VERMONT LABOR RELATIONS BOARD

BURLINGTON POLICE OFFICERS ASSOCIATION	)	
v.	)	DOCKET NO. 00-11
CITY OF BURLINGTON	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On February 25, 2000, the Burlington Police Officers' Association ("Association") filed an unfair labor practice charge against the City of Burlington ("Employer"). Therein, the Association alleged that the Employer violated 21 V.S.A. Sections 1726(a)(1) and (2) by interfering with employees in the exercise of their rights to engage in Association activities, and improperly interfering with the administration of the Association, through actions of Janet Mumane, attorney for the Employer, in a conversation she had with Corporal Clifford Robinson on February 11, 2000. The Employer filed a response to the charge on March 16, 2000.

The Labor Relations Board issued an unfair labor practice complaint on July 11, 2000. A hearing was held in the Labor Relations Board hearing room in Montpelier on August 10, 2000, before Board Members Richard Park, Acting Chairperson; Carroll Comstock and John Zampieri. Attorney James Dunn represented the Association. Attorney Joseph McNeil represented the Employer. At the conclusion of the hearing, the Board established August 24, 2000, as the date for postmarking post-hearing briefs.

On August 24, 2000, the Association filed Proposed Findings of Fact and Memorandum of Law. On August 25, 2000, the Employer filed a Motion Regarding Board Findings and a Memorandum of Law. In the motion, the Employer requested that

the Board not refer to the supervisor of Corporal Robinson by name in this decision. The Association has not filed an opposition to this motion, and we conclude that it is appropriate to grant it.

On August 30, 2000, the City filed a Supplemental Memorandum of Law and Exhibit. On September 7, 2000, the Association filed a Supplemental Memorandum. These supplemental memoranda have not been considered by the Board as it is the practice of the Board to not consider supplemental memoranda filed after the deadline for submitting post-hearing briefs. The Board also has not considered the exhibit submitted by the Employer with the supplemental memorandum. The appropriate way to seek to introduce an exhibit into evidence after the conclusion of a hearing is to file a motion, pursuant to Section 32.17 of the Board Rules of Practice, for leave to reopen a hearing because of newly discovered evidence. No such motion has been filed here, and we decline to consider the exhibit.

FINDINGS OF FACT

1. The Association is the exclusive bargaining representative of patrol officers and corporals in the City of Burlington Police Department.

2. In the fall of 1998, the Association represented one of its members, Corporal Clifford Robinson, in a grievance arbitration case concerning the Employer's denial of Robinson's request for the use of sick time. Robinson and his supervisor testified during the arbitration hearing. In a January 5, 1999 decision, Arbitrator Roberta Golick concluded that the Employer violated the Contract when it denied Robinson the sick leave he had requested. She directed the Employer to grant Robinson the sick leave (Employer Exhibit 2).

3. On January 13, 1999, Commander Glendon Button sent an e-mail message to Robinson informing him that, given the conclusion of the arbitration proceeding, he would like to meet with him to discuss the matter. Robinson responded by e-mail, stating in pertinent part:

> I would like to know if this meeting is mandatory or voluntary. If it is mandatory, I would like to have a union representative with me at the meeting. If it is voluntary, I respectively decline to meet with you.
> (Association Exhibit D)

4. No meeting occurred between Button and Robinson. Robinson wrote an eight-page letter dated January 26, 1999, to Police Chief Alana Ennis. In the letter, Robinson expressed his concern that his supervisor had not testified truthfully during the arbitration hearing with respect to a conversation between Robinson and his supervisor concerning the supervisor's request that Robinson obtain a doctor's note for his absence. Robinson stated that "(s)ince this hearing I have been haunted . . . by the concerns that I have related here . . . I have been unable to put these issues aside and move on . . ." (City Exhibit 4).

5. On February 2, 1999, Chief Ennis wrote a memorandum to Robinson in response to his letter. The memorandum provided in pertinent part:

> . . . The fact that you are still "haunted . . . by the concerns" you relayed in your letter distresses me greatly for several reasons.
>
> First, on page seven in the response to your grievance, Ms. Golick states "it's almost silly to subject this exchange to this much scrutiny." I agree with her, yet you write eight pages detailing a minor event, which seems to have loomed large in your mind. Second, Section 16.11 of the BPOA Contract (p.57) states, "The decision of the arbitrator on the matter at issue shall be final and binding on all parties." To try to reconstruct the events at this late date would be singularly unhelpful, speculative and not a good use of time for anyone involved. Third, the fact that you would request this, after you won your grievance, appears to be pedantic and even mean-spirited.

If you are unable to move ahead with your life, as you have indicated in your letter, the City has an Employee Assistance Program. You may wish to receive confidential counseling in order to put this event behind you and move on with your career. Since this matter has been resolved, I sincerely hope you are able to do so. (Association Exhibit A).

6. Robinson was upset by the Chief's response. Robinson decided not to pursue the matter further. Later that year, Robinson discussed his concerns about the veracity of his supervisor and the Chief's response to his letter to Corporal John Lewis.

7. In December 1999, Lewis was elected Association President. Shortly after his election, Lewis approached Robinson and asked him for all of the documents he had on the grievance arbitration case. Robinson did not discourage Lewis from pursuing the issue but indicated he wanted it understood that the Association was initiating the issue, not him. Upon reviewing the documents, Lewis decided to bring the issues of the veracity of Robinson's supervisor, and the February 5, 1999, memorandum from Chief Ennis to Robinson, to the Association membership at its January 20, 2000 meeting. At the meeting, the Association membership approved sending Chief Ennis a letter expressing concerns on how she had responded to Robinson in the February 5 memorandum. Robinson was at the meeting, and supported sending the letter to Chief Ennis.

8. Lewis sent Chief Ennis a letter dated January 25, 2000, stating in part:

> . . . The members of the BPOA have voted to send this letter to you formally objecting to the manner in which you responded to Cpl. Robinson's concerns. Your failure and refusal to respond appropriately to this type of management misconduct suggests that you condone such behavior on the part of your staff. BPOA members believe that, above all else, a police officer's integrity to present the truth, especially under oath, is fundamentally important to the work we do. We will settle for nothing less in our relationship with you and your management staff.
>
> We hope that you will now better understand the concerns Cpl. Robinson was expressing to you. These are concerns shared by all members of the BPOA.

The Executive Board is willing to meet with you to further discuss the issues raised in this letter. Please let us know if you would like to meet with us. (Association Exhibit B)

9. On February 10, 2000, Chief Ennis, Commander Button, Attorney Janet Murnane, Association President John Lewis, Association Vice President Labarge, and Association Secretary-Treasurer Ward met to discuss the issues raised in Lewis' January 25 letter. Murnane is an Associate in the Burlington law firm of McNeil, Leddy and Sheahan, which represents the City of Burlington. Murnane has represented the Employer in collective bargaining negotiations, grievances and arbitration, and provides legal advice to the Employer. At the meeting, Lewis clearly indicated to Employer representatives that the Union, not Robinson, was now pursuing the issues raised in Lewis' January 25 letter. Chief Ennis indicated that she was willing to meet with Robinson. Lewis told Chief Ennis that Robinson did not want to meet with her on the issue. The meeting concluded with the understanding that the Chief would respond to the Association's concerns in writing.

10. On the evening of February 10, 2000, Murnane came into the police station for a meeting. She observed Robinson having dinner alone in the police lunchroom. Murnane and Robinson knew each other from previous work-related encounters. Murnane told Robinson more than once that she did not want to interrupt his meal. Robinson indicated that she was not disturbing him. Murnane then closed the door to the lunchroom. Murnane asked Robinson if he knew there had been a meeting earlier that day between Employer and Association representatives concerning the veracity of Robinson's supervisor in the grievance arbitration hearing. Robinson indicated that he was aware there had been such a meeting. Murnane mentioned that the arbitration

hearing had occurred more than a year earlier and stated to Robinson "we've got to get through this", or words to that effect. Robinson told Murnane that the Association had brought forward the issue, not him. Murnane acknowledged that she understood the Association was pursuing the issue. Robinson indicated the Association thought there were still unresolved issues concerning the testimony of Robinson's supervisor. Murnane asked Robinson if he really believed that his supervisor had lied. Robinson responded that he did. Murnane again mentioned that the issue was more than a year old and that "we need to get through this". Murnane became red in the face and neck during this conversation, and appeared upset. We do not find by a preponderance of the evidence that Murnane made a threat to Robinson during this conversation. At the end of the conversation, Murnane again apologized for interrupting Robinson's meal and left the lunchroom. The conversation lasted approximately two minutes.

11. After this conversation, Robinson went into the police station locker room, where he met Corporal Timothy Greene. Robinson was visibly upset and agitated. Robinson relayed to Greene his conversation with Murnane. Greene advised Robinson to document the incident and report it to Lewis. Robinson then called Lewis to report the incident. Robinson told Lewis that he had been threatened by Murnane. Lewis asked Robinson to write a report of the incident and send it to him. Robinson wrote a memorandum to Lewis giving his version of the conversation with Murnane and gave it to Lewis on Feburary 11. Later on Feburary 11, Lewis and Murnane had a telephone conversation in which they discussed the conversation between Murnane and Robinson the previous day (Association Exhibit C).

12. In a letter dated February 18, 2000, to Lewis, Chief Ennis stated: "I have taken note that my letter of February 2, 1999 to Corporal Robinson was perceived as being uncaring and avoiding Corporal Robinson's concerns. This was not my intent and I will consider these concerns in future correspondence. She further stated that she was "concerned about the allegations that still persist regarding (the) testimony" of Robinson's supervisor at the arbitration hearing, and that she was "confident there was no untruthful or misleading testimony". Chief Ennis requested "that in the future we all be sensitive to the forum in which these allegations are discussed." (Employer Exhibit 3).

OPINION

The Association contends that Murnane's actions in the February 10 conversation with Robinson improperly circumvented the Association as the employees' bargaining agent and interfered with the administration of the Association. Moreover, the Association alleges that the actions created a hostile environment for Robinson which effectively interferes with, restrains and coerces all Association members from exercising their legal rights through the Association.

In determining whether an employer interfered with employees in the exercise of their rights to engage in union activities, and improperly interfered with the administration of a union, there are two types of cases. In one type, conduct inherently destructive of employee rights is involved. In the other type, the employer's conduct does not reach the level of being inherently destructive of employee rights and proof of anti-union motivation must be presented.

When the employer's discriminatory conduct is "inherently destructive" of important employee rights, no proof of anti-union motivation is needed and the Board can

find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. In re Southwestern Vermont Education Association v. Mt. Anthony Union High School Board of Directors, 136 Vt. 490, 494-95 (1987). The phrase "inherently destructive" is not easy to define precisely. In cases concluding that such conduct has occurred, the employer is held "to intend the very consequences which foreseeably and inescapably flow from (the) actions... because (the) conduct does speak for itself - it is discriminatory and it does discourage union membership, and whatever the claimed overriding justification may be, it carries with it unavoidable consequences which the employer not only foresaw but must have intended". Vermont State Colleges Faculty Federation, Local 3180, VFT, AFT, AFL-CIO v. Vermont State Colleges, 15 VLRB 216, 226-27 (1992); *citing* NLRB v. Erie Resistor Corp., 373 U.S. 221, 228 (1963).

In examining the evidence before use, we conclude that Murnane's actions during the February 10 conversation with Robinson do not rise to the level of being inherently destructive of employee rights. Although she demonstrated poor judgment in initiating the conversation, we do not find that she made threats or set into motion other actions that would have the unavoidable consequences of interfering with the administration of the Association, or interfering with Association members from exercising their legal rights through the Association.

In cases where conduct of the employer does not reach the level of inherently destructive conduct, proof of anti-union motivation must be advanced by the union. The Board employs the analysis used by the U.S. Supreme Court and National Labor Relations Board in such cases. Once an employee demonstrates protected conduct, he or

she must show the conduct was a motivating factor in the decision to take action against the employee. Then, the burden shifts to the employer to show by a preponderance of the evidence it would have taken the same action even in the absence of the protected conduct. Horn of the Moon Workers Union v. Horn of the Moon Cafe, 12 VLRB 110 (1988).

The Association has demonstrated protected conduct. The concerns raised by Robinson and the Association with respect to the veracity of Robinson's supervisor in the grievance arbitration hearing were collective activities protected by the provisions of the Municipal Employee Relations Act, 21 V.S.A. Section 171 *et seq.* Protected conduct having been demonstrated, the Association next must demonstrate that Murnane was motivated by anti-union animus in engaging in the February 10 conversation with Robinson.

The guidelines the Board follows in determining whether protected conduct motivated an employer's actions are: 1) whether the employer knew of the protected activities, 2) whether a climate of coercion existed, 3) whether the timing of the action was suspect, 4) whether the employer gave protected activity as a reason for the decision, 5) whether the employer interrogated the employee about protected activity, 6) whether the employer discriminated between employees engaged in protected activities and employees not so engaged, or 7) whether the employer warned the employee not to engage in such activity. Ohland v. Dubay, 133 Vt. 300, 302-303. Horn of the Moon, 12 VLRB at 126-127. A climate of coercion is one in which the employer's "conduct may reasonably be said to have a tendency to interfere with the free exercise of employee rights". Grievances of McCort, (Unpublished decision, Supreme Ct. Docket No. 93-237,

1994). The critical inquiry is not whether the coercion succeeded or failed, but whether the employer's conduct reasonably tended to interfere with or restrain an employee's exercise of protected rights. Id.

In applying these guidelines, we first note that Murnane was aware of Robinson's protected activities. Her timing left something to be desired in initiating a conversation with Robinson with respect to the veracity of Robinson's supervisor during the grievance arbitration hearing. This is particularly so since the Association had made it clear in a meeting earlier in the day that the Association, not Robinson, was pursuing the issue and Robinson did not wish to meet with the Employer on the issue.

However, we conclude that the Association has not demonstrated that anti-union animus motivated Murnane's actions. The unplanned nature of her conversation with Murnane is not consistent with one acting out of hostility towards the Association. Instead, it is apparent that her actions stemmed from her frustration that an issue more than a year old had been resurrected by the Association. Our conclusion would differ if the Association demonstrated that any actions of Murnane during the conversation were coercive and reasonably tended to interfere with or restrain employees' exercise of protected rights.

We do not believe the evidence warrants such a conclusion. We have not found by a preponderance of the evidence that Murnane made any threats to Robinson during this conversation. Although she clearly indicated to Robinson her view that it would be best if everyone involved got beyond the issue, we do not conclude that she made any express or implied threats against Robinson or anyone else if the issue continued to be pursued. We recognize that Robinson believed that Murnane made implied threats of

discipline against him, but we are not prepared on the evidence before us to reach such a conclusion. We view Murnane's actions as a failed, ill-advised attempt at communication rather than a coercive interrogation laced with threats. In this regard, we find it noteworthy that Murnane told Robinson more than once that she did not want to interrupt his meal, and Robinson indicated that she was not disturbing him. Given the absence of threats and the manner in which the conversation proceeded, Murnane's actions would not reasonably tend to interfere with employees' exercise of their rights or the *administration of the Association.*

Accordingly, we conclude that the Employer has not committed an unfair labor practice. It is unfortunate that the parties were unable to resolve this matter short of an unfair labor practice hearing and decision. It would bode better for relations between the parties if efforts to resolve differences in a case such as this resulted in mutual agreement rather than an imposed resolution.

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is hereby ordered that the unfair labor practice charge filed in this matter is dismissed.

Dated this 12th *day of October, 2000, at Montpelier, Vermont.*

VERMONT LABOR RELATIONS BOARD

Richard W. Park, Acting Chairperson

Carroll P. Comstock

John J. Zampieri