VERMONT LABOR RELATIONS BOARD

VERMONT STATE EMPLOYEES' ASSOCIATION	)	
	)	DOCKET NO. 91-19
v.	)	
STATE OF VERMONT	)	

MEMORANDUM AND ORDER

At issue is whether the Vermont Labor Relations Board should issue an unfair labor practice complaint in this matter. On February 27, 1991, the Vermont State Employees' Association ("VSEA") filed an unfair labor practice charge against the State of Vermont. Therein, VSEA alleged that the State committed an unfair labor practice in violation of 3 VSA §905 and §961(1) by the Governor announcing his intention to unilaterally eliminate 350 classified positions, which includes the layoff of an unidentified number of state employees, prior to the finalization of the Fiscal Year 1992 budget, and thereby preempting appropriate legislative review of the impact on programs, program staffing and levels of funding needed to effectuate the programs.

An informal meeting was held among the parties and the Board on February 28, 1991. The State filed an answer to the response on March 25, 1991. VSEA filed a reply to the State response on March 29, 1991. Oral argument was held before Board Members Charles McHugh, Chairman; Louis Toepfer and Carroll Comstock on April 11, 1991, in the Board hearing room in Montpelier. Michael Zimmerman, VSEA Staff Attorney, represented VSEA. William Griffin, Chief Assistant Attorney General, represented the State.

VSEA alleges that the Governor is bound by limitations on his authority which are imposed by the Vermont Constitution and

by statute, and that he is without the authority to unilaterally lay off classified employees, before legislative review and approval, in anticipation of budget reductions that may be required under the Fiscal Year 1992 budget. VSEA contends that the statutory and constitutional scheme does not commit the appropriations process to only one branch but instead anticipates participation by both the legislative and executive branches and, accordingly, the Governor is without authority to act unilaterally. The unilateral action by the Governor amounts to an unfair labor practice under the State Employees Labor Relations Act, 3 VSA §901 et seq. ("SELRA"), VSEA maintains, because it "interfere(s) with (or) restrain(s) . . . employees in the exercise of their rights guaranteed by . . . law" in violation of 3 VSA §961(1). The right guaranteed by law cited by VSEA is the right of employees to be free from management unrestrained by law pursuant to 3 VSA §905(b), which provides in pertinent part:

> (S)ubject to all . . applicable laws, rules and regulations, nothing in this chapter shall be construed to interfere with the right of the employer to: 1) carry out the statutory mandate and goals of the agency . . . and to utilize personnel, methods and means in the most appropriate manner possible.

VSEA contends that an examination of the Governor's powers under the Vermont Constitution and an interpretation of the appropriations scheme embodied in 32 VSA §701-709 is necessary to decide the question presented in the unfair labor practice charge.

The State contends that the charge is without merit and should be dismissed by the Board for three reasons. First, the

State contends that the charge does not state a claim within the statutory jurisdiction of the Board because the charge fails to identify any employee right guaranteed by any applicable law, rule or regulation that has been violated by the proposed reduction in the work force. Second, the State maintains that the Board is without authority to decide the constitutional questions raised by VSEA, and that constitutional questions can only be decided by the judicial branch. Third, the State contends that the Board should not serve as a substitute for the legislative arena where the debate over the Fiscal Year 1992 budget is occurring.

Prior to addressing the statutory violations cited by VSEA in this matter, we first would like to respond to statements made by the State representative at the oral argument in this matter questioning the authority of the Board in an unfair labor practice case to overrule an action of the Governor and questioning the independence of the Board from the Governor.

The provisions of SELRA clearly give the Board the authority to overrule an action of the Governor in unfair labor practice cases. §961 of SELRA lists unfair labor practices committed by an "employer", and §965(d) of SELRA gives the Board the authority to order a person to cease and desist from committing an unfair labor practice and to order "such affirmative action as will carry out the policies of this chapter." An "employer" is defined in SELRA, in pertinent part, as "the State of Vermont . . . represented by the governor or the governor's duly authorized representative(s)." §905 of SELRA provides that "(t)he governor,

or a person or persons designated by the governor . . . shall act as the employer representatives in collective bargaining negotiations and administration." Parenthetically, we note that the Governor signs the collective bargaining agreements between the State and the VSEA. Thus, it is clear under SELRA that the Board has the authority to conclude that the Governor as an "employer" has committed an unfair labor practice, and can order the Governor to cease and desist from the practice and take "such affirmative action" as the Board shall order.

The provisions of SELRA and the nature of the Board also make it clear that the Board, while a part of the executive branch, is independent from the Governor. §921(c) of SELRA provides that "(t)he Board may not be attached to any state department or agency and shall operate independently." Although it is true that the Governor appoints the members of the Board with the advice and consent of the Senate, 3 VSA §921(a), this is no different than the Governor appointing judges who serve in the judicial branch. As a quasi-judicial board, we operate as independently from the Governor as do judges.

However, we decline to issue an unfair labor practice complaint in this matter under the circumstances because we conclude that VSEA has failed to indicate any employee right "guaranteed by . . . any . . law, rule or regulation" which may have been violated by the State pursuant to 3 VSA §905(b) and §961(1).

The collective bargaining agreements now effective between the State and VSEA clearly recognize the right of the State to

lay off employees in certain situations. Under Article 2, Section 4, of the Non-Management Unit Agreement, effective July 1, 1990-June 30, 1992, "(t)he Employer may determine that a reduction in force is necessary when a lack of work situation exists or in conformance with this Article." The Agreement defines "lack of work" as "when 1) there is insufficient funds to permit the continuation of current staffing; or 2) there is not enough work to justify the continuation of current staffing." Article 72 of the Agreement establishes the provisions for reduction in force of employees and the rights of affected employees. Section 2 of the article provides:

> The right to determine that a reduction in force is necessary and time when it shall occur is the employer's prerogative, pursuant to the provisions of Article 2, Management Rights. Nothing in this agreement shall be construed to imply otherwise.
>
> At least thirty-five days before the effective date of any reduction in force and five days before any employee is officially notified of a layoff, the VSEA will be given a list of affected classes and of employees selected for layoff, and given the opportunity to discuss alternatives.

Pursuant to the Agreement, any disputes with respect to reductions in force shall be processed through the grievance procedure. Article 2, Section 6; Article 15.

Thus, VSEA and the State have contractually granted the State the authority to determine that a reduction in force is necessary and when it shall occur, including situations where insufficient funds exist. Any rights of employees under the Agreement allegedly violated may be addressed in accordance with the grievance procedure provided for in the Agreement. That question is not now before us.

Nonetheless, VSEA contends that the Governor is without constitutional and statutory authority to lay off employees during the current fiscal year (i.e, the 1991 Fiscal Year, which runs from July 1, 1990-June 30, 1991) before legislative review and approval of the budget for the next fiscal year (i.e., the 1992 Fiscal Year, which runs from July 1, 1991-June 30, 1992).

Parenthetically, we note that, contrary to the claim of the State, we believe we have authority to decide constitutional questions in this matter pursuant to 3 VSA §961(1), which grants us the authority to determine whether employee rights guaranteed by " any . . law" are violated. The Vermont Constitution, as the supreme law of Vermont, may be interpreted by us as we may interpret any other law. This is especially appropriate where there is a right to appeal to the Vermont Supreme Court which can oversee and review any decisions we make in interpreting the Constitution. Grievance of Morrissey, 7 VLRB 129, 171 (1984). Affirmed, 149 Vt. 1 (1987).

The statutory and constitutional scheme does not commit the appropriations process to only one branch but instead anticipates participation by both the legislative and executive branches. Campbell v. Kunin, (Washington Superior Court Docket No. 638-89WnC, Opinion and Order dated April 27, 1990, page 5). Vermont Constitution, ch. II, §§ 20 and 27. 32 VSA § 701-709. During the current fiscal year, Fiscal Year 1991, the Vermont General Assembly had the opportunity to review, and either to affirm or change, budget reduction actions by the Governor for the current year through the Budget Adjustment Act for Fiscal

Year 1991, which became law on March 13, 1991 (Act No. 5, Vermont General Assembly, 1991). Campbell v. Kunin, supra, at 7. Through this Act, the Legislature had the opportunity to affect the number of reductions in force which would occur during the current fiscal year and where such reductions would occur. Given this legislative oversight, and given the requirements of the constitutional and statutory framework for appropriations, we cannot conclude that employee rights guaranteed by law may have been violated.

We reach the same conclusion with respect to reductions in force occurring during the current fiscal year which may remain in effect during the next fiscal year. Through the legislative appropriations process for the Fiscal Year 1992 budget, the Legislature has the opportunity to review, and either to affirm or change, the budget recommendations of the Governor. Through enacting the appropriations bill which will fund state government for the next fiscal year, the Legislature clearly affects the number of reductions in force which will occur and where they will occur. This may result in some employees laid off during the current fiscal year being recalled from layoff.

In sum, a review of the VSEA-State collective bargaining contract and the constitutional and statutory framework for determining state appropriations leads us to conclude that the reductions in force announced by the Governor did not interfere with employee rights guaranteed by law, rule or regulation. Thus, we conclude that the State did not violate 3 VSA §905(b) and §961(1).

Now therefore, based on the foregoing reasons, the Vermont Labor Relations Board declines to issue an unfair labor practice complaint in this matter and the unfair labor practice charge filed herein is ORDERED DISMISSED.

Dated this 2nd day of May, 1991, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Charles H. McHugh, Chairman

/s/ Louis A. Toepfer
Louis A. Toepfer

/s/ Carroll P. Comstock
Carroll P. Comstock