VERMONT LABOR RELATIONS BOARD

TOWN OF CASTLETON	)	
	)	
and	)	DOCKET NO. 89-87
	)	
AFSCME, AFL-CIO	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Facts

On December 26, 1989, Robert G. Paul ("Petitioner"), an employee of the Town of Castleton ("Town"), filed a Petition for Decertification of Collective Bargaining Representative with the Labor Relations Board, alleging that the presently-certified bargaining representative, AFSCME, AFL-CIO ("Union"), was no longer supported by a majority of the bargaining unit members. The petition was accompanied by supporting signature cards, signed by not less than 30 percent of the employees in the established bargaining unit, indicating that the employees no longer desired to be represented by the Union.

On January 17, 1990, the Labor Relations Board informed the Petitioner, the Union and the Town that it would take no further action with respect to the petition for decertification of collective bargaining representative until pending unfair labor practice charges involving the Union and the Town were resolved. On March 14 and 15, 1990, respectively, after resolution of the pending unfair labor practice charges by agreement of the Town and the Union, the Union and the Town responded to the petition for decertification. The Union alleged that decertification proceedings were barred by a March 1, 1990, memorandum of agreement between the Union and the Town. The

Town responded that it believed there was no collective bargaining agreement in effect that would act as a bar to decertification proceedings.

A hearing concerning whether any collective bargaining agreement was in effect which would bar a decertification petition was held on April 16, 1990, before Board Members Louis Toepfer, Acting Chairman; William Kemsley, Sr., and Catherine Frank. Attorney Dennis Wells of Downs, Rachlin and Martin represented the Town. AFSCME Representative Ralph Crippen represented the Union. The Petitioner did not attend the hearing. Requested Findings of Fact and Memoranda of Law were filed by the Union and the Town on April 30, 1990.

FINDINGS OF FACT

1. Pursuant to a representation election held on July 8, 1988, AFSCME, AFL-CIO was certified by the Labor Relations Board on July 21, 1988, as the collective bargaining representative of all full-time employees of the Town of Castleton Highway Department and Police Department, excluding the Supervisor of the Highway Department and the Chief of Police (VLRB Docket No. 88-24). The vote of the employees for representation by AFSCME, AFL-CIO was seven in favor, zero against.

2. The first negotiating session for the initial collective bargaining agreement took place on February 8, 1989. Subsequent negotiating sessions were held between then and September 13, 1989. Following the September 13, 1989, negotiations session, the next negotiations session did not occur until March 1 of 1990 (Joint Exhibit 1, Union Exhibit 2).

3. On May 25, 1989, a unit clarification petition was filed by the Town, requesting that the position of Foreman of the Highway Department be excluded from the bargaining unit as the Town had decided to leave the position of Highway Department Supervisor vacant and to vest the supervisory duties in the Highway Department Foreman instead. On October 16, 1989, after the Union stipulated to the exclusion of the Highway Department Foreman position from the bargaining unit, the Labor Relations Board amended the prior certification order to provide that the Union be certified as the exclusive bargaining representative of all full-time employees of the Town of Castleton Highway Department and Police Department, excluding the Foreman of the Highway Department and the Chief of Police. The effect of this unit clarification was to reduce the number of employees in the bargaining unit from seven to six (VLRB Docket No. 89-42, Union Exhibit 8).

4. By September 13, 1989, the date of the last bargaining session during 1989, a number of tentative agreements on various contract provisions had been reached by the parties (Joint Exhibit 1).

5. The Union understood that the tentative agreements were conditional upon ratification of the complete collective bargaining agreement, and recognized that the Union had to go back to its members and the Town had to go back to the Board of Selectmen to ratify the final agreement. The Town understood the tentative agreement process to be a tool for identifying and then setting aside those provisions of the contract that had been tentatively agreed to, in order to allow negotiations to proceed in an orderly manner. While many of the provisions tentatively agreed to had been reviewed by the Board of Selectmen on several occasions, none had been ratified or given effect

6. On several occasions, provisions which had been tentatively agreed to by the parties were subsequently brought back to the bargaining table and renegotiated (Joint Exhibit 1, Union Exhibit 2).

7. As of September 13, 1989, there were several remaining items that had not yet tentatively been agreed to by the parties, including compensation of employees, working conditions and life insurance.

8. Sometime during August of 1989, a new Town Manager for the Town of Castleton, Rita McCullough, was appointed and took office. Prior to her appointment, McCullough was the Town Accountant, and she had been on the Town negotiating team since the commencement of negotiations with the Union.

9. On October 28, 1989, the Town filed a petition for decertification of the Union as collective bargaining representative of the employees of the Town of Castleton. During the time the Town's petition was pending, the parties postponed further negotiations. On December 7, 1989, the Board dismissed the Town's petition for decertification, concluding that the Town had not demonstrated by objective considerations that it had some reasonable grounds to believe the Union had lost the support of a majority of the collective bargaining unit members since its certification. 12 VLRB 275.

10. On November 28, 1989, Ralph Crippen, Union Representative, in a letter to Town Manager Rita McCullough, requested the scheduling of negotiations meetings to discuss remaining items of negotiation. Crippen sent McCullough another letter on December 12, 1989, indicating, in pertinent part, that he had not heard from her "regarding my request to resume negotiations sent on November 28, 1989" (Union Exhibit 1-1A).

11. On December 13, 1989, three members of the bargaining unit represented by the Union wrote to the Labor Relations Board, requesting a "revote" on representation by the Union. Subsequently, on December 26, 1989, a formal petition for decertification, the subject matter of this action, was filed by Petitioner Robert Paul, a Town employee and member of the bargaining unit. Filed with the petition were decertification cards signed by not less than 30 percent of the employees in the bargaining unit (Town Exhibit 2).

12. On December 18, 1989, the Union filed an unfair labor practice charge against the Town. The charge alleged that the Town had refused to recognize the grievance procedure and to recognize the Union as the representative of a grievant in grievance proceedings. The Town responded that there was no collective bargaining agreement in effect as of the date of filing of the grievance, and that further, the Town had filed a decertification petition which was pending at the time grievance proceedings began. The Board issued an unfair labor practice complaint on January 16, 1990 (VLRB Docket No. 89-86).

13. On December 28, 1989, the Union filed a second unfair labor practice charge against the Town. The Union alleged that the Town had refused to negotiate over the few remaining open items on the collective bargaining agreement. The Town responded that both parties had agreed to postpone negotiations until the Town's decertification petition was resolved, and that issues of negotiation had been placed on the agenda for the upcoming Board of Selectmen's meeting on January 8. The Board issued an unfair labor practice complaint on January 16, 1990 (VLRB Docket No. 89-90, Union Exhibit 1B-1H).

14. On January 11, 1990, the Union filed a third unfair labor practice charge against the Town. The Union alleged that the Town had issued a second letter of reprimand for the grievance issue that was the subject of the first unfair labor practice charge above. The Board issued an unfair labor practice complaint on February 7, 1990.

15. Prior to January 17, 1990, the Union requested a stay of the decertification petition proceedings pending resolution of all the unfair labor practice charges. On January 17, 1990, the Board notified the parties that no further action would be taken on the decertification petition until the unfair labor practice charges had been resolved.

16. Subsequently, on February 13, 1990, the parties entered into a settlement agreement resolving the three unfair labor practice charges. The stipulated settlement provided that the Town would pay attorney's fees for the attorney representing the grievant involved in two of the unfair labor practice charges and would remove a letter of reprimand from the employee's file. The agreement also provided that the Town agreed to resume contract negotiations, with the next bargaining session to be held March 1, 1990. Pursuant to the settlement agreement, the Union withdrew the pending unfair labor practice charges, and the Board issued orders on February 22, 1990, dismissing all three unfair labor practice charges (Union Exhibits N-S).

17. Negotiations resumed via a bargaining session held on March 1, 1990. During this session, the members of the bargaining team reviewed the contract provisions that had been tentatively agreed to to date, and revised previous tentative agreements or reached tentative agreements on all of the remaining contract provisions.

Provisions on which a first tentative agreement was reached on March 1, 1990, included employee compensation, working conditions, life insurance and position vacancies. Provisions that had previously been tentatively agreed to, but were reconsidered and amended on March 1, 1990, included the duration of the contract, overtime compensation, and pension benefits. The agreement duration tentatively agreed to was September 1, 1989 to June 30, 1991 (Union Exhibit 2).

18. At the conclusion of the March 1, 1990, negotiation session, the members of the negotiation teams entered into a memorandum of agreement which states:

> The Town of Castleton and AFSCME, Local 1201, have reached tentative agreement on all items TA'd (tentatively agreed to) and initialed by the parties. All TA's initialed before March 1, 1990, have been ratified by both the Union and the Town.
>
> The parties agree that all TA's initialed on or before March 1, 1990, will be presented to the Union members and the Town board with full recommendation for acceptance, by both negotiating teams.
>
> Upon ratification, this document and the initialed TA's shall serve as a signed agreement until a complete agreement can be prepared and signed.

The agreement was signed by two Town members of the bargaining team H. Rita McCullough, Town Manager, and C. William Mulholland, Town Selectman; and by three members of the Union bargaining team (Union Exhibit 3).

19. The Union negotiating team understood that the purpose of the memorandum of agreement was to document that all tentative agreements prior to March 1, 1990, had been ratified by the Town, and to document the Town's intent to ratify the entire package. The Town negotiators understood, based on statements by the Union at the March

1, 1990, negotiating session, that the memorandum of agreement was a confirmation of contact provisions tentatively agreed to prior to March 1, as well as a confirmation that provisions not previously agreed to had been reviewed and tentatively agreed to on that date. Additionally, the Town negotiators understood that the memorandum of agreement served to define the status of negotiations at the end of the incumbent Board of Selectmen's term, in preparation for the new Board due to take office on or about March 6, 1990. Both Town and Union negotiators understood that the entire collective bargaining agreement reached tentatively by the negotiating teams would have to be ratified by the Union members and the Board of Selectmen to be given effect.

20. The membership of the Union met on March 1 to review the tentative agreements and voted to ratify the entire tentative agreement reached with the Town (Union Exhibit 4).

21. The Town Board of Selectmen met on March 26, 1990, and did not ratify tentative agreements reached with the Union. The Selectmen instructed the Town negotiating committee to reconvene negotiations with the Union to discuss items they believed were still unresolved (Union Exhibits 5, 6).

OPINION

At issue is whether the decertification petition filed in this matter should be dismissed due to the purported existence of a collective bargaining agreement between the Town and the Union.

The Union asserts that a Memorandum of Agreement signed March 1, 1990, by members of the Town and Union negotiating teams constitutes a bar to the conducting of a decertification election. The Town contends that the March 1, 1990, Memorandum of Agreement was not a "final" agreement and, thus, no collective bargaining agreement exists between the Town and the Union. Further, the Town contends that, even if the Memorandum of Agreement is considered a collective bargaining agreement, it should not bar an election since the decertification petition was filed prior to the signing of the Memorandum of Agreement.

Thus, the threshold issue here is whether a collective bargaining agreement purportedly entered into by the incumbent union and the employer after a decertification petition is filed, but prior to the conducting of a decertification election, bars the conducting of the decertification election. This is a specific issue we have not had occasion in the past to determine.

In a related area where the Board has had to determine whether a decertification election should be ordered, the Board has adopted as a policy under the Municipal Employee Relations Act that an existing collective bargaining contract bars a petition for decertification of the existing collective bargaining representative for most of the term of the contract. A petition normally will be considered timely only if filed during the period 90 to 60 days prior to a contract's expiration date. Section 33.2, Board Rules of Practice. St. Albans

Police Officers Association and Local 1343, AFSCME, AFL-CIO and City of St. Albans, 8 VLRB 46, 52 (1985). The objective of the contact bar policy was stated by the Board in St. Albans, supra, at 52-53.

> The objective of this contract bar doctrine is to achieve a reasonable balance between the competing interests of stabilizing the employer-union relationship and free employee choice of a representative. The "open" period of ninety (90) to sixty (60) days prior to a contract expiration date provides employees with an opportunity for a free choice of bargaining representatives at reasonable intervals. The barring of a petition for the remainder of a contract term provides a settled work environment and stabilization of the employer-union relationship necessary for productive labor relations.

Similarly here, we are seeking to achieve a reasonable balance between the competing interests of stabilizing the employer-union relationship and free employee choice of a representative. In so doing, we conclude that where a party asserts that a contract is a bar to an election, the party must show that the contract was fully executed, signed and dated prior to the filing of the decertification petition. If we were to rule otherwise, employees may be prevented from questioning the incumbent union's majority status by means of a representation election at reasonable intervals. An incumbent union and an employer could frustrate the statutory right of employees to vote to determine whether the majority of employees no longer support the incumbent union by executing a collective bargaining contract shortly after a petition was filed. Theoretically, were we to adopt such a policy, employees could be prevented from ever testing the majority status of unions. We do not believe the Vermont General Assembly intended such a result when it granted employees the right to file a petition to "assert that the individual or employee

organization currently certified as bargaining agent is no longer supported by at least 51 percent of employees in the bargaining unit" 21 VSA §1724(a)(1).

Although we are not bound by the rules adopted by the National Labor Relations Board, we note that our ruling is consistent with that adopted by the NLRB. Brown Transportation Corp., 296 NLRB No. 157 (1989). Lane Construction Corp., 222 NLRB No. 194 (1976).

Thus, we will conduct a decertification election herein unless the Union can demonstrate that a contract was fully executed, signed and dated prior to the filing of the decertification petition on December 26, 1989. Even assuming that the March 1, 1990, Memorandum of Agreement constituted a collective bargaining agreement between the Town and the Union, a question we need not decide given our ruling herein, this Memorandum of Agreement clearly does not meet the test of being fully executed, dated and signed prior to December 26, 1989. This is so even though provisions purportedly adopted as part of the Memorandum and Agreement are retroactive to September 1, 1989, since the provisions were not finally agreed to by December 26, 1989.

At the time the decertification petition was filed, there was no collective bargaining agreement between the Union and Town. Town and Union negotiators had reached only tentative agreements on a number of various contract provisions, which tentative agreement the Union and the Town understood to be conditional upon ratification of a complete collective bargaining agreement by Union members and the Town Board of Selectmen. The lack of the binding nature of these individual tentative agreements is evident by the fact that, on several occasions, provisions which had been tentatively agreed to

were subsequently brought back to the bargaining table and renegotiated.

We are concerned that the potential exists for the Union to be decertified without the employees represented by the Union ever being covered by a single collective bargaining agreement. The decertification petition was filed at a time when the Union and Town were negotiating the initial contracts subsequent to the certification of the Union in July, 1988. Pursuant to 21 VSA §1724(h), an incumbent union is protected from decertification for one year from the date of the election where the employees voted to be represented by the Union. The potential exists for an employer to delay the bargaining process beyond the one-year insulated period in the hope that employees will question the effectiveness of the incumbent union and seek to decertify it as bargaining representative. Such a threat overhanging a workplace is not conducive to good labor relations.

However, if the incumbent union believes the employer is so delaying negotiations, the Union may file an unfair labor practice charge alleging bad faith bargaining. The Board then would determine whether the charge had merit and, if so, order appropriate relief pursuant to 21 VSA §1727(d). Absent such a charge and subsequent unfair labor practice findings by the board, we cannot presume that delay by an employer improperly frustrated the negotiations process.

Here, the Union filed no unfair labor practice charge, prior to the filing of the decertification petition, which alleged that the Town engaged in bad faith bargaining by delaying the negotiations process. Subsequent to the filing of the decertification petition,

the Union did file a charge alleging that the Town had refused to negotiate over the few remaining open items on a collective bargaining agreement. However, this charge was withdrawn by the Union prior to Board determination on the merits when the Town agreed to resume contract negotiations. Under these circumstances, we have no basis for concluding that any actions of the Town prior to the filing of the decertification petition improperly delayed good faith bargaining.

ORDER

Now therefore, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED that the Labor Relations Board shall conduct a representation election among all full-time employees of the Town of Castleton Highway Department and Police Department, excluding the Foreman of the Highway Department and the Chief of Police, to determine whether they wish to be represented by AFSCME, AFL-CIO or no Union.

Dated this 31st day of May, 1990, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Louis A. Toepfer, Acting Chair

William K. Kemsley, Sr.

Catherine L. Frank