VERMONT LABOR RELATIONS BOARD

VERMONT STATE EMPLOYEES' ASSOCIATION, TROOPER MICHAEL MANNING, SERGEANT RODNEY HALL, AND CORPORAL RUSSELL PENKA	)	
v.	)	DOCKET NO. 96-90
DEPARTMENT OF PUBLIC SAFETY, COMMISSIONER JAMES WALTON	)	

MEMORANDUM AND ORDER

At issue in this unfair labor practice case are two discovery motions filed by the parties - i.e., a Motion to Compel Discovery filed by the Department of Public Safety, Commissioner James Walton ("Employer"), and a Motion to Compel Discovery filed by the Vermont State Employees' Association, Michael Manning, Rodney Hall and Russell Penka ("Complainants") - and a Motion to Dismiss and/or for Judgment on the Pleadings filed by the Employer. The parties filed memoranda on these motions, and oral argument occurred before the Labor Relations Board on February 6, 1997, in the Board hearing room in Montpelier.

Before discussing the pending motions, it is necessary to first summarize the unfair labor practice charge filed herein. The charge arises from alleged statements made by Commissioner Walton to Corporal Penka in connection with pending state police disciplinary panel hearings involving Trooper Manning and Sergeant Hall, concerning an incident at the Woodstock Correctional Facility with Sabrina Graham. Complainants contend that Commissioner Walton advised Corporal Penka that he would have the Department investigate and potentially bring charges against Penka

and any other State Police members, who testified on behalf of Trooper Manning and Sergeant Hall, about any of their own previous conduct which might constitute a violation of the code of conduct. Complainants allege that the Commissioner's statements have made Penka and other potential witnesses reluctant to testify on behalf of Manning and Hall. Complainants contend that the Employer has committed an unfair labor practice in violation of 3 V.S.A. Section 961(1) and (4) by: 1) interfering with, restraining and coercing Penka and other VSEA members in connection with their right to assist VSEA in preparing a defense to the pending charges against Manning and Hall; 2) interfering with the right of Manning and Hall to present certain witnesses to defend against pending charges; and 3) threatening to investigate and charge members based on testimony to be given on behalf of Manning and Hall; and 4) adversely affecting VSEA's ability to prepare a defense to pending charges against Manning and Hall.

We will discuss each of the motions in turn.

Employer's Motion to Compel Discovery

The Employer requests an order from the Board compelling Complainants to respond to the Employer's Interrogatories requesting Complainants to list all employees of the Department of Public Safety who could testify at the grievance panel proceedings involving Trooper Manning and Sergeant Hall, and to indicate the incident to which they will be testifying. The Employer contends that the Department needs the witness list to "hone in on" the practical impact of the Commissioner's statements. The Employer maintains that, because of the substantially limited nature of the testimony which the grievance panel in the Manning case has indicated it will

permit, it is likely that the number of witnesses who may testify on behalf of Trooper Manning has been significantly reduced to the extent that there may be no witnesses. Given these circumstances, the Employer contends that the list of witnesses, and the incidents to which they will testify, will be highly probative as to whether an unfair labor practice occurred and what, if any, remedy the Board should grant.

Complainants object to releasing the names of potential witnesses in the disciplinary panel proceedings on the basis of an agreement reached among the Employer's attorneys, Complainants' attorneys, and the attorney for the disciplinary panel that Complainants's witness list need not be disclosed to the Employer until *five days after receipt of a decision of the Board in this unfair labor practice case.* Complainants allege that the Employer is seeking to circumvent the agreed to discovery schedule in the panel hearings by exploiting the discovery tools available in the unfair labor practice forum. Complainants further contend that the Employer's claim that no witnesses may be identified is precluded by the fact that Corporal Penka already has been identified as a potential witness in the Manning and Hall disciplinary panel hearings. Complainants also point out that the Employer has ignored the fact that the panel in the Hall case, which is separate from the panel in the Manning case, has placed no restrictions on testimony similar to that imposed by the Manning panel. Complainants also maintain that they have no objection to disclosing potential witnesses in the unfair labor practice proceeding, but that disclosing potential witnesses for the panel hearings prior to a Board decision in the unfair labor practice case may reduce the pool of potential witnesses willing to testify at the panel proceedings.

The Employer responds that the procedure established through the disciplinary panel proceeding should not bind the Board in this unfair labor practice proceeding. This is because the unfair labor practice proceeding is a separate and independent matter, the Employer contends, and the attorneys representing the Employer differ in the grievance panel proceedings and the unfair labor practice proceeding.

We conclude that the Employer's motion to compel discovery should be denied. Complainants have the burden of proving an unfair labor practice was committed in this case. They have agreed to provide to the Employer a list of Complainants' potential witnesses in the unfair labor practice proceeding who may be testifying on the issue of whether the Commissioner's statements to Penka adversely impacted their willingness to testify in the pending Manning and Hall panel proceedings. This list should be sufficient for the Employer to defend against charges that potential witnesses have been interfered with, restrained and coerced with respect to any testimony they may give in the pending disciplinary panel hearings.

We do not find persuasive the Employer's claim that the restriction on testimony imposed by the Manning panel makes it necessary that the Employer receive a list of all witnesses who could testify at the grievance panel proceedings involving Manning and Hall. The unfair labor practice proceeding is not limited to the impact the Commissioner's statements had on potential witnesses in the Manning case, but also includes the potential effect the comments may have on those interested in testifying in the Hall case.

Also, the Employer's attempt to achieve a witness list through discovery in this proceeding is disingenuous given the arrangement worked out in the disciplinary panel proceeding that the Employer could not secure such a list until 5 days after the Board issued a decision in the unfair labor practice proceeding. We concur with Complainants that the practical effect of granting the Employer's motion to compel would be to allow the Employer to inappropriately circumvent the agreed to discovery schedule in the panel hearings by exploiting the discovery tools available in the unfair labor practice forum. The Employer's reliance on separate attorneys representing the Employer in the two proceedings lacks merit; the attorneys in both proceedings are representing the same clients - the Department of Public Safety and Commissioner Walton.

Complainants Motion to Compel Discovery

Complainants request that the Board order Commissioner Walton to respond in his deposition to questions about the investigation leading up to the specific charges which he preferred against Trooper Manning. The Employer's attorneys instructed the Commissioner not to respond to such questions when the Commissioner was deposed. Complainants contend that the objection to the questions by the Employer's attorneys violated an agreement reached by the parties' attorneys at the outset of the deposition providing that "all objections, except as to matters of form, are reserved until the deposition or any part thereof is offered in evidence". Complainants also contend that the questions are relevant because they address the Commissioner's involvement in the charges against Manning and Hall,

and relate to the Commissioner's state of mind when he made the statements to Corporal Penka at issue in this unfair labor practice proceeding.

We disagree with Complainants that the stipulation entered into by the parties at the beginning of Commissioner Walton's deposition preclude the Employer's objection to, and our ruling on, questions posed during discovery. The stipulation must conform with the general scope of discovery authorized by V.R.C.P. 26(b), which provides in pertinent part:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . It is not ground for objection that the information sought will be admissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Upon review of Complainants' memorandum supporting their motion to compel, and the arguments they advanced at the February 6 oral argument in this matter, we conclude that Complainants have not made a sufficient showing to support their motion to compel. The questions at issue sought information from Commissioner Walton on what charges were recommended against Manning and Hall by the lieutenant serving as the internal affairs investigator, and whether the charges decided on by Commissioner Walton differed in any ways from those recommended. Complainants have not demonstrated to us that such information "appears reasonably calculated to lead to the discovery of admissible evidence" in support of Complainants' claims in this unfair labor practice proceeding that employees' rights to present testimony in the pending panel proceedings was interfered with, restrained or coerced.

Employer Motion for Dismissal and/or For Judgment on the Pleadings

The Employer moves to dismiss this matter, and/or obtain a judgment on the pleadings, on the basis that this matter is moot because the Employer will agree to part of the requested relief and the only remaining request for relief is inappropriate. The Employer represents that it is willing to agree to the following: 1) Commissioner Walton will cease and desist discussing the Manning and Hall grievances with potential witnesses, and will not threaten anyone who may choose to testify in this matter; and 2) the Employer recognizes its obligation not to discriminate against State Police members because of their VSEA membership or non-membership, or because they have filed a complaint or grievance. The Employer further states that it does not concede that Commissioner Walton committed an unfair labor practice in this matter, and does not concede that the Commissioner's actions constituted threats. Complainants oppose the Employer's motion on the grounds that the Employer's willingness to agree to certain terms falls well short of rendering this action moot given the Employer's unwillingness to concede any wrongdoing by Commissioner Walton in his statements to Corporal Penka.

We conclude that this case is not moot. Complainants allege in their unfair labor practice charge that Commissioner Walton's statements to Corporal Penka interfered with, restrained, and coerced potential witnesses in the pending Manning and Hall disciplinary panel proceedings. Absent an agreement by the parties to settle this matter, a decision by the Board on whether the Commissioner's statements constituted an unfair labor practice will not be without effect. An allegation that employees' rights to provide testimony are being interfered with, restrained or

coerced is a serious matter. We are unable to conclude, without conducting a hearing, whether statements made by Commissioner Walton adversely impacted employees' rights to provide testimony in the disciplinary panel proceedings. At the least, a decision by the Board on whether an unfair labor practice has been committed will provide some guidance to the parties and potential witnesses on the potential effect of witness' testifying in the disciplinary panel proceedings.

NOW THEREFORE, based on the foregoing reasons, it is hereby ordered that the Employer's Motion to Compel Discovery, the Complainants' Motion to Compel Discovery, and the Employer's Motion to Dismiss and/or for Judgment on the Pleadings are DENIED.

Dated this 20th day of February, 1997, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Catherine L. Frank
Catherine L. Frank, Chairperson

Leslie G. Seaver

Richard W. Park