VERMONT LABOR RELATIONS BOARD

BED IBEW, LOCAL 300, UNIT SIX	)	
	)	
v.	)	DOCKET NO. 99-56
	)	
BURLINGTON ELECTRIC DEPARTMENT	)	

MEMORANDUM AND ORDER

At issue is whether the Labor Relations Board should issue an unfair labor practice complaint in this matter. On August 20, 1999, BED IBEW, Local 300, Unit Six ("Union"), filed an unfair labor practice charge against the Burlington Electric Department ("Employer"). The Union alleges that the Employer violated 21 V.S.A. Section 1726(a)(5) by refusing to bargain in good faith and making an improper unilateral change.

Specifically, the Union contends that the Employer, without notice or negotiation, changed a longstanding past practice of a merit wage increase policy contained in the Employer's Comprehensive Personnel Policy Manual that has been made part of the collective bargaining agreement between the Union and Employer. The Union maintains that, prior to the change, employees were granted 3% merit wage increases, with few exceptions, as long as they met performance standards. As a result of the change in the policy, the Union alleges that employees, who would have received a 3% merit increase under the past practice, were denied increases with the exception of a few individuals who received 1% increases. The Union indicates in the charge that several grievances have been filed over the alleged change to the merit wage increase policy.

On September 9, 1999, the Employer filed a response to the unfair labor practice charge and a Motion for Summary Judgment. In the response and motion, the Employer contends that this dispute should be deferred to the grievance and arbitration procedure set forth in the collective bargaining agreement between the parties. On October 7, 1999, the Union filed a response to the Employer's Motion for Summary Judgment.

In previous cases, the Board has declined to rule on unfair labor practice charges where the Board believed the dispute involved the interpretation of a collective bargaining agreement and employees had an adequate redress for the alleged wrongs through the grievance procedure. Burlington Education Association v. Burlington Board of School Commissioners, 1 VLRB 335 (1978). AFSCME Local 490 v. Town of Bennington, 9 VLRB 195 (1986). Fair Haven Graded School Teachers Association, Vermont-NEA v. Fair Haven Board of School Directors, 13 VLRB 101, 109-110 (1990). Parties to a collective bargaining agreement are required to exhaust available contractual remedies before a statutory unfair labor practice complaint will lie. 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 it might also be an unfair labor practice. 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, 1 VLRB at 340:

> 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 contract 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 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 519-520. The exhaustion doctrine does not bind the parties if the issue raised before the Board does not qualify as a matter of contract interpretation. Id. at 520. Interpretation of an agreement may involve interpolating from a written text solutions not expressly spelled out in the text. Id. Textual interpretations may be blended with "contracts implied in fact" in the form of established past practices. Id. at 520-21. An arbitrator is ideally poised to consider and resolve such issues; they are issues concerning the "law of the shop" as opposed to the "law of the land". Id. at 521.

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. Article XXV of the parties' collective bargaining agreement incorporates the terms and conditions of the Employer's Comprehensive Personnel Policy Manual "except as otherwise specified" in the agreement. The Personnel Policy Manual provides for a merit

pay increase or decrease from "zero percent (0%) to three percent (3%)" to be determined upon completion of a performance evaluation on an employee. Article XXIII of the collective bargaining agreement establishes a grievance and binding arbitration procedure for disputes over a "violation or misinterpretation of the terms of this Agreement".

The Union has filed several grievances over the alleged change to the past practice in applying the merit wage increase policy. It is apparent that the dispute involves the interpretation of the collective bargaining agreement, including the blending of textual interpretations with established past practices; such dispute ideally should be considered and resolved in the parties' grievance procedure. Champlain Water District, 156 Vt. at 520-21. The Union appears to have an adequate recourse for the alleged wrongs since the parties' grievance procedure ends in binding arbitration. Further, there is no overriding statute or deferral policy that leads us to not defer to the grievance procedure.

Such deferral does not necessarily bar our later consideration of the matter. The Board retains jurisdiction for the purpose of entertaining a motion that grievance arbitration of the underlying issue 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 Municipal Employee Relations 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 195-196.

In reaching our conclusion, we note that we are not granting the Employer's Motion for Summary Judgment. Summary judgment under Rule 56 of the Vermont Rules

of Civil Procedure provides for a final judgment on issues. This is not appropriate when deferral to the grievance procedure is at issue since, as indicated above, the Board retains jurisdiction to later consider issues raised in the unfair labor practice charge if grievance arbitration does not meet certain criteria. The Employer's Motion for Summary Judgment has served as a vehicle in this case to consider whether to defer to the parties' grievance procedure, but our conclusion to defer to the grievance procedure should not be construed as making a final judgment on the issues raised in the unfair labor practice charge.

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 this matter to the grievance procedure; and

b. The Labor Relations Board retains jurisdiction in this matter for the purpose of entertaining a motion that grievance arbitration has failed to meet the applicable criteria set forth 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 5th *day of November, 1999, at Montpelier, Vermont.*

VERMONT LABOR RELATIONS BOARD

Catherine L. Frank, Chairperson

Carroll P. Comstock

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