VERMONT LABOR RELATIONS BOARD

RUTLAND EDUCATION ASSOCIATION ASSOCIATION AND RUTLAND STAFF ASSOCIATION	)	
v.	)	DOCKET NO. 16-58
RUTLAND CITY BOARD OF SCHOOL COMMISSIONERS, SUPERINTENDENT MARY MORAN, and ASSSTANT SUPERINTENDENT ROBERT BLISS	)	

MEMORANDUM AND ORDER

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The issue before the Labor Relations Board in this matter is whether to issue an unfair labor practice complaint. On December 7, 2016, the Rutland Education Association ("REA"), which represents teachers of the Rutland City Public Schools, filed an unfair labor practice charge against the Rutland City Board of School Commissioners, Superintendent Mary Moran, and Assistant Superintendent Robert Bliss ("Employer"). The REA contended that the Employer violated 21 V.S.A. § 1726(a)(1) and (3) when they retaliated against teachers and support staff for the REA's concerted activities concerning school safety issues by requiring all staff to wear closed toed shoes.

In its statement of facts supporting the charge, the REA indicated that the Rutland Support Staff Association ("RSSA"), which represents support staff of the Employer, filed a complaint during the 2011-12 school year with the Vermont Department of Labor about school safety concerns, and that when the safety concerns continued the REA contacted the Department of Labor in February 2016 to conduct a workplace safety investigation. The REA indicated that the investigation resulted in the Employer paying fines for workplace safety violations and agreeing to develop a safety procedure. The REA alleges that subsequently the Employer: 1) retaliated against all employees because of the REA's and employee's workplace safety

complaints and interfered with union activities by implementing procedures which included the closed toed shoe requirement; and 2) discriminated against the "faculty and staff" represented by REA in terms and conditions of employment through the closed toed shoe requirement because the employees exercised their rights to make workplace safety complaints.

The REA requests as a remedy for these unfair labor practices an order that: 1) the Employer cease and desist from threatening and/or retaliating against employees; 2) the Employer cease and desist from requiring employees to wear closed toed shoes; 3) the Employer reimburse any employees who purchased closed toed shoes because of the requirement to wear such shoes; 4) the Employer post copies of the Board decision in workplaces; and 5) the Employer pay the Association's attorney's fees.

The Employer filed a response to the charge on December 30, 2016, denying that it had committed any unfair labor practices. Labor Relations Board Executive Director Timothy Noonan met with the parties on February 10, 2016, in furtherance of the Board's investigation of the charge and to informally attempt to resolve issues in dispute. The issues were not resolved.

Subsequent to the meeting, the Employer filed a motion on February 24, 2017, requesting that the unfair labor practice charge be deferred because the matter may be resolved through the grievance arbitration procedure in the collective bargaining agreement between the Employer and the REA. On March 6, 2017, the Rutland Support Staff Association ("RSSA") filed a request to intervene in the unfair labor practice case. Additionally, the REA and RSSA filed an opposition to the Employer's motion to defer the processing of the unfair labor practice charge.

The parties subsequently agreed to hold the unfair labor practice charge in abeyance pending the completion of the related grievance arbitration proceeding. On August 24, 2017, the Board issued an order providing for the holding of the unfair labor practice charge in abeyance

pending completion of the arbitration proceeding, and requiring the Association to inform the Board within 30 days of issuance of the arbitration decision whether it desires to proceed with the unfair labor practice charge.

Arbitrator Shari Broder issued an arbitration decision on September 15, 2017. On October 9, 2017, the REA and the RSSA requested that the Labor Relations Board remove the unfair labor practice case from abeyance and issue an unfair labor practice complaint. They contend that Arbitrator Broder only addressed the grievance filed by the REA, and thus deferral to her decision with respect to the RSSA should not occur since the RSSA was not a party to the decision. As to the REA, they assert that the Board should adopt the deferral standards set forth by the National Labor Relations Board in Babcock & Wilcox Construction Co., 361 NLRB (2014), and conclude that the standards for deferral were not met with respect to REA.

The Employer filed a response on October 25, 2017, asserting that the REA and RSSA are requesting an irrational result in this matter since the arbitrator concluded that the Employer did not retaliate against the REA for filing workplace safety complaints. The Employer contends that there cannot be retaliation against the RSSA based on the same acts for which there was no retaliation against the REA. The Employer also notes that the REA and RSSA merged into one association around the time of the arbitration decision, and maintains that the merged association is improperly attempting a second bite of the apple. The Employer requests that the Board dismiss the unfair labor practice charge.

The Labor Relations Board gave REA and RSSA the opportunity to provide any further factual information or legal argument by December 20, 2017, to be considered by the Labor Relations Board in determining whether to issue an unfair labor practice complaint. The REA and RSSA filed a letter with the Board on December 20, asserting that reliance on Arbitrator

Broder's decision with respect to the RSSA is misguided and would mean the employees represented by RSSA would never have their case heard by an independent decision-maker.

The Board has discretion whether to issue an unfair labor complaint and hold a hearing on a charge. 21 V.S.A. §1727(a). In exercising its 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. Burke Board of School Directors v. Caledonia North Education Association, 17 VLRB 187 (1994). The Board discretion in deciding whether to issue an unfair labor practice complaint is broad. Hinesburg School District v. Vermont-NEA, 147 Vt. 558 (1986). VSEA v State of Vermont, 161 Vt. 600, 602 (1993). This discretion necessarily extends to circumstances in which the allegations in the charge will not be addressed in any forum. VSEA v. State, 161 Vt. at 602. Due regard is given to the Board's function of assessing carefully the interests of both sides of any labor-management dispute in the light of the special circumstances of that controversy. Id.

In exercising our discretion in this matter, we consider whether to defer to Arbitrator Broder's decision. In deciding whether to defer to the arbitration decision, arbitration must 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 Act; 4) the arbitrator clearly decided the unfair labor practice issue; and 5) the arbitrator decided issues within his or her competency. AFSCME Local 490, Bennington Department of Public Works and Police Units v. Town of Bennington, 9 VLRB 195 (1986).

In post-arbitration deferral cases, the Board has decided whether arbitrators have clearly decided unfair labor practice issues. The Board has decided that an unfair labor practice issue

effectively was decided once an arbitrator determined that an action by an employer is specifically covered and permitted by the contract. AFSCME Local 1201, Castleton Employees v. Town of Castleton, 25 VLRB 140, 141-42 (2002). BED IBEW, Local 300, Unit Six v. Burlington Electric Department, 23 VLRB 245, 250 (2000). However, where the contract did not specifically cover the action taken by the employer, the Board concluded that the arbitrator had not decided the unfair labor practice issue. Milton Education and Support Association v. Milton Board of School Trustees, 23 VLRB 301, 306 (2000); *Affirmed*, 175 Vt. 531 (2003).

In considering whether an arbitrator has clearly decided the unfair labor practice issue, the Board in Burlington Electric Department, 23 VLRB at 249, adopted the following standard articulated by the National Labor Relations Board in Olin Corporation and Local 8-77, Oil, Chemical and Atomic Workers International Union, AFL-CIO, 268 N.L.R.B. 573, 574 (1984):

> We would find that an arbitrator adequately considered the unfair labor practice if (1) the factual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. In this respect, differences, if any, between the contractual and statutory standards of review should be weighed by the Board as part of its determination under the *Spielberg* standards whether an award is "clearly repugnant" to the Act.

An award is repugnant to the act if it is "palpably wrong"; that it is not susceptible to an interpretation consistent with the act. Burlington Electric Department, 23 VLRB at 249. Milton, 23 VLRB at 311.

Nonetheless, the REA and RSSA assert that the Board should modify these long-standing deferral standards and instead adopt deferral standards set forth by the National Labor Relations Board in Babcock & Wilcox Construction Co., 361 NLRB (2014), which provide for meeting stricter standards to defer to arbitration decisions. We decline to change our deferral standards. The Board has found such standards to provide a workable and just framework to balance employer, employee and union rights in deciding whether to defer to a grievance arbitration

award. Application of the standards have resulted in the Board both deferring to arbitration decisions where appropriate; AFSCME Local 1201, Castleton Employees v. Town of Castleton, 25 VLRB at 141-42; BED IBEW, Local 300, Unit Six v. Burlington Electric Department, 23 VLRB at 250; and not deferring where that is appropriate. Milton Education and Support Association v. Milton Board of School Trustees, 23 VLRB at 306; *Affirmed*, 175 Vt. 531 (2003). Given the longstanding existing standards and the policy favoring voluntary arbitration and dispute settlement, the Associations would have to articulate and demonstrate a need to modify these standards. They have failed to do so here.

We turn to examining the arbitration decision of Arbitrator Broder to determine whether she clearly decided the unfair labor practice issue with respect to the REA. We would find that she adequately considered the unfair labor practice issue if the contractual issue is factually parallel to the unfair labor practice issue, and the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice issue.

The issue presented to Arbitrator Broder by the parties was: "Did the Board violate the 2016-2017 collective bargaining agreement by requiring all staff to wear closed-toed shoes with non-slip soles in retaliation for REA's safety complaints to VOSHA? If so, what shall the remedy be?" The arbitration decision cites various provisions of the collective bargaining agreement as applicable to deciding the grievance. The preamble of the collective bargaining agreement provides that "the goal is to have a safe workplace environment for students and the people working with the students and that reasonable policies need to be in place and enforced to accomplish this objective." Article 4.10 of the agreement states: "The parties agree that no one associated with the parties or a grievant shall take any action in response to any action associated with a grievance to harass or otherwise treat negatively anyone connected with a grievance."

Article 20.3 of the agreement states that "RPS has developed Policies and Procedures for the operations of its schools", and that the policies and procedures "are continually updated and added in order to deal with new situations and requirements." Article 20.3 further states: "To the extent that any Policy or Procedure is inconsistent with a provision of this Agreement, the Agreement shall control."

The "Discussion" section of Arbitrator Broder's decision states:

> The issue before me is whether the Board's policy requiring all staff to wear closed-toed shoes with non-slip soles was imposed in retaliation against the REA for its safety complaints to VOSHA, and in violation (of) the 2016-2017 collective bargaining agreement. Thus, my role is to decide whether the evidence supports a conclusion that the Employer's motive was to retaliate against and undermine the Union for engaging in the protected activity of filing a VOSHA complaint. It is not to otherwise second-guess whether the Employer's decision to implement a closed-toed footwear requirement was the best choice or necessary to prevent workplace injuries.
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> The evidence does not support the Union's allegations of retaliation. This policy was promulgated and agreed upon by a committee comprised mostly of members of the REA and the RSSA. While I understand that the Union would have preferred to have chosen the six teacher members of the committee, and collaboration in such endeavors can be helpful for labor-management relationships, failure to do so was not a violation of the CBA. (Assistant Superintendent Robert) Bliss and (REA President Ellen) Green corresponded about the composition of the committee, and Green said, "The list looks good so far," and requested that there be teacher and paraeducator representation from each of the schools, which there was. [Union Exhibit 4]. This was a district-wide committee, and the individuals chosen to participate constituted a representative cross-section of the school department and of those staff most affected by student-afflicted injuries. Although some committee members did not participate actively, they were given an opportunity to do so, both at meetings and online. The fact that some chose not to is their prerogative, but it does not make the process unfair or invalid.
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> The safety procedures were developed with input from people with expertise in working with students with disabilities and adopted almost unanimously. While some of the committee members acknowledged that the footwear part of the policy could cause inconvenience for employees, including themselves, during the warmer months when they were likely to wear open-toed shoes, all but one member supported the measure as a way to improve workplace safety. The one dissenter was Lucy Davine, an REA officer who thought the policy was punitive and retaliatory. If the measure were intended to be punitive, then it was punishing everyone employed by the Board, including the members of the RSSA who did not oppose the footwear policy and the administration. The evidence does not support a conclusion that it was intended to be punitive.
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> Although Davine testified that she felt intimidated by body language during this process, this was the only evidence to support the Union's allegation that there was a

> climate of coercion. Yet Davine had the opportunity to express her views and did so clearly, powerfully and without repercussion.
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> The fact that Superintendent Moran said the policy would not otherwise have been instituted had there not been a VOSHA complaint and resulting citation was not an admission that the Board was punishing the REA and its members for engaging in protected activity. The committee was convened and the entire process was undertaken in response to the VOSHA citation, VOSHA's abatement requirement, and the Employer's desire to improve workplace safety.
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> Additionally, this policy was initially proposed as a requirement for support staff who worked with children with disabilities only, not members of the REA. Presumably if the administration wanted to retaliate against the Union, it would have proposed this requirement for REA members or teachers initially or exclusively. It was only through discussion and deliberation that the members of the committee decided it was best to apply it to all personnel employed by the Board, including administrators who are not faced with the risk of student aggression as teachers and paraeducators are. Thus, there was no evidence to support the allegation that the footwear policy was conceived as a way to retaliate against the Union or to intimidate it from filing future complaints with VOSHA.
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> Although the Union correctly points out that slips and falls have not been an issue in this workplace, that does not mean there is no legitimate safety reason for the footwear requirement. While such a requirement may not be deemed necessary by some, it was not arbitrary, but was reasonably related to workplace safety. All members of the committee who testified, other than Davine, agreed with that. The fact that (VOSHA employee Dan) Whipple thought it was odd to include such a requirement in the policy because he did not see it as connected to injuries from students attacking staff does not mean that it was not a valid safety measure or that it was a pretext for retaliatory behavior. Taking a proactive approach to safety does not render the Employer's motive inappropriate or suspicious.
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> Based upon the evidence, there is no reason to conclude that the footwear policy was intended to retaliate against the Union for filing the VOSHA complaints or that it interfered with Union protected activity. As the Board did not violate the 2016-2017 collective bargaining agreement by requiring all staff to wear closed-toed shoes, the grievance is hereby denied.

We conclude by a review of this decision that the arbitrator has clearly decided the unfair labor practice issue with respect to the REA. In the unfair labor practice charge, the Associations contended that the Employer retaliated against employees, and discriminated against employees represented by the Associations, because of the Associations' workplace safety complaints and interfered with union activities by implementing procedures which included the closed toed shoe requirement. In the arbitration case, the arbitrator likewise decided whether the evidence

supported a conclusion that the Employer's motive was to retaliate against and undermine the REA for engaging in the protected activity of filing a VOSHA complaint. The arbitrator held that the evidence did not support a conclusion that the footwear policy was intended to retaliate against the REA for filing the VOSHA complaints or that it interfered with union protected activity.

Once the arbitrator made this determination, the unfair labor practice issue with respect to REA effectively was decided. The contractual and unfair labor practice issues are factually parallel, and the arbitrator was presented with the facts relevant to resolving the unfair labor practice issue.

The question whether the arbitrator decided the unfair labor practice issue with respect to the RSSA requires more extended discussion because the RSSA was not a party to the grievance before the arbitrator. We look to experience in similar situations under the National Labor Relations Act for guidance. The National Labor Relations Board has held in some cases that deferral to arbitration is not warranted where all the parties who have an important interest at stake in the unfair labor practice determination are not parties to the labor contract and therefore not represented in the arbitration. District 1199E, National Union of Hospital and Health Care Employees Union, 238 NLRB. 9, 14 (1978). International Organization of Masters, Mates and Pilots AFL-CIO (Seatrain Lines Inc.), 220 NLRB 164 (1975).

However, in applying the Olin factual parallelism standard which we have adopted, the NLRB deferred to an arbitration award that sustained the discharge of an employee, represented by one union, who was discharged for refusing, in violation of a no-strike clause in the collective bargaining agreement between that union and the employer, to cross a second union's picket line at the employer's worksite. The second union, as charging party in the unfair labor practice case,

argued that deferral was inappropriate because it had not participated in the arbitration of the discharge action. The Board disagreed, noting that the employee was represented by the first union in the arbitration proceeding and concluding that it was reasonable for the arbitrator to conclude that the collective bargaining agreement prohibited the employee from crossing the picket line. Zurn Nepco, 316 NLRB 811 (1995).

In other cases, the NLRB has applied the Olin parallel requirement to defer to grievance settlements. In Alpha Beta Co., 273 NLRB 1546 (1985); *Affirmed*, 808 F.2d 1342 (9th Cir. 1987); 15 employees filed grievances after being discharged for engaging in a sympathy strike, and the employers and the unions reached a proposed settlement providing that the employees would be reinstated without backpay. The unions permitted the employees to decide whether to accept the settlement, and the employees voted to authorize the unions to accept it after being informed of its terms. However, the employees continued to pursue previously filed unfair labor practices in order to obtain backpay. The Board concluded that it was appropriate to apply the Olin deferral principles to the grievance settlement, and dismissed the unfair labor practice charge.

In United States Postal Service and McCullough, 300 NLRB 196 (1990), the employee, who was a union shop steward, received a 14-day suspension, and then filed a grievance and an unfair labor practice charge. During the processing of the grievance, the union proposed that the suspension be reduced from 14 days to 7 days and that the employee receive 40 hours of backpay. The employee indicated that he did not approve of the proposal. Nonetheless, the union, which was able to bind the employee to the settlement without his consent, presented the settlement offer to the employer and the employer accepted it. The NLRB concluded that the Olin criteria had been met, deferred to the grievance settlement even though the employee had not approved of it, and dismissed the unfair labor practice charge.

Similarly, applying the factual parallelism standard here results in our conclusion that the arbitrator effectively decided the unfair labor practice issue for the RSSA as well as the REA. As noted by the arbitrator in her decision, the closed toed shoe with non-slip sole requirement was part of a policy promulgated and approved by a committee with substantial representation from members of the RSSA, and all RSSA members on the committee supported the closed toed shoe requirement. Given this evidence, and the fact that the only dissenter on the closed toed shoe requirement was an REA member, the question arises: If the Employer did not engage in retaliation or interference against REA, how can the same acts constitute retaliation or interference against RSSA?

As discussed above, in exercising our discretion whether to issue an unfair labor practice complaint, 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. Subsequent to the arbitration decision, the Labor Relations Board provided the REA and RSSA with an opportunity to provide any further factual information or legal argument to be considered by the Labor Relations Board in determining whether to issue an unfair labor practice complaint. No further factual information was provided on behalf of RSSA to distinguish its situation from REA concerning whether to issue an unfair labor practice complaint. Its failure to do so defeats its claim that the Board should not defer to the arbitration decision with respect to the RSSA.

In sum, we conclude that the arbitrator has clearly decided the unfair labor practice issues presented by both REA and RSSA. Our remaining determination in deciding whether to defer to the arbitration decision is whether the arbitrator's decision was clearly repugnant to the purposes and policies of the Municipal Employee Relations Act. This would require us conclude that the

arbitrator's determination that the Employer did not engage in retaliation or discrimination due to pursuing the VOSHA complaints was "palpably wrong"; that it is not susceptible to an interpretation consistent with the Act. The Associations have made no such specific allegations, and our review of the materials before us does not support such a determination.

Based on the foregoing reasons, we decline to issue an unfair labor practice complaint. It is ordered that the unfair labor practice charge filed by the Rutland Education and the Rutland Support Staff Association is dismissed.

Dated this 6th day of February 2018, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Richard W. Park, Chairperson

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Richard W. Park, Chairperson

/s/ James C. Kiehle

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James C. Kiehle

/s/ Alan Willard

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Alan Willard