VERMONT LABOR RELATIONS BOARD

AFSCME LOCAL 1201, CASTLETON EMPLOYEES	)	
	)	DOCKET NO. 00-23
v.	)	
TOWN OF CASTLETON	)	

MEMORANDUM AND ORDER

The issue before the Labor Relations Board is whether to grant the motion filed by AFSCME Local 1201, Castleton Employees ("Union") requesting that the Board retain jurisdiction and reopen this unfair labor practice case because arbitration has failed to resolve the underlying issues in the case.

On April 12, 2000, the Union filed an unfair labor practice charge, contending that the Town of Castleton ("Town") violated its duty to bargain in good faith by making the unilateral change of eliminating the zoning administrator/assessor position that was represented by the Union. As a remedy, the Union requested that the zoning administrator/assessor be reinstated, and that the Town negotiate in good faith. The Town requested that the Board defer this charge to the parties' grievance procedure. The Union objected to deferral. In a December 22, 2000, decision concerning whether to defer this case to the grievance procedure, 23 VLRB 338, the Board stated in pertinent part:

> (W)e believe it is appropriate to defer to the grievance procedure and not rule on the unfair labor practice charge at this time. A grievance has been filed, and now awaits an arbitration decision, concerning whether the Town violated various provisions of the collective bargaining agreement by terminating the employment of the zoning administrator/assessor. In the grievance, it is requested that the zoning administrator/assessor be reinstated with back pay and benefits. The termination of the zoning administrator/assessor also is at issue in the unfair labor practice charge, and the reinstatement of the zoning administrator/assessor is requested as a remedy.
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> Since the alleged improper termination of employment may be remediable through the binding arbitration provisions of the collective bargaining agreement,

> we conclude that it is appropriate to require the parties to exhaust the available remedies provided through grievance arbitration before proceeding with an unfair labor practice complaint. *(citations omitted)* This fosters the parties' collective relationship and the policy favoring voluntary arbitration and dispute settlement. *(citation omitted)*
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> Further, there is no overriding statute or deferral policy that leads us to not defer to the grievance procedure. We recognize the Union is claiming the Town has violated its duty to bargain in good faith by its actions in terminating the employment of the zoning administrator/assessor. However, the arbitration decision may resolve the dispute between the parties, making it unnecessary to proceed with the unfair labor practice charge. Since contract interpretation may resolve the dispute, deferral to the arbitration procedure is "merely the prudent exercise of restraint, a postponement of the use of the Board's processes to give the parties' own dispute resolution machinery a chance to succeed." *(citations omitted)*
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> Such deferral does not necessarily bar the Board's later consideration of this 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 deter 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 Act; 4) the arbitrator clearly decided the unfair labor practice issue; and 5) the arbitrator decided issues within his or her competency. *(citation omitted)*

On April 1, 2002, the Union filed a motion requesting that the Board retain jurisdiction because the parties had brought their dispute to arbitration and the arbitrator had failed to resolve the underlying issues in the unfair labor practice case. On April 18, 2002, the Town filed a memorandum in opposition to the Union's motion.

In post-arbitration deferral cases, the Board has considered whether arbitrators have clearly decided unfair labor practice issues. The Board has determined that, once an arbitrator determines that an action by an employer is specifically covered and permitted by the contract, that same action cannot be determined to be an improper unilateral action in violation of unfair labor practice provisions. BED IBEW, Local 300, Unit Six v. Burlington Electric Department, 23 VLRB 245, 250 (2000). However, the Board has indicated that an unfair labor practice issue was not decided by an arbitration decision

that the collective bargaining contract was not violated under circumstances where the contract did not specifically cover the action taken by the employer. Milton Education and Support Association v. Milton Board of School Trustees, 23 VLRB 301, 306 (2000).

We examine the decision issued by the arbitrator in light of these standards. On September 26, 2001, Arbitrator Gary Wooters issued an interim award. One issue raised in the unfair labor practice charge that also was at issue in the arbitration decision was the elimination of the assessor position. Arbitrator Wooters concluded that the Union's claim that the decision to eliminate the assessor's position violated Sections 101, 503 and 505 of the collective bargaining agreement was without merit because such action was governed by the management rights provisions contained in Section 111 of the agreement. Arbitrator Wooters stated as follows at pages 10-11 of his decision:

> I do not believe that I need to consider whether the Town has a statutory right to eliminate the Assessor position as it is clear that it has such a reserved right under the contract. Even if the Assessor position is in the bargaining unit, the Town has a right under Section 111(4) to "delete, revise or eliminate positions" . .
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> Section 111(4) is limited by other express provisions of the agreement. But, the Union's reliance on Section 503 is misplaced. An employee whose position is eliminated has not been "discharged" within the meaning of Section 502. The Union has pointed to no other provision of the contract which limits the right of the Town to decide that it will not longer employ an assessor.
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> Thus, it is clear under this agreement that the Town had the right to eliminate the Assessor position . . .

Since the arbitrator has determined that the elimination of the assessor position was specifically covered and permitted by the contract, that same action cannot be determined to be an improper unilateral action in violation of unfair labor practice provisions. BED IBEW, Local 300, Unit Six v. Burlington Electric Department, supra. Thus, the arbitrator has clearly decided the unfair labor practice issue concerning the assessor position, and we defer to that decision.

Another issue raised in the unfair labor practice charge that also was at issue in the arbitration decision is whether the Town had the right to terminate the employment of the person holding the zoning administrator position, Patricia Ryan-Berlickij. In both the arbitration case and unfair labor practice proceeding, the Union contends that the Town had no such right and requested the reinstatement of Ryan to that position. On that issue, Arbitrator Wooters referenced 24 V.S.A. Section 4442(a), which provides:

> An administrative officer, who may hold any other office in the municipality, shall be appointed for a term of three years by the planning commission, with the approval of the legislative body . . . An administrative officer may be removed for cause at any time by the legislative body after consultation with the planning commission.

Arbitrator Wooters then stated in pertinent part:

> . . . (T)he critical feature of sec. 4442(a) is the specification that the Zoning Administrator is appointed for a term of three years. This evidences a clear legislative intent that the appointing authority re-exercise its discretion relative to the appointment of a Zoning Administrator every three years. A contract provision which purported to give an incumbent continued tenure in this position beyond this specified term or to create a right to re-appointment would conflict with this clearly specified legislative intent. As such, I believe that it is beyond my lawful authority in interpreting and applying the collective bargaining agreement.
> . . . (H)ere . . there has been no discharge, termination or reduction in force. Rather, Ryan-Berlickij served out her term and was not re-appointed. The issue of her re-appointment is beyond the scope of the contract and my authority.
> As the contract does not govern the appointment or re-appointment process, I conclude that to the extent that this grievance deals with the failure to re-appoint to Zoning Administrator function, it is non-arbitrable.

In support of the motion to reopen this unfair labor practice charge on the basis that the arbitrator did not decide the unfair labor practice issue, the Union cites the arbitrator's holding that the Town's decision to not reappoint Ryan-Berlickij to the position of Zoning Administrator was not arbitrable. However, a logical extension of the arbitrator's ruling that the appointment of the zoning administrator was governed by the

statutory provision providing for a three-year term for a zoning administrator, and an employer had discretion under that statute to not reappoint a zoning administrator at the conclusion of the three-year term, is to effectively decide the unfair labor practice issue concerning the right of the Town to not reappoint Ryan-Berlickij.

As the arbitrator indicated, the Town had the right under 24 V.S.A. Section 4442(a) to not reappoint Ryan-Berlickij at the conclusion of her three-year term. There was no improper unilateral change in a condition of employment by failing to reappoint Ryan-Berlickij. It was a condition of employment of her position that she may not be reappointed at the conclusion of her term.

However, although Ryan-Berlickij has no right to be reinstated to the zoning administrator position, this does not decide the remaining question of whether the Town committed an unfair labor practice in selecting a successor to assume the zoning administrator duties previously performed by Ryan-Berlickij. As discussed in our earlier decision, the Town appointed Town Manager Beverly Davidson to assume the duties of the zoning administrator position in addition to her duties as town manager. 23 VLRB at 339-340. As a result, zoning administrator duties previously performed by an employee in the bargaining unit represented by the Union now were to be performed by a non-bargaining unit employee.

This presents the question of whether the Town committed an unfair labor practice by transferring the zoning administrator duties out of the bargaining unit. The Board previously has determined that the transfer of bargaining unit work to non-bargaining unit employees constitutes a mandatory subject of bargaining. Burlington Education Association v. Burlington School District, 16 VLRB 398, 406-407 (1993). The

test for whether work has been transferred away from a bargaining unit is whether, as a result of decisions by the employer, the bargaining unit in question has suffered an adverse impact. Id. Road Sprinkler Fitters Union v. NLRB, 676 F.2d 826, 831-32 (D.C. Cir. 1982). The proper question is whether work was allocated in such a way so as to cause the bargaining unit to lose work which, in light of past practices, the bargaining unit otherwise would have been expected to perform. Id. Also, the employer may not shift work away from the bargaining unit without bargaining simply because it is to the employer's economic advantage. Id.

In this case, these precedents concerning transfer of bargaining unit work must by considered along with the provision of 24 V.S.A. Section 4442(a) that a zoning administrator "may hold any other office in the municipality". The question raised is whether this statutory provision negates the responsibility of an employer to negotiate with a union over the transfer of zoning administrator work out of the bargaining unit represented by the union. The arbitrator has not decided this issue. We reopen this unfair labor practice case to consider it and decide whether to issue an unfair labor practice complaint. Before deciding the question, we conclude it is appropriate to allow the parties to file memoranda of law on it.

Based on the foregoing reasons, it is ordered:

1) The motion to retain jurisdiction filed by the Union is granted to the extent that this unfair labor practice case is reopened consistent with this decision to consider whether the Town committed an unfair labor practice by transferring the zoning administrator duties out of the bargaining unit represented by the Union, and such motion is denied in all other respects; and

2) The Union and the Town shall file memoranda of law within 30 days of issuance of this decision on whether the Town committed an unfair labor practice by transferring the zoning administrator duties out of the bargaining unit represented by the Union.

Dated this ____ day of June, 2002, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

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Catherine L. Frank, Chairperson

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Carroll P. Comstock

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Richard W. Park

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John J. Zampieri

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Edward R. Zuccaro