VERMONT LABOR RELATIONS BOARD

AFSCME LOCAL 1201, DPW CHAPTER	)	
	)	DOCKET NO. 92-47
v.	)	
CITY OF RUTLAND	)	

MEMORANDUM AND ORDER

At issue is whether the Labor Relations Board should issue an unfair labor practice complaint in this matter. AFSCME Local 1201, DPW Chapter ("Union"), contends that the City of Rutland ("City") violated the duty to bargain in good faith, pursuant to 21 VSA §1726(a)(5), by: 1) forcing the Union to continually file grievances on bargaining unit work being performed by non-bargaining unit persons, despite an arbitration decision concluding that the management practice violated the collective bargaining agreement, and 2) forcing the Union to grieve an unilaterally imposed job description and rejection of Union-represented employee bids for the job, in violation of the collective bargaining contract and an arbitrator's decision.

The Union contends that the City is forcing the Union to continually grieve and arbitrate issues which already have been decided through the arbitration process. The Union contends that this violates the City's duty to bargain in good faith because the City is seeking to undermine the effectiveness of the Union by making it economically difficult for the Union to represent employees. The City contends that it is not forcing the Union to relitigate issues already decided, and thus the Board should defer to the grievance procedure with respect to these issues.

Timothy Noonan, Board Executive Director, met with the Ralph Crippen, Union Representative, and Frank Zetelski, City Attorney,

on January 11, 1993, in furtherance of the Board's investigation of this charge.

The bargaining unit work issue involves water main work - the tapping of water mains and the installation of corporate and curb stops and the concomitant work of trenching, digging and filling. The Union contends that this work has to be performed by members of the bargaining unit pursuant to a provision of the collective bargaining agreement, which states: "No one outside the Bargaining Unit shall perform work normally done by those employees within the Bargaining Unit." The Union contends that the water main work has always been bargaining unit work exclusively, and that the City thus violated the contract by having independent contractors do this work at times. The Union contends that this issue has reached the level of an unfair labor practice due to several grievances which the Union has had to file on the issue, despite an arbitration decision which prohibits the management practice.

The arbitration decision cited by the Union, issued on November 10, 1990, sustained the Union's position that the City violated the above-cited contract provision by permitting outside contractors to do work normally done by bargaining unit employees. The arbitrator concluded that the "Union has established that the work involving installation of the corporate stop on the main line, the curb stop at the property line and the concomitant work of trenching, digging and filling is work normally done by the Bargaining Unit employees".

The City contends that, despite this language, the grievances which postdate the arbitration decision are not covered by the decision because they involve commercial taps. The

City claims that the arbitration decision only covers residential taps, and not commercial taps, because the City has never done commercial taps. Thus, the City contends that commercial taps do not constitute "work normally done by bargaining unit employees."

The second issue raised by the Union is that the City has forced the Union to grieve an unilaterally imposed job description and rejection of Union-represented employee bids for the job, in violation of the contract and an arbitrator's decision. The arbitration decision at issue, issued on July 1, 1992, concluded that the City violated the filling of vacancies and temporary assignment provisions of the Contract by not posting an assistant water treatment manager position, and placing an employee, Scott Taggart, in that position, without posting, for longer than 30 days. The award by the arbitrator provided as follows:

> As a remedy, the principal negotiators will attempt to negotiate a mutually accepted job description for the position of assistant water treatment manager within five (5) days after they have received and read this award. If they fail to reach agreement within this timeframe, the City will immediately post the job, in accord with Article 6 of the Agreement. This job posting will include specific duties and responsibilities and a statement of qualifications, all of which must constitute a statement of the realities of the job to be performed. Although Mr. Taggart is to remain on the job until it is filled, he shall not be permitted to bid on the job and shall not be awarded the job unless no other qualified bargaining unit member bids and accepts the job and/or unless and until the qualification period is not successfully completed. It is the Arbitrator's intention that all of the requirements of Article 6 be met in the instant case.

The Union contends that the City violated this award by unilaterally imposing a job description once the parties could not reach agreement, which job description was designed to fit the employee who was in the position. The Union thus contends

that bargaining unit members who bid for the job were improperly excluded as not meeting the minimum qualifications for the job, forcing the Union to grieve the issue. The City contends that the job description meets the City's anticipated needs, and that the City is just acting consistent with the arbitrator's award.

We need to decide whether to issue an unfair labor practice complaint or defer to the grievance procedure with respect to these issues. Parties to a collective bargaining agreement are required to exhaust available contractual remedies before a statutory unfair labor practice complaint will lie under the Municipal Employee Relations Act ("MERA"). Burlington Area Public Employees Union, Local 1343, AFSCME, AFL-CIO v. Champlain Water District, 156 Vt. 516, 518 (1991). The Board begins its analysis by considering if the issue contained in the charge is subject to arbitration, irrespective of whether or not it might also be an unfair labor practice under MERA. Id. at 519. If the issue is subject to arbitration, the contract grievance procedure should be applied, barring an overriding statute or deferral policy. Id. In Champlain Water District, the Court cited with approval the following statement by the Board in Burlington Education Association v. Burlington Board of School Commissioners, 1 VLRB 335, 340 (1978):

> If this Board hears as an unfair labor practice a complaint which is a grievance without first requiring the complainant to utilize the dispute resolution procedures agreed to in the collective bargaining agreement, the collective bargaining process would be undermined . . . (A)n exhaustion of contracts remedies doctrine . . . insures the integrity of the collective bargaining process by requiring the parties to collective bargaining agreements to follow the procedures they have negotiated to resolve contract disputes. This policy also encourages the parties to negotiate grievance procedures to resolve contract

> disputes which is sound labor relations policy. Labor relations stability depends on the parties working together to resolve disputes which directly affect them.

Abstention cannot be equated with abdication of the Board's statutory duty to to prevent and remedy unfair labor practices; instead the parties are directed to seek resolution of their disputes under the provisions of their own contract, thus fostering the collective relationship and the policy favoring voluntary arbitration and dispute settlement. Champlain Water District, 156 Vt. at 519-20. National Radio Co., 198 N.L.R.B. 527, 531 (1972). The exhaustion doctrine does not bind the parties if the issue raised before the Board does not qualify as a matter of contract interpretation, if an overriding statute negates deferral, or if the Board's own deferral guidelines indicate that deferral would not serve the purposes of the statute. Champlain Water District, 156 Vt. at 520.

In applying these standards to this case, we believe it is appropriate to defer to the grievance procedure and not rule on the unfair labor practice charge at this time. Both issues raised by the Union qualify as matters of contract interpretation. The water main issue is covered by the bargaining unit work provision of the contract. The issue concerning the job description for, and the filling of, the assistant water treatment manager position is covered by the filling of vacancies and the temporary assignment provisions of the contract.

Further, there is no overriding statute or deferral policy which leads us to not defer to the grievance procedure. The Board generally will defer to the grievance procedure if the employees have an adequate redress for the alleged wrongs through the

grievance procedure. AFSCME, Local 490, Bennington Department of Public Works and Police Units v. Town of Bennington, 9 VLRB 195 (1986). Here, the employees have recourse to binding arbitration to resolve the underlying disputes and grievances are now pending. Thus, it is apparent the employees have an adequate redress for the alleged wrongs through the grievance procedure.

We recognize that the Union is not disputing that the underlying issues in this matter can be resolved through the grievance procedure, and that the gravaman of the Union's charge is that the City is seeking to undermine the effectiveness of the Union by forcing the Union is continually grieve and arbitrate issues which have already been decided through the arbitration process. We concur with the Union that an employer can violate its duty to bargain in good faith in such circumstances since this may undermine the union by making it economically difficult for the union to adequately represent employees. Burlington, 1 VLRB at 343.

Nonetheless, we are not prepared at this point, absent fuller exploration of the underlying issues which the grievance procedure will provide, to conclude that the City does not have a bona fide contract interpretation disagreement with the Union with respect to the underlying issues. As a consequence, we believe it is appropriate for the grievance procedure to run its course. Thus, we defer to the grievance procedure and do not rule on the unfair labor practice charge at this time. The contractual remedies should be exhausted before issuance of an unfair labor practice complaint.

Such deferral does not necessarily end our consideration of this matter. The Board retains jurisdiction for the purpose of

entertaining a motion that grievance arbitration of the underlying issues in this matter has failed to meet the following criteria necessary for the Board to defer to an arbitrator's award:

1. fair and regular arbitration proceedings;
2. agreement by all parties to be bound;
3. the decision is not repugnant to the purpose and policies of the Act;
4. the arbitrator clearly decided the unfair labor practice issue; and
5. the arbitrator decided issues within his or her competency. Bennington, 9 VLRB at 195-96.

Now therefore, based on the foregoing reasons, it is hereby ORDERED:

a. The Labor Relations Board declines to rule on this unfair labor practice charge at this time and defers the matter to the grievance procedure; and

b. The Board retains jurisdiction in this matter for the purpose of entertaining a motion that grievance arbitration has failed to meet the applicable criteria set out above, which motion shall be filed within 30 days of issuance of the final arbitration decision of the underlying issues in this matter.

Dated this 29th day of March, 1993, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Charles H. McHugh, Chairman

Catherine L. Frank

Louis A. Toepfer