VERMONT LABOR RELATIONS BOARD

TERRENCE SANVILLE	)	
	)	
v.	)	
	)	DOCKET NO. 02-61
STATE OF VERMONT	)	
DEPARTMENT OF CORRECTIONS	)	

MEMORANDUM AND ORDER

The issue before the Labor Relations Board is whether to issue an unfair labor practice complaint. On December 24, 2002, Terrence Sanville, a correctional officer with the State of Vermont Department of Corrections ("Employer"), filed an action with the Labor Relations Board. The Board made two requests of Sanville to amend his action to conform to the Board Rules of Practice. Through January 29 and April 4, 2003, filings, Sanville indicated that he was filing both an unfair labor practice charge and a grievance in this matter. In this Memorandum and Order, we address what action to take on the unfair labor practice portion of this case.

In his unfair labor practice charge, Sanville contends that the Employer committed unfair labor practices in violation of the State Employees Labor Relations Act, 3 V.S.A. §901 *et seq.*, by retaliating against him, and harassing him, for engaging in the protected activities of assisting a mentally ill inmate. Specifically, Sanville contends that the Employer retaliated against him and harassed him by placing him on administrative leave and requiring him to undergo a psychological assessment. The Employer makes three alternative contentions: 1) the Board should dismiss the unfair labor practice charge as untimely filed, 2) the Board should dismiss the charge as lacking a factual basis, or 3) the Board should defer to the grievance procedure and decline to issue an unfair labor practice complaint.

We first consider the timeliness of the unfair labor practice charge. The State Employees Labor Relations Act provides that "no complaint shall issue based on any unfair labor practice occurring more than six months prior to the filing of the charge with the board". 3 V.S.A. §965(a). Therefore, the Board has declined to issue unfair labor practice complaints in cases where the charge was filed more than six months after the alleged unfair practice. AFT Local 3333, VFT, AFL-CIO v. U32 High School Board of Directors, et al., 6 VLRB 115, 117 (1983). There must at minimum be an alleged violation of unfair labor practice provisions within six months of when the unfair labor practice charge was filed to support the issuance of an unfair labor practice complaint. Miller v. University of Vermont, 23 VLRB 205, 208-209 (2000). Essex Educators Association (ESP Unit) v. Essex Town Board of School Directors, 24 VLRB 206, 207 (2001).

Upon review of the materials filed in this case, we conclude that there are genuine issues as to material facts which require the full development of facts afforded by an evidentiary hearing before we can adequately address the timeliness of allegations of Sanville. Grievance of Cray, 25 VLRB 93, 94-97 (2002). The materials on file indicate that Northern State Correctional Facility Superintendent Kathleen Lanman informed Sanville by letter of March 29, 2002, that he "was temporarily relieved of . . . duties . . . with pay, for a period of up to 30 workdays". She stated that "(t)his action is taken to remove you from the workplace while a fitness for duty examination is pending" and that "(t)his fitness for duty process is being conducted in accord with Article 35, Section 2(b)(6) of the Corrections Unit Agreement". Article 35, Section 2(b)(6) provides that an "appointing authority, or designated representative, may require, when there is sufficient

reason, the submission of a certificate from a physician . . . to . . . furnish evidence of good health and ability to perform work without risk to self, co-workers or the public as a condition of returning to work", and that the "State may require an employee to be examined by a physician designated by the employer, at State expense, for the purpose of determining the employee's fitness for duty".

By letters dated April 24, May 29, July 10 and August 14, 2002, Lanman informed Sanville that his relief from duty with pay was being extended "for a period of up to 30 more workdays" while a "fitness for duty examination is pending". On August 29, 2002, Lanman informed Sanville that he had been "released to come back to work". Sanville returned to work a few days later (Attachments to June 4, 2003, response filed by Sanville to the Employer's response to the unfair labor practice charge).

Sanville filed an action with the Board charging retaliation and harassment on December 24, 2002. This filing was well outside the six month period for contesting alleged unfair labor practices with respect to the initial placement of him on relief from duty and the requirement to submit to a fitness for duty examination, on March 29, 2002, as well as the April 24 and May 29, 2002, extensions of that status. However, Sanville's relief from duty due to a pending fitness for duty review was further extended on July 10 and August 14, 2002. These dates are within the six-month period for filing an unfair labor practice charge. The circumstances concerning these latter two extensions need to have the full development of facts afforded by an evidentiary hearing before we can adequately address the significance of these extensions to the timeliness of allegations made by Sanville in his unfair labor practice charge.

Nonetheless, the Employer contends that the Board should still defer to the grievance procedure and decline to issue an unfair labor practice complaint in this matter. The Board has not ruled 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). Available remedies under a collective bargaining agreement's grievance procedure must be exhausted before a statutory unfair labor practice complaint will be issued. Burlington Area Public Employees Union, Local 1343, AFSCME, AFL-CIO v. Champlain Water District, 156 Vt. 516, 518 (1991).

Given these standards, we decline to rule on the unfair labor practice charge at this time. In the grievance which he filed in this case along with the unfair labor practice charge, Sanville included in his allegations that the Employer violated Articles 5 and 35 of the Corrections Unit collective bargaining agreement by retaliating against him, and harassing him, for engaging in the protected activities of assisting a mentally ill inmate by placing him on administrative leave and requiring him to undergo a psychological assessment. Article 5 prohibits the employer from discriminating against or harassing any employee due to "any . . factor for which discrimination is prohibited by law". Article 35 provides that the employer may only require someone to submit to a fitness for duty examination by a physician "when there is sufficient reason".

The provisions of Article 5 are broad enough to allow Sanville adequate redress through the grievance procedure for the claims he also made in the unfair labor practice charge that placing him on relief from duty, and requiring him to submit to a fitness for duty examination, constituted retaliation and harassment against him for engaging in protected activities. Burgess v. State of Vermont Department of Buildings and General Services, 25 VLRB 281, 283 (2002). Further, Sanville's contention that he was improperly placed on relief from duty and required to submit to a fitness for duty exam can be adequately redressed through interpretation of Article 35's provision that the Employer may require a fitness for duty examination by a physician only if "sufficient reason" exists.

Given these considerations, we decline to issue an unfair labor practice complaint. The underlying dispute in the unfair labor practice case involves the interpretation of a collective bargaining agreement and Sanville appears to have an adequate redress for the alleged wrongs through the grievance procedure. Further, we note that factual exploration of the circumstances concerning the July and August 2000 extensions of relief from duty can occur in the evidentiary hearing on the grievance, allowing us to examine the significance of these extensions to the timeliness of allegations made by Sanville in his unfair labor practice charge.

This does not necessarily mean that Sanville is forever foreclosed from pursuing his unfair labor practice charge. Once the Board has ruled on the grievance in this matter, Sanville may move to reopen the unfair labor practice case if the Board decision has not clearly decided the unfair labor practice issue.

Given this ruling, there is no need to address the other alternative theory of the Employer that there is no factual basis for the issuance of unfair labor practice complaint in this matter.

Based on the foregoing reasons, it is ordered:

a. The Labor Relations Board declines to rule on the unfair labor practice charge at this time and defers this matter to resolution by the Board of the grievance filed in this case; and

b. The Labor Relations Board retains jurisdiction of the unfair labor practice charge filed in this matter for the purpose of entertaining a motion by Terrence Sanville that the resolution of the grievance by the Board has failed to clearly decide the unfair labor practice issue, which motion shall be filed within 30 days of issuance of the final Board decision on the grievance in this case.

Dated this ____ day of October, 2003, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

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Richard W. Park, Chairperson

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Carroll P. Comstock

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John J. Zampieri

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Edward R. Zuccaro