VERMONT LABOR RELATIONS BOARD

BURLINGTON EDUCATION ASSOCIATION	)	
	)	
v.	)	DOCKET NO. 18-08
	)	
BURLINGTON BOARD OF SCHOOL COMMISSIONERS	)	

MEMORANDUM AND ORDER

The issue before the Labor Relations Board is whether to issue an unfair labor practice complaint on an unfair labor practice charge filed by the Burlington Education Association ("Association") on February 16, 2018, against the Burlington Board of School Commissioners ("Employer"). The Association alleges that the Employer refused to bargain in good faith and interfered with employee rights, in violation of 21 V.S.A. § 1726(a)(1) and (5), by docking teachers four days of pay subsequent to their strike and failing to bargain with the Association over the effect of the docking of pay.

The Association states in its charge that on the last day of the teachers' strike on September 19, 2017, the parties agreed to a 2.5% salary increase for the 2017-2018 school year, and made no changes to the work year. The Association alleges that the docking of pay for the four days the teachers were on strike is not in keeping with the parties' collective bargaining agreement as teachers would not receive the benefit of a 2.5% salary increase or a full work year due to the docking of pay. The Association asserts that even if the docking of four days pay was legally permissible, the Employer was obligated to bargain over the effect of the loss of four days of pay with the Association. The Association further contends that the docking of four days pay constituted retaliation in response to the employees' concerted activity of engaging in a

strike. The Association requests as a remedy that the Employer make employees whole for their loss of four days' pay.

Timothy Noonan, Labor Relations Board Executive Director, met with the parties on May 5, 2018, in furtherance of the Board's investigation of the charge and in an attempt to informally resolves issues in dispute. The case has not been resolved, thus requiring the Board to determine whether to issue an unfair labor practice complaint.

In addition to filing the unfair labor practice charge, the Association filed a grievance under the parties' collective bargaining agreement at the arbitration level on January 26, 2018. The "Statement of Grievance" provided:

> The . . . Employer unilaterally reduced the work year for teachers by four days, and thereby unilaterally reduced teachers' salaries in violation of the 2017-2019 . . . Agreement and the parties' September 19, 2017 tentative agreement. The Employer's contractual violations include, but are not limited to:
>
> - Article 1: The Employer violated Article 1 of the Agreement by failing to negotiate with the . . . Union in good faith, and for unilaterally changing the work year; an item that was not in dispute upon entering factfinding or upon reaching the tentative agreement on September 19, 2017.
> - Article III: The Employer violated Article III of the Agreement by failing to negotiate with the Union in good faith, and for failing to submit proposals related to a change in work year by the contractual deadlines.
> - Article IV: The Employer violated Article IV of the Agreement by discriminating against teachers for engaging in legal union activity, i.e. striking.
> - Article V: The Employer violated Article V by disciplining teachers and reducing their compensation without just cause.
> - Article XVII: The Employer violated Article XVII of the Agreement by unilaterally changing the teacher work year from 187 to 183 days and changing the new teacher work year from 188 to 184 days.
> - Article XVIII: The Employer violated Article XVIII of the Agreement by failing to pay teachers their agreed upon salaries.
> - Article XIX: The Employer violated Article XIX of the Agreement by failing to pay teachers for their number of designated days of employment between the first day of school and the following June 30.

The Association requested as a remedy in the grievance that the Employer reimburse all teachers for four days of pay. The provisions of the collective bargaining agreement between the

Association and the Employer, effective September 2017 through August 2019, cited by the Association in its grievance provide in pertinent part as follows:

ARTICLE I
RECOGNTION

1.1 The Board recognizes the Association as the sole and exclusive representative for collective bargaining purposes concerning the terms and conditions of employment and other matters of mutual concern for all professional employees of the Board subject to representation under Chapter 57 of 16 V.S.A., as amended (Labor Relations for Teachers), but excluding administrators and all other employees.

. . .

ARTICLE III
PROCEDURE FOR NEGOTIATON OF SUCCESSOR AGREEMENT

3.1 The Board and the Association agree to meet not later than October 1 prior to the expiration of this Agreement for the purpose of commencing negotiations for a successor to the Agreement . . .

3.2 During negotiations, the Board and the Association will present relevant data, exchange points of view and make proposals and counter-proposals. The Association and Board shall exchange proposals on negotiable matters not later than October 15, prior to the expiration of this agreement. Thereafter, except by prior mutual agreement, only counter proposals relating to these initial proposals may be made by the parties. . .

. . .

ARTICLE IV
RESPONSIBILITIES OF THE PARTIES

. . .

4.12 As a duly elected body exercising governmental power within the laws of the State of Vermont, the Board hereby agrees that every teacher shall have the right to freely organize, join and support the Association for the purpose of engaging in collective negotiations. The Board shall not discriminate against any teacher with respect to hours, wages, or any terms or conditions of employment by reason of his/her membership in the Association and its affiliates, his/her participation in any activities of the Association, collective negotiations with the Board, or his/her institution of any grievance, complaint or proceeding under this Agreement.

. . .

ARTICLE V
EVALUATION

5.1 No teacher . . . shall . . . be disciplined, . . . reduced in . . . compensation . . . without just cause . . .

. . .

ARTICLE XVII
WORK YEAR

17.1 . . .
(b) Commencing with the 2014-2015 school year, the calendar work year for teachers shall not exceed one hundred eighty-seven (187) days. Teachers in their first year of service to the district shall work a calendar year that shall not exceed one hundred eighty-eight (188) school days.
. . .

ARTICLE XVIII
SALARY

. . .
18.2 a) The basic salaries of teachers covered by this Agreement shall be determined by the Salary Schedule set forth in Appendices A-1 and A-2, which is attached to and incorporated in this Agreement. For 2017-2018, the Salary Schedule shall reflect a two and one-half (2.5%) percent increase, with the allocation thereof to be as depicted in Appendix A-1. For 2018-2019, the Salary Schedule shall reflect a two and three-quarters (2.75%) percent increase, with the allocation thereof to be depicted as in Appendix A-2.
. . .

ARTICLE XIX
FINANCIAL PAYMENTS

. . .
19.3 Any teacher contracted (employed) after September 1 shall receive the salary pro-rated at the days of the work year (see 17.1) as applicable of the respective salary for said teacher for the number of designated days of employment between the first day of school and the following June 30.
. . .

ARTICLE XX
GRIEVANCE PROCEDURES

20.1 a) A claim by the Association or a teacher that there has been a violation, misinterpretation, or misapplication of the terms of this Agreement . . . shall be a grievance.
. . .
20.6 Level 3 – Arbitration – If the Association is not satisfied with the disposition of the grievance at the Superintendent's level, . . . then the Association may submit the grievance to final and binding arbitration . . .
. . .
20.7 The arbitrator shall have no power to alter the terms of this Agreement. However, it is agreed that the arbitrator is empowered to include in any award such financial reimbursements or other remedies as is judged to be proper.
. . .

Appendix A-1 of the collective bargaining agreement provides a salary schedule for the 2017-2018 contract year. The salary schedule list 16 vertical steps which teachers progress through based on years of experience, and eight horizontal steps representing educational

attainment beginning with a “BA” and ending with “MA +30”. The salaries begin at $43,765 at Step 1 with a BA and rise to the highest level of $86,165 at Step 16 with a MA +30. Appendix A-2 of the agreement provides a schedule for the 2018-2019 contract year also providing for 16 vertical steps and eight horizontal steps. The salaries range from $43,915 to $87,940.

The parties have scheduled an arbitration hearing on the grievance filed by the Association for November 13 before Arbitrator Gary Altman.

The threshold issue in this case is whether the Board should defer to the grievance procedure in the collective bargaining agreement between the Employer and the Association in lieu of issuing an unfair labor practice complaint. The Employer does not request deferral and indicates instead that it would prefer that the matter be litigated with a reviewable record as provided by Labor Relations Board proceedings.

The Board has deferred unfair labor practice charges to the grievance procedure 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 without regard to 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 Vermont Supreme 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; *citing* National Radio Co., 198 N.L.R.B. 527, 531 (1972). Where 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." Milton Education and Support Association v. Milton Board of School Trustees, 171 Vt. 64, 72 (2000); *citing* United Technologies Corp., 268 N.L.R.B. 557, 560 (1984). Winooski Police Employees' Association v. City of Winooski, 28 VLRB 102, 107 (205).

The exhaustion doctrine does not bind the parties if the issue raised before the Board does not qualify as a matter of contract interpretation. Champlain Water District, 156 Vt. At 520. The exhaustion doctrine also does not bind the parties if an overriding statute negates deferral, or if

the Board's own deferral guidelines indicate that deferral would not serve the purpose of the statute. Champlain Water District, 156 Vt. At 520.

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. A grievance is defined under the parties' collective bargaining agreement as a "claim . . . that there has been a violation, misinterpretation, or misapplication of the terms" of the agreement. Such disputes are resolved through a grievance procedure culminating in final and binding arbitration. Article XVII of the agreement addresses the length of the teachers' work year. Article XVIII, including the incorporation of Appendix A, of the agreement sets forth the basic salaries of teachers for the years of the agreement. Article IV protects teachers from discrimination based on Association membership and activities. Given these provisions, it is evident that the Association and the teachers have an adequate redress through arbitration to resolve their claims that the Employer should not have unilaterally docked teachers pay for four days and that the teachers were retaliated against due to their strike activities.

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. Teamsters Local 597 v. Chittenden County Transportation Authority, 23 VLRB 240, 243 (2000). Champlain Water District, supra. This fosters the parties' collective relationship and the policy favoring voluntary arbitration and dispute settlement. Id.

Further, there is no overriding statute or deferral policy that leads us to not defer to the grievance procedure. The Association's allegations of refusal to bargain in good faith and interference with the right of employees to engage in the concerted activity of a strike obviously involve claims central to the protections afforded employees by the Municipal Employee

Relations Act and the Labor Relations for Teachers Act. Nonetheless, this does not result in a conclusion that deferral to arbitration would be inappropriate. Arbitration 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 grievance 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." Milton Education and Support Association v. Milton Board of School Trustees, supra; *citing* United Technologies, supra. Winooski Police Employees' Association v. City of Winooski, supra.

Given the circumstances, the Employer's stated preference that the Board not defer to arbitration, and instead that this matter be litigated with a reviewable record as provided by Labor Relations Board proceedings, lacks persuasive force. 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 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 195-96.

Based on the foregoing reasons, it is 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 9th day of November, 2018, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Richard W. Park

Richard W. Park, Chairperson

/s/ James C. Kiehle

James C. Kiehle

/s/ Alan Willard

Alan Willard