

VERMONT LABOR RELATIONS BOARD

VERMONT EDUCATION ASSOCIATION)

v.)

CITY OF RUTLAND SCHOOL DEPARTMENT)

DOCKET NO. 79-32R

FINDINGS OF FACT, OPINION AND ORDER

Statement of the Case

On May 25, 1979, the Vermont Education Association (hereinafter "VEA") filed an unfair labor practice charge with the Vermont Labor Relations Board (hereinafter "Board") on behalf of the secretaries, library aides, reading tutors and teachers' aides organized as the Rutland School Staff Association. The charge (initially filed on May 25, 1979, and amended by the Petitioner on June 15, 1979) against the Employer, the Rutland City School Board (hereinafter "School Board"), alleged the termination of thirteen bargaining unit employees in violation of 21 V.S.A. §1726(a)(1) (2) and (3).

State Labor Relations Board attorney, Peter J. Monte, conducted an investigation of the charges and, after an oral report, submitted an investigative report to the Board on June 25, 1979.

The Board filed an unfair labor practice complaint as a result of the Petitioner's charge and investigative information on June 22, 1979, scheduling a hearing on this matter for July 12, 1979.

The case was heard before Board Members Kimberly B. Cheney, William G. Kemsley, Sr. and Robert H. Brown. The Petitioner was represented by Steven R. Adams and Charles J. Ochmansk of VEA. Robert E. Broderick, attorney for the City of Rutland, represented the Respondent. Requests for Findings of

Fact and Conclusions of Law were filed by Attorney Broderick and the Brief of the Petitioner was filed by Mr. Adams on July 26, 1979.

FINDINGS OF FACT

1. The Rutland School Staff Association, affiliated with the VEA, is the collective bargaining representative of the Rutland City School Department secretaries, reading tutors, library and teachers' aides, which group was so certified by the Board on July 12, 1979.
2. On November 29, 1978, a petition seeking recognition as a collective bargaining unit affiliated with the VEA was submitted to the Board by the aforementioned employees.
3. On February 15, 1979, a unit determination hearing was held before the Board, at which time VEA and the employer gave testimony regarding the appropriateness of particular employees for inclusion in the bargaining unit.
4. On April 23, 1979, the Board issued an order to conduct a secret ballot election within thirty days.
5. On June 1, 1979, the employees in the proposed bargaining unit voted in favor of union representation, 42 - 4.
6. The Board found no evidence of electioneering or campaigning conducted by either the employees or the employer from the February 15 hearing up to and including the June 1 election.
7. No statements, written or verbal, were made by the employer on either of the above referenced occasions indicating any anti-union animus or resistance to the organizing activities of the subject employees.
8. In January, 1979, the Superintendent of the Rutland City Schools projected a budget deficit of approximately \$800,000 for the 1979-80 school year, based on reduced revenues from three major sources: 1) an uncertain

amount of state aid, 2) a loss of tuition income from surrounding area towns, and 3) an unexpended balance for 1978-79 of approximately \$100,000 less than the previous year, to be carried over to the 1979-80 school year. With the notification in mid-April of the actual state aid to the Rutland City Public Schools as determined by the Legislature, the anticipated budget shortfall was revised to reflect a deficit of approximately \$350,000.

9. In order to reconcile the budget deficiency, the School Board considered several proposed budget cuts affecting many operations of the school system. The budget cut which provoked this charge is reflected in the minutes of the School Board meetings of March 6, March 20, May 9, May 12, May 22, and June 12, 1979, which record the ongoing review of proposed cuts.

(Employer Exhibit E-1A-E).

10. Subject employees, including an officer of the Rutland School Staff Association, first became aware of possible job eliminations or consolidation of positions being considered by the School Board as early as March, 1979, by either attending or reading the minutes or media coverage of the meetings.

11. During the May 22, 1979, School Board meeting, a motion was made to act on a recommendation of the School Board Personnel Committee to restore seven and one-half previously cut positions in the elementary schools by combining the positions of library aide and secretary. The motion was tabled in order to give dissenting School Board members more time to consider the consolidation.

12. On June 12, 1979, the School Board voted to combine and reduce the thirteen existing full-time and one half-time positions. The purpose of this action was to consolidate the job descriptions of library aide and elementary secretary, creating a new, combined library aide/secretary position. The result of the action was the layoff of seven secretaries and six library aides.

13. On June 13, 1979, the affected employees received written notice that they would not be offered their previously held positions for the 1979-80 school year by Assistant Superintendent Joseph Flora.

14. In addition to a \$12,223 saving realized from the reduction and consolidation of the elementary library aide and secretarial staff, staff in several other departments of the elementary and secondary schools were subject to budget cuts totalling \$271,496. Non-staff budget cuts include \$129,837 from the maintenance budget, \$19,566 from athletic programs, \$14,324 from the lunch program, \$14,048 in data processing equipment and maintenance, and \$59,509 resulting from a 25% reduction of all instructional budgets. Total savings from staff, program and building maintenance budget cuts amount to \$521,003. (Employer Exhibit-1)

We find the facts contained in this exhibit to be true.

15. Two business reasons existed for consolidating the library aide and secretary positions rather than retaining all thirteen employees as half-time: 1) to ensure continuity in these functions at the elementary school, and 2) to provide the employees in these positions with full-time fringe benefits, resulting in less staff turnover.

16. Three witnesses who were affected employees asserted that the combined secretarial and library aide duties and responsibilities required of the new position would be difficult to perform effectively. The employer's witnesses agreed the position would be demanding. We find the job description to be an assignment of work within the employer's prerogatives.

17. It is the expressed intention of the employer in hiring the six full-time and one half-time library aide/secretaries to consider the discharged employees who are members of the bargaining unit before any applicant outside of this group is hired.

18. Of the thirteen discharged employees, the employer testified probably nine or ten had applied for the new positions. In the opinion of the Assistant Superintendent of Schools, seven employees would be rehired, "if interested and qualified".

19. Thirteen employees of a bargaining unit of more than forty members (as indicated by the June 1, 1979 election results of 42 - 4 in favor of representation) were terminated as a result of the School Board's consolidation of the subject positions. If the employer rehired seven discharged employees, then only two or three members of the bargaining unit have been affected by the employer action.

OPINION

Fortunately, the particular thicket of labor law in which we presently find ourselves is one through which our own cases have laid out a trail. In In Re: Southwestern Vermont Education Association, 136 Vt. 490 (1978), our court in relying on NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967) held:

"...(W)hen 'inherently destructive' conduct on the part of the employer is involved, no direct proof of anti-union motivation must be shown to establish a prima facie case. The employer, under such circumstances, has the burden of explaining his action to avoid the charge of unfair labor practice."

As Southwestern Vt. Educ. Assn. supra, points out:

"...(O)nce it has been proved that the employer engaged in a discriminatory conduct which could have adversely affected employee rights to some extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him."

With the discharge of thirteen bargaining unit employees taking place soon after the union representation election of June 1, 1979, we find this

action to be within the purview of "inherently destructive" employer conduct, its natural foreseeable consequences warranting the inference of an intent to discriminate. (See NLRB v. Erie Resistor Corporation, 373 U.S. 221, 10 L.Ed. 2d 308, 83 S.Ct. 1139, 94 ALR 2d 1147.) Thus, the burden of proof is on the School Board to establish that the sole reason for the discharge of the employees in this case was for economic reasons.

We believe in this case the employer has satisfied the heavy burden of proving that the layoff effected by the consolidation of the elementary school library aides and secretaries was due to sound, legitimate, economic reasons, and was not motivated by an intent to discriminate against or coerce the subject employees as prohibited by 21 V.S.A. §1726 (a)(1)(2) and (3).

While in Southwestern Vt. Educ. Assn., a flagrant fact pattern evidenced an unfair labor practice which compelled this Board, and later, the Supreme Court, to sustain the charge against the employer, the absence of these key elements here leads to an opposite result.

In Southwestern Vt. Educ. Assn., the Board and the Court found elements of a "climate of coercion" and "suspect timing" which, with the knowledge of union activity, constituted improper employer motivation.

The facts in Southwestern Vt. Educ. Assn. which indicated a "coercive climate" existed were as follows: the School Board knew of union activities; it had obtained labor counsel to represent it; and its superintendent had issued an anti-union memorandum to all employees in the midst of the controversy. The Court found the whole record showed "a bitter controversy, with active opposition to the union".

In comparison, the facts of the instant case distinguish it from Southwestern Vt. Educ. Assn. Here there is no "coercive climate". Although the Rutland City School Board was aware of union organizing activities, it

did not issue any anti-union materials; and it did not resist union representation of the subject employees.

The second element of improper employer motivation found in Southwestern Vt. Educ. Assn. was the suspicious timing and circumstances surrounding the discharge of the union adherents. The idea to contract janitorial services, having been rejected on two previous occasions over a period of approximately two and a half years, was suspiciously resurrected. Under terms previously rejected by the School Board, a contract was entered into in the middle of the school year effecting the layoff of the union organizers.

Again, the facts relating to the element of "suspect timing" in the instant case depart from Southwestern Vt. Educ. Assn. Here the timing of the actual layoff and the June 1, 1979 election was coincidental.

The union representation election was the culmination of certification procedures, the timing of which is largely dependent on actions of this Board, which neither party could foresee.

The School Board, as well, was not free from time constraints beyond its control. We take note of two statutory requirements determining the timing of budget preparation: 1) 16 V.S.A. §11(a)(12) stating that the "school year" shall begin July 1 and end the following June 30, and 2) a corresponding Rutland City Charter deadline of April 1 for the submission of a proposed school district budget. We presume the School Board's final submission of the budget to the mayor's office in mid-June was made accordingly for the ensuing school year.

Faced with an anticipated budget deficit and uncertain information upon which to base its decisions until such time as the final state aid amounts were determined, the respondent made many budget cuts affecting

several school system operations. These decisions were made only after due consideration of limited resources to meet the many staff, program and building maintenance demands.

Coincidence of timing, although cause for rigorous scrutiny, has not, standing alone, been sufficient evidence of improper motivation behind an employee discharge, as we have held before in Vermont State Colleges Faculty Federation, AFT Local #3180, AFL-CIO v. Vermont State Colleges, 1 VLRB ____ (1978) and Barre City Police Officers Association, AFSCME v. City of Barre, 1 VLRB 223 (1978).

In addition to the presence of "suspect timing" and a "climate of coercion", the Board and the Court in Southwestern Vt. Educ. Assn. examined the degree to which the bargaining unit was adversely affected by the employer's purported economic action.

The employees dismissed in Southwestern Vt. Educ. Assn. as a result of contracting janitorial services were only those employees involved in union organizing activity. The remainder of the janitors within the school system were not affected, except for one transfer. The organizing activities were halted abruptly as five of six employees seeking representation were discharged.

However, in the instant case, thirteen employees of a bargaining unit of more than forty members were terminated as a result of the consolidation and reduction of positions, seven of which may be rehired. We assume the employer's testimony to give preferential consideration to the affected employees when filling the new positions was given in good faith, and our decision rests in large part on that reliance. Therefore, the bargaining unit will remain substantially intact, with only two or three individuals

who did not apply for the new positions,
separated from their positions as a result of the School Board action.
We are confident the Association will call any hiring irregularities to our
attention.

ORDER

Because we are unable to find from the evidence that a violation of
21 V.S.A. §1726 (a)(1)(2) and (3) has been made by the employer, the School
Department having proven its reasons for the action terminating the subject
employees to be solely economic, it is hereby ORDERED that the above-
captioned unfair labor practice charge be DISMISSED.

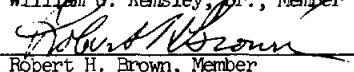
Dated this 6 day of September, 1979, in Montpelier, Vermont.



Kimberly B. Cheney, Chairman



William G. Kemsley, Jr., Member



Robert H. Brown, Member