

VERMONT LABOR RELATIONS BOARD

JOHN ALEXANDER

v.

VERMONT STATE EMPLOYEES'
ASSOCIATION

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DOCKET NO. 11-54

MEMORANDUM AND ORDER

On Monday, September 19, 2011, John Alexander filed an unfair labor practice charge against the Vermont State Employees' Association ("VSEA"). Alexander alleges that the VSEA restrained or coerced him in the exercise of his rights pursuant to §962(1) of the State Employees Labor Relations Act¹ by withdrawing its representation of him in his grievance before the Labor Relations Board over his dismissal from state employment.

Specifically, Alexander alleges that the VSEA committed unfair labor practices because: 1) VSEA did not provide him with the opportunity to appeal the decision to withdraw representation of him and meet with representatives of the Board of Trustees Legal Assistance Review Committee, even though VSEA earlier had allowed him the opportunity to appeal the decision and meet with the Legal Assistance Review Committee the first time VSEA made the decision to not represent him; 2) the decision of VSEA to withdraw representation was not based in fact and was unsupported by a thorough review of the merits of the grievance; and 3) VSEA General Counsel Michael Casey failed to act in the best interest of his client in petitioning the Legal Assistance Review Committee to review the grievance for a second time.

¹ 3 V.S.A. § 901 *et seq.*

VSEA contends in response to the charge that the charge is untimely filed. VSEA further asserts that, should the Board consider the merits of the charge, Alexander has failed to provide any specific factual basis which demonstrates any breach of duty by VSEA in withdrawing representation of Alexander.

Labor Relations Board Executive Director Timothy Noonan met with Alexander and Robert DiPalma, the attorney representing VSEA, on December 22, 2011, in furtherance of the Board's investigation of the charge and to informally attempt to resolve issues in dispute. The parties have not resolved this matter. Thus, the Labor Relations Board needs to decide whether to issue an unfair labor practice complaint against VSEA.

Pertinent Factual Background

The following pertinent factual background for the purpose of deciding whether to issue an unfair labor practice complaint is based on written materials provided by Alexander and VSEA and information provided during the December 22 investigatory meeting.

Alexander, a 22 year permanent status employee with the Department of Corrections, was dismissed on September 16, 2010. Alexander was a member of VSEA at the time of his dismissal and had been a member for more than 20 years. Alexander sought legal assistance from VSEA in filing a grievance over his dismissal to the Labor Relations Board. VSEA considered whether to represent Alexander pursuant to VSEA Policy #10-A. Policy #10-A provides in pertinent part as follows:

PROCEDURES TO BE FOLLOWED FOR LEGAL ASSISTANCE REVIEW:

1. STAFF ASSISTANCE REVIEW.

A. Requests for Legal Assistance.

Legal Assistance is provided in accordance with this policy to the members . . . of VSEA's bargaining units before the Vermont Labor Relations Board . . . Members . . . who desire legal assistance on matters related to their employment may submit a request for legal assistance to their field representative. The field representative shall process the request for legal assistance and submit it to members of the Staff Legal Assistance Committee, as provided for in this policy.

B. Staff Legal Assistance Committee.

There shall be a Staff Legal Assistance Committee composed of the VSEA President, General Counsel, and the VSEA Director. The Staff Legal Assistance Committee shall meet as necessary to review requests for legal assistance with the field representative who processed the request. The Staff Legal Assistance Committee shall approve or reject a request for legal assistance on the basis of whether there is a reasonable likelihood of prevailing on the merits. If the committee approves a request for legal assistance, Legal Counsel will provide such assistance in conformity with this policy. Legal Counsel will provide the Board of Trustees with a report of all approved requests for legal assistance. If the Committee rejects a request for legal assistance, Legal Counsel will notify the employee requesting such assistance of his/her rights pursuant to Section 2 B of these Procedures.

. . .

2. BOARD OF TRUSTEES LEGAL ASSISTANCE REVIEW COMMITTEE

A. Composition.

The President shall, in accordance with Bylaw 11(1)(j), appoint three members of the Board of Trustees to serve on the Board of Trustees Legal Assistance Review Committee.

B. Procedure.

Where the Staff Legal Assistance Committee rejects a request for legal assistance, the employee requesting such assistance will have the right to appeal the decision to the Board of Trustees Legal Assistance Review Committee. The Board of Trustees Legal Assistance Review Committee will meet as required on a case-by-case basis with Legal Counsel and the employee requesting assistance to review the case. Legal Counsel will present an analysis of the case and recommendations to the Committee.

The Committee will decide on a recommended course of action and communicate that recommendation to Legal Counsel. Thereafter, the Committee will submit a written report of its deliberation, including its recommendation, to the Board of Trustees. The Board of Trustees shall have the authority to approve or reject a request for legal assistance in accordance with this policy, provided that it conforms with Legal Counsel's professional responsibility.

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3. SCOPE OF REPRESENTATION

The Board of Trustees recognizes that filing deadlines may expire during the course of the review process provided for in this policy. Accordingly, the Board adopts the following guidelines.

A. Vermont Labor Relations Board

When in the opinion of Legal Counsel, the deadline for filing a grievance before the VLRB may expire during the review process set forth in Procedures Sections 1 or 2 of this policy, Legal Counsel may, with the approval of the Staff Legal Assistance Committee, prepare the grievance which will be signed by the grievant. VSEA will assure that the grievance is properly prepared and filed.

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VSEA General Counsel Michael Casey informed Alexander by letter dated October 1, 2010, that the VSEA Staff Legal Assistance Committee "determined that your case does not have a reasonable likelihood of success at the Vermont Labor Relations Board. Therefore, VSEA will not provide you with legal representation at the Board." Casey informed Alexander that he had "the right to appeal the decision of the VSEA Staff Legal Assistance Committee to the VSEA Board of Trustees Legal Assistance Review Committee". Casey further indicated to Alexander that an appeal to VSEA Board of Trustees Legal Assistance Review Committee "does not extend your deadline for filing a grievance with the VLRB", and that he was required to "file a grievance with the VLRB on or before October 15, 2010, to preserve your right to proceed" (emphasis in original).

On October 15, 2010, Attorney Jeffry Taylor filed a grievance on Alexander's behalf with the Labor Relations Board contending that the State Department of Corrections violated the collective bargaining agreement in dismissing him. Alexander also filed an appeal of the VSEA Staff Assistance Legal Assistance Committee decision not to represent him to the VSEA Board of Trustees Legal Assistance Review Committee. Alexander met with the Legal Assistance Review Committee on December 14, 2010. The Legal Assistance Review Committee recommended to the VSEA Board of Trustees that VSEA represent Alexander in his grievance, and the Board of Trustees made the decision that VSEA would represent Alexander. VSEA General Counsel Michael Casey filed a notice with the Labor Relations Board on January 12, 2011, substituting himself for Taylor as representative of Alexander in the grievance over Alexander's dismissal.

Casey conducted discovery in the grievance and obtained audiotape interviews and other information on the underlying incident leading to Alexander's dismissal, an argument and physical fight with a co-worker at the Poultney Cemetery when they were supervising a work crew of offenders. Among the audiotape interviews received by Casey included those of four offenders who witnessed the argument and physical fight. He also received a statement made by Alexander concerning the incident and the report of the State investigator of the incident. Casey then presented summaries of the audiotape interviews, the Alexander statement, and excerpts from the investigator's report to the VSEA Board of Trustees Legal Assistance Review Committee. The Committee did not subsequently meet with Alexander. VSEA President Robert Hooper sent a letter to Alexander dated Thursday, March 17, 2011, which provided in pertinent part:

The VSEA Board of Trustees Legal Assistance Review Committee reconvened on March 15, 2011 to review new information pertaining to your grievance. As you know, VSEA policy does not allow VSEA to provide legal assistance in a grievance unless there is a reasonable likelihood of success on the merits. When we met with you on December 14, 2010, we had limited documentation concerning the events leading to your dismissal. Since that time, we have reviewed audiotaped interviews and other information provided by you and the State. Based on the information we have reviewed, which was not in our possession when we met with you in December, the Board of Trustees Legal Assistance Review Committee concluded that your case does not have a reasonable likelihood of success on the merits. As a result, VSEA will not be providing you with further representation in your pending grievance at the Vermont Labor Relations Board (“VLRB”).

This decision does not mean that you cannot continue to proceed with your VLRB grievance. You have the right to pursue the grievance on your own, or with private counsel of your own choice, at your own expense. We will forward your file to you so that you can proceed on your own should you choose to do so. . . (emphasis in original)

Casey also sent Alexander an e-mail on Friday, March 18, 2011, discussing the Board of Trustees Legal Assistance Review Committee decision to withdraw representation of Alexander in his pending grievance. Alexander does not recall whether he had received the March 17 letter from Hooper prior to receiving the March 18 e-mail from Casey. VSEA immediately mailed Alexander the entire file of his case. Neither Casey nor the VSEA Legal Assistance Review Committee discussed with Alexander the possibility of withdrawing representation of him prior to informing him the representation was withdrawn.

VSEA notified the Labor Relations Board on March 21, 2011, that VSEA was withdrawing representation of Alexander. On March 31, 2011, Taylor filed with the Labor Relations Board a notice of appearance on behalf of Alexander. Taylor subsequently represented Alexander from this time through the completion of the first day of hearing before the Labor Relations Board on the grievance on August 18, 2011.

Grievant represented himself at the two remaining days of Board hearings, September 14 and September 29, 2011, and filed a post-hearing brief on October 21, 2011. The Labor Relations Board issued Findings of Fact, Opinion and Order on December 1, 2011, concluding that just cause existed for Alexander's dismissal and dismissing his grievance. 31 VLRB 411.

There have been at least five grievances before the Labor Relations Board in the past 10 years, other than Alexander's grievance, in which VSEA has undertaken representation of a VSEA member and then withdrew the representation during the period the grievance was pending before the Board (i.e., VLRB Docket No. 01-37, Grievance of Young; VLRB Docket No. 08-21, Grievance of Vail; VLRB Docket No. 08-39, Grievance of Sunderland; VLRB Docket No. 10-28, Grievance of Abel; VLRB Docket No. 10-51, Grievance of Barbiero).

Discussion

The Labor Relations Board has discretion whether to issue an unfair labor practice complaint and hold a hearing on a charge. In exercising this discretion, the Board will not issue a complaint unless the charging party sets forth sufficient factual allegations for the Board to conclude that the charged party may have committed an unfair labor practice.² In determining whether to issue an unfair labor practice complaint, we view the pertinent factual background in the light most favorable to Alexander.

There is a threshold issue whether this unfair labor practice charge was timely filed. The State Employees Labor Relations Act provides that "(n)o (unfair labor practice) complaint shall issue based on any unfair labor practice occurring more than six

² *Burke Board of School Directors v. Caledonia North Education Association*, 17 VLRB 187 (1994).

months prior to the filing of the charge with the board”.³ The Labor Relations Board by rule has adopted the time computation rule of the Vermont Rules of Civil Procedure.⁴

The time computation rule provides in pertinent part:

In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a State or federal legal holiday, . . . in which event the period runs until the end of the next day which is not one of the aforementioned days. . .⁵

The alleged unfair labor practice occurred on March 18, 2011, the date Alexander received notification that VSEA was withdrawing its representation of him. Alexander filed his unfair labor practice charge on Monday, September 19, 2011. Given the Board’s adoption of the above time computation rule of the Vermont Rules of Civil Procedure, Alexander had until Monday, September 19, 2011, to file an unfair labor practice charge. Since he filed his charge on September 19, we conclude that it was timely filed.

We turn to discussing the merits of whether VSEA committed unfair labor practices when it withdrew its representation of Alexander in his grievance pending before the Board. In making such a determination, we consider whether VSEA violated its duty of fair representation. Although the State Employees Labor Relations Act does not contain an explicit duty of fair representation”, a union’s status as exclusive bargaining representative is the source of such a duty.⁶

³ 3 V.S.A. § 965.

⁴ Section 12.1, Labor Relations Board Rules of Practice.

⁵ V.R.C.P. 6(a).

⁶ *Vaca v. Sipes*, 386 U.S. 171, 177 (1967). *Ilges v. Burlington Area Public Employees Union, Local 1343, AFSCME, AFL-CIO*, 11 VLRB 235, 239 (1988).

A union has a duty to fairly and equitably represent all employees in the bargaining unit and a breach of that duty would be an unfair labor practice.⁷ A union's duty of fair representation means that it must serve the interests of all employees without hostility or discrimination, exercise its discretion in good faith, and avoid arbitrary conduct.⁸ This duty extends to both the negotiations for a contract and the enforcement of the contract provisions.⁹

When an allegation is made that a union has not fairly represented employees in handling grievances, the following standards provide guidance in determining whether an unfair labor practice has occurred: 1) an individual employee does not have the absolute right to have his or her grievance taken to arbitration, 2) a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion, 3) a union must engage in more than mere negligence to violate its duty of fair representation.¹⁰

In addition to these standards adopted from federal court decisions which the Board has applied in past decisions, we also look to other federal court decisions for guidance in addressing the particular issues in this case.¹¹ The United States Supreme Court has held that, in assessing a union's duty of fair representation, "union discretion is essential to the proper functioning of the collective bargaining system."¹² The First Circuit Court of Appeals has indicated that a union need not process an employee's grievance if the chances for success are slight.¹³ Also, the Second Circuit Court of Appeals has held that a union's grievance handling is lawful where, in denying a

⁷ *Wilson v Williamstown Staff Association*, 14 VLRB 197, 200 (1991).

⁸ *Id. Ilges*, 11 VLRB at 239.

⁹ *Id.*

¹⁰ *Duran v. IBEW Local 300*, 19 VLRB 256 (1996). *Ploof v. Village of Enosburg Falls*, 147 Vt. 196, 201 (1986).

¹¹ *Ilges*, 11 VLRB at 239.

¹² *Electrical Workers (IBEW) v. Foust*, 442 U.S. 42, 51 (1979).

¹³ *William v. Sea-Land Corp.*, 844 F.2d 17 (1st Cir. 1988).

grievance, established procedures are followed and those procedures fall within the wide range of reasonableness afforded a union representative.¹⁴

We apply these standards first to Alexander's claim that VSEA committed an unfair labor practice because it did not provide him with an opportunity to appeal the decision to withdraw representation of him and meet with representatives of the Board of Trustees Legal Assistance Review Committee, even though VSEA earlier had allowed him the opportunity to appeal the decision and meet with the Legal Assistance Review Committee the first time VSEA made the decision to not represent him.

Alexander has not demonstrated that VSEA violated any established procedures by its actions. VSEA's procedures for legal assistance review provide for employee appeal of a VSEA staff legal assistance committee rejection of grievance representation, and VSEA followed this procedure in providing Alexander with the right to appeal the initial staff legal assistance committee decision to not represent him in his grievance and allowed him to meet with the VSEA Board of Trustees Legal Assistance Review Committee considering the appeal. Alexander initially was successful in this appeal and VSEA undertook representation of him.

However, the VSEA Board of Trustees Legal Assistance Review Committee subsequently reconvened to review new information containing Alexander's grievance which had come into VSEA's possession after VSEA undertook representation of him, and ultimately decided to withdraw VSEA representation of him. VSEA did not notify Alexander in advance that such action was possible and did not provide him with an opportunity to meet again with the Legal Assistance Review Committee.

¹⁴ *Wilder v. GL Bus Lines*, 258 F.3d 126 (2nd Cir. 2001).

VSEA's procedures for legal assistance review do not address how VSEA should proceed when previous decisions of the Legal Assistance Review Committee are reconsidered. Given the silence of the procedures in such instances, we consider VSEA's actions in light of the general duty of fair representation standards providing unions with discretion and finding violations of the fair representation duty only if union actions are arbitrary and are not taken in good faith.

VSEA's actions followed a review of new information, including summaries of audiotape interviews of offender witnesses to the incident resulting in Alexander's dismissal, which led to a determination that Alexander's case did not have a reasonable likelihood of success on the merits. It was not arbitrary for VSEA to make this determination absent further input from Alexander. It fell within the wide range of discretion a union has in deciding whether to represent an employee in a grievance. Also, it is apparent VSEA was engaging in good faith in its actions. VSEA had demonstrated its good faith earlier in reversing a decision to not represent him in his grievance, and only withdrew its representation after review of new information casting doubt on the prospects of Alexander prevailing in his grievance.

We next address Alexander's claim that VSEA committed an unfair labor practice because its decision to withdrawn representation was not based in fact and was unsupported by a thorough review of the merits of the grievance. Again, we consider VSEA's action in light of the standards providing unions with discretion and finding violations of the fair representation duty only if union actions are arbitrary and are not taken in good faith.

It was not arbitrary for VSEA to reverse its decision based on more extensive information obtained by VSEA after agreeing to represent Alexander and concluding that he did not have a reasonable likelihood of success on the merits of his grievance. The non-arbitrary and good faith nature of VSEA's actions is reinforced by the Labor Relations Board placing some reliance in the decision upholding Alexander's dismissal on the testimony of the same offender witnesses whose audiotape interviews VSEA had relied on to withdraw representation.

Finally, we consider Alexander's claim that the VSEA General Counsel failed to act in the best interest of his client in petitioning the Legal Assistance Review Committee to review the grievance for a second time. The VSEA General Counsel did not act arbitrarily or in bad faith by presenting newly discovered information to the Committee which cast doubt on the reasonable likelihood of success of Alexander's grievance.

Based on the foregoing reasons, we decline to issue an unfair labor practice complaint and it is ordered that the unfair labor practice charge filed by John Alexander is dismissed.

Dated this ____ day of February, 2012, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Richard W. Park

Richard W. Park, Chairperson

/s/ James C. Kiehle

James C. Kiehle

/s/ Gary F. Karnedy

Gary F. Karnedy