VERMONT LABOR RELATIONS BOARD

VERMONT STATE COLLEGES FACULTY FEDERATION, AFT LOCAL 3180, AFL-CIO	)	DOCKET NO. 86-22
and	)	
VERMONT STATE COLLEGES	)	

MEMORANDUM AND ORDER

At issue is whether the Labor Relations Board should grant the Motion to Stay Certification and Order to Bargain filed by the Vermont State Colleges ("Colleges") on September 14, 1987. By such motion, the Colleges are seeking to stay, pending appeal, the Board Order of April 27, 1987, certifying the addition of certain adjunct faculty members employed by the Colleges to the bargaining unit of full-time faculty and ranked librarians and certifying the Vermont State Colleges Faculty Federation, AFT Local 3180, AFL-CIO ("Federation") as the exclusive bargaining representative of the adjunct faculty members. The Colleges have appealed the Board's April 27 Order to the Vermont Supreme Court. The Colleges are seeking on appeal to reverse the Board's determinations that the adjuncts are State employees and that they should be part of the full-time faculty bargaining unit.

The Federation filed a Memorandum In Opposition to Stay on October 7, 1987. Oral argument on the motion was heard December 4, 1987, before Board Members Charles H. McHugh, Chairman; Catherine Frank and Dinah Yessne. Attorney Nicholas DiGiovanni represented the Colleges. Attorney Michael Schein represented the Federation. The Board concludes, and the parties accept, that the Board's authority to rule on this motion resides in VRAP 1(a), 8(a) and 13.

The Colleges contend that to require bargaining with individuals who may not even qualify as employees or to require bargaining in a unit whose validity is being examined by the Supreme Court on appeal will not promote labor harmony, would be illogical and would cause irreparable harm to the Colleges. The Colleges offer several reasons for their position:

1) Bargaining forces the Colleges to expend extensive time, effort and public funds to bargain with a unit that may be struck down as unlawful.

2) There is the possibility of labor strife if such bargaining does not produce a satisfactory settlement for both full-time and adjunct faculty.

3) If bargaining takes place and tentative agreements are reached with the Federation, the Colleges will be substantially prejudiced if the unit is later declared invalid by the Court since if tentative agreements are invalidated by Court ruling, a tremendous frustration is likely to occur among adjuncts and insistence upon extending such agreements to them, even without the Federation, is a real likelihood.

4) No substantial prejudice results to the Federation by deferring bargaining until after the final Court decision.

5) The suspension of certification and bargaining orders during the pendency of an appeal on the unit issue is in line with private and state public sector labor laws elsewhere.

6) A suspension of the certification and order to bargain is appropriate because it preserves the status quo pending appeal.

On the other hand, the Federation contends that the proper focus here is not Federal precedent, but the standard which must be applied under Vermont law on stays pending appeal: 1) whether the party seeking the stay will suffer irreparable injury if the stay is not granted; 2) whether issuance of a stay will substantially harm other parties; and 3) where lie the best interests of the public. The Federation makes the following arguments in applying this standard:

1. The examples of injuries offered by the Colleges are not irreparable. The Colleges have exaggerated the time and effort of bargaining since they are compelled by law to bargain with the Federation anyway in its capacity as agent for the full-time faculty. The possibility of labor strife is speculative and the harm to labor relations is greater if the employer stonewalls than if the employer obeys an order which is later set aside by the Supreme Court. The possibility that a tentative agreement could become a baseline even if the Supreme Court reverses the Board Order is speculative and highly unlikely given the lack of individual bargaining power of part-time employees scattered across four campuses.

2. Issuance of a stay will substantially harm the Federation and its members. Operating under the assumption that the Supreme Court backlog means the pending appeal could take up to two years to resolve, the Federation maintains substantial harm will occur as follows: 1) the Federation will not be able to collect two year's worth of dues; 2) the short-term nature of some adjunct faculty employment could result in the Federation losing its majority support before it can do anything for its adjunct members who voted to be represented by the Federation and

mean that the individuals who choose representation may never get it; and 3) there could be a two-year delay in improved wages for adjunct faculty.

3. The public interest cuts both ways; there is a public interest in preserving public resources against illegitimate expenditures while, on the other hand, there is a public policy in favor of free and untrammeled exercise of collective bargaining rights.

We are persuaded by the Federation's arguments that issuance of a stay will substantially harm the Federation and its members and that the injury suffered by the Colleges if a stay is not granted will not be irreparable.

Most compelling to us is that under the circumstances herein, the State Employees Labor Relations Act (SELRA) declaration that "(e)mployees shall have the right of self-organization; to form, join or assist employee organizations; to bargain collectively through representatives of their own choice...;" 3 VSA §903(a); may well be frustrated if we grant a stay of our Order of Certification. Given the transient nature of adjunct faculty employment which will result in a continually-shifting composition of the bargaining unit and the backlog of cases at the Supreme Court[1], issuance of a stay could mean the Federation will lose its majority support among adjuncts before it

[1]We note that the Federation's estimate that the delay between the Board decision and the Vermont Supreme Court decision will be two years is not unreasonable. Historically, the average time between Board decision and court decisions in cases appealed has been 22 months. The average time has increased recently. The average time for the last 22 Supreme Court decisions was 29 months (see statistical report prepared by the Board of its decisions for the period January 1, 1987 to December 31, 1987, which were appealed to the Supreme Court).

can bargain on behalf of them and mean that the individuals who chose representation by the Federation may never actually be represented.

This substantial harm resulting from issuing a stay outweighs any harm the Colleges will suffer if the order is not stayed. While we do not minimize the effect this will have on the Colleges, we do not believe any harm suffered will rise to the level of irreparable injury.

We recognize that the Colleges will have to expend additional time and effort to negotiate with the Federation concerning the adjunct faculty. However, it is evident this burden will be substantially lessened by the fact the adjuncts are not in a separate bargaining unit, but have simply been added to the unit of full-time faculty and ranked librarians on whose behalf the Federation already bargains.

We are not persuaded by the Colleges arguments of the possibility of labor strife. This was a consideration taken into account by the Board in deciding that it was appropriate to place adjuncts in the same bargaining unit as full-time faculty and ranked librarians. The Board concluded that the common interests of the adjuncts and the full-time employees overrode differences among them. 10 VLRB 39, at 49-50. Moreover, the possibility of labor strife is likely greater if the Federation is not allowed to now bargain with the Colleges on behalf of the adjuncts.

We also are not persuaded that, if tentative agreements are reached and later invalidated by Court ruling, the practical reality is that the Colleges likely will be compelled to extend the terms of the agreement to adjuncts, even without a union. This is a potential injury which the Colleges are empowered to avoid. If the Supreme Court reverses the Board decision and invalidates any agreement reached concerning the adjunct faculty, the Colleges will be under no obligation to extend the agreement to the then-unrepresented adjuncts. Practically, it is unlikely the Colleges will be compelled by adjunct insistence to extend the terms of the agreement to them. Individual adjunct faculty scattered across four campuses will possess little bargaining power to compel such a result.

The closest question with respect to irreparable injury is that the Colleges will expend public funds, through the terms of any negotiated contract and/or through time and resources devoted to negotiations, by now being required to bargain concerning the adjuncts even though the Supreme Court might later rule that such bargaining was not mandated by SELRA. Under the circumstances herein, we conclude that the public interest in the effectiveness of collective bargaining rights outweighs the general public interest in the chance that public monies unnecessarily will be spent. Moreover, the very nature of collective bargaining allows the parties to address any relevant considerations relating to expenditure of public monies during the period the unit decision of the Board is on appeal.

Now therefore, based on the foregoing reasons, it is hereby ORDERED the Vermont State Colleges' Motion to Stay the Order of Certification issued by the Labor Relations Board on April 27, 1987, is DENIED.

Dated this 8th day of January, 1988, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Charles H. McHugh, Chairman

Catherine L. Frank

Dinah Yessne