determine what is "inappropriate or excessive" discipline. Id.

In Gorruso, the Court cited with approval the following statement by the Board in Grievance of Colleran and Britt, 6 VLRB 235, 266 (1983), a case decided prior to the time the pertinent contract language became effective, with respect to the proper standard of review:

> The Board will not require that the employer prove by a preponderance of the evidence that its choice of discipline was proper. On this issue, the Board recognizes that a range of choices is available to the employer. If the State establishes management responsibly balanced the relevant factors in a particular case and struck a balance within tolerable limits of reasonableness, its penalty decision will be upheld. The Board will only alter the penalty selected by the employer if the employer imposes a penalty so severe, given the facts, that its choice amounts to an abuse of discretion.
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> To be sure, we are not to substitute our judgment concerning the appropriateness of the penalty for that of the employer. I assume what the Court meant in Goddard, although not fully articulated, is that it is an inherent management function to control and direct the work force, and a necessary attribute of that function is to exercise discipline. Accordingly, as long as the exercise of that function is reasonable it will be sustained. Management is thus given broad discretion in disciplinary matters. It is the Board's function only to assure that this discretion has been properly exercised within tolerable limits of reasonableness, i.e., "within the limits of law and contract".

In filing the unfair labor practice charge at issue herein, VSEA essentially contends that the State reneged on its contract with VSEA and committed an unfair labor practice by enlisting the aid of the Supreme Court to accomplish something it was unable to do at the

bargaining table; namely, to remove from the Board the contractually-agreed upon authority to reduce penalties and to restore the status quo ante with respect to the Board's authority.

Regardless of other issues raised in this matter by the State, including whether this charge was timely filed, we decline to issue an unfair labor practice complaint against the State for successfully pursuing an appeal to the Supreme Court. The Court agreed with the State's interpretation of the Contract language with respect to the Board's scope of review in disciplinary cases. The Board must accept the Court's conclusion as the final determination on that issue. Accordingly, we cannot conclude that the State was reneging on its agreement with VSEA in seeking to accomplish something it was unable to do at the bargaining table, given the Court's conclusion that the State's position is consistent with the Contract.

Now therefore, based on the foregoing reasons, the Labor Relations Board HEREBY declines to issue an unfair labor practice complaint and ORDERS this matter DISMISSED.

Dated this 1st day of December, 1988, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Charles H. McHugh, Chairman

William B. Kemsley, Sr.

Catherine L. Frank